
CLOSING KEYNOTE ADDRESS

THE LAST DAYS OF DISCO: WHY THE AMERICAN POLITICAL SYSTEM IS DYSFUNCTIONAL

JACK M. BALKIN*

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INTRODUCTION

Whit Stillman’s 1998 film *The Last Days of Disco* portrays the misadventures of aimless young people in the early 1980s who engage in meaningless and occasionally misguided behavior and who are slowly transitioning to adult life.¹ For my purposes, “the last days of disco” also refers to the period of the late 1970s and early 1980s when the United States was going through a political transition – between an older, exhausted political regime and a newer one.

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Bruce Ackerman, Mark Graber, Linda Greenhouse, Sanford Levinson, Reva Siegel, and Stephen Skowronek for their comments on previous drafts.

¹ THE LAST DAYS OF DISCO (Castle Rock Entertainment 1998).

Near the end of the 1970s, many people believed that the United States of America was thoroughly ungovernable; by 1984, most people did not say that anymore.² As Ronald Reagan's 1984 presidential campaign argued, it was "morning in America," and even people who opposed President Reagan's policies understood that the Republic was back up and running again, just not in ways they particularly liked.³ The last days of disco marked the end of a previous political regime, which had ground into dysfunction, and the end of an older constitutional order – the New Deal/Civil Rights regime. The last days of disco also marked the beginning of a new political regime and a new constitutional order – the conservative regime in which we have been living for the past three decades.

Today, our political system once again seems remarkably dysfunctional. Many people think that our 225-year-old Constitution is the problem.⁴ But what looks like constitutional dysfunction is actually constitutional transition, a

² See STEVEN F. HAYWARD, *THE AGE OF REAGAN: THE FALL OF THE OLD LIBERAL ORDER: 1964-1980*, at xiv (2001) (observing dire predictions in the late 1970s that America was "ungovernable," that "the presidency was an inherently impossible office in our modern complex world," and that constitutional reforms were necessary to enable Presidents to be more effective).

³ See James W. Ceaser, *The Theory of Governance of the Reagan Administration*, in *THE REAGAN PRESIDENCY AND THE GOVERNING OF AMERICA* 67 (Lester M. Salamon & Michael S. Lund eds., 1984) ("During Reagan's first year, by contrast, there was a remarkable shift in perceptions about the capacity of the system to act, even if many did not agree with how it was acting. Virtually all talk about a crisis of ungovernability and the demise of presidential leadership ceased.").

⁴ See, e.g., LARRY J. SABATO, *A MORE PERFECT CONSTITUTION: IDEAS TO INSPIRE A NEW GENERATION* (2007) (arguing for a new Constitution); Sanford Levinson, *So Much to Rewrite, So Little Time . . .*, 27 *CONST. COMMENT.* 515, 515 (2011) ("[T]he Constitution imposes on us a dangerously dysfunctional political order that presents a clear and present danger to our collective future."); Lawrence Lessig, *A Conference on the Constitutional Convention*, *HUFFINGTON POST* (Aug. 10, 2011, 12:11 PM), http://www.huffingtonpost.com/lawrence-lessig/a-conference-on-the-const_b_923249.html, archived at <http://perma.cc/T22V-873H> (explaining the purpose behind organizing a conference to discuss a new constitutional convention); Matthew Yglesias, *Juan Linz's Bad News for America*, *SLATE* (Oct. 2, 2013, 12:08 PM), http://www.slate.com/articles/business/moneybox/2013/10/juan_linz_dies_yale_political_scientist_explains_why_government_by_crisis.html, archived at <http://perma.cc/7V6J-G5CR> ("The current atmosphere of political crisis isn't a passing fad and . . . it's very likely to get worse. Much worse. And lead to a complete breakdown of constitutional government and the democratic order.").

It is worth noting that not all commentators share these dire assessments. See, e.g., Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 *DRAKE L. REV.* 989 (2013) (arguing that the degree of political dysfunction is exaggerated and, in any case, may be cured by subconstitutional changes); R. Shep Melnick, *The Conventional Misdiagnosis: Why "Gridlock" Is Not Our Central Problem and Constitutional Revision Is Not the Solution*, 94 *B.U. L. REV.* 767, 775-81 (2014) (arguing that claims of dysfunction are exaggerated).

slow and often frustrating movement from an older constitutional regime to a new one. This particular transition has been – and will continue to be – particularly difficult, for two reasons. First, gradual transformations in the role of the presidency and the growth of the modern state mean that even the most politically adept and fortunate Presidents face greater obstacles to implementing transformative change than they once did; they are less able than past reconstructive leaders to disrupt existing institutions and clear the ground for a new politics. This, by itself, does not prevent the emergence of a new constitutional regime. But second, and perhaps more important, the transition will be especially difficult because we are near the peak of a long cycle of increasing polarization between the nation's two major political parties. That polarization greatly raises the stakes of a transition to a new constitutional regime; and therefore, the defenders of the old regime have every incentive to resist the emergence of a new regime until the bitter end.

For these reasons, and others I will describe, the political transition will be a long, hard slog. But we will get through it. And once we get through it, things will look quite different. Most people, including most academics, will no longer say that we have a dysfunctional Constitution or that America is ungovernable. They may still complain about what the government is doing, and they may strongly oppose its policies. That is not the same thing, however, as saying that the government is paralyzed and cannot function. A dysfunctional regime is not the same thing as an unjust regime or a regime in which your favorite party loses elections.

One should not confuse my argument with unalloyed optimism. This is not a story of “all's well that ends well.” The period of transition we are going through is likely to be protracted and hard – harder, perhaps, than most of America's previous political transitions (though not all). It will almost certainly be more difficult than the last transition that occurred in the late 1970s and early 1980s, when the two parties were not as polarized. While our political system treads water, the nation's problems will continue to mount. The economy remains sluggish because of fundamental disagreements about how to repair it; millions of Americans remain out of work. Necessary reforms will be delayed or crippled; our infrastructure will continue to degrade. Enemies abroad may seek to capitalize on our political distractions and our self-inflicted injuries. Moreover, even after the transition has been completed, many scars and injuries to our politics caused by the years of political difficulty will remain. Both politics and government programs will feature many awkward kludges. New exertions of executive power crafted to deal with a dysfunctional Congress may serve as justifications for future Presidents to act unilaterally. What we will eventually get will not be anybody's idea of a political perfection. The emerging constitutional order will offer new possibilities, but it will also bear the scars of past struggles.

I. THE CONSTITUTION VERSUS THE CONSTITUTIONAL ORDER

Before explaining my views in more detail, let me first consider an alternative account of our present situation. This account has been made most famously by my friend and frequent co-author, Sanford Levinson. Levinson argues that the problem today is that we have a dysfunctional Constitution, and that its long-term defects are now catching up with us.⁵ Much of the time, Levinson argues, these undesirable features of the Constitution are merely undemocratic; but when they are combined with other features of the political system, they generate serious dysfunction.⁶

Levinson's argument that we have a dysfunctional Constitution is based on two important dichotomies or distinctions. These dichotomies are easily confused, but they are not the same thing. The first distinction is between what Levinson calls the "Constitution of Conversation" and the "Constitution of Settlement."⁷ The Constitution of Conversation concerns what most law professors care about most: constitutional cases, constitutional doctrines, and the kinds of constitutional questions that lawyers might someday bring before the courts.⁸ Cases, doctrines, and questions constitute the Constitution of "Conversation" because lawyers and judges regularly argue about these matters, and because courses in constitutional law tend to focus on them and make students talk about them endlessly.⁹ The Constitution of Settlement, by contrast, consists of features of our constitutional system that are not normally litigated in courts. They do not produce judicial decisions and judicially created doctrines, and, for the most part, they do not appear in constitutional law casebooks.¹⁰

A second distinction in Levinson's work is between the hard-wired Constitution and those elements of the Constitution (actually the constitutional

⁵ See SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012) [hereinafter LEVINSON, *FRAMED*]; SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) [hereinafter LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*].

⁶ Sanford Levinson, *What Are We to Do About Dysfunction? Reflections on Structural Constitutional Change and the Irrelevance of Clever Lawyering*, 94 B.U. L. REV. 1127, 1129-30 (2014) (arguing that structural elements contribute to dysfunction when combined with other features like polarization).

⁷ LEVINSON, *FRAMED*, *supra* note 5, at 19, 30.

⁸ *Id.* at 30.

⁹ Sanford Levinson, *"Reflection and Choice": A One-Time Experience?*, 92 NEB. L. REV. 239, 255 (2013) (explaining that aspects of the Constitution like the Equal Protection Clause constitute "the Constitution of Conversation" because they are "subject to endless conversation and, more to the point, litigation about what exactly they mean at any given time" (internal quotation marks omitted)).

¹⁰ *Id.* ("[P]rofessors of constitutional law[] rarely spend any time in their classes or their scholarship on the elemental structures of the Constitution that I have taken to calling the 'Constitution of Settlement.'").

system) that are not hard wired.¹¹ An element of the Constitution is hard wired if one cannot change that feature without a constitutional amendment (or a new constitutional convention).¹² Conversely, an element of the Constitution is not hard wired if one can alter it without amendment or a new convention. I would call these aspects of the constitutional system the “Constitution of Construction.” In constitutional theory, constitutional construction is the process of building out the Constitution-in-practice on top of the existing constitutional framework created by adoption and amendment.¹³ One can engage in constitutional construction in many different ways: through the development of judicial doctrine; through the creation of new institutions; through framework statutes; through changing the internal rules, customs, or practices of various branches of government; or through creating or modifying conventions and practices between different branches of government, or between the federal government and the states.

Thus we have two different distinctions involving four different ideas: the Constitution of Settlement versus the Constitution of Conversation, and the Hard-Wired Constitution versus the Constitution of Construction. This creates a box of four, with examples shown below.

¹¹ Sanford Levinson, *The United States and Political Dysfunction: “What Are Elections for?”*, 61 *DRAKE L. REV.* 959, 981 (2012) (“I have come to believe that the most important aspects of any constitution are the hard-wired structures within which politics takes place.”).

¹² See Levinson, *supra* note 4, at 516; *id.* at 517 (“My own emphasis on the ‘hard-wired’ Constitution, incidentally, allows me to forego almost all ‘interpretive’ disputes, since there is no serious argument about the ‘meaning’ of most of these particular provisions . . .”).

¹³ JACK M. BALKIN, *LIVING ORIGINALISM* 4-6, 35, 69-70 (2011).

Figure 1. Two Different Distinctions About the Sources of Constitutional Dysfunction.

	<i>Constitution of Conversation</i>	<i>Constitution of Settlement</i>
<i>Hard-Wired Constitution</i>	<ul style="list-style-type: none"> • State legislatures pick the method of choosing Electoral College electors, who then elect the President (<i>Bush v. Gore</i>).¹⁴ 	<ul style="list-style-type: none"> • Each state gets two Senators. • President's term begins on January 20.
<i>Constitution of Construction</i>	<ul style="list-style-type: none"> • <i>Citizens United v. FEC</i>.¹⁵ • Constitutional limits on open primaries. • Constitutional limits on voting rights protections. 	<ul style="list-style-type: none"> • Senate filibuster rules. • Single-member districts. • First-past-the-post electoral rules.

Levinson argues that important causes of our constitutional and political dysfunction lie in the Constitution of Settlement, and not the Constitution of Conversation.¹⁶ These causes of dysfunction concern precisely those aspects of the constitutional system that law professors worry about least.

My disagreement with Levinson stems from the fact that he too easily moves from this claim to the further claim that the remedy should focus on changing the hard-wired aspects of the Constitution – that is, that the proper and necessary cure for our dysfunction is a series of new constitutional amendments, or, even better, a new constitutional convention.¹⁷

Even if the Constitution of Settlement is the cause of our current dysfunction – which, I think, is not entirely the case – the Constitution of Settlement is not the same thing as the Hard-Wired Constitution. The Hard-Wired Constitution is much smaller than the Constitution of Settlement. Much of the Constitution of Settlement can be changed through the ordinary

¹⁴ 531 U.S. 98, 104 (2000) (“[T]he state legislature’s power to select the manner for appointing electors is plenary . . .” (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892))). The Electoral College is a rare example of a provision of the Hard-Wired Constitution whose application is also sometimes litigated and is the subject of much controversy. The practical operation of the Electoral College is part of the Constitution of Construction. For example, states can route around certain features of the Electoral College through a state compact. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 457-61 (2012); Vikram David Amar, *Response: The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 *GEO. L.J.* 237, 254-58 (2011).

¹⁵ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁶ Levinson, *supra* note 6, at 1136 (“I believe that it is the Constitution of Settlement that helps to account for the dysfunctionality of the American political system and, therefore, of the accompanying discontent and alienation from the system.”).

¹⁷ *Id.* (calling for a new constitutional convention to remedy dysfunction); see also Levinson, *supra* note 9, at 242 (“I strongly favor a new national constitutional convention . . .”).

processes of constitutional construction; hence one can change many dysfunctional features of our system without a constitutional amendment, much less a new constitutional convention.

Suppose we were to list features of our current system that make it dysfunctional. We might include polarized political parties, the undue influence of money in politics, the malapportionment of political power, and the proliferation of veto points in the political system. To be sure, veto points in a representative democracy are not bad in and of themselves – in fact, under the right circumstances, they may help promote bargaining and compromise.¹⁸ Today, however, there are more blocking points than in the original constitutional design. Perhaps more important, when combined with today's highly polarized political parties, veto points that once promoted bargaining and compromise now produce intransigence and gridlock.¹⁹

What are the causes of these unhelpful features? They might include, for example:

- (1) Our current system of campaign finance.
- (2) A primary system that leads to more ideologically extreme candidates who are unwilling (or afraid) to compromise, especially – in recent years – in the Republican Party.
- (3) The choice of exclusively single-member districts instead of multimember at-large districts or some version of proportional representation.
- (4) Relatedly, the use of first-past-the-post election rules versus runoffs or proportional representation.
- (5) Political gerrymandering designed either to preserve incumbency or to maximize partisan advantage (which are not the same thing).
- (6) State electoral laws and practices designed to restrict or discourage the exercise of voting rights by poor people and minorities.
- (7) The decision in *Shelby County v. Holder*,²⁰ which crippled the preclearance provisions of the Voting Rights Act.
- (8) First Amendment doctrines that limit campaign finance reform or prevent reform of the primary system.
- (9) The organization of House and Senate committees, which prevent legislation from moving forward.

¹⁸ See Mark Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 643-44 (2014) (arguing that veto points can lead either to political blockage or bipartisan bargaining, depending on the construction of political parties and the constitutional order).

¹⁹ *Id.* (“American politics is presently dysfunctional because the same veto points that may have promoted more consensual legislation fifty years ago are now more often means for preventing governing officials from accomplishing such basic constitutional purposes as staffing the judiciary and funding basic services.”).

²⁰ 133 S. Ct. 2612, 2631 (2013).

- (10) The elimination of earmarks in appropriations bills, which limits the scope of potential bargains with individual Congressmen and Senators.
- (11) Senate rules involving filibusters, holds, and requirements of unanimous consent, which have been recently modified or eliminated for executive and some judicial appointments, but which still delay much legislation.
- (12) The so-called Hastert Rule, under which the Speaker of the House will refuse to allow a vote on legislation supported by a majority of the House unless a majority of his caucus also supports it. The Hastert Rule thus prevents legislation that would otherwise gain majority support in both Houses and would be signed by the President. It is worth noting that the Hastert Rule is not even an actual rule; rather, it is a political convention invoked by the current Speaker of the House John Boehner. Boehner fears that if he allows too many bills to pass the House with only a minority of Republican support, he will be deposed by the most conservative parts of his caucus, who are determined to enforce ideological purity and prevent compromise. The Speaker's capitulation – defended in terms of a made-up rule – thus empowers an effective veto by the most extreme parts of the Republican caucus.

What is noteworthy about these causes and features of dysfunction is that each is either a part of the Constitution of Conversation, or a part of the Constitution of Settlement that we might alter without a new constitutional amendment or a new constitutional convention.

Another way of putting this is that many features of dysfunction are features of our current *constitutional regime* or *constitutional order* – that is, the current set of political institutions, rules, practices, and conventions, including all the features mentioned above and especially the existence of (asymmetrically) polarized parties. These are not primarily features of the Hard-Wired Constitution. They are aspects of the Constitution of Construction, some of which are aspects of the Constitution of Settlement, and some of which are aspects of the Constitution of Conversation. These features are not indelibly written into the text; they have been different before and they might be different again, without changing the text. The problems we face today may require a change in current practices – or even in the current political regime – rather than a change in the constitutional text, much less a new constitutional convention.

Let me be clear: I am not opposed to constitutional amendment, nor am I even opposed to the idea of constitutional conventions, as occur in the states from time to time. I simply do not think that the lack of new amendments is the source of our current problems, or that new amendments are necessarily the appropriate cure.

To be sure, the process of seeking an amendment or a new constitutional convention may mobilize the citizenry, put certain issues on the political agenda, and force politicians and judges to deal with them. Mobilization for amendments or for a new convention might spur politicians to change their practices, or judges to alter existing doctrines. In this sense, political agitation

for an amendment or a convention can be a very good thing. But that is because it is a useful means of mobilizing politics and engaging citizens, rather than because it necessarily results in amendments or a convention.

Moreover, given the current degree of political polarization, it is unlikely that party leaders would support a new constitutional convention, especially if they believed that they might be made worse off or lose political power as result.²¹ To be sure, the Constitution's Article V amendment process offers a partial end-run around Congress. It allows for three-quarters of the state legislatures to call for a new convention to propose amendments; these amendments, in turn, can be ratified "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."²² But party leaders are likely to be heavily involved in all aspects of that process as well.

Generally speaking, people in power do not favor changes in the rules of politics unless they believe that they will benefit from those changes. If one political party reasonably believed it would benefit, the other would probably conclude that it had much to lose, and vice versa. Hence, in a deeply polarized politics with competitive parties, party leaders have few incentives to engage in significant constitutional reforms. Indeed, as Mark Graber points out, politicians generally engage in constitutional reforms to entrench or consolidate their political power rather than to surrender it or to make themselves vulnerable.²³ Hence, Graber concludes that we are likely to get the kind of constitutional amendments (or constitutional convention) that Levinson is advocating either (1) after depolarization, which would by itself solve most problems of dysfunction; or (2) after one party takes over the levers of government so completely as to enjoy supermajority control, and then seeks to entrench its position, which would also solve the problem of dysfunction in a different way.²⁴ Thus, there is a mismatch between the nature of the problem and Levinson's proposed solution to the problem.

²¹ See Graber, *supra* note 18, at 616 (arguing that it will be difficult "to overcome political polarization by constitutional means . . . when each polarized party prefers the dysfunctional constitutional status quo to a new constitutional order operated by the rival party").

²² U.S. CONST. art. V.

²³ Graber, *supra* note 18, at 645 ("The goal of most successful constitutional reform in the United States is to entrench the existing structure of political competition and align other constitutional practices so that the dominant political forces can operate the constitutional order more effectively."); see also *id.* at 646 ("[M]ost (temporarily) successful exercises of constitutional reform in the United States are better described as 'hegemonic preservation,' as efforts by existing elites to realign politics to preserve a favorable constitutional politics, than as means for undermining the existing structure of political competition." (citing RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 11 (2004)) (footnote omitted)).

²⁴ *Id.* at 646-47.

Yet, even if one doubts that constitutional amendments or a new constitutional convention are the appropriate cure for political dysfunction, one aspect of Levinson's thesis remains quite important. Levinson estimates that perhaps eighty percent of our current dysfunction is due to causes other than features of the American Constitution that he criticizes.²⁵ Nevertheless, he argues that features of the Constitution that would simply be undemocratic in other times create serious dysfunction when combined with other aspects of our current situation, including, for example, strongly polarized parties. Just as disasters often occur due to the conjunction of different elements – each of which separately might be relatively harmless – so our current political problems are exacerbated by the Constitution of Settlement. At various points in this Article, I will note situations in which Levinson's argument applies.

II. THE ELEPHANT IN THE ROOM

If the problem is not so much the Constitution as the constitutional order or the constitutional regime, how might we change that order or regime? This question brings us to the elephant in the room. And the elephant in the room is the elephant in the room: the GOP.

Thomas Mann and Norman Ornstein's recent book, *It's Even Worse than It Looks*,²⁶ argues that many of our current problems are due to the asymmetric polarization of the nation's two major political parties. Asymmetric polarization has two features. First, there is almost no overlap between the most conservative Democrat in Congress and the most liberal Republican. There are no more conservative Democrats, and there are no more liberal Republicans, and even the moderates in each of the two parties are pretty far apart. Second, as Ornstein and Mann explain, this is primarily due to the increasing radicalization of the Republicans over time, especially as Southern Democrats left the party and became Republicans. While the Democrats have gotten a little more liberal, the Republicans have gotten a lot more conservative.²⁷

Ornstein and Mann have famously laid their cards on the table, and boldly stated that “the core of the problem lies with the Republican Party.”²⁸ They argue that as a result of long-term changes in American party system:

[T]he Republican Party[] has become an insurgent outlier – ideologically extreme; contemptuous of the inherited social and economic policy regime; scornful of compromise; unpersuaded by conventional

²⁵ Levinson, *supra* note 6, at 1130.

²⁶ THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 44 (2012) (“Partisan polarization is undeniably the central and most problematic feature of contemporary American politics.”).

²⁷ *Id.* at 51-58.

²⁸ Thomas E. Mann & Norman J. Ornstein, *Admit It. The Republicans Are Worse.*, WASH. POST, Apr. 29, 2012, at B1.

understanding of facts, evidence, and science; and dismissive of the legitimacy of its political opposition. When one party moves this far from the center of American politics, it is extremely difficult to enact policies responsive to the country's most pressing challenges.²⁹

III. THE GOP'S GOT NINETY-NINE PROBLEMS (AND CONFLICT EXTENSION IS ONE)

Despite Mann and Ornstein's diagnosis, I want to offer some sympathy for the GOP. The GOP finds itself in a very difficult position for two reasons. The first is a third dimension of political polarization, which Geoffrey Layman and Thomas Carsey call "conflict extension."³⁰ This puts Republican politicians – and therefore the Democrats with whom they would otherwise work – in a serious bind. The second reason is the gradual decline of the Republican Party's dominance in the constitutional regime.

A. *Conflict Extension*

Polarization means that *when* the two parties disagree, they are ideologically increasingly far apart. But it is still possible for the parties to disagree about some issues very strongly while broadly agreeing about others; or it is possible for different parts of each party coalition to have a range of different positions on a sizeable number of issues.

Conflict extension means that Democrats and Republicans have simultaneously become polarized on multiple policy dimensions and multiple policy issues, even issues that ostensibly have little to do with each other. In earlier generations, the Democratic and Republican Party coalitions were cross cutting, facilitating certain kinds of political compromises and cross-party coalitions on particular issues, even when there was significant polarization on other issues. For example, while many Southern Democrats supported New Deal measures, they remained resolutely racially conservative and unwilling to compromise on civil rights legislation.³¹ Similarly, in the past, some Republicans might be social or racial liberals, but strongly support lower taxes, smaller deficits, and less government regulation. Thus, polarization on some issues might coexist with more complicated distributions of positions on others.

These intraparty divisions – and opportunities for cross-party coalitions – have gradually disappeared. If you know a politician's views on abortion, you can often tell their views on the corporate income tax, and vice versa.³² If you

²⁹ MANN & ORNSTEIN, *supra* note 26, at xiv; *see also id.* at 103 (offering a similar analysis).

³⁰ *See* Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and "Conflict Extension" in the American Electorate*, 46 AM. J. POL. SCI. 786, 789 (2002).

³¹ *See* IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 127-29* (2013) (describing the phenomenon and its long-term effects on American politics).

³² Graber, *supra* note 18, at 640; *see also* Mark A. Graber, *The Coming Constitutional*

know how they feel about affirmative action, you probably also know their views on climate change and environmental regulation. Conflict extension makes political compromise, and hence effective political change, quite difficult. That is because conflict extension means that there are fewer possibilities for cross-cutting alliances between members of different parties. Such cross-cutting alliances make it easier for various parts of each party coalition, over time, to win concessions on different issues and bestow benefits on constituents.

In a period of serious conflict extension, Republicans might well conclude that they cannot work with President Obama and the Democrats for two reasons. First, there are very few policies on which they and Democrats agree that would enable members of each side to claim a political victory or deliver valuable benefits for their constituents. Compromise is likely to be seen as political failure, political corruption, co-optation, or a lack of ideological purity. Politicians may also fear that any compromise with Democrats will encourage primary challenges from more extreme candidates on the right. Second, Republicans fear that Obama will get the credit for successful compromises, allowing the President and the Democrats to consolidate their political power, which will lead to even more policies that Republicans oppose.³³ To Mann and Ornstein, Republican politicians sometimes seem to act as if they were unhinged, but conflict extension shows why there is a method to their madness. Resolute opposition may be a matter of political survival given the evolution of the Republican base that keeps Republican politicians in power.

B. *Loss of Political Dominance*

This brings me to the second problem that the GOP faces – a shrinking political base coupled with growing radicalization and factionalism. The GOP used to be the dominant political party in the United States, and it is no longer. Similarly, movement conservatism used to be the most powerful political force in American politics, and it is no longer. Moreover, depending on how you look at it, the GOP is either in the middle of a civil war or a nervous breakdown. Neither is a good situation for a party that wishes to preserve its political dominance.

Why is the GOP no longer the dominant party? There are multiple reasons. One reason is changing demographics. The party's base is increasingly white,

Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making, 56 *How. L.J.* 661, 695-99 (2013) (explaining the relationship between elite polarization and conflict extension).

³³ See LEVINSON, *FRAMED*, *supra* note 5, at 234 (arguing that because Democratic Senator Ted Kennedy's support of No Child Left Behind assisted President George W. Bush's reelection in 2004, Senate Minority Leader Mitch McConnell "altogether rationally . . . concluded that Republicans have nothing to gain . . . from collaborating in anything that [President Obama] could then claim as an achievement").

elderly, religious, and centered in rural areas, especially in the South. A second reason concerns the increasing radicalization of elements of the party and increasing factionalization within the party. The rise of a radical Tea Party – itself composed of different factions – and its uneasy relationship to “mainstream” Republicans, is the most obvious example of the problem.

Division into factions, in turn, has many causes. A party is composed of people of different views. When a party is ascendant, its various groups may put aside their differences in an attempt to defeat a common enemy. But once the party achieves many of its initial goals, disagreements emerge. New goals present themselves. There may be significant controversies among the party faithful about the nature of these goals, the priorities between them, and the best way to pursue them. For example, many Christian conservatives who joined the conservative coalition wanted to outlaw abortion and restore prayer in schools. For other conservatives, for example, defense hawks and economic libertarians, these were not high priorities. Parts of the coalition may believe that they are unjustly neglected, and that other factions have benefitted more. A sense of inequitable treatment may lead to charges that politicians have been corrupted or co-opted, or have sold out. Moreover, past successes tend to encourage the expansion of utopian vision. Each of these phenomena may encourage the development of increasingly radical or uncompromising elements within the party.

In addition, as one moves through history, new problems and challenges arise. Previous political decisions, including previous political victories, may produce new situations and new problems. An ever-changing political landscape may generate fractures or divisions that were not present before – or that did not seem so important before – especially when the party was focused on forming a unified coalition or on achieving an earlier set of goals.

Today, a once-dominant party that featured a once-dominant governing coalition is gradually losing its political edge. Moreover, the party sees that it is losing its dominance, that demographic change is allied against it, and that it is slowly being displaced by an ascendant new governing coalition headed by the opposition party.

The combination of asymmetric polarization and conflict extension means that if Republicans lose their political dominance, a new political coalition led by liberal Democrats is likely to engage in constitutional constructions and to pass new legislation that virtually no members of the Republican Party will favor. If Republicans lose, they are likely to lose big because there are few cross-cutting cleavages in the two parties.

The Republican Party – and the conservative movement that has driven it forward – is now attempting to do almost anything it can think of to keep the new coalition from gaining dominance in American politics. Another way of putting it is that desperate times call for desperate measures. Given the stakes created by polarization and conflict extension, the desire to cling to power and forestall the loss of dominance has led various elements of the party to push

the envelope and to engage in strategies of obstruction and confrontation that well-socialized politicians might not have attempted in the recent past.

IV. TWO CRISES AND A FAILED PRESIDENCY

The Republicans' predicament arises from conflict extension. But, conflict extension is not an accident that mysteriously struck them unawares. It arises from the kind of party that the Republicans wanted to become, and eventually became. America's political dysfunction is shaped by the fact that the contemporary Republican Party, like the Jacksonian Democrats and the Reconstruction Republicans before it, is a movement party.

Since Barry Goldwater's failed 1964 presidential campaign, the party has gradually been taken over and inhabited by a powerful social mobilization, one that has deeply shaped not only the party but all of American politics. For decades now, the various strands of the conservative movement have breathed life into the Republican Party, given it political energy and ideas, and shaped its political agenda. These elements of the party have understood politics not as the *preservation* of a conservative status quo but rather as an ongoing *revolution* and a necessary restoration of important American values. They have understood the point of politics as the completion of a conservative revolution begun by Ronald Reagan, a fulfillment that, despite undoubted successes along the way, has perpetually eluded the movement's grasp. Hence, the history of the party and the conservative movement has been a series of repeated attempts to gain control of enough elements of the national government to complete a conservative political revolution, and to establish a political shift as significant in its own way as either the New Deal or the Civil Rights Revolution. Each wave, while succeeding in some respects, has been repulsed, leading to yet another attempt, often more radical in its ambitions than the last. Nevertheless, the party has been forced to attempt a conservative reformation under perpetually changing circumstances, while employing a political coalition suffering from a long-term decline.

This feature of the Republican regime helps us understand two recent political crises in American history, as well as the difficulties faced by the George W. Bush presidency. The first political crisis took place in 1995 and 1996, when the Republican regime was at the peak of its influence. The second crisis followed the dashed hopes of the Bush presidency and the election of Barack Obama: the debt ceiling crisis of the summer of 2011, which was eventually repeated as the debt ceiling crisis and government shutdown of October 2013. Unlike the earlier shutdown, the 2013 crisis happened while the Republican regime was in decline.

The 1995-1996 crisis occurred after the election of President Bill Clinton, the first Democrat elected to the White House after Ronald Reagan. Even though the Republicans had lost the presidency, they assumed at this was at most a temporary deviation from the party's successful reorientation of American politics, and indeed, in the 1994 midterm elections, the Republicans had regained both Houses of Congress for the first time in decades. At this

point there was every reason to be optimistic about completing the Reagan Revolution, if only the Democrat in the White House could be neutralized.

The 1995-1996 crisis reflected Republicans' vision of themselves as the party of ideas and the natural party of government. It was an attempt to try to run domestic policy out of the Republican-controlled Congress – and particularly out of the House of Representatives. Speaker Newt Gingrich imagined that he could act as a sort of prime minister, take the lead in domestic policy, and more or less force President Clinton to do his bidding. In hindsight, this goal seems unlikely. Nevertheless, recall that after the debacle of the 1994 elections, Clinton at one point sheepishly had to explain to the press that the President is not irrelevant. The very fact that Clinton had to say this publicly suggested that he saw himself in a greatly weakened position. Thus, Gingrich believed that he had the chance to create a new set of political conventions that would require a President of the opposition party to follow the domestic priorities of the Republican Party.

This proved to be a miscalculation. Levinson's *Constitution of Settlement* shows us why. Given the way that the American constitutional system has developed, it is no longer possible to ignore the President and run domestic policy in the United States out of the two Houses of Congress. Perhaps that might have been possible earlier in American history, if the presidency could have been fully domesticated. For example, had Andrew Johnson been not only impeached but also convicted in 1868, Reconstruction Republicans might have developed a new set of conventions – and passed new legislation – that brought the office of the presidency increasingly within congressional supervision. Although the presidency was weakened following Johnson's impeachment, Congress did not capitalize on the opportunity. Under President Theodore Roosevelt, the powers of the presidency began to expand, and the trend has continued ever since.

By the late twentieth century, the President controlled too many structures and institutions to be constrained. It is not currently possible to jerry rig the American presidential system to make the Speaker of the House into a prime minister. Modern Presidents simply have too many levers to frustrate Congress, and too many ways to appeal to the public as the leader of the Nation. For some years now, America has had a plebiscitarian President who claims a mandate from the people to represent – and lead – the entire country. Such a President cannot be sidelined so easily. All this is broadly consistent with Levinson's point: the impediments to political revolution in the United States are shaped by the *Constitution of Settlement*, both the hard-wired features and those features that are susceptible to constitutional construction.

Because of the *Constitution of Settlement*, Gingrich was very likely to fail at his excellent adventure. But Gingrich's failure was hardly the end of the Republican Party's dominance. The party had just taken over both Houses of Congress, and the conservative movement was still ascendant. And in some ways the Gingrich Revolution was actually a success. The Clinton healthcare plan was beaten back; many parts of the liberal domestic agenda were shelved.

The Republicans and Clinton reformed welfare policies and balanced the budget, two important conservative domestic priorities. To be sure, Republicans then overreached and tried to remove Clinton; the impeachment ultimately cost Gingrich his speakership. Yet, if anything, the 1995-1996 crisis was a spur for conservatives to try to get up the hill one more time, take over all three branches of the government, and impose their vision on the country.

The Republicans achieved that goal during George W. Bush's presidency, winning, for a time, what I call the "constitutional trifecta." They controlled the presidency, both Houses of Congress, and the courts, and their political opposition was in a defensive crouch.

Ironically, at the very moment of Republican triumph, the regime had already begun to weaken. There would be no Reagan-esque landslide in 2000 or 2004, or even the healthy margin of victory claimed by George H.W. Bush in 1988. George W. Bush actually lost the popular vote in 2000, and to get even close, he found that he had to significantly modify and temper the Republican message. Bush ran in 2000 on a platform of "compassionate conservatism" and as a "reformer with results." The implication of these slogans was that standard form movement conservatism was not sufficiently compassionate and that henceforth, Republicans needed to be pragmatic, nonideological, and results oriented.³⁴ At the same time, Bush needed to keep all of the various factions of his party together. Bush had to portray himself not as the follower of his father, the patrician George H.W. Bush – often suspected of not being a "true" conservative – but as a plain-speaking populist and an orthodox follower of Ronald Reagan.

Put differently, George W. Bush faced the recurrent problem of Presidents affiliated with a successful-but-aging political regime. He had to innovate to deal with changing circumstances and new challenges, all the while remaining sufficiently orthodox to avoid challenges within his party.³⁵ He had to please all of the various factions of his party, whose differences and demands would emerge both as a result of the party's previous success and in light of changing events. At the same time, Bush had to find ways to appeal to the more moderate sympathies of the general electorate. The longer a political regime proceeds, the more difficult this juggling act becomes for leaders of the dominant party, and the more openings for the opposition party to crack the winning coalition apart.

Yet one unexpected event gave Bush an enormous opportunity. The 9/11 terrorist attacks unified the Republican Party and kept intraparty challengers at bay. Both Bush's self-proclaimed War on Terror and his war against Iraq gave his party and the conservative movement a second wind, and a new reason for

³⁴ Bush's father, sounding related themes in his 1988 presidential campaign, had called for a "kinder, gentler America" after the ideological struggles of the Reagan years.

³⁵ STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL* 135-36 (2d ed. 2011) (describing President Bush as "the latest in a long line of 'orthodox innovators' in American presidential history" (citation omitted)).

being after the fall of Communism. It became possible to imagine not simply the fulfillment of the Reagan Revolution, but the inauguration of a new conservative constitutional regime, organized around the triptych of low taxes, traditional values, and a global war on terror.

The precedent for this renewal would be the long Republican regime that lasted from the Civil War to the New Deal. During this seventy-two-year period, only two Democrats were elected to office – Presidents Grover Cleveland and Woodrow Wilson.³⁶ The Democrats had their chances, to be sure. The failure of the populist-Democratic alliance led by William Jennings Bryan to forge a new political regime gave the Republican Party a second wind with the election of William McKinley in 1896, extending Republican dominance until 1932. In this model, President George W. Bush would be the modern equivalent of William McKinley, bringing new life to the Republicans through his crusade against global terror and extending the party's political hegemony for decades to come.

Unfortunately, things did not turn out well for Bush or for the Republicans. The demand for ever-lower taxes conflicted with the party's national security commitments, which required increasing expenditures and expanding government. The same was true of the new Medicare drug prescription entitlement, designed to bring more elderly voters into the Republican Party. The war in Iraq turned out to be a fiasco, the economy crashed, and by the time Bush left office, he and his party had largely been discredited. The very opportunities that helped Bush unify and revitalize his party proved to be his and his party's undoing.

The widespread perception that the Bush presidency had failed created opportunities for the opposition party – if they were able to exploit them. For the first time in many years, Republicans appeared politically weakened; they feared that Barack Obama would transform American politics beyond repair. Therefore, Republicans hunkered down into a remarkably unified opposition, hoping, as Senate Minority Leader Mitch McConnell put it, to make Obama a one-term President.

The stimulus and the passage of Obamacare radicalized elements of the Republican coalition – now reorganized and associated with the Tea Party. Their energy gave the Republicans an enormous victory in the 2010 midterm elections. That victory, in turn, gave the Republicans renewed hope for their political program. Perhaps Obama's recent success was merely an aberration

³⁶ The story is a bit more complicated. President Andrew Johnson, a War Democrat, assumed office in 1865 upon President Lincoln's assassination, but he did not restore the Jacksonian Democrats' fortunes and was impeached. Samuel Tilden won the popular vote in 1876, but lost the Electoral College to Rutherford B. Hayes. Grover Cleveland actually won the popular vote three times, but lost the Electoral College in 1888 to Benjamin Harrison. President Wilson managed to win in 1912 only because former President Theodore Roosevelt drew Republican votes away from the incumbent Republican nominee, William Howard Taft. Thus, the Democrats won either pluralities or popular majorities in six of the eighteen presidential elections held between 1860 and 1928.

caused by the unpopularity of the Bush Administration's policies. Perhaps the conservative movement might still achieve a genuine conservative transformation of the Constitution and American government. Perhaps rather than heralding a liberal revolution, Obama would prove to be a modern day William Jennings Bryan – serving as a convenient foil for a reinvigorated second conservative constitutional regime.

Buoyed by the 2010 election, and led by the Tea Party vanguard, the Republicans tried to assert control of domestic policy once again in 2011 and in 2013. But now, unlike 1995, they controlled only one House of Congress, along with the ability to block legislation through Senate filibusters. Lacking the ability to pass legislation on their own, they had only veto points to work with. This helps explain the debt ceiling crisis of 2011 and the debt ceiling crisis and government shutdown of 2013. These were attempts to find a point of leverage to convert a negative into a positive power – to control domestic policy, to weaken and humiliate the President of the opposition party, and to reorient American politics clearly and firmly in a conservative direction.

Many members of the party did not believe that the strategy would work, but the radicals persevered, hoping that the debt ceiling could be turned into a new weapon of conservative political power. Each time the debt ceiling had to be renewed, the Republicans could demand additional concessions, Obama would acquiesce, and eventually Republicans would establish new conventions of politics in which the debt ceiling gave Congress leverage over the President and the ability to set priorities in domestic politics.

This strategy, like Gingrich's in 1995, was also doomed to failure, and for similar reasons: the United States has a presidential and not a parliamentary system, and the modern presidency has too many options to be controlled effectively by Congress. To be sure, Republicans got a great deal out of the first debt ceiling crisis; as a result of the Budget Control Act of 2011, Obama agreed to draconian cuts in federal spending that would have made most liberal leaders of the past blanch.³⁷ Yet, the Republicans remained the party of “no” rather than the moving force in domestic policy. Obama appeared to have learned his lesson; no longer facing reelection, he vowed never to negotiate on the debt ceiling again. As a result, Republicans were all but humiliated in the 2013 crisis, and their political position was saved only by the botched rollout of the Obamacare website in the fall of 2013. The failure of the 2013 government shutdown and debt ceiling crisis showed that, no matter how complicated the Democrats' political situation, the Republican Party still faced enormous difficulties in restoring its political dominance. It still controlled the House of Representatives, and it might yet control the Senate, too, but its

³⁷ In the wake of the Budget Control Act of 2011, House Speaker John Boehner famously asserted that “I got 98 percent of what I wanted[;] I’m pretty happy.” Interview by Scott Pelley with John Boehner, Speaker of the House, U.S. House of Representatives, in Washington, D.C. (Aug. 1, 2011) (transcript archived at <http://perma.cc/5NGW-9XHJ>).

underlying political coalition was fractious, internally divided, and slowly weakening.

V. HISTORICAL CYCLES AND POLITICAL TIME

All of this brings me to the work of my Yale colleague, Stephen Skowronek. Much of what I have described in the past few pages is consistent with Skowronek's theory of presidential leadership and political time.³⁸ With some important qualifications that I will discuss later on, Skowronek's account of the cycle of presidential leadership styles corresponds roughly to the rise and fall of constitutional regimes.

It is worth emphasizing this last point: though my argument adopts several of Skowronek's ideas, it focuses on a different question. As the title of his book suggests, Skowronek is interested in "The Politics that Presidents Make";³⁹ how the nature of American politics is shaped by the successive problems of authority that each President bequeaths to his successors. I am interested in the rise and fall of constitutional regimes and constitutional change. To the extent that Presidents are the leaders of their parties, and major drivers of what happens within constitutional regimes, the connection between cycles of presidential leadership and constitutional change is important. Nevertheless, as Skowronek's own recent work suggests, we may be entering a point in history in which a focus on presidential leadership diverges from the development of constitutional regimes.⁴⁰

Skowronek's model has two big ideas. The first is that Presidents take office in the context of the political regime created by their predecessors.⁴¹ A political regime consists of the interests, assumptions, and ideologies that dominate public discussion, and the relative strength of the parties' electoral coalitions. During each regime, one political party tends to set the basic agendas of politics, and tends to control the federal judiciary most of the time. It is therefore not difficult to see why presidential regimes tend to overlap with constitutional regimes. As a new party becomes ascendant, it replaces the judges appointed by the old regime with new ones, who tend to police and maintain the regime's constitutional commitments. Politicians affiliated with the regime pass new laws and create new institutions that further the regime's

³⁸ See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (3d prtg. 2000); SKOWRONEK, *supra* note 35.

³⁹ See generally SKOWRONEK, *supra* note 38.

⁴⁰ See SKOWRONEK, *supra* note 35, at 181-86 (arguing that the age of transformative presidencies is over); Stephen Skowronek, *Twentieth-Century Remedies*, 94 B.U. L. REV. 795 (2014).

⁴¹ SKOWRONEK, *supra* note 38, at 34 ("A president's political authority turns on his identity vis-à-vis the established regime"); SKOWRONEK, *supra* note 35, at 18 ("Presidents bid for authority by reckoning with the work of their predecessors").

agenda and values; a friendly bench is more likely to uphold and legitimate these changes.⁴²

A famous example is the constitutional struggle over the New Deal. A Supreme Court staffed by defenders of the old Republican regime rebuffed Franklin Roosevelt's attempts at constitutional transformation. Yet after 1937, Franklin Roosevelt was able to appoint a majority of Justices to the Supreme Court, and the Court responded with a series of landmark decisions upholding key New Deal measures and altering constitutional law in multiple areas.

Within any political regime, there is a cycle of presidential leadership styles – the cycle happens in part because of the place that Presidents find themselves in the rise and fall of regimes: a new President may be allied with the current regime and its dominant party or opposed to it. And the political regime may still be robust or it may be vulnerable to overthrow. This is the question of where the President sits in political time.⁴³

A political regime begins with a disruptive, ground-clearing assertion of leadership by a new President and his party – what Skowronek calls a reconstructive presidency.⁴⁴ The new President has the opportunity to take advantage of the weakness and decay of the old political regime; to create a new, enduring political coalition; and to significantly reorient the agenda of politics with new commitments of ideology and interest. Examples of reconstructive Presidents are Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin D. Roosevelt, and Ronald Reagan. The cycle ends with a weakened President of the same party who can no longer hold the coalition together, and whose failures lead to a new reconstructive presidency, a new dominant party, and a new political coalition. Skowronek calls these unfortunate leaders “disjunctive” Presidents because they are faced with an impossible task; they can neither further the outmoded commitments of the old regime nor openly repudiate them.⁴⁵ Examples are Presidents John Adams, John Quincy Adams, James Buchanan, Herbert Hoover, and Jimmy Carter. Note that each is succeeded by a reconstructive President of the opposite party.

In between the beginning and end of a regime are two kinds of Presidents – those from the same party as the reconstructive leader and those from the opposite party. *Affiliated* Presidents from the same party practice a politics of “articulation.”⁴⁶ They attempt to fulfill and extend the regime's ideological goals while meeting the challenges posed by changing circumstances, the

⁴² That is why Levinson's and my theory of “partisan entrenchment” is broadly consistent with regime theory. See *infra* note 60. Nevertheless, courts are independent actors in a regime and are not simply the reflections of party politics and party ideology. See BALKIN, *supra* note 13, at 287 (arguing that the Supreme Court is a player in the construction of politics, and not simply a mirror of politics).

⁴³ SKOWRONEK, *supra* note 38, at 34-36; SKOWRONEK, *supra* note 35, at 84-86.

⁴⁴ SKOWRONEK, *supra* note 38, at 36-39; SKOWRONEK, *supra* note 35, at 92-98.

⁴⁵ SKOWRONEK, *supra* note 38, at 39-41; SKOWRONEK, *supra* note 35, at 86-92.

⁴⁶ SKOWRONEK, *supra* note 38, at 41-43; SKOWRONEK, *supra* note 35, at 99-104.

perverse burdens created by previous successes, and increasingly conflicting demands from the various factions of the dominant coalition. The challenge of these Presidents is to innovate and deal with new challenges while appearing to maintain party orthodoxy, mollifying different factions within the party, and holding off potential rivals. Examples of affiliated Presidents include James Madison, James K. Polk, Theodore Roosevelt, Lyndon Johnson, and George H.W. Bush.

Finally, *preemptive* or oppositional Presidents represent the party opposite from the dominant coalition⁴⁷ – for example, a Whig during the Jacksonian era (Presidents John Tyler and Millard Fillmore), a Democrat following the Civil War (Presidents Grover Cleveland and Woodrow Wilson), or a Republican during the New Deal/Civil Rights regime (President Richard Nixon). They must find ways to preempt the stronger political forces arrayed against them. Preemptive Presidents can achieve a great deal if they understand that they face strong political headwinds and must always trim their sails. Their legitimacy is often put in question, and they can survive only by appearing moderate, pragmatic, and nonideological, and by finding ways to borrow ideas from their political opponents. A particularly successful example is President Dwight Eisenhower, whose party affiliation was actually unknown until he first ran for President in 1952. Eisenhower presented himself as a new kind of Republican; he accepted the legitimacy of the New Deal, and in fact he promoted one of the largest public works projects in history – the interstate highway system. Preemptive Presidents often seek a “third way” between the dogmas of the two major parties in order to establish their own legitimacy and preempt opposition. President Bill Clinton, the first Democrat elected after Ronald Reagan, is a recent example.⁴⁸

We can summarize Skowronek’s account in the following diagram:

⁴⁷ SKOWRONEK, *supra* note 38, at 43-45; SKOWRONEK, *supra* note 35, at 105-13.

⁴⁸ See SKOWRONEK, *supra* note 35, at 105 (“Clinton set out to preempt the Republican revolution by promising a ‘third way.’”).

Figure 2. Presidential Leadership Styles in Skowronek's Theory of Political Time.⁴⁹

<i>President Takes Office:</i>	<i>When the Current Regime Is Vulnerable</i>	<i>When the Current Regime Is Robust</i>
<i>Opposed to the Current Regime</i>	<p><i>Reconstructive</i></p> <ul style="list-style-type: none"> • Repudiates old politics and clears ground for a new regime. • Examples: Jefferson, Jackson, Lincoln, Roosevelt, and Reagan 	<p><i>Preemptive</i></p> <ul style="list-style-type: none"> • Offers a third way to shore up legitimacy. • Examples: Tyler, Fillmore, Cleveland, Wilson, Eisenhower, Nixon, and Clinton.
<i>Allied with the Current Regime</i>	<p><i>Disjunctive</i></p> <ul style="list-style-type: none"> • Coalition falls apart; President presides over the dissolution of the regime. • Examples: J. Adams, J.Q. Adams, Buchanan, Hoover, and Carter. 	<p><i>Affiliated</i></p> <ul style="list-style-type: none"> • Must articulate regime's commitments and balance party orthodoxy against the need for innovation; tries to mollify multiple factions. • Examples: Madison, Monroe, Polk, Grant, T. Roosevelt, Taft, Truman, Kennedy, Lyndon B. Johnson, and George H.W. Bush.

If we accept Skowronek's account, where are we in political time? Is Barack Obama a reconstructive President, smashing apart the Reaganite world he inherited, or is he a preemptive President, temporizing, compromising, and triangulating, like Bill Clinton? Is he the second coming of Ronald Reagan, who successfully forged a new Republican regime? Or is he like Richard Nixon – elected while the New Deal/Civil Rights regime was in decline but still potent, and who found himself presiding over a deeply divided country?

Obama campaigned in 2008 as a transformational figure, and perhaps he sought to be such a figure.⁵⁰ But he has not turned out to be one. The reasons are multiple and complex: partly the circumstances he faced, and partly his own actions and decisions. He may have lacked the appropriate personality for repudiation and genuine transformation; he may have made crucial strategic or tactical misjudgments at particular moments. Yet it may also be possible that, given the current organization of American politics, almost no one, no matter how skilled and motivated, could have played this role. There is no doubt that Obama's achievements have been remarkable: ameliorating the worst effects of the Great Recession, saving the American auto industry, passing a national healthcare bill that had eluded the efforts of all of his predecessors since Harry Truman, reforming the student loan program, enacting financial services

⁴⁹ For the information on which Figure 2 is based, see SKOWRONEK, *supra* note 38, at 36; SKOWRONEK, *supra* note 35, at 85.

⁵⁰ See SKOWRONEK, *supra* note 35, at 168-69 (discussing President Obama's self-consciously reconstructive posture during his 2008 presidential election campaign).

reform, and winding down two exhausting wars in Iraq and Afghanistan. Yet, despite these accomplishments, Obama does not appear to have successfully transcended the old politics and forged a new political regime. Especially once Democrats lost control of the House of Representatives in 2010, political dysfunction seems only to have worsened as conservative Republicans have engaged in repeated obstruction. Obama's presidency has not ushered in a Reagan-esque "morning in America"; it is likely to be remembered for political frustration, governmental gridlock, two debt ceiling crises, and a government shutdown, as well as for its remarkable policy achievements.

VI. NO MORE RECONSTRUCTIVE PRESIDENCIES?

It is of course possible that Obama is just another preemptive President like Bill Clinton. Indeed, there are important structural similarities between the political situation faced by Obama, the second Democrat elected after Reagan, in 2008; and Richard Nixon, the second Republican elected after FDR, in 1968. Like Obama, Nixon faced the most vehement opposition from his political opponents, and like Obama, Nixon often had to capitulate to or at the very least compromise with the domestic priorities of the opposing party. Nixon consolidated the welfare state, supported large parts of the civil rights revolution, and signed the Environmental Protection Act, while Obama engaged in deficit reduction and reduced the federal workforce. Perhaps the old regime is not yet exhausted, and it will take a third Democrat to finally topple it.⁵¹

But there is another explanation: it concerns Skowronek's second big idea, which he calls the "[w]aning of [p]olitical [t]ime."⁵² In contrast to the cycle of presidential leadership styles, the waning of political time is a long-term secular trend. As regimes crumble, each new attempt at political disruption and ground clearing is less successful at destroying older, entrenched elements. The effect is cumulative, and becomes especially pronounced as the state grows larger and more complex during the twentieth century. FDR was unable to engage in the same kind of creative destruction as a President like Andrew Jackson or Abraham Lincoln. Ronald Reagan could muster even less change than FDR: he left most of the administrative and regulatory state in place, and simply altered its beneficiaries.⁵³

One cause of the waning of political time is the thickening of political institutions: the increasing complexity of political life, the multiplication of veto points in the political system, and the proliferation of contending interests that reformers must assuage. Another cause of the waning of political time, however, is the changing conception of the presidency that emerges in the twentieth century. Early-twentieth-century progressives, Skowronek explains,

⁵¹ Cf. SKOWRONEK, *supra* note 35, at 177 ("[N]o second-round opposition leader has successfully reconstructed American government and politics.").

⁵² SKOWRONEK, *supra* note 38, at 407.

⁵³ See *id.* at 32; Skowronek, *supra* note 40, at 801.

wanted two contradictory things from the President.⁵⁴ They wanted the President to smash outmoded ways of doing things and clear a path for progressive reforms. At the same time, they wanted the President to manage government programs rationally, identify new problems as they arose, propose sound policy solutions, and implement them with skill and expertise. In the first model, the President is a barnstorming iconoclast, sweeping aside entrenched practices. In the second, the President is an adaptable rational manager, proposing and implementing sound policies, negotiating with other parts of the government, and smoothly adapting to change. These two conceptions of the presidency are in tension with each other, and as government grows and entrenched institutions form, the second model of negotiation and policy management begins to crowd out the first model of ground-clearing transformation.⁵⁵

According to Skowronek, we may have already reached the point of no return. He argues that it is exceedingly difficult for any President today, no matter how energetic and charismatic, to have the same creative, ground-clearing effect as previous reconstructive Presidents.⁵⁶ Institutions are too thick, and the space of potential policies is too crowded with incumbent institutions, calcified bureaucracies, and entrenched beneficiaries. Moreover, the President's everyday job of managing the accumulated features of the state increasingly monopolizes his or her time and attention. No matter how much modern Presidents call for fundamental change, they are destined to maneuver through the increasingly dense forests of politics rather than being able to uproot them.⁵⁷

The contemporary President's job is that of policy entrepreneur-in-chief, solving problems of governance as they present themselves, and negotiating with the various forces that previous exercises of state building have put in place. Future Presidents, Skowronek tells us, may succeed as policy managers, adopting a style closer to the politics of preemption.⁵⁸

Skowronek's waning of political time thesis, if correct, would explain our political dysfunction by arguing that we have arrived at a potentially transformative moment but without the conditions for a transformative leader. Although the post-1980 conservative regime is dying, Obama and the

⁵⁴ Skowronek, *supra* note 40, at 801-02.

⁵⁵ SKOWRONEK, *supra* note 35, at 185; Skowronek, *supra* note 40, at 804-05; *id.* at 804 ("Prospects for a presidentially led political transformation seem to have been crowded out by the demand for policy fixes, even as this demand appears to be overwhelming the presidency's managerial capacities.").

⁵⁶ See SKOWRONEK, *supra* note 38, at 32; Skowronek, *supra* note 40, at 803-05.

⁵⁷ Skowronek, *supra* note 40, at 803 (arguing that President Obama has correctly perceived the "new reality . . . that, for all intents and purposes, the interdependence of interests has rendered the reconstructive option counterproductive").

⁵⁸ SKOWRONEK, *supra* note 38, at 442-46 (describing a politics of "perpetual preemption"); Skowronek, *supra* note 40, at 804.

Democrats are unable to displace or repudiate much of its policies and practices. Instead of dismantling them, they must negotiate their way through and around them. Obama, and any future Presidents that follow, can no longer engage in a genuine politics of reconstruction. Hence, the country will limp forward slowly, without hope of a decisive political transformation.

Tea Party Republicans may be seeking an old-fashioned ground clearing on the right. They disdain the expertise- and elite-driven politics that the progressives championed. But they face the opposite problem. The acceptance of scientific policymaking as the proper mode of government action, and widespread popular expectations that the government is now responsible for social welfare, social insurance, full employment, environmental protection, and economic prosperity, mean that libertarian radicals will find it almost impossible to dismantle the modern policy state wholesale. Instead, the best they can hope for is to undermine it and prevent its further expansion, leading to what Skowronek calls a “permanent siege” against the policy state.⁵⁹

VII. CONSTITUTIONAL REGIME CHANGE WITHOUT A RECONSTRUCTIVE PRESIDENCY

Does this mean that there will be no new constitutional regimes? The answer is no, and here I diverge from Skowronek’s model. Recall that Skowronek’s is a theory of *presidential leadership*. He is concerned with the kind of authority that Presidents have for political action, and the limits of that authority imposed by the political and historical circumstances in which Presidents find themselves. My interest, by contrast, is in *constitutional regimes*.

A constitutional regime involves more than the presidency. It also features, among other things, Congress, the courts, the administrative agencies, the military, the foreign policy establishment, the structure of political parties, and the work of civil society organizations that participate in politics.

We might define a change in constitutional regimes according to six factors: (1) a new dominant party (or, as in 1828 and 1896, a newly reorganized dominant party); (2) new demographics that generate new party coalitions; (3) new methods of party organization; (4) a significant reorientation of the goals and agendas of governance; (5) important changes in the commitments of ideology and interest of the dominant party or coalition; and (6) changes in the composition of the judiciary and the values enforced by the judiciary on behalf of the dominant party or coalition. These six features of a constitutional regime do not depend primarily on the emergence of a reconstructive, ground-clearing

⁵⁹ Skowronek, *supra* note 40, at 804 (“Unable to resolve their redemptive message in a categorically different way of governing, the insurgents have settled in for a permanent siege. As a persistent assault on the legitimacy of the policy state, the movement not only thrives on the limitations of that system, but also contributes to its shortfalls.” (footnote omitted)).

presidency, though it is not difficult to see why such a presidency would contribute to and accompany these changes.

A. *Partisan Entrenchment and Doctrinal Transformation*

We can immediately see the difference between Skowronek's focus and my focus by considering the sixth factor, the control of the federal judiciary. Regardless of whether Presidents are reconstructive, they still get to appoint new judges, and if Presidents of one party appoint enough judges, constitutional doctrine begins to change. Sanford Levinson and I call this process "partisan entrenchment."⁶⁰

The federal judiciary tends to enforce, over long periods of time, the regime's constitutional and ideological commitments.⁶¹ That is not because it is the purpose of the judiciary to enforce these commitments, but rather because of the cumulative effect of judicial appointments, as well as the work of affiliated civil society organizations that work to find cases and controversies to bring before the federal courts to modify existing doctrines and create new ones.

The Reagan regime is a good example. It may well be that Reagan could not disrupt politics as much as Jackson, Lincoln, or FDR could. But his judicial appointments, and those of his Republican successors – in conjunction with powerful civil society organizations like the Federalist Society and networks of conservative lawyers – significantly changed American constitutional law. More than this: Conservative politicians and civil society groups changed basic assumptions about the likely direction of constitutional doctrine; they emboldened conservative utopian thought while making many of the utopian ideas of New Deal/Great Society liberals increasingly "off the wall."

⁶⁰ Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 489-501 (2006) [hereinafter Balkin & Levinson, *Processes of Constitutional Change*]; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045, 1066-68 (2001) [hereinafter Balkin & Levinson, *Understanding the Constitutional Revolution*]; see also Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 *AM. POL. SCI. REV.* 511, 512 (2002) [hereinafter Gillman, *Political Parties*]; Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism, in THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 138-68* (Ronald Kahn & Ken I. Kersch eds., 2006) [hereinafter Gillman, *Party Politics*].

⁶¹ For variations on this basic theme, see BALKIN, *supra* note 13, at 286; KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 158-60* (2007); Balkin & Levinson, *Processes of Constitutional Change*, *supra* note 60, at 495-96; Balkin & Levinson, *Understanding the Constitutional Revolution*, *supra* note 60, at 1105-07; Gillman, *Political Parties*, *supra* note 60, at 517-22; Gillman, *Party Politics*, *supra* note 60, at 138-68; Mark A. Graber, *The Counter-majoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 *ANN. REV. L. & SOC. SCI.* 361, 363-64 (2008).

During the Reagan regime, for example, conservative judges stopped focusing on poverty, or on racial and economic inequality in education and in the criminal justice system. Instead, they restricted access to federal courts, curtailed civil rights litigation, and created new limits on federal power. They enforced property rights against environmental regulation, restrictions on affirmative action and race-conscious redistricting efforts, and First Amendment limits to campaign and commercial speech regulations. The modern Supreme Court, with a conservative majority, often chooses to take these cases instead of others, and it decides these cases in ways quite differently than the comparatively more liberal judges of the older, New Deal/Civil Rights regime would have. These cases, in turn, are developed and brought to the federal courts by conservative lawyers and conservative public interest firms that blossomed during the regime.

Assume, then, that there will be no more reconstructive presidencies in the mold of Andrew Jackson and his war on the Second Bank. Yet if the Democrats keep winning the White House often enough, their appointees will eventually dominate the federal courts, and a new Supreme Court composed of liberals like Justices Sonia Sotomayor and Elena Kagan will enforce a new set of commitments. This will happen whether or not Democratic Presidents are reconstructive in Skowronek's sense.

There are other reasons to think that we are moving to a new constitutional regime. The most important is demographic change and the political opportunities it creates. Currently, the Democrats seem to be moving slowly toward a position of demographic dominance. The emerging Obama coalition has been called a coalition of the ascendant: single persons, racial minorities, well-educated elites, and single women. This new coalition is quite different than the collection of groups and individuals that formed the New Deal/Civil Rights coalition, and it is growing at the expense of the conservative or Reagan coalition, which is both shrinking and falling apart.

Yet, demography by itself is not necessarily destiny. A shift in regimes depends both on changes in the electorate *and* on the ability of politicians to respond to and capitalize on those changes. Opportunities to capitalize on demographic change, even when offered, are not always taken up or taken up successfully. The Whigs missed their chance to stop the Democrats in their tracks the 1840s, and the populists missed their opportunity to replace the Republicans in the late 1890s.

B. *The Party as Database*

We are also in the midst of a change in party organization made possible by digital technologies. During the 2008 and 2012 presidential elections, the Obama campaign developed new ways to use the internet, social media, and data mining to identify potential supporters, register them, raise money from them, and get them to the polls on Election Day. The campaign's success points to the possibility of a new way of thinking about party organization.

In the Jacksonian era, mass political parties emerged, held together by party platforms, mobilization efforts, and systems of patronage. The political party of the early twenty-first century is increasingly organized around the collection and analysis of information. This is the idea of the party as database. The party's electoral success depends increasingly on its abilities at data mining and political surveillance of potential voters and messaging to those voters.⁶² Information systems are indispensable to their continued success. Parties must be able to gather information on likely voters and contributors and calibrate their messages to them. Surveillance and data analysis allow campaigns to figure out who might support them. They can then micro-target potential supporters with individualized messages, raise money repeatedly from them, and get them out to vote. Like other organizations in the twenty-first century – both in the public and private sector – a political party collects and analyzes information about the public in order to promote its goals. Databases and surveillance are by now as important as shoe leather and campaign rallies.

This new model of party organization has important side effects. First, parties increasingly engage in political surveillance of their members and potential members.⁶³ Parties want to know who will contribute to and vote for their candidates, and avoid wasting time and resources on persons who are not worth pursuing. Once supporters are identified, parties want to know how best to mobilize these people and get them to the polls on Election Day. Thus, instead of voters choosing parties, parties seek to choose their voters by ever more finely detailed data analysis and targeted communications strategies. Digital technologies can be used in many ways, but they are particularly valuable in an era of polarized parties and a polarized electorate, in which the set of genuinely independent and/or persuadable voters is small, relatively uninformed, and may be susceptible to micro-targeting strategies.

⁶² See Craig Timberg & Amy Gardner, *Democrats Push to Use Obama Voter Database*, WASH. POST, Nov. 21, 2012, at A1, A1 (“If you voted this election season, President Obama almost certainly has a file on you. His vast campaign database includes information on voters’ magazine subscriptions, car registrations, housing values and hunting licenses, along with scores estimating how likely they were to cast ballots for his reelection.”); see also *How Rove Targeted the Republican Vote*, PBS FRONTLINE (Apr. 12, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/architect/rove/metrics.html>, archived at <http://perma.cc/FK74-7FQ9> (“[Karl] Rove built an elaborate system for identifying the Republican vote. It centered on gathering extensive statistics on voters, refining and testing this data to predict the potential Republican votes, and then implementing a get-out the-vote strategy while constantly monitoring, measuring and testing it.”).

⁶³ See Colin Bennett, *The Politics of Privacy and the Privacy of Politics: Parties, Elections and Voter Surveillance in Western Democracies*, FIRST MONDAY (Aug. 5, 2013), <http://firstmonday.org/ojs/index.php/fm/article/view/4789/3730>, archived at <http://perma.cc/M22Q-KBVZ> (“The winning strategy of [the Obama presidential] campaign has been attributed, in part, to its unprecedented ability to capture and profile personal data on the American voting public and to target precisely defined constituencies with tailored messaging, in both off-line and online formats.”).

A second issue is ownership of intellectual property – who maintains databases and with whom they share their data and their analysis. Increasingly, those who control the databases control the party.⁶⁴ This tends to weaken party structure and the ability of party leaders to discipline insurgent groups. Independent funders or organizations like Americans for Prosperity, founded by David and Charles Koch, Karl Rove’s American Crossroads, or the Tea Party Express may become more important than the traditional party apparatus, not only because they have independent sources of funding to support their favored candidates, but also because they have information on potential voters and donors.

Owners of databases become like warlords, masters of individual fiefs, who enjoy autonomy and independent political power, and who are therefore less easily controlled by a central party apparatus. This phenomenon has been developing for a long time. The New Right emerged through the use of mailing lists to generate political support and funding. Digital technologies have simply sped up the process; they amplify the possibilities for action outside traditional party control, making data-mining strategies ever more powerful and therefore ever more essential to political success. Technology changes the balance of power not only between parties, but also between various actors within parties and outside parties who seek to control or influence American parties and American politics.

C. *Reconstruction Without a Reconstructive Presidency*

If I am correct, then Skowronek’s waning-of-time thesis does not mean the end of new constitutional regimes. But it does suggest that transitions to new regimes may become more difficult. In American democracy, the public often looks to a newly elected President to shake things up in Washington and reform politics. The change of administrations offers the possibility – if not the reality – of dramatically changing the agendas of politics. Given the modern plebiscitarian presidency, often the public wants the President to serve as a disruptor, as an agent of profound change.

Imagine, then, a world in which no such actor exists in the system. In such a world, the transition between constitutional regimes, when it occurs, will be difficult, slow, and protracted. The new dominant party will not be able to remove all of the accumulated detritus of American politics. Instead,

⁶⁴ See, e.g., Kenneth P. Vogel, *Karl Rove v. the Koch Brothers*, POLITICO (Oct. 10, 2011, 4:44 AM), http://www.politico.com/news/stories/1011/65504_Page3.html, archived at <http://perma.cc/RW6P-JBM9> (describing “dueling efforts to build databases of likely conservative voters for targeting throughout the campaign and on Election Day”); Kenneth P. Vogel & Maggie Haberman, *Karl Rove, Koch Brothers Lead Charge to Control Republican Data*, POLITICO (Apr. 22, 2013, 5:04 AM), <http://www.politico.com/story/2013/04/karl-rove-koch-brothers-control-republican-data-90385.html>, archived at <http://perma.cc/BPF6-AVAA> (“[I]t’s about who controls the party through its most precious asset – its voter data – and the multimillion-dollar contracts that could follow.”).

Presidents will have to maneuver around them. The President's job becomes artful policy management in the face of powerful institutional constraints.

If so, then a transition is not guaranteed to occur, or occur quickly. It may get stuck in a sort of twilight period or interregnum of intense political competition between the older dominant party and a new one that seeks to emerge as dominant. The two parties may continue to struggle for a long time in a battle in which neither party can dominate. Or the old dominant party (in this case, the Republicans) may regroup, reinvigorate itself, and prevent the other party from gaining command. Moreover, when regime change does occur, it may occur in a deeply compromised way. Later Presidents may have only limited options to change the system; politics may offer only opportunities for pragmatic adjustments, compromises, and policy kludges.

Take Obamacare as an example. Obamacare is an example of what Steven Teles calls "kludgeocracy" – rule through kludges.⁶⁵ Instead of providing Medicare for all, or a simple single-payer system, Obamacare is a complicated three-layer cake: it expands Medicaid, reforms Medicare, and keeps private insurance for everyone else. It creates exchanges for consumers – this is the feature that has given the Administration such difficulties during the initial rollout – and it adds a dollop of subsidies to enable middle-class people to afford insurance through the exchanges.

Obamacare is a policy kludge;⁶⁶ yet, it is the best that the Obama Administration thought it could do given the forces arrayed against it, even when the Democrats held the presidency, a majority in both Houses of Congress, and for a time, sixty votes in the Senate. It could be that all of the kinks in the Affordable Care Act (ACA) are worked out eventually, and that the ACA becomes a much beloved feature of the American state, as is the case with government healthcare guarantees in Britain and Australia. Or, it could turn out to be a disaster. In addition, the economy could stall and begin a second recession, or the Democrats could be discredited by a series of scandals. In that case, we might well see a resurgence of the Republican Party. The party might reorganize as a radicalized populist party in the image of the Tea Party, and engage in its own politics of repudiation and reconstruction, except that the repudiation will be of the short, brief Obama regime, or more correctly, the Obama interregnum.

⁶⁵ Steven M. Teles, *Kludgeocracy in America*, NAT'L AFF., Fall 2013, at 97, 97-98 ("[A] kludge is an inelegant patch put in place to solve an unexpected problem When you add up enough kludges, you get a very complicated program that has no clear organizing principle, is exceedingly difficult to understand, and is subject to crashes.").

⁶⁶ See *id.* at 98 ("To see policy kludges in action, one need look no further than the mind-numbing complexity of the health-care system (which even Obamacare's champions must admit has only grown more complicated under the new law, even if in their view the system is now also more just) . . .").

VIII. CONFLICT EXTENSION AND THE NEW CONSTITUTIONAL ORDER

Although Skowronek's waning of time thesis explains some features of our current dysfunction, it is an incomplete explanation. For example, it does not really address the most obvious feature of our current political situation and most obvious cause of our present dysfunction – party polarization plus conflict extension. The parties today are polarized in ways that we have not seen since the Civil War. Skowronek's model does not focus on this feature of politics; in his account, transformative change became increasingly difficult in the twentieth century even when parties were depolarized. To understand how polarization and conflict extension affect political dysfunction, we must turn to the work of Mark Graber.⁶⁷

Graber explains that one feature of a constitutional regime – or as he calls it, a constitutional order – is the configuration of political parties.⁶⁸ The relationship between political parties can be strongly polarized or depolarized; similarly, conflict extension can be strong or limited. Parties are depolarized when various members of opposing parties share similar views on a number of policy questions. For example, during parts of the twentieth century, conservative Southern Democrats agreed with conservative Republicans on many social, regulatory, and fiscal issues, while liberal Democrats and liberal Republicans often agreed with each other on issues of civil rights and civil liberties. Conflict extension is either heightened or limited when opposed positions on a wide variety of different issues are either strongly or weakly correlated.

The degree of polarization between political parties has gone through cycles. At the founding, polarization was absent because there were no political parties; the Framers opposed the idea of parties, believing that they would undermine republican government.⁶⁹ Nevertheless, parties quickly formed during the Constitution's first decade. The United States went through a series of party configurations during the antebellum period; between roughly 1816 and 1824, for example, there was only one viable political party in the United States, which soon splintered and produced a new party system.

By the Civil War, Democrats and Republicans had formed two strongly polarized parties that also dominated different regions of the country. After the Civil War, Republicans used their political advantages to reshape the constitutional order to benefit themselves.⁷⁰ After the end of Reconstruction,

⁶⁷ See generally Graber, *supra* note 18; Graber, *supra* note 32.

⁶⁸ Graber, *supra* note 18, at 615-18.

⁶⁹ *Id.* at 634 (“[A]ll agreed that parties were bad and that constitutional politics should be structured to prevent their rise.”).

⁷⁰ *Id.* (observing that the rise of mass political parties coincided with increased polarization and “a different constitutional order, one based on rule by the legitimate party of the people”); Mark A. Graber, *Constructing Constitutional Politics: The Reconstruction Strategy for Protecting Rights* 68-69 (Univ. of Md. Francis King Carey Sch. of Law, Working Paper No. 1390, 2013), available at <http://digitalcommons.law.umaryland.edu/cgi/>

Democrats regained a rough political parity with their opponents, and the next several decades witnessed intense competition between the two parties, which was resolved with the Republican victory in 1896. During this same period, the two parties began to depolarize. Bourbon Democrats like Grover Cleveland had much in common with business-oriented Republicans. By the turn of the twentieth century, both parties featured progressive and conservative wings.

Political polarization began again during the 1960s in part because of the politics of race. Many Southern Democrats left the party and became Republicans; Republicans were able to attract many formerly Democratic white ethnic voters in the North and West through appeals on social issues and through opposition to busing and affirmative action. In the next several decades the two parties slowly realigned, with Democrats becoming more uniformly liberal and Republicans more uniformly conservative. Nevertheless, polarization and conflict extension did not become extreme until the last years of the twentieth century. We have now entered a new age of strongly polarized parties roughly a century and a half after the last episode.

The cycle of party polarization and depolarization is much longer than the cycle of the rise and fall of constitutional regimes, and it does not coincide with Skowronek's cycles of presidential leadership or with his conception of the waning of political time. Therefore, we can understand our present political moment as the confluence of three different political cycles or trends.

First, we are in the confusing situation of the end of an old regime and the beginning of a new regime. Second, we are experiencing this transition without the benefit of a traditional ground-clearing or reconstructive presidency. Third, the parties have reached a period of intense polarization and conflict extension not seen in this country since the 1850s. Our present dysfunction is the result of the intersection of all of these trends, each of which likely exacerbates the effects of the others. And, as Levinson would remind us, the problems of polarization and conflict extension are exacerbated by a presidential system – with staggered elections for House, Senate, and President; life terms for federal judges; and malapportioned systems of representation – that makes it hard for either party to gain command of sufficient levers of power.

The cycle of party polarization is important because it makes transition to a new constitutional order especially difficult. As Graber points out, it was much less difficult for nonpolarized parties to transition to the New Deal/Civil Rights regime in the 1930s or to the Reagan regime in the 1980s.⁷¹ That is because the emergence of a new dominant coalition did not mean a complete loss of

viewcontent.cgi?article=2394&context=fac_pubs (explaining how Republicans designed the Fourteenth Amendment to entrench control by the “legitimate party of the people”).

⁷¹ See Graber, *supra* note 18, at 639 (pointing out that twentieth-century reformers faced “the simpler task of transforming constitutional institutions so that the Constitution would operate better in a political universe already structured by two nonideological parties”). In particular, the Republican Party that President Ronald Reagan led in the 1980s still contained many moderates and liberal Republicans, while the Democratic Party still contained many southerners, moderates, and conservatives.

influence for members of the formerly dominant – and newly subordinate – party. Ideological allies existed across party lines, and could still form winning coalitions on some issues. Moreover, lack of pronounced conflict extension meant that different politicians could ally with different elements of the opposing party on different issues. Regardless of one’s party affiliation, most members of Congress could expect to gain victories and constituent benefits – or at least acceptable compromises – on a variety of issues that they cared about.

Once the two parties became strongly polarized and conflict extension was severely pronounced, however, transition to a new constitutional order became far more difficult, because the stakes of such a transition were raised.⁷² Almost all of the members of each party disagree with almost all of the members of the other party on almost every important issue. If a given party loses political dominance, they are likely to lose on issue after issue. Moreover, the winning party is likely to use its advantages to entrench itself and its policies. That means that accepting a subordinate position is politically hazardous, and political compromise becomes extremely risky. In such a situation, rational politicians may choose to do almost everything in their power to keep the other side from winning political victories. Obstruction is especially important to prevent the other party from demonstrating its ability to govern effectively and thereby consolidate its electoral chances in future elections.

All this suggests why Senate Minority Leader Mitch McConnell decided that the best strategy for congressional Republicans was to obstruct Barack Obama at every turn.⁷³ It also helps explain why Tea Party Republicans have seen intransigence as the best strategy. Obstruction and intransigence serve both defensive and offensive goals. They keep the other side from consolidating its political position and they keep the party’s base energized and loyal.

President Obama once suggested hopefully that once he was reelected, “the fever” of partisanship would break and Republicans would begin to cooperate more often with his Administration.⁷⁴ His hopes have turned out to be premature. Given the incentives produced by polarization and conflict extension, we can expect that extreme partisan conflict will continue for some time. It is much like watching a fight between two exhausted fighters, neither

⁷² See *id.* at 639-40 (“Americans at the turn of the twenty-first century are trying to operate with two ideological parties a constitutional order that New Dealers designed to be operated by two nonideological parties. . . . [P]ractices that helped stabilize a functional New Deal constitutional regime by promoting pluralist bargaining presently constitute severe barriers to transforming the dysfunctional contemporary constitutional order.”).

⁷³ Carl Hulse & Adam Nagourney, *Senate Republican Leader Finds Weapon in Party Unity*, N.Y. TIMES, Mar. 17, 2010, at A13.

⁷⁴ Remarks at an Obama Victory Fund 2012 Fundraiser, in Minneapolis, Minnesota, 2012 DAILY COMP. PRES. DOC. 436, at 3 (June 1, 2012).

of whom can land a knockout blow, or watching a baseball game in extra innings in which neither team can seem to score the winning run.

Graber suggests that we may move to a new system built around polarized parties.⁷⁵ Government dysfunction will be cured only when one of the polarized parties wins everything, and then imposes its particular constitutional vision on the nation. That is what happened the last time the cycle reached its peak in the years following the Civil War.⁷⁶

In addition, history suggests that the parties will not remain strongly polarized indefinitely and that conflict extension will soon begin to abate. Eventually, the parties will depolarize. Changing circumstances, unexpected problems, and new agendas of concern will tend to put pressure on existing coalitions and form new unities of interest. Moreover, simply because it is larger and represents more people, the dominant party may find itself less unified over time, and develop multiple factions. Conversely, the other party may have to accept more heterogeneity simply to stay competitive. The cycle of change will continue, new issues and problems will arise, demographic shifts will continue, and differences will emerge within each party coalition – as well as similarities of interest across parties. Eventually the United States will move to a less polarized politics with a new party structure, as it did once before by the end of the nineteenth century.⁷⁷

⁷⁵ Graber, *supra* note 18, at 646 (“[H]istory suggests that whatever constitutional reform takes place in the foreseeable future will be initiated and managed by one or both polarized parties. Rather than a means for escaping the structure of contemporary constitutional politics, successful constitutional reform will consist of the combination of formal, semiformal, and informal constitutional changes necessary for one or both ideological parties to operate the constitutional order effectively.”).

⁷⁶ See *id.* at 645-46 (describing Republican plans to structure politics so that loyal Unionists would control the meaning of the postwar Constitution); Graber, *supra* note 70, at 5-6. Controlling the political branches by itself does not guarantee sustained political success, however, if a party’s electoral coalition is weakening and intraparty bickering prevents concerted action. The Democrats won both Houses of Congress and the presidency in 1976, but were unable to prevent the collapse of the New Deal/Civil Rights Regime four years later. Thus, even if the Republicans were to gain the presidency and both Houses of Congress in 2016, they would also need to revive their declining electoral coalition and prevent growing factionalism within their party. Otherwise, the next Republican President could face challenges similar to a disjunctive President like Jimmy Carter.

⁷⁷ Here again Levinson’s Constitution of Settlement is relevant. Winning the constitutional trifecta may be necessary to a new constitutional order because of the Constitution of Settlement combined with polarized parties. Given the system of separated powers; staggered terms of office between President, House, Senate, and the judiciary; and the multiple veto points that developed in the late twentieth century, it is not enough for one party to win a single election to change the direction of governance, as might occur in a parliamentary system such as that of Great Britain. A single party has to win enough elections over time to gain control of all of the levers of power. The use of the term “trifecta” is particularly apt, because in horse racing, winning the trifecta is comparatively rare. Put another way, betting for a trifecta is a wager one is likely to lose.

But that is in the long run. In the short run, who is most likely to win? Who is most likely to score a run in the bottom of the eighteenth inning? Currently, the most likely party would be the Democrats, for the demographic reasons we discussed earlier. The demographics are on their side, and unless they blow their chance, they have a good chance at becoming the dominant party within a decade or so. If heavily Hispanic states like Texas, Arizona, and Florida become reliably Democratic, the Republican Party will have to rethink its coalition and its electoral strategy.

Nothing, however, is guaranteed. Currently, the Obama Administration is dealing with the shaky rollout of the Affordable Care Act, and many other problems loom on the horizon. If the Republicans are able to make Americans tire of Obamacare and seek to dismantle it, the Democratic brand will be tarnished, just as the Republican brand was at the end of the George W. Bush Administration.

The Democrats could also lose the initiative because of a continued weak economy, a second recession, scandals, or widely perceived incompetence.⁷⁸ Then Republicans would get a second chance to reform their party. They might attempt a populist revival from the right, and a new exercise in creative destruction.

IX. THE SIDE EFFECTS OF A LONG TRANSITION

Now let me turn to the scarring and the side effects that result from the long, protracted struggle between the parties in transitioning to a new regime. They concern not so much Congress as the executive and the judiciary.

A. *The Executive in a Period of Sustained Dysfunction*

First, consider the executive. Under current conditions, Congress is deadlocked. It is unable to pass normal budgets, unable to pass much significant new legislation, and unable to make even the most reasonable minor fixes to existing laws. Even normal funding of the government has become problematic, as the government shutdown and debt ceiling crises have demonstrated. Congress finds itself able to act only in the midst of a genuine crisis brought on by its own dysfunction. In these circumstances the President, believing that he cannot rely on Congress to do anything important, begins to take on increasing responsibility for solving problems of domestic as well as foreign policy. The President starts offering controversial interpretations of statutes and the Constitution to allow him greater flexibility to implement

⁷⁸ For a cautionary note, see John Sides, *The Democratic Party's Uphill Path to 270 Electoral Votes in 2016*, WASH. POST (Jan. 18, 2014, 10:24 PM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/18/the-democratic-partys-uphill-battle-to-270-electoral-votes-in-2016>, archived at <http://perma.cc/3P2X-62Z9>; John Sides, *The Perils of Democrats' Euphoria, or Why the 2012 Election Is Not a Realignment*, MONKEY CAGE (Nov. 12, 2012), <http://themonkeycage.org/2012/11/12/the-perils-of-democrats-euphoria-or-why-the-2012-election-is-not-a-realignment>, archived at <http://perma.cc/8UEJ-54TK>.

policy.⁷⁹ President Obama, following techniques from the Bush Administration, has begun engaging in various waivers, extensions, policies of nonprosecution, and refusals to collect taxes.⁸⁰ He has issued executive orders to achieve effects as close as possible to what would ordinarily have been legislative fixes.⁸¹ Drawing on all of the accumulated tools of the administrative state, the President has developed new forms of executive legislation. His rationale is simple: “If I can’t rely on Congress to act responsibly, I’m going to do everything myself.”

This approach, however, threatens to result in a vicious cycle. The President’s opponents naturally decry each round of administrative fixes, arguing that he lacks respect for the rule of law and has become a tyrant.⁸² They ask why they should compromise with a President who will surely alter their work after the fact, and they send signals that they will be even more intransigent in the future. The President, in turn, sees this rhetoric and these signals as evidence that his strategy of executive lawmaking was justified; he has his lawyers craft justifications for new interpretations, waivers, fixes, and refusals to prosecute, and the cycle continues. We might call this the model of “presidential legislation.” The President begins to act in the domestic sphere closer to the way that he normally acts in matters of foreign policy; in the latter sphere, the President is widely acknowledged to be the first mover and enjoys considerable discretion to make foreign policy decisions.⁸³

⁷⁹ See, e.g., *Noel Canning v. NLRB*, 705 F.3d 490, 498 (D.C. Cir. 2013) (citing U.S. CONST. art. II, § 2, cl. 3) (describing President Obama’s use of the Recess Appointments Clause to place members onto the National Labor Relations Board without obtaining the Senate’s advice and consent), *cert. granted*, 133 S. Ct. 2861 (2013); *Hearing on Libya and War Powers Before the S. Foreign Relations Comm.*, 112th Cong. 11-17 (2011) (statement of Hon. Harold Koh, Legal Adviser, U.S. Department of State) (explaining why President Obama’s intervention in Libya did not violate the War Powers Resolution).

⁸⁰ For a historical perspective, see Andrew Rudalevige, *Waiving at History*, MONKEY CAGE (Aug. 8, 2012), <http://themonkeycage.org/2012/08/08/waiving-at-history>, archived at <http://perma.cc/K8HU-MKW6>.

⁸¹ See, e.g., Press Release, Dep’t of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), archived at <http://perma.cc/83S4-JXSU>; *Obama’s New Immigration Policy Explained: 7 Key Facts*, DAILY BEAST (June 15, 2012), <http://www.thedailybeast.com/articles/2012/06/15/obama-s-new-immigration-policy-explained-7-key-facts.html>, archived at <http://perma.cc/CG3F-ZH9U>.

⁸² See, e.g., Ted Cruz, *The Imperial Presidency of Barack Obama*, WALL ST. J., Jan. 29, 2014, at A17.

⁸³ See generally Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010) (describing how the American constitutional system bestows discretionary powers onto the executive branch and observing that, even in the context of emergency powers, the President ordinarily has much greater discretion to act unilaterally in the area of foreign policy than in the area of domestic policy).

A dysfunctional Congress tempts the executive to begin to act more and more unilaterally, either by asserting inherent executive authority or by creatively interpreting previous Congressional authorizations to allow him to do whatever he wants. The problem is that the rule of law may suffer in the process. Precedents created during an extended period of dysfunction do not go away once a new regime is consolidated. Expansion of presidential lawmaking powers is simply too valuable a tool to discard. The techniques that President Obama has employed to deal with one of the most feckless Congresses in recent history will be used again by later Presidents. They will pocket the accumulated authority created during a period of dysfunction and use it in new contexts, even when Congress is functioning far better. In fact, the opportunities created by Obama's pioneering techniques will give future Presidents new threat advantages in their dealings with future Congresses, unless Congress passes new laws – probably over a presidential veto – that strip away these newly accumulated powers of quasi-legislation.

This is the great irony of the Republican strategy – largely designed and implemented by Senate Minority Leader Mitch McConnell – of attempting to obstruct Barack Obama as much as possible in the hopes of politically crippling him and making him a one-term President.⁸⁴ In the short run, it has hindered economic recovery and made governance much more difficult, but it did not deny Obama a second term, and it led to filibuster reforms that weakened the power of the minority party in the Senate. In the long run, this strategy will only strengthen the presidency and undermine the separation of powers and the rule of law.⁸⁵

B. *The Judiciary in a Period of Sustained Dysfunction*

The second phenomenon concerns the judiciary. A period of sustained political dysfunction also tends to empower the judiciary vis-à-vis Congress. Federal courts are free to disregard or show disrespect toward Congress for two reasons. First, an increasingly dysfunctional Congress does not inspire respect. Second, a deadlocked Congress can do little to threaten the independence of the judiciary.⁸⁶ One can therefore expect that judges will feel

⁸⁴ See Major Garrett, *Top GOP Priority: Make Obama a One-Term President*, NAT'L J. (Oct. 23, 2010), <http://www.nationaljournal.com/member/magazine/top-gop-priority-make-obama-a-one-term-president-20101023>, archived at <http://perma.cc/JPQ2-QYHN>.

⁸⁵ To be sure, the Supreme Court may limit the President's power at the edges – for example, by limiting recess appointments. *See supra* note 79. But this diminution in power is more than compensated for by the change in the filibuster rules.

⁸⁶ *See, e.g.*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 660-61 (1992) (“[I]f the public at large accords the Court a high level of diffuse support . . . then these issue-oriented [political] elites might run some political risks if they press vigorously for Court-curbing measures.”); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 885-86 (2011) (“[T]he lawmaking requirements of Article I . . . give the political faction supporting the judiciary – even if it is only a political minority – multiple opportunities to veto

freer to engage in judicial review, and will tend to show Congress less deference. The expansion of judicial review is overdetermined because judges appointed by the older dominant party, late in the regime, will tend to push the jurisprudential envelope.

Because judges enjoy life tenure, the composition of the judiciary does not proceed in lockstep with changes in the constitutional regime.⁸⁷ Depending on the vagaries of the appointments process, the ascendant opposition party may already have established control of the courts by the time the political regime shifts. A good example is the period between 1969 and 1971, when Richard Nixon was able to appoint four Justices to the Supreme Court, allowing the Republicans to put an end to the Warren Court's liberal majority long before Reagan's election in 1980. Republicans got this chance because of Lyndon Johnson's miscalculation in 1968 – seeking to appoint then-Associate Justice Abe Fortas to replace retiring Chief Justice Earl Warren. The Democrats lost the ability to fill either spot after Fortas was engulfed in scandal and forced to resign.

It is more likely that the older dominant party will continue to control the courts for some period of time after the ascendant party begins a new regime. A good example is Franklin D. Roosevelt's first term, in which a conservative majority dominated the Supreme Court until 1937 and struck down many important New Deal initiatives.

The current situation looks a little more like the problem that FDR encountered. President Obama faces a court dominated by the old regime, even if one of the Republican holdovers, Justice Anthony Kennedy, sometimes votes with the liberal Justices on certain issues.

In a situation like that of the present, as the old order is giving way, courts dominated by appointees of the old regime are likely to try to do two things. First, courts will attempt to entrench the constitutional and ideological commitments of the old regime, and resist attempts by rising political forces that might threaten those commitments. Gerard Magliocca calls this phenomenon “preemptive” judicial review⁸⁸ – courts reach out to decide

jurisdiction-stripping legislation favored by its opponents.”). See generally James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 58 AM. J. POL. SCI. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222749.

⁸⁷ See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”). Putting aside what is meant by “good Behaviour,” life tenure is a nearly unique feature of the United States Constitution. Almost no countries, and only one of the fifty states, have life tenure. See LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*, *supra* note 5, at 125-26; Linda Greenhouse, *New Focus on the Effects of Life Tenure*, N.Y. TIMES, Sept. 10, 2007, at A20 (“Most countries place term or age limits on their high-court judges, as do 49 states (all but Rhode Island).”). Thus, the complicated relationship between new constitutional orders and the composition of the judiciary is due to the Constitution of Settlement.

⁸⁸ Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v.*

important questions that are crucial to the ideological commitments of the old regime and attempt to resolve them before the new regime can gain control of the courts. Examples of preemptive judicial review might include the behavior of the conservative “four horsemen” during the early days of the New Deal, or the decisions of the Democratic Justices during the early years of the Chase Court in the Lincoln and Johnson Administrations.⁸⁹

Second, courts dominated by members of the old regime will tend to push the jurisprudential envelope – they will overturn or limit older doctrines, or create new doctrines so as to further the ideological commitments of the regime in the time still remaining. The last years of the Warren Court, and the early years of the Burger Court, for example, were among the most ambitious in promoting liberal constitutionalism. *Dred Scott v. Sandford*,⁹⁰ which sought to lock in constitutional protections for slavery, was the work of a Jacksonian Court late in the Jacksonian regime.

Courts behave this way not simply because they see that the end of the regime is near – they may guess wrong, after all. It is rather because as the regime progresses, members of the dominant party will increasingly turn to their allies on the courts to promote their agendas. Earlier victories may lead to more daring attempts to remake constitutional doctrine. The boundaries of constitutional utopian thought expand. Positions that before had seemed unthinkable or “off the wall” now become thinkable, especially as the courts are increasingly stocked with true believers who take these claims seriously. As before, it matters not only who sits on the courts but what kinds of cases are brought to the attention of the courts. As the regime proceeds, lawyers and civil society organizations affiliated with the dominant party work to shape public opinion and generate litigation campaigns and test cases.⁹¹ Examples in our own era include the Federalist Society, the U.S. Chamber of Commerce, and conservative public interest firms like the Institute for Justice. As the regime progresses and victories in the courts mount, these affiliated groups may become increasingly ambitious in their goals or increasingly radical in their views.

One might understand the Roberts Court’s jurisprudence from this perspective. From 2006, when Justice Alito joined the Court, to the present, the Court has become increasingly daring in areas like campaign finance and

Georgia and *Dred Scott*, 63 U. PITT. L. REV. 487, 488-90 (2002).

⁸⁹ See Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17, 19-20 (2000) (arguing that once the Civil War ended, Jacksonian appointees on the Chase Court returned to upholding the commitments of the old regime against Republican innovations).

⁹⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

⁹¹ On the role of civil society organizations, see CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 20-22 (1998); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 11-14 (2008).

commercial speech. It seriously limited the Medicaid expansion in the Affordable Care Act, and it came within a hair's breadth of striking down the entire statute, under a legal theory that was widely regarded as "off the wall" when it was first broached.⁹² Then, in 2013, the Court did something that would have been completely unthinkable only a few years ago: it struck down part of the Voting Rights Act, one of the signature achievements of the New Deal/Civil Rights regime.⁹³ The preclearance provisions of the Act, which were crippled by the Court's decision, were long a *bête noire* of conservatives,⁹⁴ but few imagined that the Supreme Court would dare strike them down until recently.⁹⁵ Whether the Justices of the Court actually understand themselves this way, the Roberts Court as a whole has been acting as if it is important to take care of as much unfinished business as possible while a conservative majority is still in control. Assisted by conservatives in the lower courts, and by energetic litigation campaigns by conservative civil society groups, the Court seems to be attempting to get what it can while the getting is good.⁹⁶

⁹² Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608-09 (2012) (plurality opinion); see Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012, 2:55 PM), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040>, archived at <http://perma.cc/68XN-25UK> (explaining the role of the Republican Party and its allied intellectuals and media organizations in changing public opinion about the plausibility of the constitutional challenge to the individual mandate).

⁹³ Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).

⁹⁴ See Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 72-73 & nn.367-68 (2013) (describing the Reagan Administration's hostility to the Voting Rights Act and President Reagan's belief that it was humiliating to the South).

⁹⁵ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197, 202-06 (2009) (avoiding the question of the Voting Rights Act's constitutionality, but suggesting that its preclearance provisions may be outdated).

⁹⁶ See Linda Greenhouse, *What's Your Hurry?*, N.Y. TIMES OPINIONATOR (June 12, 2013, 8:30 PM), http://opinionator.blogs.nytimes.com/2013/06/12/whats-your-hurry/?_php=true&_type=blogs, archived at <http://perma.cc/7ZKW-KHYS> ("[T]he overall theme [of the Roberts Court] in the words of the old Janis Joplin song [is]: get it while you can. This is as good as it's going to get.").

Keith Whittington's work on judicial review suggests that we might also expect significant struggles between a Democratic President and Republican holdovers in the federal judiciary until the Democrats control the courts once more. Whittington believes that transformative Presidents like Jackson or Lincoln are most likely to engage departmentalist rhetoric, arguing for the President's ability to interpret the Constitution independently from the courts. See WHITTINGTON, *supra* note 61, at 22-23. In other context, however, Presidents are likely to eschew departmentalist rhetoric and treat the courts as an occasional or potential ally against Congress or state and local governments.

An interesting question raised by Whittington's thesis is what will happen in an age without reconstructive presidencies in the Jacksonian mold. Will Obama, who lacks many features of a reconstructive President, take a departmentalist line? Or will Obama behave

CONCLUSION

The transition to the next constitutional order will not be as easy as that which occurred during the last days of disco. That is because we sit at the intersection of three different secular trends. We are simultaneously experiencing (1) the disintegration of a political regime; (2) the further debilitation of reconstructive presidential leadership; and (3) the crest of a 150-year-cycle of party polarization and conflict extension. Neither the Democrats in 1932 nor the Republicans in 1980 faced such a triple threat.

The noted political scientist (and disco queen) Gloria Gaynor once argued that, despite all of her trials and tribulations, “I Will Survive.”⁹⁷ Applied to the United States, the Gaynor Thesis is that despite the desolation produced by destructive relationships, renewal is not only possible but also likely as long as we maintain faith and allow our faith to spur our future action. It is hardly surprising that “I Will Survive” has become a beloved disco anthem, because this is, in fact, the American story.⁹⁸ At the same time, no one should underestimate the difficulties of the transition Americans face during the next few years. In the words of another diva, Margo Channing, played by the immortal Bette Davis, “Fasten your seatbelts – it’s going to be a bumpy night.”⁹⁹

more like a preemptive President? Preemptive Presidents often find it prudent to support judicial review even when they lose, because in particularly difficult political environments, “the law and the judiciary may be the best defense that a president has.” *Id.* at 166-67; see also BALKIN, *supra* note 13, at 286.

⁹⁷ GLORIA GAYNOR, *I WILL SURVIVE* (Polydor Records 1978). For a live performance of the diva in action, see Ichnos71live, *Gloria Gaynor – I Will Survive (Live 1979)*, YOUTUBE (Dec. 13, 2008), <http://www.youtube.com/watch?v=Faf1ch7Q9XE>.

⁹⁸ See generally Jack M. Balkin, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

⁹⁹ *ALL ABOUT EVE* (Twentieth Century-Fox Film Corp. 1950).

