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## Race and the Cycles of Constitutional Time

Jack M. Balkin

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# Race and the Cycles of Constitutional Time

*Jack M. Balkin\**

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## I. INTRODUCTION

Guy Charles has pointed out to me that *The Cycles of Constitutional Time* [*Cycles*]<sup>1</sup> does not say a lot about race. Although statements about race, slavery, and Jim Crow appear at various points in the narrative,<sup>2</sup> race is not an organizing theme of the book. And yet race – and the use of race as a political strategy – is behind many of my claims in *Cycles*. Charles’s suggestion inspired me to write this Article, and to tell the story of the book by making race the organizing principle.

*The Cycles of Constitutional Time* argues that we can understand American constitutional development in terms of three kinds of cycles.<sup>3</sup> The first is the rise and fall of regimes featuring dominant political parties. The second is a very long cycle of polarization and depolarization that stretches from the Civil War through the present.<sup>4</sup> The third cycle is a series of episodes of constitutional rot and constitutional renewal.<sup>5</sup>

Each of these cycles has deep connections to successive political struggles in the United States over race and racial equality. In each regime, the dominant electoral coalition is shaped by the politics of slavery (in the antebellum period) or race (after the Thirteenth Amendment).<sup>6</sup> In several cases, the dominant coalition breaks down because of disputes about slavery or race. The cycle of polarization is highly correlated with attempts by politicians to make race, and more generally, identity, the central questions that divide the two major political parties. Finally, each period of constitutional rot in the country’s history has been accompanied by deep polarization that is connected both to increasing income inequality and to party coalitions divided over issues of race.

I do not claim that race is either the sole or the dominant explanation for the cycles of constitutional time in the United States. Nevertheless, as we shall see, race is a powerful factor, and the politics of race are an important driver of the cycles of regimes, polarization, and rot described in the book. My purpose in this Article is to highlight the role that racial politics plays in the transformations described in *Cycles*, and to show how questions of race are important at each stage of the story.

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1. JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020).

2. *See id.* at 13, 15, 18, 30, 45, 52, 62–63, 89–90, 116, 124, 135–37, 142, 161–66, 168, 172–73.

3. *Id.* at 6.

4. Lee Drutman, *American Politics Has Reached Peak Polarization*, VOX (Mar. 24, 2016), <https://www.vox.com/polyarchy/2016/3/24/11298808/american-politics-peakpolarization> [<https://perma.cc/RDL4-XM9B>]; Jeff Lewis, *Polarization in Congress*, VOTEVIEW.COM (Mar. 11, 2018), [https://www.voteview.com/articles/party\\_polarization](https://www.voteview.com/articles/party_polarization) [<https://perma.cc/5VZB-DUJA>] (graph of “Liberal-conservative partisan polarization by chamber”).

5. BALKIN, *supra* note 1, at 6.

6. U.S. CONST. amend. XIII.

## II. THE CYCLE OF REGIMES

Because of features of constitutional design, electoral rules, and the development of the party system, American politics has a distinctive shape.<sup>7</sup> It features political regimes, long periods of time in which one party tends to dominate politics. The dominant party does not win all of the elections, but it wins most of them and it sets the agenda for what people think is politically possible at a particular period of time.<sup>8</sup> There have been six of these regimes in American history, each featuring a dominant party. In each cycle a new dominant party rises, forms a winning coalition, dominates political agendas, and then slowly decays and falls apart, often the victim of its own success:

*Table 1: Regimes in American Political History, 1789-2020<sup>9</sup>*  
(Years of White House control in parentheses)

Name	Years	Dominant Party	Opposition Parties
Federalist	1789–1801	Federalists (12)	Jeffersonians (0)
Jeffersonian	1801–1829	Democratic-Republicans (28)	Federalists (0)
Jacksonian	1829–1861	Democrats (24)	National Republicans; Whigs; Republicans (8)
Republican	1861–1933	Republicans (52)	Democrats (20) <sup>10</sup>
New Deal/Civil Rights	1933–1981	Democrats (32)	Republicans (16)
Reagan (Second Republican)	1981–?	Republicans (24)	Democrats (16)

7. Jack M. Balkin, *Rot and Renewal: The 2020 Election in the Cycles of Constitutional Time*, 13 *NORTHEASTERN U. L. REV.* 617, 622–24 (2021).

8. BALKIN, *supra* note 1, at 13.

9. BALKIN, *supra* note 1, at 15. In Table 1, I begin each regime in the year a new president takes office, while in the book I begin with the date of the preceding election that shifts power.

10. I count Andrew Johnson as a Democratic president, even though he ran as Lincoln's running mate in 1864 as part of a national unity ticket.

As we trace the rise and fall of these coalitions, we can see the role that race plays in each of them.

### A. Political Regimes in the Antebellum Era

The first transition between political regimes occurred in the election of 1800, when Thomas Jefferson's Republicans defeated the Federalist Party of John Adams and Alexander Hamilton. Jefferson (and Aaron Burr) won the Electoral College by only eight votes over John Adams, seventy-three to sixty-five.<sup>11</sup> But Jefferson, his critics said, rode into the White House "on the shoulders of slaves."<sup>12</sup>

The source of this accusation is the 1787 Constitution's three-fifths clause.<sup>13</sup> Counting slaves as three-fifths of a person increased the share of congressional representation for the slave-holding states, an electoral advantage that slowly decreased over time as the North and West became more populous.<sup>14</sup> Because each state received electoral votes equal to the sum of its senators and representatives, the three-fifths clause gave slave-holding states an advantage not only in Congress but also in electing the president through the Electoral College system.<sup>15</sup> Without this boost in political power, Jefferson probably would have lost the 1800 election. Because the North and West soon began to grow in population, the Jeffersonian takeover of American politics might have been delayed by several election cycles – if it ever occurred at all.

From the Founding to the Civil War, the three-fifths clause affected who became president.<sup>16</sup> It made a slaveholding state, Virginia, the most powerful state in the Union, with the largest number of electoral votes until 1812, when New York finally surpassed it.<sup>17</sup> With the exception of one term by John Adams, from 1789 to 1824 the Presidency was occupied by four Virginia

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11. See *1800 Presidential Election*, 270TOWIN, [https://www.270towin.com/1800\\_Election/index.html](https://www.270towin.com/1800_Election/index.html) [https://perma.cc/E2WZ-GVCW] (last visited Feb. 11, 2021).

12. GARRY WILLS, *NEGRO PRESIDENT: JEFFERSON AND THE SLAVE POWER 2* (2005) (quoting the *Mercury and New-England Palladium* of Boston, January 20, 1801). Sean Wilentz argues that this does not take into account "the Federalists' deliberate suppression of the Jeffersonian vote in key Northern states." SEAN WILENTZ, *THE POLITICIANS AND THE EGALITARIANS: THE HIDDEN HISTORY OF AMERICAN POLITICS* 105 (2016).

13. U.S. CONST. art. I § 2, cl. 3, amended by U.S. CONST. amend. XIV.

14. MICHAEL F. CONLIN, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN CIVIL WAR* 90-91, 96 (2019).

15. *Id.*; MICHAEL TODD LANDIS, *NORTHERN MEN WITH SOUTHERN LOYALTIES THE DEMOCRATIC PARTY AND THE SECTIONAL CRISIS* 5 (2014).

16. CONLIN, *supra* note 16, at 120–21.

17. See *1812 Presidential Election*, 270TOWIN, [https://www.270towin.com/1812\\_Election/index.html](https://www.270towin.com/1812_Election/index.html) [https://perma.cc/4GLG-JQFP] (last visited Feb. 11, 2021).

slaveholders – George Washington, Thomas Jefferson, James Madison, and James Monroe.<sup>18</sup> John Adams’s son, John Quincy, occupied the White House for another interregnum of four years.<sup>19</sup> After that, during the Jacksonian regime that began following the 1828 election, the president was either a Southerner or a Northern politician willing to accommodate the South.<sup>20</sup>

The three-fifths clause also gave the South extra leverage in legislation. For example, until 1850, the South demanded and received parity in the admission of new slaveholding and non-slaveholding states.<sup>21</sup> This gave it numerical equality in the Senate even as the population of non-slaveholding states increased.

The three-fifths clause also helped ensure that the Supreme Court would be friendly to the interests of slavery. As the country moved westward, the number of judicial circuits expanded.<sup>22</sup> This led Congress to increase the

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18. Akhil Reed Amar, *Actually, the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES, April 6, 2019, <https://www.nytimes.com/2019/04/06/opinion/electoral-college-slavery.html> [<https://perma.cc/UX7D-96EY>] (“Eight of the first nine presidential elections were won by candidates who were plantation owners from Virginia”); Elizabeth Nix, *Which states have produced the most U.S. presidents?*, HISTORY (Sep. 10, 2014), <https://www.history.com/news/which-u-s-states-have-produced-the-most-presidents> [<https://perma.cc/57WG-65ZS>]; Evan Andrews, *How Many U.S. Presidents Owned Enslaved People?*, HISTORY (July 19, 2017), <https://www.history.com/news/how-many-u-s-presidents-owned-slaves> [<https://perma.cc/D2K3-PLLP>]; THE LIBRARY OF CONGRESS, *Chronological List of Presidents, First Ladies, and Vice Presidents of the United States*, [https://www.loc.gov/rr/print/list/057\\_chron.html](https://www.loc.gov/rr/print/list/057_chron.html) [<https://perma.cc/L3JZ-PWRU>] (last visited Feb. 5, 2021).

19. THE WHITE HOUSE, *John Quincy Adams*, <https://www.whitehouse.gov/about-the-white-house/presidents/john-quincy-adams/> [<https://perma.cc/5KL5-VMPP>] (last visited Feb. 11, 2021).

20. Amar, *supra*, note 18 (“every president until Abraham Lincoln was either a Southerner or a Northerner who was willing (while president) to accommodate the slaveholding South”); *see also* PAUL FINKELMAN, MILLARD FILLMORE 51, 84 (2011) (noting Fillmore’s support for the Compromise of 1850).

21. CONLIN, *supra* note 16, at 105–109.

22. JUSTIN CROWE, BUILDING THE JUDICIARY LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 124, 127, 139 (2012); Charles G. Geyh, *Judicial Independence, Judicial Accountability, And The Role Of Constitutional Norms In Congressional Regulation Of The Courts*, 78 IND. L.J. 153, 171 (2003) (“As new states entered the Union, new judicial districts were created to service the new states, new district judges were added to staff the new judicial districts, new circuits were added to include the new states, and new Supreme Court Justices were added to oversee the new circuits.”).

number of Supreme Court Justices.<sup>23</sup> Each Justice of the Supreme Court was supposed to ride circuit – travel around and hear federal cases in the group of states assigned to them.<sup>24</sup> By convention, each Justice was supposed to be an inhabitant of one of the states in the circuit assigned to them.<sup>25</sup> Jacksonian Democrats made sure that a majority of the circuits were composed of slaveholding states.<sup>26</sup> This, in turn, helped ensure that a majority of Justices were from slaveholding states, or were otherwise sympathetic to the interests of slavery.<sup>27</sup>

The cumulative advantages created by the three-fifths clause allowed Jefferson’s Republicans, and later Andrew Jackson’s Democrats, to dominate American politics until the Civil War.<sup>28</sup> Because it shaped the nature of representation, the three-fifths clause also shaped the distinctive ideology and interests of the Jeffersonian regime and later, the Jacksonian regime. The representational boost to slaveholders meant that the dominant party from 1800 to the Civil War would seek not only to protect slavery, but also to extend its spread throughout the new territories that the United States acquired through purchase and conquest.

During the Jacksonian regime that succeeded the Jeffersonian regime, the dominant party was the country’s first mass political party: the “party of democracy,” or the Democratic Party.<sup>29</sup> The Jacksonian coalition championed the expansion of suffrage to white working men and the rights of ordinary

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23. *Id.*

24. *Id.* at 168.

25. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 149 (2006) (“The presidential practice of appointing one Supreme Court justice from each circuit guaranteed a Southern majority on that tribunal.”).

26. Mark Graber, “No Better Than They Deserve:” *Dred Scott And Constitutional Democracy* 34 NO. KENTUCKY L. REV. 589, 604 (2007) (“Federal law ... structured the federal judicial system in ways that guaranteed that a majority of the justices on the Supreme Court would be citizens from slave states.”).

27. *Id.* at 609–610 (“The Court that decided *Dred Scott* had a southern majority because Jacksonians in the executive and legislative branches of the government passed legislation placing five of the nine federal circuit court districts entirely within the slave states, and presidents who depended on southern votes ensured that one representative from each federal circuit district sat on the Supreme Court.”); 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, 514 (2002) (“[T]o ensure the protection of Southern regional interests . . . the slave states were divided into five circuits, meaning that they would enjoy a majority on the Supreme Court.”)

28. See LANDIS, *supra* note 17, at 5 (2014) (“the combination of the Three-Fifths Clause and the subservience of Northern Democrats gave the South almost unchallenged domination over the federal government in the antebellum era.”)

29. *Democratic Party*, HISTORY, (Apr. 4, 2018), [https://www.history.com/topics/us-politics/democratic-party#section\\_2](https://www.history.com/topics/us-politics/democratic-party#section_2) [<https://perma.cc/4JDP-EJZE>].

working men against financial elites.<sup>30</sup> But the Jacksonian coalition was hardly egalitarian. It depended on the exclusion of women, Native Americans, and Blacks from governance.<sup>31</sup>

The Jacksonian regime and its governing coalition were made possible and kept in place by a racially exclusionary politics.<sup>32</sup> That politics, in turn, made the Jacksonian coalition increasingly captive to the interests of slavery – which opponents called the Slave Power.<sup>33</sup> As I discuss later on,<sup>34</sup> the first key episode of constitutional rot, in the 1850s, is due to the fact that the defense and expansion of slavery had become a dominant force in American politics.

### B. *The Republican Regime*

The Republican Party, which began in 1854, sought to combat the rot caused by the dominance of the Slave Power in American politics.<sup>35</sup> Thus, race played an important role in the rise of the next political regime, the long Republican regime in which the GOP was the dominant political party from 1860 to 1932.<sup>36</sup> That regime and its governing coalition emerged out of the struggle over the expansion of slavery in the federal territories.

In its early years, and especially after the ratification of the Fifteenth Amendment in 1870, it seemed as if a central goal of the regime would be to

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30. See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: FROM LINCOLN TO JEFFERSON* 513 (2005) (“At bottom, the Jackson Democracy was chiefly what its proponents said it was – a political movement for, and largely supported by, those who considered themselves producers pitted against a nonproducer elite.”).

31. GERALD LEONARD AND SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S–1830S* 147, 175–77, 207–209, 220 (2019).

32. *Id.*; see also DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848* 280 (2007) (“In the South, Jackson’s popularity was enhanced by the feeling that only he could be relied upon to maintain white supremacy and expand the white empire, to evict the Indian tribes, to support and extend slavery.”).

33. WILLS, *supra* note 14, at 11 (explaining that the Slave Power was facilitated by the three fifths clause and other pro-slavery parts of the Constitution).

34. See *infra* Part IV-B.

35. HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* 6–7 (2014); WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1856* 357–365 (1987); Matthew Karp, *The People’s Revolution of 1856: Antislavery Populism, National Politics, and the Emergence of the Republican Party*, 9 *THE JOURNAL OF THE CIVIL WAR ERA* 524–545 (2019).

36. See *supra* Table 1; BALKIN, *supra* note 1, at 14.

protect and defend the rights of the freedmen, and that this regime would be backed by a multi-racial coalition of whites and Blacks.<sup>37</sup> But as the years wore on, the Republican regime became less concerned about racial equality and more concerned about the defense of business interests.

Black voting rights became important to the Republican coalition as a result of the Reconstruction Amendments.<sup>38</sup> In 1866, when Congress debated the Fourteenth Amendment, Black suffrage was a radical idea.<sup>39</sup> Instead of guaranteeing African Americans the right to vote, Section 2 of the Fourteenth Amendment fashioned a compromise: states that denied Black men the right to vote would lose a proportionate share of representatives in the House.<sup>40</sup> That provision, it turns out, was never enforced.<sup>41</sup>

In the meantime, however, Congress took control of Reconstruction from President Andrew Johnson and refused to allow the former Confederate states to reenter the Union until these states adopted new state constitutions and elected new state governments that ratified the Fourteenth Amendment.<sup>42</sup> Congress further required the former Confederate states to allow both Blacks and whites to vote for delegates to these new state constitutional conventions.<sup>43</sup> The predictable result was that the newly organized southern

37. U.S. CONST. amend. XV; THE LIBRARY OF CONGRESS, *15th Amendment to the U.S. Constitution: Primary Documents in American History*, <https://guides.loc.gov/15th-amendment> [<https://perma.cc/X5FA-3H23>] (last visited Feb. 14, 2021).

38. Jordan Grant, *In 1868, Black suffrage was on the ballot*, NATIONAL MUSEUM OF AMERICAN HISTORY, February 27, 2020, <https://americanhistory.si.edu/blog/black-male-suffrage> [<https://perma.cc/MA2T-VXKK>]; Robert C. Kennedy, *On This Day: On February 24, 1866, Harper's Weekly featured a cartoon about voting rights for African Americans.*, N.Y. TIMES, (2001), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/harp/0224.html> [<https://perma.cc/LXT7-2A6Q>].

39. Grant, *supra* note 38; *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, LIBRARY OF CONGRESS, <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=072/llcg072.db&recNum=611> [<https://perma.cc/8VTK-BQTN>] (last visited Feb. 14, 2021).

40. U.S. CONST. AMENDMENT XIV, § 2.

41. See Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149, 178 (2015); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 108–116, 124 (1961).

42. Grant, *supra* note 38; THE WHITE HOUSE, *Andrew Johnson, The 17th President of the United States*, <https://www.whitehouse.gov/about-the-white-house/presidents/andrew-johnson/> [<https://perma.cc/K2L4-SZQY>] (last visited Feb. 14, 2021).

43. See PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, AND REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 356–67 (7th ed. 2018); 14 U.S. STAT. 428, 429 (1867); Gabriel J. Chin, *Reconstruction, Felon*

states guaranteed Black suffrage, and because Blacks were a large proportion of the population, they became a powerful force in Southern politics.

As a result, many Republicans changed their minds about Black suffrage, realizing that it would guarantee Republican political competitiveness – if not political control – in the South. By 1868, when the states ratified the Fourteenth Amendment, Black suffrage in the South had fundamentally changed the political calculus.<sup>44</sup> Republican politicians quickly sent a Fifteenth Amendment, guaranteeing Black suffrage, to the states, and it was ratified in 1870.<sup>45</sup>

If one had stopped the historical narrative at that point, one might have predicted that the dominant coalition in the new Republican regime would be a multi-racial coalition in which both whites and Blacks would participate in governance, especially at the state level. But it soon became clear that this strategy for maintaining political dominance would not succeed. It did not succeed because of enormous resistance – and political terrorism – by white Southerners.<sup>46</sup> The “massive resistance” following *Brown v. Board of Education*<sup>47</sup> was nothing compared to white Southern resistance to equal citizenship for Blacks in the former Confederacy. Only resolute military control could suppress this resistance and protect Black civil rights. But Northern will to maintain this control – which was both expensive and unpopular – gradually gave way, partly as a result of the Panic of 1873.<sup>48</sup>

Over the course of the late nineteenth century, Republicans slowly stopped pressing for Black civil rights.<sup>49</sup> Democrats regained the House of

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*Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment*, 92 GEO. L. J. 259, 270–71, 271 n.67 (2004).

44. See, e.g., Chin, *supra* note 46, at 259; ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 89-94 (2000); Grant, *supra* note 38.

45. THE LIBRARY OF CONGRESS, *15th Amendment to the U.S. Constitution*, *supra* note 37.

46. DAVID W. SOUTHERN, *THE PROGRESSIVE ERA AND RACE: REACTION AND REFORM, 1900-1917* 1, 17–18 (2005); STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES FROM SLAVERY TO THE GREAT MIGRATION* 272–73, 287–89, 310–312 (2003).

47. *Brown v. Board of Ed. of Topeka, Kan.*, 347 U.S. 483 (1954); see generally NUMAN V. BARLETTY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950's* (1997).

48. SOUTHERN, *supra* note 48, at 19.

49. C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 22–50 (1966) (arguing that Republicans reoriented their party toward business interests, making Black civil rights a lower priority).

Representatives in the 1874 elections, and the two parties remained highly competitive throughout the Gilded Age.<sup>50</sup> Democrats regrouped in the South, and so-called Redeemer governments reestablished white hegemony.<sup>51</sup> Although Blacks could still vote in the South during this period, they gradually lost political control. Republicans, meanwhile, turned their attention to economic nationalism and the protection of railroads and business interests. To be sure, Republicans continued to “wave the bloody shirt,” blaming the Democrats for the Civil War, but their devotion to Black civil rights increasingly took a back seat to other issues.<sup>52</sup>

One key turning point came during Benjamin Harrison’s administration, when Republicans had control of the White House and both Houses of Congress for the first time since the end of Reconstruction.<sup>53</sup> This proved to be their last chance to push through civil rights legislation protecting Black voting rights. Harrison, a former Union general who supported Black civil and political rights, pushed for passage of the Lodge Bill, an early precursor of the Voting Rights Act.<sup>54</sup> But enough Northern and Western Republicans failed to support it, and it died.<sup>55</sup>

By this point, Republicans had effectively given up on protecting Black voting rights to bolster their political coalition. Instead, they focused on a different strategy for maintaining political control. They admitted new sparsely populated states to the Union, with the hope that these new states would usually vote Republican, giving them an advantage in the Senate.<sup>56</sup>

By the end of the Gilded Age, Republican politicians had moved on to new sets of issues. Although they were still the Party of Lincoln, they had mostly lost interest in protecting the rights of Blacks. A Supreme Court controlled by Republican appointees gave its blessing to Jim Crow in 1896 in *Plessy v. Ferguson*.<sup>57</sup> Democratic-controlled Southern states began to strip Blacks of their voting rights through new state constitutions and

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50. ROBERT W. CHERNY, *AMERICAN POLITICS IN THE GILDED AGE 1868-1900* 47–48, 141–43 (1997).

51. SOUTHERN, *supra* note 48, at 21–24.

52. WOODWARD, *supra* note 51, at 22–50; CHERNY, *supra* note 52, at 33–34.

53. Vincent P. De Santis, *Benjamin Harrison and the Republican Party in the South, 1889-1893*, 51 *INDIANA MAGAZINE OF HISTORY* 4, 279 (1955).

54. Allan B. Spetter, *Benjamin Harrison: Life Before the Presidency*, UVA MILLER CENTER, <https://millercenter.org/president/bharrison/life-before-the-presidency> [<https://perma.cc/9P8S-K25F>].

55. SOUTHERN, *supra* note 48, at 34.

56. Mark A. Graber, *Constructing Constitutional Politics: The Reconstruction Strategy For Protecting Rights* 99-100, 104-05, [https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2394&context=fac\\_pubs](https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2394&context=fac_pubs) [<https://perma.cc/6XWW-EBNJ>]; Heather Cox Richardson, *When Adding New States Helped the Republicans*, *THE ATLANTIC*, (September 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/when-adding-new-states-helped-republicans/598243/> [<https://perma.cc/4UC5-26B9>].

57. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

disenfranchisement schemes aimed both at Blacks and impoverished whites.<sup>58</sup> In 1903, in *Giles v. Harris*,<sup>59</sup> the Supreme Court announced that it would not and could not do anything to stop determined attempts at the disenfranchisement of Black voters in Southern states.<sup>60</sup>

Instead, the Supreme Court's jurisprudence developed a different focus: the protection of capital. In 1888, the Court declared that corporations were persons under the meaning of the Fourteenth Amendment,<sup>61</sup> giving railroads and other businesses new constitutional means to resist economic regulation. In 1895, the Court struck down the federal income tax in *Pollock v. Farmer's Trust and Loan Co.*<sup>62</sup> And in 1897, in *Allgeyer v. Louisiana*,<sup>63</sup> the Court recognized freedom of contract as a specially protected constitutional liberty, inaugurating the *Lochner* era. In this way, the Fourteenth Amendment, originally designed to protect the rights of Black citizens, became a vehicle for protecting the rights of businesses. These decisions reflected the evolution of the Republican regime during the Gilded Age. The Republican Party transformed from a multi-racial coalition devoted to equal rights for all citizens into a coalition primarily concerned with the protection of business interests, including the interests of railroads and other corporations. Meanwhile, the opposition party, the Democrats, remained the party of the South, and actively fought against the protection and expansion of Black civil and political rights.

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58. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295, 301–304 (2000); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE, RESTRICTION, AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* 238-65 (1974); SOUTHERN, *supra* note 48, at 24–26.

59. *Giles v. Harris*, 189 U.S. 475 (1903).

60. *Id.* at 488 ("relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.")

61. *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888); see also *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394, 396 (1886) (reporter's note of statement by Chief Justice Waite that all of the Justices believed that corporations were persons under the meaning of the Fourteenth Amendment).

62. *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, *modified on reh'g*, 158 U.S. 601, 637 (1895) (striking down the 1894 Federal Income Tax).

63. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (recognizing constitutional liberty of freedom of contract).

### C. *The New Deal/Civil Rights Regime*

Until the 1896 election, issues of religion, race, and the memory of the Civil War were key points of contention between the two major political parties.<sup>64</sup> After 1896, politics began to focus on different issues, and political polarization began to recede.<sup>65</sup>

For many years, the Democratic Party seemed to have little to offer African Americans. That began to change with the New Deal.<sup>66</sup> The Great Migration brought Black people from Southern states where they could not vote to Northern states where they could.<sup>67</sup> Republican abandonment of Black civil rights created an opening for Northern Democrats to compete for Black votes. If both parties were racist, Black Americans could decide which party offered the greatest chances for economic improvement. Despite the racism of Southern Democrats, Black voters recognized that the Democratic coalition promised greater economic benefits and began to vote accordingly.<sup>68</sup> By the 1936 election, approximately seventy percent of African Americans voted for Franklin Roosevelt.<sup>69</sup>

The New Deal coalition made many different kinds of economic reforms possible, and it brought large numbers of Black voters into the Democratic Party. Political depolarization allowed cross-party alliances on different issues. But the success of the New Deal coalition always rested on a Faustian bargain concerning race.<sup>70</sup> That coalition held together because of a racial compromise between Northern liberal Democrats and Southern Democrats, mostly at the expense of African Americans.<sup>71</sup> Northern and Southern Democrats often agreed on many questions of economic regulation. But they disagreed strongly on questions of race.

To extent that the New Deal coalition held, Southern conservatives and Northern liberals could inhabit the same party, and the Democrats could

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64. BALKIN, *supra* note 1, at 166.

65. *Id.*

66. *Id.*

67. Isabel Wilkerson, *The Long-Lasting Legacy of the Great Migration*, SMITHSONIAN MAGAZINE (Sept. 2016), <https://www.smithsonianmag.com/history/long-lasting-legacy-great-migration-1809601118/> [<https://perma.cc/YM4P-3LGB>].

68. See NANCY JOAN WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF F.D.R.* xiv (1983) (arguing that despite Roosevelt's lack of interest in promoting civil rights, African Americans began to vote Democratic because of the substantive economic benefits promised by the New Deal).

69. Brooks Jackson, *Blacks and the Democratic Party*, FACTCHECK.ORG, (April 18, 2008), <https://www.factcheck.org/2008/04/blacks-and-the-democratic-party/> [<https://perma.cc/YXX2-3N6Z>].

70. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 17–18 (2013).

71. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

remain the dominant political force, with each side of the coalition working across the aisle with Republicans on particular issues. But the coalition began to fray almost as soon as it was established. Roosevelt tried unsuccessfully to purge conservative Southern Democrats in the 1938 election, and Southern conservatives, in turn, objected to demands from liberals in the party.<sup>72</sup>

Harry Truman was far more overt in his support for Black civil rights than Roosevelt ever dared.<sup>73</sup> He desegregated the armed forces in 1947 and ran on a civil rights plank in the 1948 election.<sup>74</sup> In response, Southern Democrats bolted from the party, and Senator Strom Thurmond ran for president as a Dixiecrat.<sup>75</sup> Meanwhile, Dwight D. Eisenhower's two successful presidential runs in 1952 and 1956 began to attract more Southerners to the Republican Party.<sup>76</sup> These tendencies would accelerate in 1964, when Barry Goldwater, an opponent of the 1964 Civil Rights Act, gained the Republican nomination.<sup>77</sup> Lyndon Johnson won a landslide victory that year, but Goldwater carried five states in the Deep South, long a Democratic stronghold.<sup>78</sup> That result was a harbinger of things to come.

Differences over race eventually doomed the New Deal coalition, although the crackup would take many decades. The civil rights era was a turning point. The social unrest of the 1960s and mobilizations for Black civil rights and women's liberation put continuous stress on the Democrats' coalition.<sup>79</sup> The Voting Rights Act of 1965 transformed American politics.<sup>80</sup> The South became increasingly competitive for both parties, and because of Republican political strategies on race, eventually a Republican bastion.

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72. SUSAN DUNN, *ROOSEVELT'S PURGE: HOW FDR FOUGHT TO CHANGE THE DEMOCRATIC PARTY* 7 (2010).

73. MICHAEL R. GARDNER, *HARRY TRUMAN AND CIVIL RIGHTS* 109 (2002).

74. *Id.* at 96, 111–13.

75. *Id.* at 101–02.

76. See Chester J. Pach, Jr., *Dwight D. Eisenhower: Campaigns and Elections*, UVA MILLER CENTER, <https://millercenter.org/president/eisenhower/campaigns-and-elections> [<https://perma.cc/CJY3-EYAS>].

77. Suzanne McGee, *How Barry Goldwater Brought the Far Right to Center Stage in the 1964 Presidential Race*, HISTORY, <https://www.history.com/news/barry-goldwater-1964-campaign-right-wing-republican> [<https://perma.cc/839P-BQBH>] (last visited Feb. 14, 2021).

78. *Id.*

79. *Democratic Party*, *supra* note 31.

80. *Voting Rights Act of 1965*, HISTORY, (Nov. 9, 2009), <https://www.history.com/topics/black-history/voting-rights-act> [<https://perma.cc/MK65-T4D7>] (last visited Feb. 14, 2021).

By the 1970s, the country had entered what we now call the culture wars.<sup>81</sup> Opposition to desegregation, court-ordered busing and affirmative action became key issues in American politics.<sup>82</sup> A racist demagogue, Alabama Governor George Wallace, managed to attract a large number of Democratic voters in the 1968 presidential election.<sup>83</sup>

Goldwater's 1964 campaign showed that if race became the central issue of national politics, the South would abandon the Democrats.<sup>84</sup> Wallace showed that a reactionary combination of populism and racism was attractive to many voters in the New Deal coalition. After Wallace, Republican politicians and the conservative activists who formed the New Right learned how to use wedge issues of culture and race to successfully break apart the New Deal Democratic coalition.<sup>85</sup> They succeeded in forming a new conservative coalition that included many white ethnics, Catholics, and evangelical Christians.<sup>86</sup> This eventually became the Reagan coalition that won the White House for three consecutive terms in 1980, 1984, and 1988.<sup>87</sup>

#### D. *The Reagan Regime and the Culture Wars*

The Reagan Regime marked the triumph of the conservative movement in American politics. Building on the political lessons of the 1960s and 1970s, Republican politicians and conservative political entrepreneurs discovered that the key to becoming the nation's dominant party was to fight the culture wars and make issues of race, religion, morality, and culture the central

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81. ANDREW HARTMAN, *A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS 2* (2015)(describing the birth of the culture wars out of the tumult of the 1960s).

82. *Id.* at 63, 105.

83. The standard account of Wallace's political career is DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1995).

84. Ron Elving, *Dixie's Long Journey From Democratic Stronghold To Republican Redoubt*, NPR (Jan. 25, 2015, 7:03 AM), <https://www.npr.org/sections/itsallpolitics/2015/06/25/417154906/dixies-long-journey-from-democratic-stronghold-to-republican-redoubt> [<https://perma.cc/36HD-YX8W>].

85. See Aram Goudsouzian, *Why the Republican Party is so polarizing*, WASH. POST, (Nov. 6, 2018 5:00 AM), <https://www.washingtonpost.com/outlook/2018/11/06/why-republican-party-is-so-polarizing/> [<https://perma.cc/V5HN-CGU2>] (arguing that the Republican Party's strategy of polarization began with George Wallace's 1968 campaign and the emergence of the New Right).

86. A. James Reichley, *The Reagan Coalition*, 1 BROOKINGS REV. 6, 6 (1982).

87. Thomas B. Edsall & Richard Morin, *Reagan's 1984 Voter Coalition is Weakened in Bush Victory*, WASH. POST (Nov. 9, 1988), <https://www.washingtonpost.com/archive/politics/1988/11/09/reagans-1984-voter-coalition-is-weakened-in-bush-victory/48de1848-eeb3-43f7-be89-d8dab70a4480/> [<https://perma.cc/S6SY-NW22>].

questions of American politics.<sup>88</sup> The left wing of the Democratic Party had become very liberal on both cultural and economic issues in the late 1960s and early 1970s. The sexual revolution, student protests against the Vietnam War, and opposition to desegregation, busing, and affirmative action roiled the country.<sup>89</sup> This unrest and uncertainty gave Republicans an opportunity to remake politics along conservative lines.

The very idea of a “culture war” suggests a conscious decision to develop new issues and reframe existing social controversies in ways that make the central battles of politics about race, religion, identity, and culture rather than about economics and class. Even if Republicans lost many individual battles – for example, on issues of sex equality or sexual morality – fighting the culture wars was good politics because it was in their interest to split the Democratic coalition apart, while it was in the interest of Democratic politicians to keep the old New Deal coalition together for as long as possible. For many years, Republican success in prosecuting culture war issues posed a seemingly intractable problem for Democrats: how to simultaneously appeal to voters who were liberal on issues of race, religion, and culture while retaining the loyalty of more conservative white working-class voters, especially in the Midwest and South.

Race, of course, was not the only issue in the culture wars. Conservative politicians successfully combined their opposition to desegregation and affirmative action with a focus on crime, social disorder, appeals to patriotism, and cultural issues like the decline of the nuclear family, pornography, drugs, abortion, and homosexuality.<sup>90</sup> Nevertheless, racial issues and appeals to racial resentment were always an important element in the culture wars.<sup>91</sup> These issues and appeals allowed conservative Republicans to attack social welfare and re-distributional programs by successfully associating them with racial minorities in the minds of voters and by arguing that these programs undermined individual responsibility and personal morality.<sup>92</sup> In addition, by emphasizing the country’s social disorder, demanding strict criminal

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88. See E.J. DIONNE, *WHY AMERICANS HATE POLITICS: DEATH OF THE DEMOCRATIC PROCESS* 12 (1991) (arguing that cultural issues allowed Republicans to split the New Deal coalition).

89. See HARTMAN, *supra* note 81, at 25-26, 35, 63, 105; *The 1970s*, HISTORY, <https://www.history.com/topics/1970s/1970s-1> [<https://perma.cc/4E83-HZ9W>] (last visited Feb. 14, 2021).

90. See DIONNE, *supra* note 90, at 79.

91. STUART STEVENS, *IT WAS ALL A LIE: HOW THE REPUBLICAN PARTY BECAME DONALD TRUMP* 7–36 (2020) (describing Republican strategists’ and politicians’ use of race).

92. *Id.*

penalties, and criticizing constitutional restraints on law enforcement, Republicans played on stereotypes about Black criminality.<sup>93</sup>

Ronald Reagan's famous attacks on "welfare queens" who cheated the government and "strapping young buck[s]" who spent their food stamps on expensive steaks exemplified conservative racial framings.<sup>94</sup> Conservative politicians and their allies in conservative media realized that many issues that might seem unrelated to race could nevertheless be racialized and connected to stereotypes about African Americans.<sup>95</sup> In this way, conservatives succeeded in turning economic and class issues that had united the New Deal coalition into cultural issues that divided it.

Conservative Christians were an important part of the Reagan coalition. But even here, race helped attract religious conservatives to the Republican cause.<sup>96</sup> For example, the Reverend Jerry Falwell, who founded the Moral Majority, was first drawn to the New Right not because of opposition to abortion but because the federal government refused to allow tax exemptions for private "segregation academies" that discriminated on the basis of race.<sup>97</sup> Falwell's decision to focus on abortion came in the late 1970s, well after *Roe v. Wade* was decided.<sup>98</sup>

The *reductio ad absurdum* of the strategy of using racial resentments to maintain the Republican coalition was the 2016 election of Donald Trump, an unvarnished racist demagogue. Racial resentment was an important factor in

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93. *Id.*

94. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 4, 58–59 (2015).

95. *Id.*; STEVENS, *supra* note 93.

96. Randall Balmer, *The Real Origins of the Religious Right*, Politico, (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133> [<https://perma.cc/ZD8S-WT59>].

97. *Id.*; KATHLEEN M. SANDS, *AMERICA'S RELIGIOUS WARS THE EMBATTLED HEART OF OUR PUBLIC LIFE* 209 (2019).

98. Balmer, *supra* note 98 ("[I]t wasn't until 1979 – a full six years after *Roe* – that evangelical leaders, at the behest of conservative activist Paul Weyrich, seized on abortion . . . [because] the anti-abortion crusade was more palatable than the religious right's real motive: protecting segregated schools.").

Trump's victory,<sup>99</sup> and Trump found multiple ways to invoke race and racial stereotypes both during the 2016 campaign and throughout his presidency.<sup>100</sup>

Republican political strategies on culture and race made Republicans increasingly a white person's party. Moreover, the party slowly traded off college-educated professionals and suburbanites – who became independents or Democrats – for white working-class voters, especially in the South and rural areas of the nation.<sup>101</sup> The culture wars helped the party gain and keep political power for decades, but it created a serious long-term problem. First, Republicans became less attractive to younger and college-educated voters.<sup>102</sup> Second, as the country has become more racially diverse, the percentage of white voters has decreased with each election cycle.<sup>103</sup> This created increasingly difficult choices about how to keep the party dominant politically. Republican politicians might back away from strategies of racial resentment in order to attract Black, Asian, and Latino voters who might be attracted by the party's cultural and religious conservatism and its promises of economic opportunity. Or Republican candidates might push even harder

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99. Alan Abramowitz & Jennifer McCoy, *United States: Racial Resentment, Negative Partisanship, and Polarization in Trump's America*, ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 137, 140–46 (2019), <https://journals.sagepub.com/doi/pdf/10.1177/0002716218811309> [<https://perma.cc/7AUE-LX4P>]; Matthew Fowler, *Why 41 percent of white millennials voted for Trump*, WASH. POST, (Dec. 15, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/15/racial-resentment-is-why-41-percent-of-white-millennials-voted-for-trump-in-2016/> [<https://perma.cc/4EBQ-GWLF>]; Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 PS: POL. SCI. & POL. 528 (2018); Carlos Algara & Isaac Hale, *Racial attitudes & political cross-pressures in nationalized elections: The case of the Republican coalition in the Trump era*, 68 ELECTORAL STUD. 102207 (2020); Brian F. Schaffner, Matthew Macwilliams, & Tatishe Nteta, *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9 (2018).

100. *See infra* notes 161–166.

101. BALKIN, *supra* note 1, at 163.

102. *Id.* at 18.

103. Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RES. CTR., (Sept. 23 2020), <https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/> [<https://perma.cc/TM3P-35C5>].

on racial and cultural appeals in order to turn out an ever-larger percentage of the white vote.<sup>104</sup>

Donald Trump doubled down on the second strategy in 2016 and 2020.<sup>105</sup> Although Trump managed an Electoral College victory in 2016, he never managed to win the popular vote, and the Democrats increased their popular vote majority in 2020.<sup>106</sup> Indeed, since George H.W. Bush's victory in 1988, the Republican Party has won the popular vote for the Presidency only once, in 2004.<sup>107</sup> This is not good news for a political party that wants to remain dominant.

Although we appear to be nearing the end of the Reagan regime, the 2020 election suggests that it is not over yet. Although Joe Biden won the White House, Democrats lost seats in the House of Representatives.<sup>108</sup> They underperformed expectations in the Senate, finally achieving a 50-50 tie following the January runoffs in Georgia.<sup>109</sup> This means that Democrats will have trouble achieving their most ambitious goals for reform. The January 6, 2021, insurrection at the Capitol also greatly complicated matters.<sup>110</sup> It showed that conspiracy theories arguing that the 2020 election was stolen – designed to de-legitimize the incoming Biden Administration – may persist

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104. Danielle Kurtzleben, *Trump Defied The 2013 GOP Autopsy. So Was It A 'Failure'?*, NPR, (July 16, 2020), <https://www.npr.org/2020/07/16/891590318/trump-defied-the-2013-gop-autopsy-so-was-it-a-failure> [<https://perma.cc/T467-W2AC>].

105. *Id.*

106. *National Popular Vote Tracker*, COOK POLITICAL REPORT, <https://cookpolitical.com/2020-national-popular-vote-tracker> [<https://perma.cc/HF8L-GA47>] (last visited Feb. 14, 2021) (showing a 2.4% shift in the popular vote from the 2016 election).

107. BALKIN, *supra* note 1, at 18.

108. Kelsey Snell, *House Democrats Dissect What Went Wrong And How To Rebound From Losses*, NPR, (Nov. 15, 2020), <https://www.npr.org/2020/11/15/934586955/house-democrats-dissect-what-went-wrong-and-how-to-rebound-from-losses> [<https://perma.cc/5WYU-CNSM>].

109. *Democrats Take Senate Control With Georgia Wins - Live Results and Analysis*, Wall Street Journal, Jan 9, 2021 at 4:27 pm ET, <https://www.wsj.com/livecoverage/georgia-senate-runoff-elections-2021> [<https://perma.cc/UJ5B-WV3H>].

110. Ed Pilkington, *Incitement: A Timeline of Trump's Inflammatory Rhetoric Before the Capitol Riot*, GUARDIAN (Jan. 7, 2021), <https://www.theguardian.com/us-news/2021/jan/07/trump-incitement-inflammatory-rhetoric-capitol-riot> [<https://perma.cc/TW9Z-LQZB>]; *Woman Dies After Shooting in U.S. Capitol; D.C. National Guard Activated After Mob Breaches Building*, WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/06/dc-protests-trump-rally-live-updates/> [<https://perma.cc/FEB2-EG4D>]; Maggie Haberman, *Trump Told Crowd 'You Will Never Take Back Our Country with Weakness.'* N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html> [<https://perma.cc/HN7L-2FFD>].

for years, and that many Republican politicians are willing to play along with these theories for political gain.

Whether the Reagan regime is truly on its way out or manages to reconstitute itself will have a lot to do with how the Democrats manage to deal with the crises of the present moment: the coronavirus pandemic and the economic contraction that accompanied it. A great deal will also turn, however, on how the two parties handle the question of race in their evolving coalitions.

For many years, the Republican Party has tried to win elections primarily with white voters. As noted above, in the long run this is a losing proposition. In the 2020 election, however, Donald Trump attracted a slightly larger number of Black and Latino voters – particularly male voters – than he had in 2016.<sup>111</sup> The increased share was relatively small nationwide, but it was more significant in certain areas of the country like Florida and Texas that are crucially important to the Republican coalition.<sup>112</sup>

Trump's modest inroads with non-white voters probably surprised Democrats who assumed that these voters would never vote for an overt racist like Trump. But this neglects several factors. First, minority voters are not monolithic. They have conflicting and cross-cutting values, which will become ever more salient as the percentage of non-white voters in the population grows.<sup>113</sup> Second, many non-white voters are culturally

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111. Chris Alcantara, et al., *How independents, Latino voters and Catholics shifted from 2016 and swung states for Biden and Trump*, WASH. POST, (Nov. 12, 2020), <https://www.washingtonpost.com/graphics/2020/elections/exit-polls-changes-2016-2020/> [<https://perma.cc/95YA-54A6>] (noting that Trump's share of the non-white vote improved from 21% in 2016 to 26% in 2020); Avik Roy, *No, Trump Didn't Win 'The Largest Share Of Non-White Voters Of Any Republican In 60 Years'*, FORBES, (Nov 9, 2020), <https://www.forbes.com/sites/theapothecary/2020/11/09/no-trump-didnt-win-the-largest-share-of-non-white-voters-of-any-republican-in-60-years/?sh=4863cb054a09> [<https://perma.cc/GYJ3-33AM>] (noting that Trump improved from an 8% to a 12% share of the Black vote, a 29% share to a 32% share of the Latino vote, and a 29% to a 31% share of the Asian vote).

112. Alcantara et al., *supra* note 113; Matt Grossman et al., *Why Latinos Moved Toward Trump (and Why Most Are Still Democrats)*, NISKANEN CTR, (Dec. 2, 2020), <https://www.niskanencenter.org/why-latinos-moved-toward-trump-and-why-most-are-still-democrats/> [<https://perma.cc/2SGF-VCDJ>]; Arelis R. Hernández & Brittney Martin, *Why Texas's overwhelmingly Latino Rio Grande Valley turned toward Trump*, WASH. POST, (Nov. 9, 2020), [https://www.washingtonpost.com/national/texas-latino-republicans/2020/11/09/17a15422-1f92-11eb-ba21-f2f001f0554b\\_story.html](https://www.washingtonpost.com/national/texas-latino-republicans/2020/11/09/17a15422-1f92-11eb-ba21-f2f001f0554b_story.html) [<https://perma.cc/S7TQ-6LVH>].

113. Michael Powell, *Liberals Envisioned a Multiracial Coalition. Voters of Color Had Other Ideas*, N.Y. TIMES, (Nov. 16, 2020),

conservative and aspire to be prosperous members of the middle class; this may attract them to the Republican Party. Third, Republican attacks on Democrats as socialist may succeed with non-white voters opposed to socialism, which they identify with authoritarian and anti-democratic governments abroad. Fourth, some non-white voters may expect that in a country with two white-dominated parties, both parties will either be racist or unresponsive to demands for racial justice; if so, they may vote for whichever party has the best chance of improving their lives economically. Fifth, non-white voters are not evenly distributed around the country. Republicans may find ways to appeal to those minorities, for example in Texas and Florida, who are most crucial to their electoral success. Sixth, and finally, in order to be competitive nationally, Republicans do not have to win majorities of minority voters as long as they can increase their margins slightly in particular areas of the country, a task that both George W. Bush and Donald Trump have shown is entirely achievable.<sup>114</sup>

Because the racial demographics of the country are evolving, and the percentage of white voters is likely to decrease with each election cycle, the next regime will be led by whichever party can best take advantage of these changes in the voting population. Because of decades of Republican appeals to white racial resentments, the Democrats have a clear head start. Their coalition is already multiracial; they have developed, elected, and appointed a far larger group of racial and ethnic minorities to offices and judgeships, and Democratic politicians have made appeals to Black, Latino, and Asian voters a priority.<sup>115</sup> Although the future remains uncertain, Democrats still have a good chance at forging a new political regime to succeed the Reagan regime.<sup>116</sup>

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<https://www.nytimes.com/2020/11/16/us/liberals-race.html> [<https://perma.cc/6SZM-DRQF>].

114. Giovanni Russonello and Patricia Mazzei, *Trump's Latino Support Was More Widespread Than Thought, Report Finds*, *New York Times*, April 2, 2021, <https://www.nytimes.com/2021/04/02/us/politics/trump-latino-voters-2020.html> [<https://perma.cc/7HZF-6L8G>]; Roberto Suro, Richard Fry And Jeffrey S. Passel, *How Latinos Voted in 2004*, Pew Research Center, June 27, 2005, <https://www.pewresearch.org/hispanic/2005/06/27/iv-how-latinos-voted-in-2004/> [<https://perma.cc/8FUM-3GX3>]; Julio Ricardo Varela, *The Latino Vote in Presidential Races: 1980–2012*, *Latino USA*, October 29, 2015, <https://www.latinousa.org/2015/10/29/the-latino-vote-in-presidential-races/> [<https://perma.cc/TK76-R4MV>].

115. Nancy Scherer, *Diversifying The Federal Bench: Is Universal Legitimacy For The U.S. Justice System Possible?*, 105 *Nw. L. Rev.* 587, 588-89 (2011); Sara Atske, *More minority federal judges have been appointed under Democratic than Republican presidents*, Pew Research Center, July 19, 2016, <https://www.pewresearch.org/fact-tank/2016/07/19/more-minority-federal-judges-have-been-appointed-under-democratic-than-republican-presidents/.examples> of non-white elected/appointed judges and politicians from Democratic party

116. BALKIN, *supra* note 1, at 8, 29, 64, 159.

Nevertheless, when the loss of political power is at stake, almost all political parties can find ways to adapt. In recent years, the Republican Party has mostly relied on the strategies of a party that knows it is losing majority support: stocking up on life-tenured judges, gerrymandering districts, restricting access to the franchise, and alleging election fraud. But these strategies for minoritarian rule will only succeed in close elections. If the Republican Party is to remain viable as a majority party in a representative democracy, it will have to attract an ever-larger share of racial and ethnic minorities in the future. Doing this will require the Republican coalition to reconstitute itself, and this, in turn, will affect the second cycle of constitutional development – political polarization.

### III. THE CYCLE OF POLARIZATION AND DEPOLARIZATION

In Part II, I described how issues of race have shaped the rise and fall of political regimes in the United States. In this Part, I explain the role that race played in the cycle of polarization and depolarization.

Before the Civil War, American politics became deeply polarized over the slavery issue, but along sectional rather than strictly partisan lines. Multiple parties went in and out of existence.<sup>117</sup> Our modern party system began shortly before the Civil War, when the Republicans joined the Democrats as the country's two major parties. These parties were defined first by the Civil War and then by the memory of the Civil War.<sup>118</sup> This meant that race would remain an important dividing line in American politics. During the late nineteenth century, the Republicans were more likely to defend the rights of Black people (although, as noted in Part II, their interest in protecting Black rights eventually declined), while Democrats, especially in the South, pushed for a return of white rule and white supremacy. Similarly, most Democrats supported Chinese exclusion policies, while the issue split Republicans in the West and East.<sup>119</sup>

Polarization between the parties during the Gilded Age also concerned religious identity.<sup>120</sup> Protestant Republicans in the North were more likely to

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117. Political Parties in the United States, 1820-1860,

[https://www.ncpedia.org/sites/default/files/documents/nchist\\_political-parties-1820.pdf](https://www.ncpedia.org/sites/default/files/documents/nchist_political-parties-1820.pdf) [<https://perma.cc/9KMS-MHH6>].

118. CHERNY, *supra* note 52, at 22–23.

119. BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* 46–49 (2018); Jungkun Seo, *Wedge-issue dynamics and party position shifts: Chinese exclusion debates in the post-Reconstruction US Congress, 1879–1882*, 17(6) *PARTY POL.* 823–47 (2010).

120. CHERNY, *supra* note 52, at 28–29; GIENAPP, *supra* note 37, at 365–67.

be hostile to and suspicious of Catholic immigrants from Europe, most of whom joined the Democratic Party.<sup>121</sup> Republicans and Democrats also squared off over issues of personal morality, especially alcohol consumption and gambling.<sup>122</sup> Thus, the late nineteenth century had its own version of the culture wars, structured, as in our own day, around questions of race, religion, immigrant status, and morality.<sup>123</sup>

Political polarization tends to cause and be caused by growing inequalities of income and wealth. That is, polarization and income inequality tend to egg each other on.<sup>124</sup> As we have seen in our own age, political fighting over cultural issues diverts politics from questions of economic equality, makes political compromise more difficult, and hinders the passage of redistributive legislation. A politics dominated by culture wars allows politicians to shape the law to benefit wealthy backers, thus increasing income inequality still further, and making the wealthy even more politically influential. Growing income inequality, in turn, tends to intensify cultural and racial divisions.

Just before the Civil War, income inequality in both the North and South had increased significantly.<sup>125</sup> But the Civil War and emancipation destroyed a great deal of wealth. Even so, political polarization between Democrats and Republicans remained high because of deep bitterness over the Civil War and Reconstruction. During the Gilded Age, income inequality increased rapidly, helping to keep polarization high, and large waves of immigration, especially Catholic immigration, helped stoke the late nineteenth century's version the culture wars.

Political competitiveness, which often leads to political gridlock, also tends to increase party polarization.<sup>126</sup> One reason why gridlock promotes polarization is that partisans become frustrated and increasingly desperate to break through the political blockages in the system and push their own agendas. A second reason that gridlock leads to polarization is that political gridlock maintains the status quo and blocks legislation that would ameliorate increasing income and wealth inequality.

Following the 1874 elections (when the Democrats retook the House for the first time since the Civil War), the two parties became highly competitive,

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121. CHERNY, *supra* note 52, at 27, 29–30.

122. *Id.* at 25, 28–29.

123. *Id.* at 29–31.

124. BALKIN, *supra* note 1, at 34; NOLAN McCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 80-81 (2019) (noting reasons why polarization and income inequality may cause each other).

125. BALKIN, *supra* note 1, at 34; Peter H. Lindert & Jeffrey G. Williamson, *American Incomes 1774–1860* 24, (Nat'l Bureau of Econ. Res., Working Paper No. w18396, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2147106](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2147106).

126. FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016) (arguing that political competitiveness encourages polarization and gridlock).

and for about two decades, American politics was essentially gridlocked.<sup>127</sup> There were many close presidential elections, and in two cases (1876 and 1888), the popular vote winner lost to the winner of the Electoral College, a feat that would not be repeated until our own Second Gilded Age, also a period of highly competitive parties and intense political polarization. As a gridlocked national government did little to deal with the mounting problems and pervasive corruption of the Gilded Age, the culture wars raged on. Issues of race, religion, morality, and identity dominated Gilded Age politics, and Republicans repeatedly waved the bloody shirt and blamed Democrats for the Civil War, labeling them the party of rebellion and immorality.<sup>128</sup>

Polarization stayed high throughout the nineteenth century until the turn of the twentieth century, at which point politics began to depolarize rapidly.<sup>129</sup> One reason is that that newer generations – and new political issues – replaced older ones.<sup>130</sup> Issues of class and economics, which were long sidelined during the culture wars of the Gilded Age, came to the forefront. The public tired of Gilded Age corruption, and inequalities of wealth had become so great that pressures for reform finally broke through. Movements for progressive reforms developed in both parties, symbolized by Theodore Roosevelt in the Republican Party and Woodrow Wilson in the Democratic Party.<sup>131</sup>

A less innocent explanation for the political depolarization that begins in the 1890s is that Republicans gave up on trying to protect Black civil and political rights. Whites in the two parties moved toward an accommodation on the issues of race that had divided them since the Civil War.<sup>132</sup> This accommodation meant that, after 1896, Republicans acquiesced in the South disenfranchising its black citizens and establishing one-party rule in the South.<sup>133</sup>

Thus, the gradual decline in political polarization between the two parties at the turn of the twentieth century was achieved at the expense of

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127. CHERNY, *supra* note 52, at 46–50.

128. *Id.* at 22–24.

129. Lewis, *supra* note 4.

130. BALKIN, *supra* note 1, at 27; *see generally* R. HAL WILLIAMS, *REALIGNING AMERICA: MCKINLEY, BRYAN, AND THE REMARKABLE ELECTION OF 1896* (2010) (describing new political issues and coalitions in the election of 1896).

131. *See* George W. Ruiz, *The Ideological Convergence of Theodore Roosevelt and Woodrow Wilson*, 19 *PRESIDENTIAL STUD.* Q.159, 159–60 (1989).

132. SOUTHERN, *supra* note 48, at 35 (“By the 1890s the White North seemed to crave reconciliation with the White South.”).

133. *Id.* (“The Party that initiated Reconstruction found that it no longer needed the South and its black voters to win national elections.”)

African Americans.<sup>134</sup> The predictable result was acceptance or at the very least acquiescence in vicious forms of racism and racial violence.<sup>135</sup> The Progressive Era witnessed the birth of the second version of the Ku Klux Klan.<sup>136</sup> By 1920, the Klan had millions of members, and had become a powerful force in politics, not only in the South, but also in the Northeast and Midwest.<sup>137</sup> The depolarization of American politics allowed Democrats and Republicans to cross party lines and shifted the focus of politics to issues of economics, paving the way for the New Deal. But it occurred at the cost of sidelining questions of racial equality for many years.

Although accommodation over race allowed both depolarization and the creation of the New Deal coalition, persistent pressures for racial justice, especially after World War II, began to drive cracks in the coalition, as described previously. Following the passage of the Voting Rights Act in 1965, the Republican Party became newly competitive in the South.<sup>138</sup> Taking lessons from George Wallace, Republican politicians and the New Right learned how to use wedge issues to split the New Deal coalition and gradually reorganize American politics around issues of identity, religion, ethnicity, and race.<sup>139</sup> The success of these strategies led to our current political system. Polarization grew during the 1970s and 1980s, but really took off during the 1990s.<sup>140</sup> Barack Obama's election in 2008 increased polarization still further, producing partisan resentments the country had not seen since the Civil War and the Gilded Age.<sup>141</sup>

Congressman (and later House Speaker) Newt Gingrich is a key figure in the modern history of political polarization in the United States.<sup>142</sup> Gingrich realized that polarization could make Republicans a majority party that could not only win presidential elections but also gain control of Congress.<sup>143</sup> Gingrich and his allies developed a slash-and-burn style of politics that became a model for conservative campaigns, labeling political

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134. *Id.* at 34–36.

135. *Id.* at 94–97, 107–10.

136. *Id.* at 71.

137. *Id.* at 191.

138. VOTING RIGHTS ACT OF 1965, Pub. L. 89-110, 79 Stat. 437; Fred M. Shelley, et al., *The Civil Rights Movement and Recent Electoral Realignment in the South*, 47 SOUTHEASTERN GEOGRAPHER 13, 13–14 (2007).

139. See Goudsouzian, *supra* note 85 (arguing that the Republican Party's strategy of polarization began with George Wallace's 1968 campaign and the emergence of the New Right).

140. Lewis, *supra* note 4.

141. *Id.*

142. 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* 31–43 (2012).

143. *Id.* at 33.

opponents as immoral, sick, and un-American.<sup>144</sup> Republican operatives built on this strategy: they sought out wedge issues involving race, religion, and sexuality to fracture formerly Democratic majorities, placing culture war issues front and center.<sup>145</sup> Another important factor was the rise of distinctively conservative media, including talk radio, Fox News, and later Internet sites like Breitbart. Conservative media encouraged polarization by stoking cultural resentments and promoting the conservative movement and the Republican Party.<sup>146</sup>

One of the consequences of the Republican strategy of polarization is that political polarization in the Reagan regime has been asymmetrical: Democrats have moved a little to the left, primarily because conservative

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144. SAM ROSENFELD, *THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA* 268 (2017) (arguing that Gingrich “led the way” in developing the GOP’s “highly disciplined and confrontational political strategy that would take partisan combat in both chambers to new heights.”); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 146–51 (2018) (describing Gingrich’s strategy of demonizing his political allies); MANN & ORNSTEIN, *supra* note 144, at 35–39 (same); McKay Coppins, *The Man Who Broke Politics*, *THE ATLANTIC*, October 17, 2018, <https://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832/> [<https://perma.cc/WG2Y-Y6BA>] (“[F]ew figures in modern history have done more than Gingrich to lay the groundwork for Trump’s rise. During his two decades in Congress, he pioneered a style of partisan combat—replete with name-calling, conspiracy theories, and strategic obstructionism—that poisoned America’s political culture and plunged Washington into permanent dysfunction.”).

145. *See* MANN & ORNSTEIN, *supra* note 144, at 44 (describing consequences of Republican strategies of polarization). For a recent mea culpa by a Republican strategist detailing the deliberate use of race and racial grievance as wedge issues. *See* STEVENS, *supra* note 93.

146. YOCHAI BENKLER, ROBERT FARIS, & HAL ROBERTS, *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION AND RADICALIZATION IN AMERICAN POLITICS* 75–100 (2018) (arguing that conservative media have created a propaganda feedback loop that amplifies and encourages disinformation and conspiracy theories); Yochai Benkler, et al., *Study: Breitbart-led right-wing media ecosystem altered broader media agenda*, *COLUM. JOURNALISM REV.*, (Mar. 3, 2017), <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php> [<https://perma.cc/NGN4-VA3W>] (showing the emergence of a distinctive right-wing media disinformation system); NICOLE HEMMER, *MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA AND THE TRANSFORMATION OF AMERICAN POLITICS* 260–61 (2016); BRIAN ROSENWALD, *TALK RADIO’S AMERICA: HOW AN INDUSTRY TOOK OVER A POLITICAL PARTY THAT TOOK OVER THE UNITED STATES* (2019); Jane Mayer, *The Making of the Fox News White House*, *THE NEW YORKER*, (March 4, 2019), <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house> [<https://perma.cc/S2XM-772U>] (describing how Fox News became a propaganda arm of the Trump Administration).

Southerners left the party, but Republicans moved considerably to the right.<sup>147</sup> The combination of a center-left party and an increasingly hard-right party is a characteristic feature of modern American politics. While the Democratic Party resembles mainstream liberal parties in Europe, the Republican Party increasingly resembles authoritarian anti-immigrant parties in Turkey and Hungary.<sup>148</sup>

#### A. Racial Polarization in American Politics

Race and racial issues were always important features of the Republican strategy of political polarization.<sup>149</sup> They were key elements of the culture wars that helped Republicans win the South and become the majority party in the United States. Accordingly, Republican politicians and operatives encouraged the organization of politics around racial resentments.<sup>150</sup> Despite

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147. MANN & ORNSTEIN, *supra* note 144, at 51–58 (describing asymmetric polarization); Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, AM. POL. SCI. ASS'N, NEGOTIATING AGREEMENT IN POLITICS 19–26 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (reviewing evidence of asymmetric polarization).

148. Sahil Chinoy, *What Happened to America's Political Center of Gravity?*, N.Y. TIMES, (June 26, 2019), <https://www.nytimes.com/interactive/2019/06/26/opinion/sunday/republican-platform-far-right.html> [<https://perma.cc/KA2R-NVVY>] (explaining that “The Republican Party leans much farther right than most traditional conservative parties in Western Europe and Canada,” while “The Democratic Party, in contrast, is positioned closer to mainstream liberal parties.”); Anna Lührmann, et al., *New Global Data on Political Parties: V-Party*, V-DEM INSTITUTE, BRIEFING PAPER NO. 9, 26 (Oct. 2020), [https://www.v-dem.net/media/filer\\_public/b6/55/b6553f85-5c5d-45ec-be63-a48a2abe3f62/briefing\\_paper\\_9.pdf](https://www.v-dem.net/media/filer_public/b6/55/b6553f85-5c5d-45ec-be63-a48a2abe3f62/briefing_paper_9.pdf) [<https://perma.cc/577R-NDSW>] (“[T]he Republican party in the US has retreated from upholding democratic norms in recent years. Its rhetoric is closer to authoritarian parties, such as AKP in Turkey and Fidesz in Hungary. Conversely, the Democratic party has retained a commitment to longstanding democratic standards.”); *The Republican Party has lurched towards populism and illiberalism*, THE ECONOMIST, (Oct. 31, 2020), <https://www.economist.com/graphic-detail/2020/10/31/the-republican-party-has-lurched-towards-populism-and-illiberalism> [<https://perma.cc/4QTN-CMTS>]; Ivana Kottasová, *US Republicans are starting to look a lot like authoritarian parties in Hungary and Turkey, study finds*, CNN, (Oct. 26, 2020), <https://edition.cnn.com/2020/10/26/world/republican-party-more-illiberal-study-intl/index.html> [<https://perma.cc/39KP-9C2K>].

149. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 98 (1992) (“Race was central, Richard Nixon and key Republican strategists began to recognize, to the fundamental conservative strategy of establishing a new, noneconomic polarization of the electorate.”).

150. Adam M. Enders & Jamil S. Scott, *White racial resentment has been gaining political power for decades*, WASH. POST: MONKEY CAGE, (Jan. 15, 2018, 11:55 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/15/white-racial-resentment-has-been-gaining-political-power-for->

this, for many years, both major political parties contained both racial liberals and racial conservatives, especially among voters who do not pay much attention to politics.<sup>151</sup> Racial liberals are those who score lower on standard tests for racial resentment and thus are more likely to assert that racial inequalities are primarily due to present discrimination and the legacy of past discrimination.<sup>152</sup> Racial conservatives are those who score higher on standard tests for racial resentment and thus are more likely to assert that racial inequalities are primarily due to the fact that minorities lack individual initiative and that whites are the more likely victims of racial discrimination through racial preferences.<sup>153</sup>

In the 2000s, as the demographic transformation of the United States became increasingly apparent, race and attitudes about race became especially important factors in the country's ever-increasing political polarization.<sup>154</sup> As the percentage of whites in the voting population declined, white racial identity became increasingly self-conscious.<sup>155</sup> The election of the nation's

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decades/ [<https://perma.cc/5S5E-768L>] (arguing that “racial priming” by elites has been a key factor in the racialization of politics); *see generally* TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* (2001) (arguing that politicians use terms like “welfare” and “crime” to manipulate white voters’ racial resentments); DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* (1996) (explaining how political elites frame issues to activate racial resentments).

151. MICHAEL TESLER, *POST-RACIAL OR MOST-RACIAL: RACE AND POLITICS IN THE OBAMA ERA* 146–47 (2016); Chris Hayes & Michael Telser, *Why Is This Happening? The rise of white identity politics didn't start with Trump explains Michael Tesler: podcast & transcript*, NBC NEWS, (Oct. 30, 2018), <https://www.nbcnews.com/think/opinion/rise-white-identity-politics-didn-t-start-trump-explains-michael-ncna926191> [<https://perma.cc/V7FJ-PR97>].

152. TESLER, *supra* note 153, at 21–22 (citing KINDER & SANDERS, *supra* note 152); Hayes & Telser, *supra* note 153.

153. TESLER, *supra* note 153, at 21–22 (citing KINDER & SANDERS, *supra* note 152); Hayes & Telser, *supra* note 153.

154. *See* TESLER, *supra* note 153, at 37–39 (arguing that because race is especially salient, it has been an important driver of political polarization).

155. Richard D. Kahlenberg, *The Rise of White Identity Politics*, WASH. MONTHLY, (July 2019), <https://washingtonmonthly.com/magazine/july-august-2019/the-rise-of-white-identity-politics/> [<https://perma.cc/Q5W5-S4R3>] (“White voters increasingly see themselves as a threatened ethnic group.”); ASHLEY JARDINA, *WHITE IDENTITY POLITICS* 139–40 (2019) (noting increase in white racial consciousness and fears that whites were becoming “a dispossessed minority”); JOHN SIDES, ET AL., *IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA* 88–89 (2018) (noting survey research showing increasing concern by whites about discrimination against whites); ARLIE

first Black president, Barack Obama, in 2008, made the question of racial identity especially salient even to white voters who had not been paying very much attention to politics.<sup>156</sup>

Despite Obama's post-racial rhetoric and his (in hindsight, naïve) attempts to bring an end to the nation's political polarization, his mere existence as a Black president helped to polarize attitudes about race among whites.<sup>157</sup> The 2008 campaign and Obama's election moved increasing numbers of racial liberals into the Democratic Party and racial conservatives into the Republican Party.<sup>158</sup> Thus, Obama's presidency accelerated an already existing trend toward the racialization of politics. Divisions on political issues that appeared to have little to do with race – the Obama stimulus, tax cuts, and health care – increasingly became connected to whether white voters were racially liberal or racially conservative.<sup>159</sup> As American politics became increasingly racialized, political polarization increasingly activated white racial identity.<sup>160</sup>

This set the stage for Donald Trump's 2016 campaign and subsequent presidency. By the 2016 election, Donald Trump was not even subtle about using race to energize the Republican base.<sup>161</sup> He was happy to make obviously racist appeals,<sup>162</sup> while brazenly insisting that he was the “least

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RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* (2016) (noting increasing concerns by whites that non-whites were displacing them and that whites are being discriminated against); Hayes & Telser, *supra* note 153.

156. TESLER, *supra* note 153, at 158–64; Hayes & Telser, *supra* note 153.

157. TESLER, *supra* note 153, at 7, 158–64; Hayes & Telser, *supra* note 153.

158. TESLER, *supra* note 153, at 148–9, 163–64; Hayes & Telser, *supra* note 153.

159. Michael Tesler, *The Spillover of Racialization into Health Care: How President Obama Polarized Public Opinion by Racial Attitudes and Race*, *AMERICAN JOURNAL OF POLITICAL SCIENCE*, 56(3), 690–704 (2012); Enders & Scott, *supra* note 152 (“More and more, white Americans use their racial attitudes to help them decide their positions on political questions such as whom to vote for or what stance to take on important issues including welfare and health care.”).

160. Enders & Scott, *supra* note 152; Peter Baker, et al., *Trump Employs an Old Tactic: Using Race for Gain*, *N.Y. TIMES*, (July 20, 2019), <https://www.nytimes.com/2019/07/20/us/politics/trump-race-record.html> [<https://perma.cc/F6G9-NB43>].

161. German Lopez, *Donald Trump's long history of racism, from the 1970s to 2020*, *VOX*, (Aug. 13, 2020), <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history> [<https://perma.cc/H3EE-SJK8>].

162. Baker et al., *supra* note 162; Lopez, *supra* note 163; John Cassidy, *Trump's Overt Racism Is Uniting Democrats and Unnerving Some Republicans*, *THE NEW YORKER*, (July 15, 2019), <https://www.newyorker.com/news/our-columnists/trumps-overt-racism-is-uniting-democrats-and-unnerving-some-republicans> [<https://perma.cc/DB8U-KC42>]; Ibram X. Kendi, *Is This the Beginning of the End of American Racism?*, *THE ATLANTIC*, (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/the-end-of-denial/614194/>.

racist person” one would ever meet,<sup>163</sup> in the 2020 campaign he boasted that no President had done more for African Americans, with the possible exception of Abraham Lincoln.<sup>164</sup> If appeals to race had previously been the not-so-secret strategy of Republican electoral success, Donald Trump let everyone in on the secret.<sup>165</sup> As Thomas Esdall put it, Obama was an involuntary lightning rod for racial polarization, but Trump was a lightning strike, who deliberately provoked racial divisions to gain power.<sup>166</sup> Trump managed to make white Democrats even more racially liberal and white Republicans even more racially conservative, heightening political polarization in the process.

### B. Depolarization and a Second Progressive Era

Is polarization a permanent feature of American politics? In *Cycles*, I argue that many of the features that led to depolarization at the end of the First Gilded Age are likely to occur again.<sup>167</sup>

Polarization seems enduring today because the culture wars have led to a politics organized around issues of identity – race, religion, and culture – on which compromise is difficult, if not impossible.<sup>168</sup> The focus on these issues – along with the strategy of polarization – has thoroughly transformed the two

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163. Eugene Scott, Donald Trump: I’m ‘the least racist person’, CNN, September 15, 2016, (12:53 PM EDT), <https://www.cnn.com/2016/09/15/politics/donald-trump-election-2016-racism/index.html> [<https://perma.cc/DA45-5M72>]; Eugene Scott, Six times President Trump said he is the least racist person, WASHINGTON POST,

January 17, 2018, <https://www.washingtonpost.com/news/the-fix/wp/2018/01/17/six-times-president-trump-said-he-is-the-least-racist-person/> [<https://perma.cc/VGG3-74CQ>].

164. Kendi, *supra* note 164; Emily Stewart, *Trump says he’s the best president for Black people since Abraham Lincoln but is not actually Lincoln*, VOX, (Oct 22, 2020), <https://www.vox.com/policy-and-politics/2020/10/22/21529762/trump-biden-debate-abraham-lincoln-racist> [<https://perma.cc/2TTR-WSL8>].

165. See SIDES, ET AL., *supra* note 157, at 93 (“Candidates have traditionally used implicit racial and ethnic appeals ... [to] activat[e] support among voters with less favorable views of racial minorities. But Trump’s appeals were explicit.”); Baker et al., *supra* note 162 (“Mr. Trump’s presidency has been filled with so many racial conflicts that many in Washington have become numb.”).

166. Thomas B. Esdall, *The Deepening ‘Racialization’ of American Politics*, N.Y. TIMES, (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/opinion/trump-obama-race.html> [<https://perma.cc/Q9BV-5JJ2>].

167. BALKIN, *supra* note 1, at 37, 168.

168. *Id.* at 167 (comparing the present situation to 1896).

major parties from where they stood at the end of the New Deal/Civil Rights regime. But it has also produced incoherent party coalitions, each of which now has a populist wing and a neoliberal wing.<sup>169</sup>

The Democrats, once a labor and working-class party with a strong base in the South, have become a cosmopolitan party, strong in the cities, the suburbs, and along the coasts.<sup>170</sup> The Democrats' base of support includes both working-class and business interests as well as minority voters.<sup>171</sup> The Republicans, once a party of professionals and business interests centered in the North and the West, have been transformed into the dominant party in the Democrats' old stronghold – the South.<sup>172</sup> They have traded away large numbers of suburbanites and college-educated professionals for white working-class and rural voters, who coexist uneasily in a party supported by the business community and financed by a powerful base of wealthy donors.<sup>173</sup> By 2020, the Republican Party seemed to be united only by cultural grievances and intense hatred of whatever liberals happen to be for.<sup>174</sup>

Political coalitions are always in motion as newer voters replace older ones who die off. I argue in *Cycles* that as American voting populations slowly evolve, the internal divisions within each party on issues of class and economic equality will grow larger, and the internal differences within each party will become more salient.<sup>175</sup> These looming conflicts will begin to unravel our current structure of party coalitions polarized around zero-sum issues of identity, race, religion, and culture. Economic issues will increasingly dominate.<sup>176</sup> As this happens, politicians will find it easier to forge alliances across party lines on particular issues, leading to further depolarization – akin to what happened in the first several decades of the twentieth century.<sup>177</sup>

That is my prediction, at any rate. We will not know if it will come true for some time. It is possible that the period of depolarization during the early twentieth century was just an anomaly that will never return. But even if something like my prediction does happen, it raises a troubling question, if we think about the story from the perspective of race and racial equality.

The last time depolarization happened, in the early twentieth century, it came at the expense of African Americans. Issues of racial equality – and

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169. *Id.* at 167–69.

170. *Id.* at 165–66.

171. *Id.* at 166–67.

172. *Id.*

173. *Id.*

174. See Jack M. Balkin, *The Reagan era never really ended. A Trump loss could change that*, WASH. POST, (Nov. 3, 2020), <https://www.washingtonpost.com/outlook/2020/11/03/reagan-trump-political-regimes-biden-cycles/> [<https://perma.cc/L3CC-4JTR>].

175. BALKIN, *supra* note 1, at 168–74.

176. *Id.*

177. *Id.*

problems of racist violence – were pushed to the side so that white politicians could make deals about the economy and government expenditures. And when economic reforms did come during the New Deal, Southern Democrats made sure that African Americans got fewer benefits from many of the new programs, and they used the filibuster to prevent any progress on issues of racial justice.<sup>178</sup>

Will the past be prologue? Will depolarization in the twenty-first century come at the same price as depolarization in the twentieth – a political accommodation between whites that sidelines urgent issues of racial justice?

There are reasons to think that depolarization will have different effects this time around. By 2045, the U.S. Census predicts that racial minorities will collectively constitute a majority of the U.S. population, and whites will be a minority group.<sup>179</sup> Both parties will eventually become multiracial coalitions. The Democrats are already there; the Republicans will take longer, for reasons I have already described. Multiracial coalitions, because they wish to preserve cohesion, have incentives not to make issues of racial identity the central focus of politics. In this political environment, racial minorities may find it easier to demand economic policies and social programs that respond to their interests.

Unlike Republicans at the end of the nineteenth century, today's Democrats simply cannot succeed as a national political party without voters who are not white. It will be much harder for the Democrats of 2035 to sell out the interests of racial minorities than it was for the Democratic Party of 1935. An important difference between the early twentieth century and the early twenty-first is that political depolarization came after the Republican Party had already given up on protecting Black rights. It is hard to imagine that the Democratic Party will behave the same way anytime soon.

The story for Republican Party is a bit different. The Republican Party has a core of voters whose racial resentments have been stoked and whose white racial identity has been activated. As whites become a minority in the United States, both tendencies will probably get even worse. White racial resentments will become sharper and appeals to white identity more overt. In the short run at least, Republicans will remain a white person's party, and Trumpian racial demagoguery will continue. And because the debate about voting fraud has become racialized – especially following the 2020 election –

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178. KATZNELSON, *supra* note 72; KATZNELSON, *supra* note 73.

179. William H. Frey, *The US will become 'minority white' in 2045: Census projects Youthful minorities are the engine of future growth*, BROOKINGS: THE AVENUE, (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/> [<https://perma.cc/UBR2-WCT7>].

Republicans will continue to attempt to limit racial minorities' access to the vote in order to win elections.

Even so, Republicans will not be successful as a national party without attracting a growing number of Black, Latino, and Asian voters. That means that the long-run problem for Republicans will be similar to that of the Democratic coalition during the New Deal: to find positions that both its white voters and the growing share of racial minorities it hopes to attract can agree on. Solving this problem will lead Republicans, like Democrats, to focus on economic questions. Cultural warfare will not go away, but it will shift to issues on which both conservative racial minorities and conservative whites can find common ground: moving from race and ethnicity to religion, personal morality, and citizenship status.

In addition, the definition of who counts as “white” will probably change, as it did during the nineteenth and twentieth centuries.<sup>180</sup> Possibly many mixed-race people, Latinos, and Asians will be assimilated into the social status of being white (or whatever the successor term becomes), creating a new “white” majority.<sup>181</sup> One should not assume, however, that this will end racial consciousness, much less cure racial inequalities. Quite the contrary: the danger is that as whiteness is redefined, African Americans will continue to be excluded as the racial other.<sup>182</sup>

We should not expect that a Second Progressive Era will be any more racially peaceful than the first one was. American politics is still constructed around questions of identity and will be for some time to come. And as whites come to understand themselves less as the political majority and more as a political minority, white racial consciousness and white racial resentments will increase. Until both of the two major party coalitions have become fully multi-racial, we should expect that the racial politics of the next several decades will remain divisive and fraught. The legacy of strategies of political polarization during the Reagan regime will be with us for some time to come,

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180. See generally NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2010) (arguing that conceptions of whiteness, constantly changing through history, allowed immigrant populations, but not African Americans, to be considered as white in the United States); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE* (2006) (arguing that the New Deal and labor unions allowed immigrants to become part of white America).

181. For example, see Richard Alba, *The Likely Persistence Of A White Majority*, AM. PROSPECT, (Jan. 11, 2016), <https://prospect.org/civil-rights/likely-persistence-white-majority/> [<https://perma.cc/5GL6-SRVH>] (“Some people from minority as well as mixed backgrounds are being attracted into a still heavily white mainstream, changing the mainstream even as it continues to be dominated by whites.”)

182. See Eric Levitz, *America Will Only Remain ‘Majority White’ If Blacks Remain an Underclass*, N.Y. MAG., (May 3, 2018), <https://nymag.com/intelligencer/2018/05/for-america-to-be-white-blacks-must-be-an-underclass.html> [<https://perma.cc/7BRA-B5Q9>] (“No one can be white unless someone else is black; and America can’t retain a white majority unless it also maintains a black minority.”).

and the flames of racial resentment fanned in the past two decades will not quickly die down.

At the end of the book, I point out that it is possible to imagine occasional cooperation between the populist side of the Democratic Party and the populist side of the Republican Party on economic questions.<sup>183</sup> But I also point out that this cooperation will depend on whether or not redistributive legislation and public goods programs can be presented as deracialized – as benefitting working-class Americans and their families regardless of race, rather than as benefits that will flow primarily to racial minorities and non-white immigrants.<sup>184</sup> Associating government programs with race was the tactic used to galvanize opposition to President Obama’s economic stimulus bill and the Affordable Care Act.<sup>185</sup> If political opponents successfully racialize reforms, Republican politicians will refuse to cooperate, and this will prevent cross-party coalitions. In that case, it will be much harder to deal with problems of economic inequality in the United States.

#### IV. RACE AND CONSTITUTIONAL ROT

The third cycle described in the book involves episodes of constitutional rot followed by periods of constitutional renewal. My discussion builds on the history laid out in the previous two Sections.

##### *A. Constitutional Rot*

I define rot as the process by which governments become less democratic and less republican over time.<sup>186</sup> “Less democratic” means that government becomes increasingly unresponsive to popular opinion and popular will. “Less republican” refers to various elements of republican decay: loss of public trust in institutions, loss of trust between political leaders of different parties, the breaching of norms of cooperation between members of different parties, the rise of demagogues who engage in propaganda and promote conspiracy theories, and pervasive political corruption.<sup>187</sup> Loss of republican civic virtue means that elected representatives become increasingly less devoted to the public good, instead focusing on pleasing or paying off a

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183. BALKIN, *supra* note 1, at 168–74.

184. *Id.* at 169, 172–3.

185. TESLER, *supra* note 153, at 29–35; Tesler, *supra* note 161.

186. BALKIN, *supra* note 1, at 44–45.

187. *Id.* at 46, 49.

relatively small set of powerful individuals and groups who keep them in power.<sup>188</sup>

I identify four key factors in constitutional rot, which I call the Four Horsemen of Constitutional Rot.<sup>189</sup> The first is increasing economic inequality. The second is political polarization. The third is loss of trust between citizens and government, between members of different parties, and between political leaders. The fourth factor is a series of policy disasters that show that the government is unable or unwilling to take care of its citizens and act in their interests. All of the four horsemen are on the march in the United States today.

Constitutional rot also involves the gradual decay of norms of cooperation between different parties that is necessary for multiparty democracy to function.<sup>190</sup> Political leaders increasingly refuse to play by the rules of democracy and engage in various hardball tactics to stay in power, because they no longer regard their opponents as legitimate and fear allowing their opponents to have power. Representative democracy requires acceptance of majority rule, and a willingness to give up power when a party fails to win the support of a majority. When constitutional rot sets in, the dominant party is increasingly unwilling to accept democratic rotation in office. Instead, politicians attempt to entrench minoritarian government. Thus, constitutional rot eventually leads to oligarchy or to authoritarianism, even if the country still holds elections and preserves the outward forms of representative government.<sup>191</sup>

### B. Race and Constitutional Rot

In *Cycles*, I point to three different episodes of constitutional rot in the nation's history. The first is the period just before the Civil War, when the Slave Power dominated American politics.<sup>192</sup> Wealthy slaveholders used their economic power and the representational boost of the three-fifths clause to entrench their power in the federal government and to use their political power to expand slavery into new federal territories.<sup>193</sup> After Abraham Lincoln's election, Southern elites feared that they could no longer control the federal government and that the new Republican Party could not be trusted. They left the Union, precipitating the most important constitutional crisis in American history, the Civil War.

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188. *Id.* at 46.

189. *Id.* at 49–50.

190. *Id.* at 46; see also LEVITSKY & ZIBLATT, *supra* note 146, at 102–17 (emphasizing importance of norms of cooperation and forbearance in multiparty democracies).

191. BALKIN, *supra* note 1, at 50, 53; see also Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, CONST. DEMOCRACY IN CRISIS? 13 (Mark A. Graber, Sanford Levinson & Mark Tushnet, eds., (2018).

192. BALKIN, *supra* note 1, at 45.

193. *Id.* at 52.

The second episode of constitutional rot occurred during the First Gilded Age, a period of growing economic inequality, strong polarization, demagogic politics, and deep political corruption.<sup>194</sup> In *Cycles*, I argue that a third episode of constitutional rot is occurring today. We are living in America's Second Gilded Age, which has many of the same worrisome features as the First Gilded Age.<sup>195</sup> In addition, today's Republican Party, increasingly filled with radicals and authoritarians, and led by a racist demagogue, Donald Trump, has repeatedly undermined democratic norms.<sup>196</sup> Facing the changing demographics of the United States, and fearful that it will be unable to win national majorities, Republicans have tried to maintain power through a series of strategies designed to entrench minority rule.<sup>197</sup>

Race plays an important role in each of these three episodes of rot. The Slave Power leveraged the ownership and exploitation of Black people to maintain control over American politics. Gilded Age politicians used race as a means of stoking polarization and mutual hatreds between the two major political parties.<sup>198</sup> Polarization led to a long period of political gridlock, during which wealth and income inequality mounted, and railroads and other business interests leveraged their financial power to gain even greater

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194. *Id.* at 62–64.

195. *Id.* at 53, 62–64.

196. See LEVITSKY & ZIBLATT, *supra* note 146, at 145–204; Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 19–66 (2020).

197. Seth Masket, *It's dangerous when the minority party rules everyone else*, WASH. POST, (Sept. 25, 2020), [https://www.washingtonpost.com/outlook/minority-party-electoral-college-court-trump/2020/09/25/1163b954-fdfc-11ea-8d05-9beaaa91c71f\\_story.html](https://www.washingtonpost.com/outlook/minority-party-electoral-college-court-trump/2020/09/25/1163b954-fdfc-11ea-8d05-9beaaa91c71f_story.html) [<https://perma.cc/4DJP-XT2Y>]; Jacob T. Levy, *Democracy for Republicans*, NISKANEN CTR, (Feb. 20, 2019), <https://www.niskanencenter.org/democracy-for-republicans/> [<https://perma.cc/H5WE-2K49>]; Vann R. Newkirk II, *How the Minority Wins*, THE ATLANTIC, (Dec. 12, 2018), <https://www.theatlantic.com/politics/archive/2018/12/gop-maneuvers-rule-minority-party/577948/> [<https://perma.cc/V2EJ-MELK>]; Damon Linker, *The GOP's minority rule*, THE WEEK, (July 20, 2018), <https://theweek.com/articles/785710/gops-minority-rule> [<https://perma.cc/7Z7P-XFSP>].

198. See CHERNY, *supra* note 52, at 25–29 (explaining how Democratic and Republican parties divided over issues of race, ethnicity, and religion); Julia Azari & Marc J. Hetherington, *Back to the Future? What the Politics of the Late Nineteenth Century Can Tell Us about the 2016 Election*, 667 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 92, 102 (2016) (noting that race was a major driver of political polarization between North and South during the late nineteenth century).

advantages for themselves.<sup>199</sup> As I noted earlier, racially polarized politics is also an important feature of today's Second Gilded Age.<sup>200</sup> Like the first Gilded Age, we also live in a period of sustained government gridlock and political corruption, in which politicians have used strategies of polarization to deflect attention from upward redistribution of income and mounting problems of economic inequality.<sup>201</sup>

Although racialized polarization increased throughout the Second Gilded Age, President Donald Trump has exacerbated it by repeatedly drumming up symbolic fights about race and engaging in racist rhetoric.<sup>202</sup> Trump's conspiracy theories surrounding the 2020 election played to the racialized polarization of American politics that he had helped inflame. These conspiracy theories have asserted that illegal votes were counted – or that votes were stolen or altered – in urban areas with large minority populations.<sup>203</sup> Trump's attack on the legitimacy of the 2020 election was a

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199. CHERNY, *supra* note 52, at 46.

200. *See supra* text accompanying notes 103–18.

201. BALKIN, *supra* note 1, at 53; *see generally* JACOB S. HACKER & PAUL PIERSON LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY (2020) (describing the use of strategies of political polarization to enable upward redistribution); JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM (rev. ed. 2008) (describing how Republican policies have enriched business interests and wealthy donors by shifting risks of capitalism onto the poor and middle class).

202. *See* Kevin Liptak & Kristen Holmes, *Trump calls Black Lives Matter a 'symbol of hate' as he digs in on race*, CNN, (July 1, 2020), <https://www.cnn.com/2020/07/01/politics/donald-trump-black-lives-matter-confederate-race/index.html> [<https://perma.cc/5YPK-KUSY>] (noting Trump's defense of Confederate monuments, his attacks on Black Lives Matter and racially coded attacks on fair housing laws); Ashley Parker & Josh Dawsey, *Trump pushes fights over racist legacy while much of America moves in a different direction*, WASH. POST, (June 11, 2020), [https://www.washingtonpost.com/politics/trump-pushes-fights-over-racist-legacy-while-much-of-america-moves-in-a-different-direction/2020/06/11/8d4398a4-abf5-11ea-9063-e69bd6520940\\_story.html](https://www.washingtonpost.com/politics/trump-pushes-fights-over-racist-legacy-while-much-of-america-moves-in-a-different-direction/2020/06/11/8d4398a4-abf5-11ea-9063-e69bd6520940_story.html) [<https://perma.cc/4E8B-4Z8B>] (“President Trump has charged into a series of fights over the nation’s racist legacy – gambling that taking divisive stances on Confederate symbols and policing will energize his mostly white supporters in November.”).

203. Emily Badger, *The Cities Central to Fraud Conspiracy Theories Didn't Cost Trump the Election*, N.Y. TIMES, November 16, 2020, <https://www.nytimes.com/2020/11/16/upshot/election-fraud-trump-cities.html> [<https://perma.cc/9QQ7-REL6>] (“That these three cities [Philadelphia, Detroit, and Milwaukee] would become the chief sites of Republican claims of fraud in this election is unsurprising. All three are heavily Democratic. They have large African-American populations. And in their respective states, they have long been targets of racialized charges of corruption.”); Janell Ross and Janelle Griffith, *How Trump's legal battles to overturn the election undermine the Black vote*, NBC NEWS, (Nov. 24, 2020), <https://www.nbcnews.com/news/nbcblk/how-trump-s-legal-battles-overturn-election-undermine-black-vote-n1248866> [<https://perma.cc/JAW7-AAG7>]; Juana Summers, *Trump Push To Invalidate Votes In Heavily Black Cities Alarms Civil Rights Groups*, NPR, (Nov. 24, 2020),

continuation of his attacks on the legitimacy of minorities exercising political power – the most famous being his claim that Barack Obama was not legitimately president because he was not born in the United States.<sup>204</sup> Trump’s attacks on racial minorities and on minority political power resonated with racially conservative whites who feared that they were slowly losing political dominance in the United States.<sup>205</sup> It was hardly surprising, then, that many of the insurrectionists in the January 6, 2021 attack on the Capitol were members of white supremacist and white nationalist groups.<sup>206</sup>

### C. Constitutional Rot as a Relative Term

*Cycles* does not argue that other periods in American history lack elements of constitutional rot.<sup>207</sup> American democracy has never been fully democratic and never fully republican. Subordinating racial groups violates both principles of democracy and republicanism, and American history is full of racial subordination and denials of access to the political process.

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<https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group> [<https://perma.cc/KH57-NJ82>].

204. BARACK OBAMA, *A PROMISED LAND* 737 (2020) (arguing that “[f]or millions of Americans spooked by a Black man in the White House, [Trump] promised an elixir for their racial anxiety” by “peddling assertions that I had not been born in the United States and was thus an illegitimate president.”); Michael Barbaro, *Donald Trump Clung to ‘Birther’ Lie for Years, and Still Isn’t Apologetic*, N.Y. TIMES, (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html> [<https://perma.cc/PTB9-FSKZ>].

205. Thomas B. Edsall, *White Riot*, N.Y. TIMES, (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/opinion/capitol-riot-white-grievance.html> [<https://perma.cc/N9LB-HTB7>].

206. Edsall, *supra* note 206; John Blake, *The Capitol insurrection could be a bigger racial reckoning than the George Floyd protests*, CNN, (Jan. 17, 2021), <https://www.cnn.com/2021/01/17/us/capitol-riot-racial-justice-blake/index.html> [<https://perma.cc/L392-X2CB>]; Sabrina Tavernise and Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation’s Capitol*, N.Y. TIMES, (Jan. 12, 2021), <https://www.nytimes.com/2021/01/07/us/names-of-rioters-capitol.html> [<https://perma.cc/8BAX-R5R4>]; Kristin Romey, *Decoding the hate symbols seen at the Capitol insurrection*, NATIONAL GEOGRAPHIC, (Jan. 12, 2021), <https://www.nationalgeographic.com/history/2021/01/decoding-hate-symbols-seen-at-capitol-insurrection/> [<https://perma.cc/Q8AX-2BNN>]; Mallory Simon and Sara Sidner, *Decoding the extremist symbols and groups at the Capitol Hill insurrection*, CNN, (Jan. 11, 2021), <https://www.cnn.com/2021/01/09/us/capitol-hill-insurrection-extremist-flags-soh/index.html> [<https://perma.cc/WWE9-HPGJ>].

207. BALKIN, *supra* note 1, at 45.

The country began with slavery and limited rights to vote. Even after slavery was abolished in 1865, racial and economic inequalities continued, and got worse over time: Jim Crow and black disenfranchisement began at the turn of the twentieth century and continued for decades.<sup>208</sup> Women did not obtain the right to vote nationwide until 1920. Our modern conception of civil rights and civil liberties is barely a half century old, has always been imperfectly enforced, and has been repeatedly undermined by episodes of political retrenchment. The redemption of American democracy remains an unfinished project.<sup>209</sup>

The idea of constitutional rot, in other words is a relative conception.<sup>210</sup> It describes a period of backsliding from a period of relative improvement in democracy and republicanism that may have been unjust and imperfect in many respects.

A similar point applies to periods of constitutional renewal. Constitutional renewal does not mean that all aspects of the constitutional system improve. The constitutional system can get better in some respects and worse in others. During the early Jacksonian period, for example, the right to vote expanded to include most white males. But increasing democratization was accompanied by the exclusion of women, the expansion of slavery, and the forced relocation of Native Americans.<sup>211</sup> In terms of democracy and republicanism, the Jacksonian era is simultaneously a period of progress and regress.

Another example is the Progressive Era, which the book identifies as a period of constitutional renewal following the First Gilded Age. During the first two decades of the twentieth century, progressives pushed for reforms in multiple areas, promoting greater democracy, securing women's right to vote, opposing political corruption, breaking up monopolies, helping the downtrodden, and promoting greater economic equality.<sup>212</sup> But race was the Progressive Era's major blind spot.<sup>213</sup> Some progressive reformers ignored racial inequalities while others, like Woodrow Wilson, actively made things worse.<sup>214</sup> Educated elites embraced scientific theories of racism.<sup>215</sup> Even as progressives sought to reform politics, Southern states became one-party regimes that disenfranchised Blacks and poor whites and brutally put down resistance. Racist demagogues like Ben Tillman dominated southern politics, defending violence against Black people and refusing to accept majority government if it included rule by Black voters.<sup>216</sup> The Progressive Era, for all

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208. See SOUTHERN, *supra* note 48, at 24–33, 38, 72–109.

209. BALKIN, *supra* note 1, at 45.

210. *Id.*

211. LEONARD & CORNELL, *supra* note 33, at 147, 175–77, 207–209, 220.

212. SOUTHERN, *supra* note 48, at 1, 44–45.

213. *Id.* at 2–3.

214. *Id.*

215. *Id.* at 47–56.

216. *Id.* at 88–91, 97–102.

its achievements, was also a regressive era, especially when we focus on race.<sup>217</sup> It was both an era of constitutional renewal and a continuation of constitutional rot.

The lesson of the Jacksonian and Progressive eras is that when democratic renewal primarily concerns the expansion of democracy for whites, it often comes at the expense of racial minorities. Conversely, periods of democratic renewal for African Americans, such as Reconstruction and the Civil Rights era, are often bitterly resisted by conservative whites who want to maintain the elevated status of being white. The result in both cases has been that attempts at multi-racial democracy have been succeeded by periods of racial retrenchment, racialized political polarization, increasing economic inequality, and political corruption.

It is hardly accidental that constitutional rot is connected to attempts to maintain racial hierarchy.<sup>218</sup> Throughout American history politicians have tried to gain and maintain political power by deliberately polarizing politics, using race as a central tool of political polarization. Whether or not these attempts have been successful in the short run, the long-term result has been constitutional rot.

## V. CONCLUSION

*The Cycles of Constitutional Time* ends with a warning that constitutional rot is a stubborn condition, and that eradicating it will take many years of political effort.<sup>219</sup> Nevertheless, because the Reagan regime is nearing its conclusion, and because political coalitions are continually changing, Americans have a chance to alter the basic assumptions of

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217. *Id.* at 47.

218. There is a deep tension between the maintenance of racial hierarchies, on the one hand, and democracy and republicanism on the other. The logic of democracy pushes toward broad participation in governance and general equality among the members of the political community. The republican conception of liberty is non-domination rather than merely formal freedom from restraint. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 6, 12, 21, 31–32 (1997) (arguing that the distinctively republican conception of freedom is nondomination). In republican thought, the opposite of liberty is slavery—subjection to the arbitrary will of another—which can take many different forms, and is not limited to chattel slavery. Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUMBIA L. REV. 1459, 1481–86, 1496 (2012). The American colonists, for example, thought of themselves as political slaves because they were not represented in Parliament. *Id.* at 1481–85.

219. BALKIN, *supra* note 1, at 173–74.

American politics and renew their democracy in the next few decades.<sup>220</sup> Whether Americans will succeed, of course, cannot be known at present. Things may even get worse before they get better. All we have is possibility and hope, not certainty.

Much will turn on how the two major political parties accept and accommodate themselves to the changing racial demographics of the United States. To the extent that the parties become genuine multiracial coalitions, they will have incentives to deemphasize the racially polarized politics of the past forty years, and fight about economic issues that can appeal across the different parts of their coalition. Just as President Franklin D. Roosevelt's Democrats attracted Black voters because the latter saw that New Deal policies benefited them economically, both parties might find new ways both to attract and appeal to African Americans, Latinos, and Asians, who will collectively constitute the majority of voters by the middle of the twenty-first century.

The Democrats are already well on the road to this reformation. Because of the politics of the Reagan regime, and especially the Trump presidency, the Republican Party faces a greater challenge. At present it seems backed into a corner as a white person's party devoted to stirring up cultural and racial resentments to an ever-greater pitch to mobilize its shrinking base of white voters. But, as noted above, the situation is actually more complicated: Republicans have powerful incentives to increase their share of non-white voters, and the party's coalition continues to evolve.

In this Article, I have argued that race and the politics of race have been important drivers of the cycles of constitutional time. That is likely to continue for the foreseeable future, but with one important difference. Up until now, the use of race in American politics has always operated under a particular set of assumptions: that whites are and will continue to be, the overwhelming majority of the country's voters, and that all other groups are, and will continue to be, political if not numerical minorities. For most of its history, American politics has been a struggle for political power between different groups of whites, with non-whites either excluded or relegated to the margins of political power. In the years to come, we will discover what will happen to the cycles of constitutional time when this assumption changes.

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220. *Id.*