

What Makes an American Constitutional Revolution, and Are We Having One?

Carol Nackenoff

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Carol Nackenoff, *What Makes an American Constitutional Revolution, and Are We Having One?*, 81 Md. L. Rev. 320 (2022)

Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol81/iss1/13>

This Symposium is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

WHAT MAKES AN AMERICAN CONSTITUTIONAL REVOLUTION, AND ARE WE HAVING ONE?

CAROL NACKENOFF*



From 1776.shop, a boutique run by Proud Boys members

INTRODUCTION

The 1775 Gadsden flag (“Don’t tread on me”), 1776 hoodies, references to Capitol stormers as patriots, and claims that January 6, 2021, was the “Republicans’ ‘1776 Moment’”¹ certainly allude to revolution. A number of groups whose names are increasingly familiar oppose what they view as federal government tyranny and illegitimate exercise of power—they do not believe the government speaks for them (although President Trump may). Some who stormed the Capitol to “Stop the Steal” do not vote.² Trump and followers refuse to accept that the Democrats constitute a legitimate opposition party; instead, the country must be saved from them. A Pew survey tracked how partisan antipathy has become both more intense and more personal during the past decade: The proportion of partisans who harbor

© 2021 Carol Nackenoff.

* Richter Professor of Political Science, Swarthmore College.

1. A remark specifically attributed to Georgia Republican Representative Marjorie Taylor Greene. See Catie Edmonson & Luke Broadwater, *Before Capitol Riot, Republican Lawmakers Fanned the Flames*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/11/us/politics/republicans-capitol-riot.html>. “Today is 1776,” tweeted Colorado Republican Representative Lauren Boebert on January 6, 2021. Lauren Boebert (@laurenboebert), TWITTER (Jan. 6, 2021, 8:30 AM), <https://twitter.com/laurenboebert/status/1346811381878845442>. Both Greene and Boebert were first elected to the House in November 2020. Edmonson & Broadwater, *supra*. The Tea Party often used the Gadsden flag as well.

2. Blake Ellis & Melanie Hicken, *They Stormed the Capitol to Overturn the Results of an Election They Didn’t Vote In*, CNN (Feb. 1, 2021, 2:07 PM), <https://www.cnn.com/2021/02/01/us/capitol-rioters-non-voters-invs/index.html>.

cold or very cold feelings toward the other party continues to rise, and a disproportionate share of the most hostile are male.³ A January 2021 survey found that 39% of Republicans (17% of Democrats) agreed that “[i]f elected leaders will not protect America, the people must do it themselves even if it requires taking violent actions.”⁴ In the same survey, 56% of Republicans (22% of Democrats) agreed that “[t]he traditional American way of life is disappearing so fast that we may have to use force to save it.”⁵

A number of scholars have emphasized the oversized importance of the moment, some drawing analogies between the elections of 2020 and 1860.⁶ Few think the results of this election will fundamentally address the crisis of democracy that they perceive. Both in terms of international affairs and domestic politics, we are said to be witnessing “a world-historical moment.”⁷ Will the United States survive as a republic of laws? Michael Klarman, American legal historian and Harvard constitutional law scholar, points out that “President Trump is largely a symptom of much deeper problems. That he was ever in a position to be elected President reveals how badly broken the American political system has become.”⁸ According to University of Chicago law professors Aziz Huq and Tom Ginsburg, “[c]ontrary to what one might assume given the robust celebration of the U.S. Constitution, that document and its common-law glosses have an ambiguous and uncertain relationship to the risk of constitutional retrogression.”⁹

3. *How Partisans View Each Other*, PEW RSCH. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/how-partisans-view-each-other/>. The share of Democrats rating Republicans very coldly (0–24 points) on a 100-point feelings thermometer rose from 41% to 57% from March 2016 to September 2019, while the percentage of Republicans rating Democrats very coldly rose from 46% to 60% during this period. *Id.* Now, 79% of Democrats rate Republicans coldly or very coldly and 83% of Republicans have similar views of Democrats. *Id.* About two-thirds of Republican and Democratic males give the other party very cold ratings. *Id.*

4. Daniel A. Cox, *After the Ballots are Counted: Conspiracies, Political Violence, and American Exceptionalism: Findings from the January 2021 American Perspectives Survey*, SURV. CTR. ON AM. LIFE (Feb. 11, 2021), <https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism/>.

5. *Id.*

6. See, e.g., Michael Hirsch, *The Most Important Election. Ever.*, FOREIGN POL’Y (Sept. 25, 2020, 2:07 PM), <https://foreignpolicy.com/2020/09/25/2020-election-donald-trump-joe-biden/> (citing political scientist Charles Kupchan’s claim about the importance and enormous stakes of the 2020 election). The Lincoln Project, founded in 2019 to defeat Donald Trump and Republicans who supported him in 2020, also drew explicit comparisons to the election of 1860. See Paige Williams, *Inside the Lincoln Project’s War Against Trump*, NEW YORKER (Oct. 5, 2020), https://www.newyorker.com/magazine/2020/10/12/inside-the-lincoln-projects-war-against-trump?utm_source=NYR_REG_GATE.

7. Hirsch, *supra* note 6 (citing John Ikenberry and Joseph Nye for this proposition on the international front).

8. Michael J. Klarman, *The Supreme Court 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 255 (2020).

9. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 162 (2018).

“We hold these truths to be self-evident,” Thomas Jefferson wrote in the Declaration of Independence.¹⁰ In 2021, what truths do Americans hold self-evident? Citizens do not agree on facts, some Americans have lost faith in Enlightenment institutions and values, and confidence in higher education has been declining.¹¹ Some QAnon adherents believe that the government of the United States has been illegitimate since 1871.¹² And there are Fourteenth Amendment deniers among the radical right.¹³ Social media echo chambers help create virtual communities—potentially capable of forming political flash mobs¹⁴—who believe that coronavirus (“COVID-19”) vaccinations are the work of the Devil (or implant microchips in recipients), subscribe to lizard people from Mars conspiracies (at least 12 million do, including the Nashville bomber), and QAnon conspiracies (which 33% of Republicans in 2020 believe are mostly true).¹⁵

Perhaps it will not do to be overly dramatic: There was no sustained era of consensus in American politics, nor a golden age of rationality. In earlier times, there were Salem witch trials, Daniel Shays’s Rebellion, the Whiskey Rebellion, and sufficient personal animosity between Federalists and Republicans surrounding the election of 1800 that, reportedly, adherents did

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. See, e.g., Jennifer Kavanagh & Michael D. Rich, *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life*, RAND CORP. (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2314/RAND_RR2314.pdf. David Brooks claims that “many people have lost faith in the Enlightenment habits and institutions” in *The Enlightenment Project*, N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/opinion/the-enlightenment-project.html>. On higher education, see, for example, Scott Jaschik reporting on Gallup survey changes between 2015 and 2018 in *Falling Confidence in Higher Education*, INSIDE HIGHER EDUC. (Oct. 9, 2018), <https://www.insidehighered.com/news/2018/10/09/gallup-survey-finds-falling-confidence-higher-education>.

12. Shayan Sardarizadeh, *Why are QAnon Believers Obsessed with 4 March?*, BBC, (Mar. 4, 2021), <https://www.bbc.com/news/blogs-trending-56260345>.

13. See Garrett Epps, *Constitutional Myth #8: The 14th Amendment Doesn’t Exist*, ATLANTIC (July 13, 2011), <https://www.theatlantic.com/national/archive/2011/07/constitutional-myth-8-the-14th-amendment-doesnt-exist/241858/>.

14. On the rise of flash mobs and their potential to supplant traditional forms of political activity, including political parties, see Sergey Fedorchenko, *Political Flashmob – A Sign of a New Society?*, RESEARCHGATE (Jan. 2011), https://www.researchgate.net/publication/259182530_POLITICAL_FLASHMOB_-_A_SIGN_OF_A_NEW_SOCIETY. Flash mobs are spontaneous crowds organized through online networks, and can be mobilized as new forms of political participation. *Id.*

15. *Report: Americans Pessimistic on Time Frame for Coronavirus Recovery*, CIVIQS (Sept. 2, 2020), <https://civiqs.com/reports/2020/9/2/report-americans-pessimistic-on-time-frame-for-coronavirus-recovery>. On reptilian space invaders, see Joy Pan, *The World is Controlled by a Group of Elite Reptiles*, OHIO ST. UNIV.: THE PSYCHOLOGY OF EXTRAORDINARY BELIEFS (Apr. 18, 2018, 9:00 AM), <https://u.osu.edu/vanzandt/2018/04/18/the-world-is-controlled-by-a-group-of-elite-reptiles/comment-page-1/>.

not speak to each other on the streets of Boston.¹⁶ Then there was the Civil War, which only the late American exceptionalism scholar Louis Hartz could paper over.¹⁷ One recent study argues that parties out of power were not seen as the loyal opposition until at least the time of Van Buren's presidency,¹⁸ following carefully forged compromises among party elites.¹⁹ Constitutional law scholar Mark Graber has argued that constitutions are agreements made among people who do not agree on values.²⁰ Yet elsewhere he adds, "[m]ost citizens and most social movements must believe that the constitution supports, or at least does not thwart, their most cherished values and interests."²¹

Is the United States experiencing a constitutional revolution? What kind of evidence should we look for, and with what measures or metrics should we weigh the evidence? In a recent, rich study on constitutional revolutions, comparative constitutional law scholars Gary Jacobsohn and Yaniv Roznai argue that fundamental constitutional change occurs in diverse ways, and that "radical change can occur through constitutional channels."²² They urge scholars to focus on the substance or content of the change rather than the process.²³ The authors point out that using the old constitutional order's mechanisms to create a new constitutional order can provide a façade of legality, since it effects change using the rule of law, but power exercised in this way can still vary in its legitimacy.²⁴ Their perspective helps us think more expansively about changes that may now be taking place in the American constitutional order—and where to look for those changes.

16. See Peter Onuf, *Thomas Jefferson: Campaigns and Elections*, UNIV. VA.: MILLER CTR., <https://millercenter.org/president/jefferson/campaigns-and-elections> (last visited Sept. 25, 2021). Federalists depicted Thomas Jefferson as a godless Jacobin, while Jeffersonian-Republicans depicted John Adams as a tyrant who may have been plotting an alliance through the marriage of a son to a daughter of King George III. *Id.* Professor Onuf noted "that the 1800 election reached a level of personal animosity seldom equaled in American politics." *Id.* The Age of Federalism has been described as an age of passion, and one with apocalyptic thinking and conspiratorial fantasies, where Federalists and Jeffersonians feared and hated each other, and liberty and power engaged in a pitched battle. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY REPUBLIC, 1788–1800* 4 (1993).

17. See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955). Sean Wilentz nicely quipped that Hartz "turned politics in a modern liberal polity into fake battles fought with wooden swords." Sean Wilentz, *Uses of The Liberal Tradition: Comments on "Still Louis Hartz After All These Years,"* 3 PERSPS. ON POLS. 117, 118 (2005).

18. Martin Van Buren, the eighth President of the United States, served from 1837–1841.

19. Carol Nackenoff, Book Review, 16 PERSPS. ON POLS. 547 (2018).

20. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

21. MARK A. GRABER, *A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM* 140 (2013).

22. GARY JEFFREY JACOBSON & YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION* 5–6 (2020).

23. *Id.* at 224.

24. *Id.* at 224, 227.

I. MAINTAINING A CONSTITUTION: EROSION OF INSTITUTIONAL SUPPORTS?

The Framers of the Constitution relied on both institutional structure and the development of internalized norms to maintain the new system of governance they drafted. “[E]ssential to the preservation of liberty” under this new system was the construction of government’s interior structure so that through “opposite and rival interests” the “several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”²⁵ This plan for institutional safeguards earned poor, but somewhat uneven, marks during the Trump era.²⁶

At the time of the founding, the idea of a written constitution as fundamental law, whose provisions had a status higher and apart from ordinary lawmaking or rulemaking was new.²⁷ Yet the Framers understood the new Constitution to establish a republic with guardrails that would place at least some matters beyond the purview of elected officials.²⁸ The Framers also wished to thwart ambitions of would-be autocrats who might seek ways around institutions designed to prevent unmediated political action and transgress or ignore republican norms.²⁹ Elected leaders play an important role in upholding democratic norms.

Presidents have become particularly important over the past century due to factors that include the growth in power of the executive branch and enhanced direct public communication abilities.³⁰ Presidents claim the ability to speak for all the people because of the mode of their election and because they can “go public” to lobby for their political agendas, urging supporters to action. Some of the very changes that have made presidents more central in national politics create the means for a would-be autocrat to

25. THE FEDERALIST NO. 51, at 380–82 (James Madison) (The Floating Press 2011).

26. See George Packer, *The President is Winning His War on American Institutions*, ATLANTIC, Apr. 2020, <https://www.theatlantic.com/magazine/archive/2020/04/how-to-destroy-a-government/606793/>; see generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018). For a different perspective, see Elaine Kamarck, *Did Trump Damage American Democracy?* BROOKINGS: FIXGOV (July 9, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/09/did-trump-damage-american-democracy/>.

27. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 262, 274–75 (1969); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 15, 54–55, 62 (1989).

28. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton).

29. See THE FEDERALIST NOS. 1, 22 (Alexander Hamilton), NOS. 47, 48, 51 (James Madison).

30. The rise of the administrative state; increased role of foreign affairs on the national political agenda; the decline in dependence of presidential nominees on their party for funding, communication opportunities, and securing the nomination; and changes in technology from radio and television to the Twittersphere have all contributed to the increasing power of the executive branch.

find the weaknesses in institutional guardrails. The origin of these processes can be traced to the years before the Trump presidency.³¹

From 2017 to 2021 during the Trump Administration, the Justice Department was expected to perform as the President's personal law firm and Attorney General Jeff Sessions was forced out and replaced by those considered more loyal.³² Other executive branch officers were readily replaced if insufficiently loyal, and Trump frequently appointed acting heads of agencies or sections who served without being confirmed by the Senate.³³ There was enormous turnover among White House staffers.³⁴ Many executive branch positions were deliberately left unfilled, as a means of waging war on the administrative state.³⁵ Reports and warnings by intelligence services were ignored, disputed, and debunked.³⁶ Critics were "disloyal," and if they were part of the administration, they were sometimes fired by tweet.³⁷ Cities with Democratic mayors—most voting heavily Democratic in national elections—were threatened with potential loss of or

31. See HEDRICK SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* ch. 16 (1988) for one notable example, including of end runs around Congress by the Reagan White House. Polarization has only led to further gridlock, accelerating these efforts. See James Goldgeier & Elizabeth N. Saunders, *The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump*, FOREIGN AFFAIRS, Sept./Oct. 2018, at 146.

32. Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>; James Risen, *William Barr Has Turned the Justice Department Into a Law Firm with One Client: Donald Trump*, INTERCEPT (June 22, 2020, 2:18 PM), <https://theintercept.com/2020/06/22/william-barr-has-turned-the-justice-department-into-a-law-firm-with-one-client-donald-trump/>.

33. Joel Rose, *How Trump Has Filled High-Level Jobs Without Senate Confirmation Votes*, NPR (Mar. 9, 2020, 5:04 AM), <https://www.npr.org/2020/03/09/813577462/how-trump-has-filled-high-level-jobs-without-senate-confirmation>; Lara Seligman, *Trump Skirting Congress to Install Loyalists in the Pentagon*, POLITICO, <https://www.politico.com/news/2020/07/17/trump-loyalists-pentagon-366922> (July 17, 2020, 2:20 PM); Anne Joseph O'Connell, *Acting Leaders: Recent Practices, Consequences, and Reforms*, BROOKINGS: REPORT (July 22, 2019), <https://www.brookings.edu/research/acting-leaders/>.

34. Kathryn Dunn Tenpas, *Tracking Turnover in the Trump Administration*, BROOKINGS: REPORT (Jan. 2021), <https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/>.

35. Former White House chief strategist Steve Bannon was explicit about this goal. See Max Fisher, *Stephen K. Bannon's CPAC Comments, Annotated and Explained*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/us/politics/stephen-bannon-cpac-speech.html>.

36. See, e.g., Robert Draper, *Unwanted Truths: Inside Trump's Battles with the U.S. Intelligence Agencies*, N.Y. TIMES MAG. (Aug. 25, 2020), <https://www.nytimes.com/2020/08/08/magazine/us-russia-intelligence.html>; Joshua Geltzer & Ryan Goodman, *The Pattern and Practice of Trump's Assaults on the Intelligence Community*, JUST SEC. (Sept. 3, 2019), <https://www.justsecurity.org/66035/the-pattern-and-practice-of-trumps-assaults-on-the-intelligence-community/>.

37. See, e.g., *The White House Revolving Door: Who's Gone?*, BBC: NEWS (Dec. 15, 2020), <https://www.bbc.com/news/world-us-canada-39826934>; Jack Detsch & Robbie Gramer, *Trump Fires His Embattled Pentagon Chief by Tweet*, FOREIGN POL'Y (Nov. 9, 2020, 1:26 PM), <https://foreignpolicy.com/2020/11/09/trump-fires-esper-pentagon-defense-secretary/>.

denial of federal assistance during the spring crush of the COVID-19 pandemic.³⁸

Federalism, another kind of bulwark of the constitutional order, was not only peculiarly under attack by the Republican president, but perhaps more surprisingly, few Republican members of Congress came to its defense. During the Black Lives Matter protests in the summer of 2020, Portland and Seattle experienced, and other cities were threatened with, unbidden federal intervention in local law enforcement.³⁹ Trump's charges against state election processes and practices (in some moments invoking *Bush v. Gore*⁴⁰) presumed that we have national standards and rules governing elections instead of an incredibly complex array of state and county election rules, practices, and procedures.⁴¹ Congress has been reluctant to impose more uniformity upon the states, but the President demanded that states behave as if there were such uniformity.

The American constitutional order may have dodged a bullet with the departure of Trump from 1600 Pennsylvania Avenue, but there is clearly a taste among a significant portion of the American public for a president-savior who will pull down the pillars with his strength (or, in the immortal lyrics of *Disco Inferno*, "burn that mother down").⁴²

For some time, Congress has been failing to pursue institutional interests as a co-equal branch of government. In that highly polarized institution, Congress seems to be a place where most legislation goes to die.⁴³ This is deliberate partisan strategy among Republican legislators under the

38. Many of these developments—at least the ones up to 2018—are mentioned in LEVITSKY & ZIBLATT, *supra* note 26.

39. Jonathan Stempel, *Trump's Legal Authority to Deploy Agents to U.S. Cities May be Limited*, *Experts Say*, REUTERS (July 21, 2020, 5:21 PM), <https://www.reuters.com/article/us-global-race-protests-law/trumps-legal-authority-to-deploy-agents-to-u-s-cities-may-be-limited-experts-say-idUSKCN24M2WF>. My understanding is that the President claimed authority under the 1807 Insurrection Act and Section 253 of the Posse Comitatus Act of 1878, although a number of scholars insist that the expectation was that states would request the intervention/assistance, even under the 1807 Act (the context of the 1878 Act makes that rather clear in that case). See Christine Hauser, *What is the Insurrection Act of 1807, the Law Behind Trump's Threat to States?* N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/article/insurrection-act.html>.

40. 531 U.S. 98 (2000).

41. See, e.g., SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 42–60 (2006).

42. The Trammmps, *Disco Inferno*, LYRICS <https://www.lyrics.com/lyric/144558/The+Trammmps/Disco+Inferno>.

43. Occasional popular spending bills, including COVID-19 relief measures, notwithstanding. See Drew DeSilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/>; see also Jeff Lewis, *Polarization in Congress*, VOTEVIEW (June 4, 2020), https://voteview.com/articles/party_polarization.

leadership of Senator Mitch McConnell.⁴⁴ At the same time, the Republican Party, almost exclusively identified at this point as Trump's party, is policing members who reject the notion that the 2020 election was stolen.⁴⁵ Republican members of Congress who dared vote for impeachment or conviction in the second trial of Donald Trump face reprisals at home—if they are running again. And fellow Republican House members removed Representative Liz Cheney from her leadership post as conference chair in May 2021 for challenging Trump's claims that he won the 2020 election.⁴⁶

At the state level, Republican parties have recently censured senators, representatives, governors, secretaries of state and Republican election officials who refused to support Trump's claim that he won a substantial election victory only to have it stolen, or who voted for impeachment or conviction in the second trial.⁴⁷ These formal statements of disapproval by party activists could affect some Republican officials' chances of re-election.⁴⁸ Many of those who loyal Trump supporters see as having

44. Allan Smith, *McConnell Says He's '100 Percent' Focused on 'Stopping' Biden's Administration*, NBC NEWS (May 5, 2021, 5:04 PM), <https://www.nbcnews.com/politics/joe-biden/mcconnell-says-he-s-100-percent-focused-stopping-biden-s-n1266443>. Senator McConnell said in a *National Journal* interview on October 23, 2010, that “[t]he single most important thing we want to achieve is for President Obama to be a one-term president.” Glenn Kessler, *When Did Mitch McConnell Say He Wanted to Make Obama a One-Term President?*, WASH. POST (Jan. 11, 2017, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2017/01/11/when-did-mitch-mcconnell-say-he-wanted-to-make-obama-a-one-term-president/>.

45. See Jonathan Bernstein, *How Trump Hijacked His Party's Best Resources*, BLOOMBERG: OP. (July 26, 2021, 8:57 AM), <https://www.bloomberg.com/opinion/articles/2021-07-26/how-trump-hijacked-the-republican-party-s-best-resources>. See also Amy Gardner, *In Ramp-Up to 2022 Midterms, Republican Candidates Center Pitches on Trump's False Election Claims*, WASH. POST (July 5, 2021, 6:00 AM), https://www.washingtonpost.com/politics/republican-trump-2022-midterms-election-falsehoods/2021/07/04/3a43438c-d36f-11eb-ae54-515e2f63d37d_story.html.

46. Barbara Sprunt, *GOP Ousts Cheney from Leadership over Her Criticism of Trump*, NPR: POLITICS (May 12, 2021, 3:38 PM), <https://www.npr.org/2021/05/12/995072539/gop-poised-to-oust-cheney-from-leadership-over-her-criticism-of-trump>.

47. E.g., *Georgia Republican Party Passes Resolution to Censure Secy. of State Brad Raffensperger*, WSB-TV 2 (June 5, 2021, 11:19 PM), <https://www.wsbtv.com/news/local/georgia-republican-party-passes-resolution-censure-secy-state-brad-raffensperger/2DMVKJITTVFG3M5JLHWH2A7XTU/>; Matthew S. Schwartz & Emma Bowman, *Arizona Republicans Censure Party Leaders at Odds with Trump*, NPR: POLITICS (Jan. 23, 2021, 10:07 PM), <https://www.npr.org/2021/01/23/959974795/arizona-republicans-censure-party-leaders-at-odds-with-trump>. Several Illinois county Republican parties censured Representative Kinzinger. See Corina Curry, *U.S. Rep. Adam Kinzinger Calls Censure Votes 'Petty' After Latest from Will County*, ROCKFORD REG. STAR (Feb. 19, 2021, 5:58 PM CT), <https://www.rstar.com/story/news/politics/elections/2021/02/19/illinois-republicans-censure-rep-adam-kinzinger-trump-impeachment-vote/4512821001/>.

48. Senator John McCain was formally censured by the Arizona Republican Party in 2014 but rather easily won re-election. See Jonathan J. Cooper, *Arizona Republicans Censure Cindy McCain, GOP Governor*, AP NEWS (Jan. 23, 2021), <https://apnews.com/article/donald-trump-race-and-ethnicity-censures-arizona-lawsuits-a50165b9d5c4468d5d1bb434c5e9c80a>. See also Julie Carr Smyth, *Ohio GOP Censures 10 Republicans Who Voted to Impeach Trump*, AP NEWS (May 7,

abandoned the former President face the prospect of local activist-implemented ballot box reprisals or other sorts of retaliation.⁴⁹ Federal judges, members of Congress, and state officials also face death threats.⁵⁰ It is a take-no-prisoners, broach-no-disagreement battle that became noteworthy with the rise of the Tea Party.

If the stakes weren't perceived to be so high, would Republican-controlled state legislatures, led by North Carolina's example, have moved to strip Democratic governors-elect of a number of traditional powers?⁵¹ Following the 2020 election, Republican-dominated state legislatures have weakened the secretary of state's powers (Georgia, Arizona), changed election laws to allow some or all county commissions to restructure the election board and appoint all new members (Georgia), removed power over elections from local authorities (Arkansas), made it easier in some states to overturn election results, and authorized partisan audits.⁵² Arizona's legislature authorized an extensive audit of all ballots in Maricopa County, hiring the Florida-based firm Cyber Ninjas to lead the effort.⁵³ A great deal of private money funded the audit, and the Cyber Ninjas acknowledged receipt of over \$5 million in private donations, mostly from nonprofit groups headed by Trump allies.⁵⁴ Prior to being selected to conduct the Arizona

2021), <https://apnews.com/article/donald-trump-ohio-censures-trump-impeachment-impeachments-578073278925ed09e4eb3bc6639e32a6>.

49. Some of the Senate Republican votes for impeachment came from those who were just re-elected (six years provides some cushion for voters to forgive and forget). See THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison) (2011); RICHARD F. FENNO, JR. THE UNITED STATES SENATE: A BICAMERAL PERSPECTIVE 1–6, 26–46 (1982). Other votes came from those who planned to retire from the Senate, or from those who had less reason to fear a successful effort to “primary” them from the right.

50. See Cody Fenwick, *Federal Judges Face Increasing Threats Amid Trump's Attacks*, *American Bar Association Warns*, SALON (Aug. 15, 2019, 1:49 PM), https://www.salon.com/2019/08/15/federal-judges-face-increasing-threats-amid-trumps-attacks-american-bar-association-warns_partner/; Shelley Inglis, *Death Threats and Intimidation of Public Officials Signal Trump's Autocratic Legacy*, CONVERSATION (Jan. 26, 2021, 2:57 PM), <https://theconversation.com/death-threats-and-intimidation-of-public-officials-signal-trumps-autocratic-legacy-153281>.

51. Tara Golshan, *How Republicans are Trying to Strip Power from Democratic Governors-Elect*, VOX (Dec. 14, 2018, 1:41 PM), <https://www.vox.com/policy-and-politics/2018/12/4/18123784/gop-legislature-wisconsin-michigan-power-grab-lame-duck>.

52. Nick Corasaniti & Reid J. Epstein, *How Republican States Are Expanding Their Power over Elections*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/06/19/us/politics/republican-states.html>.

53. Bob Ortega et al., *His Cybersecurity Firm is Working on the Arizona 'Audit'. But People Who Know Him Have Questions*, CNN: POLITICS, <https://www.cnn.com/2021/06/17/politics/arizona-audit-cyber-ninjas-logan-invs/index.html> (June 17, 2021, 10:54 PM).

54. Jane Mayer, *The Big Money Behind the Big Lie*, NEW YORKER (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie>.

audit, the Cyber Ninja's C.E.O. had tweeted his claims about 2020 election fraud.⁵⁵

Courts sometimes participate in a shift in constitutional identity.⁵⁶ Recently, some states have successfully expanded or contracted the size of the highest courts in the state to entrench partisan advantage. This state-level court packing has chiefly been initiated by Republicans.⁵⁷ At least twenty such bills were introduced in eleven states during the past decade, and these efforts succeeded in titling the highest state courts further to the right in Arizona (2016) and in Georgia (2017, following passage of legislation in 2016). According to Marin K. Levy, who studies state-level court packing, "the proposed attempts to alter the courts were often done in ways that would guarantee adding justices from a political party to shift the ideological makeup of the court in a considerable way."⁵⁸

Andrew Arato has noted that when populist movements take over governments, they attack independent courts.⁵⁹ While in office, Trump called into question judges' ability, legitimacy, and judicial independence when courts ruled against him.⁶⁰ This has contributed to a brewing, potent anti-judicial narrative. An aura of neutrality and objectivity is necessary to the perceived legitimacy of courts. Political scientists Steven Levitsky and Daniel Ziblatt view an assault on judicial independence as an attack on an important guardrail of American democracy.⁶¹ All but the most minor legal

55. See Sam Levine & Anna Massoglia, *Arizona Ballot Audit Backed by Secretive Donors Linked to Trump's Inner Circle*, GUARDIAN (June 9, 2021), <https://www.theguardian.com/us-news/2021/jun/09/arizona-election-audit-trump-2020-review>.

56. See JACOBSON & ROZNAI, *supra* note 22, ch. 6, examining the case of Israel.

57. Andrew DeMillo, *Despite Rhetoric, GOP Has Supported Packing State Courts*, AP NEWS (Oct. 24, 2020), <https://apnews.com/article/legislature-arizona-iowa-separation-of-powers-us-supreme-court-31f4996a200be4622361603aabf92302>.

58. Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1150 (2020). Professor Levy provides examples of Republican-led efforts in Florida, Iowa, and South Carolina; although a Democrat-led effort in Louisiana also seemed to be aimed at partisan advantage. *Id.* at 1139–43. Sometimes, a state legislature seeks to unpack or reduce the size of the state's highest court—often in response to an unpopular decision—such as in Montana, Oklahoma, Washington. *Id.* at 1145–48. See also Marin K. Levy, *Republicans Have Already Packed State Supreme Courts*, WASH. POST (Oct. 26, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/10/26/court-packing-republicans-states/>.

59. ANDREW ARATO, *Populism, Constitutional Courts, and Civil Society*, in JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 318, 331–41 (Christine Landfried ed., 2019). Arato finds this pattern across a number of cases. *Id.* at 318–21. Mark Tushnet points out the importance of distinguishing between left-wing and right-wing populism in considering the relationship between populism and liberalism. Mark Tushnet, *Varieties of Populism*, 20 GERMAN L.J. 382, 385–88 (2019).

60. *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), <https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts>.

61. LEVITSKY & ZIBLATT, *supra* note 26, at 97–117, 179–80; see also Nancy Bermeo, *On Democratic Backsliding*, J. DEMOCRACY, Jan. 2016, at 11.

challenges to 2020 electoral outcomes and state certifications of election results were rebuffed by courts, demonstrating that the rule of law proved resilient at least where the challengers had marshaled scant evidence to back up their claims.

II. EROSION OF NORMS AND CONSTITUTIONAL BELIEF?

The Framers knew that institutional design alone could not maintain the Constitution. Cultivating and maintaining support and even veneration for the Constitution among the populace, and internalization of norms among elites, would be essential.⁶² This part of the project looks far less secure than observers might have thought just a few decades ago because norms and beliefs that support the constitutional order are eroding.

A number of the guardrails that support American democracy have been weakening, according to Levitsky and Ziblatt, following patterns that have been observed in countries experiencing much greater democratic erosion than the United States.⁶³ Throughout his presidency, Trump referred to the press as “the enemy of the people,” and said that mainstream journalism produced “fake news.”⁶⁴ Faith in the legitimacy of the 2020 presidential election was undermined by the then-incumbent President, who impeded the orderly transfer of power and continues to insist the election was stolen. According to a Monmouth University poll, approximately two-thirds of Republicans and nearly one-third of all Americans believe that Joseph Biden won the presidential election only because of voter fraud, and 29% of Republicans say they will never accept Biden as the President.⁶⁵

There is no reason to assume that just because the Constitution has survived for a long time—with twenty-seven formal amendments, informal changes, a great deal of constitutional construction, and perhaps even

62. Thomas Jefferson, *Query XIX*, in NOTES ON THE STATE OF VIRGINIA (1787), <http://xroads.virginia.edu/~Hyper/HNS/Yoeman/qxix.html>.

63. LEVITSKY & ZIBLATT, *supra* note 26, at 176–200, 204–05.

64. Scott Simon, *Opinion: Calling the Press the Enemy of the People Is a Menacing Move*, NPR (Aug. 4, 2018, 8:08 AM), <https://www.npr.org/2018/08/04/635461307/opinion-calling-the-press-the-enemy-of-the-people-is-a-menacing-move>; *How President Trump Took ‘Fake News’ into the Mainstream*, BBC: NEWS (Nov. 12, 2018), <https://www.bbc.com/news/av/world-us-canada-46175024>.

65. *Majority Back Capitol Riot Commission*, MONMOUTH UNIV. POLLING INST. (Mar. 17, 2021), https://www.monmouth.edu/polling-institute/reports/MonmouthPoll_US_031721/. The poll, conducted by telephone between February 25 and March 1, 2021, asked: “Do you believe Joe Biden won the 2020 election fair and square, or do you believe that he only won it due to voter fraud?” *Id.* Among Republicans, 65% answered only because of voter fraud. *Id.* The follow-up question was: “Now that Biden is in office do you feel it is time to move on or will you never accept Biden as president?” and 29% of Republicans answered never accept. *Id.*

redefining constitutional moments spearheaded by “the people”⁶⁶—it is destined to endure in a form most constitutional scholars would recognize. One reason for confidence is that empirical evidence supports the conclusion that wealthy nations do not supplant orderly turnover of power by elections once established. Comparative political science scholar Adam Przeworski points out, for example, that “the probability that competitive elections would be replaced by some other way of selecting or imposing rules converges to zero when per capita income becomes large.”⁶⁷ Elections become entrenched as a mechanism for resolving conflicts without bloodshed.⁶⁸ Yet “[h]istorical experience suggests that when conflicts spill to the streets, public support for authoritarian measures designed to maintain public order tends to increase, even if street protests are targeted precisely against such authoritarian tendencies of governments.”⁶⁹

The accelerating growth of income inequality could prove a potential game changer.⁷⁰ Neoliberal policies, widely supported by centrist Democrats as well as Republicans, stand to exacerbate inequalities in life chances in the United States. If elected governments fail to improve the everyday lives of most people, Przeworski predicts it will only strengthen anti-system and anti-establishment sentiments, whether here or in Europe.⁷¹ Distrust and suspicion of economic, political, or cultural elites may deepen resentments and further undermine support for institutions. Erosion of democratic norms and that necessary fiction of peoplehood is bound to have constitutional consequences.

Jacobsohn and Roznai contend that “[a] substantial reorientation in constitutional practice and understanding often proceeds incrementally, without a decisive rupture or violent usurpation.”⁷² Incremental changes leading to a shift in constitutional identity may not be immediately apparent.⁷³ Whether there has been a shift in constitutional identity under such circumstances depends in part on examining “aspirational commitments embedded in the document.”⁷⁴ Such an inquiry may not be straightforward.

66. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, Vol. 1 (1991). JACOBSON & ROZNAI, *supra* note 22, at 17–22, 36, discuss the inadequacy of Ackerman’s notion of constitutional moments, in part because revolutions may be incremental.

67. ADAM PRZEWORSKI, *WHY BOTHER WITH ELECTIONS?* 119 (2018).

68. *Id.* at 127 (“What is democracy other than a set of rules . . . for the solution of conflicts without bloodshed?” (quoting NORBERTO BOBBIO, *THE FUTURE OF DEMOCRACY* 156 (1989))).

69. *Id.* at 133.

70. On rapid changes in income and wealth distribution in the United States since roughly 1980 (and comparisons to other wealthy industrialized nations), see THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 371–77 (Arthur Goldhammer trans., HARV. UNIV. PRESS 2014).

71. PRZEWORSKI, *supra* note 67, at 133.

72. JACOBSON & ROZNAI, *supra* note 22, at 15.

73. *Id.*

74. *Id.* at 10.

For example, are rebellious references to 1776 a demand that any means necessary should be used to restore the authentic values of the American Revolution or of the Constitution—values that have been hijacked or corrupted?

Some disagreements about constitutional aspirations are likely to track longstanding disagreements about constitutional meaning. However, let me posit that reading the Constitution in light of enlightenment values (e.g., the Declaration of Independence), or stipulating that the Constitution’s quest to form “a more perfect Union,” includes a textual or moral commitment to expanding equality and democracy.⁷⁵ A revolution could then be said to occur if changes are introduced that advantage those who want to use the democratic process to restrict change and entrench their own privileges. “We the people” becomes an exclusive club. This is arguably ushering in a shift in constitutional identity.

A commitment to popular democracy is incompatible with entrenching minority control of election outcomes. In general, we believe majorities should prevail unless they violate the rights of individuals or minorities. The Senate filibuster, requiring a supermajority to invoke cloture, is often justified by arguments that a minority should be able to protect itself against majority decisions that adversely affect them.⁷⁶ The Constitution itself builds in the overrepresentation of lightly populated, rural, and often conservative states that we currently see in the Senate, although that institution was never designed to be based on considerations of population.⁷⁷ From 2015 to 2017, for instance, “the 46 Democratic caucus members in the 114th Congress received a total of 67.8 million votes in winning their seats, while the 54 Republican caucus members received 47.1 million votes.”⁷⁸

The situation on the House side tends to entrench minority control of election outcomes in a different manner. Through legislative control over redistricting in twenty-six states for the 2020 redistricting cycle (thirty-four in 2000 and twenty-nine in 2010), one party may garner far more votes than the other statewide but find the other party constitutes the lion’s share of the

75. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012).

76. Daniel Wirls, *The Senate Filibuster Explained—And Why it Should Be Allowed to Die*, CONVERSATION (Sept. 13, 2019, 2:29 PM), <https://theconversation.com/the-senate-filibuster-explained-and-why-it-should-be-allowed-to-die-123551>. On arguments about protecting rights of individuals or minorities by judicial review, see, for example, Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1162–63 (1977).

77. ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 48–50, 144–45 (2d ed., 2003); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 49–62 (2006).

78. Dylan Matthews, *The Senate’s 46 Democrats Got 20 Million More Votes than Its 54 Republicans*, VOX (Jan. 3, 2015, 10:00 AM), <https://www.vox.com/2015/1/3/7482635/senate-small-states> (quoting Nathan Nicholson, a researcher at FairVote).

state's congressional delegation.⁷⁹ Following an expressly partisan gerrymander, North Carolina, in 2018, elected ten Republicans and two Democrats to Congress, despite Republicans receiving just 50.4% of the vote and Democrats receiving 48.4%.⁸⁰

The Supreme Court under Chief Justice John Roberts has moved away from earlier judicial efforts to protect access to the political process. In 2019, the Court determined that naked partisan gerrymandering of legislative districts was a political question having no judicial remedy.⁸¹ Justice Kagan's dissent emphasized—and the conservative majority even seemed to concede—the incompatibility between partisan gerrymandering and democratic principles of equal access to the ballot box and free and fair elections.⁸² She pointed out that “politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.”⁸³ When politicians can choose their own voters, political minorities can disempower political majorities.⁸⁴ The Roberts Court has made it far easier for money—including corporate money—to enter the electoral arena, without regard to the appearance of corruption (Congress could regulate campaign contributions if they aimed to combat quid pro quo corruption).⁸⁵ The Court later loosened the definition of bribery to make it harder to convict public officials of acting in direct response to money or gifts (narrowly defining an “official act” as the specific use of formal governmental power), despite any impact on the electoral process or confidence in the same.⁸⁶

The Court has given a green light to states that want to introduce restrictions on ballot access. In 2008, the Court rejected a facial challenge to

79. Doug Spencer & Justin Levitt, *National Summary*, LOY. L. SCH.: ALL ABOUT REDISTRICTING, <https://redistricting.lls.edu/national-overview/?colorby=Institution&level=Congress&cycle=2020> (last visited Sept. 3, 2021). A potential additional harm of such practices is that U.S. congressional districts that have seen significant changes because of redistricting have become even more polarized than other districts. See Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AM. POLS. RSCH. 878, 878 (2007).

80. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019). For a review of Republican and Democratic vote totals in the state, see *id.* at 2510 (Kagan, J., dissenting). In *Rucho*'s companion case, *Lamone v. Benisek*, Maryland's Democrats had gerrymandered to their advantage, seven seats to one. 348 F. Supp. 3d 493, 497 (D. Md. 2018), *vacated sub nom.*, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

81. *Rucho*, 139 S. Ct. at 2504.

82. *Id.* at 2509, 2511–12 (Kagan, J., dissenting).

83. *Id.* at 2523 (Kagan, J., concurring) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018)).

84. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as Amici Curiae in Support of Appellees at 12–14, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (Nos. 18–422, 18–726).

85. See *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

86. See *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (quoting 18 U.S.C. § 201(a)(3)) (involving the public corruption felony conviction of former Virginia Governor Robert McDonnell, which was overturned by the Court).

Indiana's strict voter identification law, finding that, even absent evidence of voter fraud, a state has an interest in preventing such fraud and in maintaining confidence in the electoral system. There was, the Court concluded, no undue burden on those who had to produce documents such as birth certificates in order to obtain the free ID.⁸⁷ By the time of the decision, Georgia had also implemented a strict voter identification law requiring voters to present a government-issued photo ID; a number of states followed the lead of Indiana and Georgia after the *Crawford* decision.⁸⁸

In 2013, the Court in *Shelby County v. Holder*⁸⁹ struck down the Section 4 coverage formula in the 1965 Voting Rights Act, thereby eliminating the Section 5 preclearance provisions that required federal approval of any jurisdictional changes to voting procedures. The Court found continuing federal oversight of certain states and jurisdictions inconsistent with federalism and offensive to the dignity interests of the states, and determined that Congress had not provided sufficient evidence of the continuing need for such oversight.⁹⁰ Within hours of the decision, Texas passed a voter identification law that had been stymied by the preclearance provision, accepting forms of identification more likely to be held by Republicans than Democrats.⁹¹ The Court, insisting the nation had changed since 1965, thwarted the will of Congress, which passed the twenty-five-year reauthorization by a 98-0 voice vote in the Senate and a 390-33 roll call vote in the House in 2006.⁹² On July 1, 2021, the Court upheld Arizona's new and

87. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188–89 (2008).

88. For other states, see Students of American Elections Class POLS 22, *American Elections 2020*, SWARTHMORE COLLEGE (2020), <https://american-elections.swarthmore.edu/>. See also *Voter Identification Requirements | Voter ID Laws*, NAT'L CONF. STATE LEGISLATURES (Aug. 9, 2021), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

89. 570 U.S. 529 (2013).

90. *Id.* at 556–57.

91. Klarman, *supra* note 8, at 5.

92. See *Actions – H.R. 9 – 109th Congress (2005-2006): Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, H.R. 9, 109th Cong. (2006), <https://www.congress.gov/bill/109th-congress/house-bill/9/actions>. Congress had been warned in 2009 that the coverage formula was in deep trouble as far as the Court was concerned. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009). There has been no agreement to amend it—nor any serious effort to do so since *Shelby County*. Congress had managed an amicable renewal of the VRA in 2006 only by agreeing not to introduce changes. Professors Guy-Uriel Charles and Luis Fuentes-Rohwer note that the Voting Rights Act may have been a “superstatute,” by which they mean “a category of landmark legislation that addresses a significant public policy problem that if left unresolved would call into question a fundamental constitutional commitment.” Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1390–91 (2015). However, they point out:

The decision in *Shelby County* is clear evidence that the Court's current conservative majority believes that the regulatory model that has undergirded modern voting rights

more restrictive ballot measures in *Brnovich v. Democratic National Committee*⁹³ (including restrictions on ballot collection methods that have made it easier for some Latinos and Native Americans to vote) by holding that they do not violate Section 2 of the Voting Rights Act, finding no racially discriminatory purpose in HB 2023.⁹⁴

Disempowering groups of voters who have been historically disadvantaged in the political process or who support the opposition party through incremental changes made through legal channels may signal a constitutional revolution.

CONCLUSION

The very notion of popular sovereignty, the late American historian Edmund Morgan famously argued, is based on fictions.⁹⁵ Popular government depends on the willingness of people to believe in fictions. If they do not think that representative institutions represent them (and want to hang elected officials who they brand traitors), it will be hard to construct, maintain, or reconstruct “a people.” If a substantial portion of the citizens believe that liberty ought to be unconditional, the project of governance is probably doomed. If different components of the citizenry support the Constitution but embrace such dramatically different visions of constitutional values and meanings that common ground is neigh-impossible to find, there may be no “people.” If many citizens believe the Supreme Court produces political and illegitimate decisions, the fiction of objectivity and neutrality disappears. And for some, when courts uphold a secular liberal democratic order, they may also be seen as facilitating the “spread of a cultural liberalism at odds with custom and religion.”⁹⁶ The very notion of “a people” at present is being called into question. If “[m]ost citizens and most social movements must believe that the Constitution supports, or at least does not thwart, their most cherished values and interests,”⁹⁷ we cannot dismiss the possibility that the United States is experiencing a constitutional revolution.

policy and has been in place for almost 50 years is no longer tenable because of what it views as the sufficient decline of intentional racial discrimination by state actors.

Id. at 1392.

93. 141 S. Ct. 2321 (2021).

94. See *Ariz. Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221 (2020) and *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 222 (2020), which were consolidated on October 2, 2021, and argued on March 2, 2021. *Brnovich*, 141 S. Ct. at 2236.

95. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 14–15 (1988).

96. William A. Galston, *The Populist Challenge to Liberal Democracy*, *J. DEMOCRACY*, Apr. 2018, at 8; see also William A. Galston, *The 2016 Election: The Populist Moment*, *J. DEMOCRACY*, Apr. 2017, at 23.

97. GRABER, *supra*, note 21.