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THE PLACE OF THE PRESIDENCY IN HISTORICAL TIME

ROBERT L. TSAI*

ABSTRACT

This Essay arises from a symposium based on Jack Balkin's book, The Cycles of Constitutional Time, which argues that America's constitutional development is marked by patterns of decline and renewal. I contend that the presidency today has become endowed with outsized expectations borne of popular frustrations with a centuries-old document that is desperately in need of updating. As a result, Presidents enjoy imbalanced and dangerous power to initiate legal reform or stymie it. Going forward, three dynamics are worth watching. First, noisy signals coming from performative transformation can obscure the true source and scope of legal changes initiated by a President. This dynamic frustrates accountability and exacerbates the possibility of unearned transformation. Second, institutional imbalance over the ability to generate legal change can take the form of ad hoc bureaucratic work-arounds. Third, modern Presidents are increasingly tempted to rely on social movements to gain and retain power. These developments augment a President's ability to influence the pace or degree of legal change, but each also carries significant pitfalls.

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INTRODUCTION

Jack Balkin has been laboring profitably on the subject of constitutional change for some time.¹ Whether writing alone or with longtime collaborators, his work reveals the many mechanisms by which elites and ordinary citizens advance their competing understandings of our canonical legal texts. In *The Cycles of Constitutional Time*, Balkin brings together the different threads of his past work, arguing that the key is to understand the cyclical nature of political creation and decline.² Drawing on regime theory, and in particular the work of Stephen Skowronek,³ Balkin argues that constitutional change is structured according to the patterns of rot and polarization, which then give way to opportunities for the politics of redemption and renewal.⁴

Cycles is a worthy addition to the corpus on political change. There are many implications of Balkin's embrace of a cyclical framework, including naturalizing the inevitability of political change in every society, offering hope to partisans of all stripes that defeats may be temporary because the time to dust off their proposals may come around again, and revealing the paths that advocacy and development might take in the absence of truly revolutionary conditions. For what it's worth, I think Balkin is openly interested in the second and third objectives but will probably deny that the first is his goal (even so, I think that some amount of naturalization is inevitable given the mode of analysis).⁵

My objective in this Essay is to recenter what Balkin pushes to the periphery in his book: the role of presidential action. I contend that the modern presidency, with its outsized role in our political imagination, along with the immense powers of the office and the unmatched opportunities afforded a President, is essential to appreciating the possibilities for and limitations of legal transformation.⁶ This is true whether or not you think, as Balkin does, that history follows certain patterns of corruption and renewal.

¹ E.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

² See JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 4 (2020).

³ STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (rev. ed. 1997).

⁴ See BALKIN, *supra* note 2, at 13-14.

⁵ By embracing regime theory to explain constitutional change, Balkin resists purely generational explanations. And yet, it just so happens that each major regime that he identifies (the New Deal/Civil Rights regime and the one inaugurated by Reagan's presidency) has lasted roughly a generation. See BALKIN, *supra* note 2, at 15 tbl.2.1.

⁶ Several scholars have offered accounts of constitutional law that center the presidency. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (proposing new theory of judicial review to unite constitutional interpretations throughout generations into one model); ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION*

Balkin's inclination in *Cycles* is to de-emphasize the role of the presidency overall. He does so, first, by saying that "[a] constitutional regime involves far more than the presidency."⁷ In other words, there are a lot of other moving parts in the system: judges, legislators, and social movements, just to name a few.⁸ Sometimes working together, sometimes working at cross-purposes, a multiplicity of actors contributes to the creation or decline of a political regime.⁹ Balkin's second point follows from his first: other phenomena that are not obviously directed by Presidents, or that lie beyond their capacity to fully control, such as "doctrines, institutions, and practices," make up what he deems "the Constitution-in-practice."¹⁰

And yet it's not possible to decide whether cyclical analysis is helpful without reckoning with the historical reality that not all constitutional actors are equal in a complex political order. The story of how the presidency has grown from a relatively weak post that could occasionally invoke great power into the constitutional actor most expected to inspire and generate legal change is a complicated one. A major part of the tale is that other aspects of our order have broken down with such regularity that more people today are receptive to savior figures than ever before.¹¹ As bad as things can get, people haven't completely given up hope that things can improve—they've just infused one national office with the powers and regular expectations to do something about it.

Another aspect of this development is that we now have success stories of presidentially led constitutional transformation, from President Abraham Lincoln's turning the war to save the Union into a crusade to end the enslavement of Black people, which ultimately produced significant constitutional amendments,¹² to President Lyndon B. Johnson's embrace of the

LAW (2020) (describing how President's role in immigration policy stems from his constitutional law enforcement duty); Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323 (2019) (arguing that Trump Administration was embracing Lochnerism); Robert L. Tsai, *Obama's Conversion on Same-Sex Marriage: The Social Foundations of Individual Rights*, 50 CONN. L. REV. 1 (2008) [hereinafter Tsai, *Obama's Conversion*] (exploring "executive-led development of constitutional rights" through lens of Obama Administration's actions on marriage equality); Robert L. Tsai, *Reconsidering Gobitis: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363 (2008) [hereinafter Tsai, *Reconsidering Gobitis*] (explaining how executive branch actions quickly "undermine[d] the social plausibility of [*Minersville School District v. Gobitis*, 310 U.S. 586 (1940)]").

⁷ BALKIN, *supra* note 2, at 24.

⁸ *See id.*

⁹ *Id.* at 25.

¹⁰ *Id.*

¹¹ As Richard Albert incisively points out, "American constitutional time runs at its own pace, on its own clock, and according to its own calendar" because of "the peculiarities of America's ancient constitution." Richard Albert, *A Theory of American Constitutional Time*, 101 B.U. L. REV. 1807, 1810 (2021).

¹² U.S. CONST. amends. XIII, XIV, XV.

Black civil rights movement, which led to landmark legislation.¹³ We also have other models of executive leadership in President Andrew Johnson, who rallied White citizens against land reform and citizenship rights for Black Americans during Reconstruction,¹⁴ as well as President Donald Trump, who harnessed growing dissatisfaction over the nation's changing demographics to transform immigration policy, afford border enforcement agencies sweeping discretion on the ground,¹⁵ and limit the authority of immigration judges to grant relief.¹⁶

Conversely, social movements striving to reduce the power of the executive branch have fared relatively poorly in recent decades, whether taking the form of antiwar or antisurveillance activism.¹⁷ At best, such efforts have led to modest legal reforms but no serious threat to dislodge the presidency from its pride of place as first mover in most domains.¹⁸ Meanwhile, movements on both the left (for example, racial justice, women's rights, labor, LGBTQ+ equality, immigrants' rights) and the right (Evangelicalism, White identity, nationalist, militia) have increasingly looked to presidential leadership as their preferred mode to enact legal change or stem the tide of undesirable cultural forces.¹⁹ All of these justice-based movements have buoyed public expectations for ambitious and powerful Presidents, even as the obstacles to monumental change have continued to multiply.

This emergence of the American President as a secular visionary and primary site of fundamental conflict, which I simply refer to as “the place of the presidency in historical time,” returns to Skowronek's original insight that political development is in an undeniable sense *cumulative*—i.e., as time passes, it is harder for successive Presidents to tear everything down, so we should expect to see fewer truly transformative leaders.²⁰ Most aspirants seek power by

¹³ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000f); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

¹⁴ As Annette Gordon-Reed explains, President Johnson felt that “he alone should control Reconstruction, and it was his will that the Confederate states be speedily brought back into the Union with all the rights for white people that had previously existed under the Constitution intact, save for their right to hold slaves.” ANNETTE GORDON-REED, *ANDREW JOHNSON* 110 (Arthur M. Schlesinger, Jr., and Sean Wilentz eds., 2011). In the words of ex-Confederate Secretary of Treasury Christopher Memminger, President Johnson “held up before us the hope of ‘a white man’s government’” which led White Southerners “to set aside negro suffrage” and resist other plans to help freed persons achieve equality. *Id.* at 118-19. Indeed, Johnson stoked political restoration. *See id.* at 119.

¹⁵ *See* COX & RODRÍGUEZ, *supra* note 6, at 184-88.

¹⁶ *See id.* at 186-87.

¹⁷ *See* SIDNEY M. MILKIS & DANIEL J. TICHENOR, *RIVALRY AND REFORM: PRESIDENTS, SOCIAL MOVEMENTS, AND THE TRANSFORMATION OF AMERICAN POLITICS* 9-10 (2019).

¹⁸ *See id.*

¹⁹ *See generally id.* (exploring relationship between Presidents and social movements over time).

²⁰ *See* SKOWRONEK, *supra* note 3, at 410. Skowronek says this about President Reagan: “To dislodge established commitments of ideology and interest in the traditional fashion, the

making big promises, and some will even give it a go once in office, but nearly all will fail to deliver because of the structural conditions that pile up and aren't easily cleared away.

In one sense, Skowronek is absolutely correct: there are real bureaucratic, social, and electoral hurdles standing in the way of every Chief Executive's ability to actually get anything done. As he puts it, "the clock at work in presidential leadership . . . continue[s] to tell political time."²¹

In another sense, however, the pressures on a President to go big, despite the long odds, have not receded but increased over time. These hydraulic pressures can push an administration to respond with a frenzy of activity in the hunt for major achievements, as well as to break rule-of-law norms, circumvent anti-corruption limits, and entrench partisan power. For better or worse, Presidents have a major impact on the concerns Balkin deems recurring threats—polarization, corruption, and inequality.²²

To understand this impact, we must consider three questions: First, in what sense can a modern President act as a force for legal change? The answer to this question will give us a realistic sense of executive capacities to improve or destroy conditions of governance. Second, what kinds of comparative advantage does a President enjoy as an agent of change? The answer to this question reveals the extent to which a President can control bureaucracies and exert influence on the development of the law. Third, as a special species of a general problem of informal relationships, what is to be made of a President's proximity to social movements, now a common occurrence? The answer to this final question will provide some clues as to what presidentially inspired change may look like in the future.

I. THE PRESIDENT AS CHANGE AGENT: A STRUCTURAL ACCOUNT

There are two main ways of theorizing a President's capacity to effect constitutional change. The first is formal and legalistic, paying attention to formal powers and corresponding sources of authority.²³ A second approach is informal and structural, focusing on methods, strategies, styles, moods, and other conditions.²⁴

Reagan administration had to take on all the systems and processes that had evolved over the course of the twentieth century" *Id.* at 418.

²¹ *Id.* at 410.

²² BALKIN, *supra* note 2, at 49-54.

²³ See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 185 (Free Press paperback rev. ed. 1991) (1960).

²⁴ See generally JOHN P. BURKE, *PRESIDENTIAL POWER: THEORIES AND DILEMMAS* (2016) (examining theories of presidential power as well as methods Presidents use to achieve their goals). As an example of the structural approach to presidential authority, Richard Neustadt focused on the following elements that he identified as impacting a President's power: (1) "perceptions of legitimacy and sentiments of loyalty"; (2) institutional changes; (3) shifts in the policy landscape; (4) the President's own temperament and other "human qualities"; (5) political miscalculations; and (6) institutionalization of the presidency. See NEUSTADT, at

One of Skowronek's great achievements is to give us terminology for understanding the less formal structural conditions in which a President must operate. While many would-be Presidents speak in epoch-making rhetoric, actual conditions yield few truly transcendent leaders. When we look past President Obama's rhetoric of reconciliation or President Trump's promise to make America great again, we realize that most Presidents are working in a predecessor's shadow either as affiliates of an existing regime or as disjunctive leaders.²⁵

By the same token, in seeking to identify cycles within regimes, Balkin's theory fleshes out what we might call the nonrevolutionary dynamics of political change. Closing the wealth gap, reducing racial inequality, and improving a sense of public virtue won't necessarily represent fundamental change or ensure that it will occur, but making progress on these agenda items can help foster conditions that are necessary for any dramatic political project.²⁶

Several additional implications flow from a structural emphasis. First, perhaps paradoxically, we should be able to get more granular in identifying not just the sources of political inertia but also the institutional pathologies that lock in certain policies and principles—even when change is desperately desired by a majority of voters. Second, it follows that we should be able to recognize new forms of executive creativity—that is, techniques to circumvent obstacles that aren't easily dislodged. Such innovation will take place as frustrated voters elect Presidents who promise to break the gridlock in Washington. Third, given the public expectations for strong leadership, a President and his allies—within his party and among interest groups and bureaucratic actors—will have a powerful incentive to “perform” transformation even when major change is not in the offing.

A. *Soft Power, Noisy Signals*

The plentiful resources at the disposal of a modern President as head of his party, Chief Executive, and Commander-in-Chief afford him significant advantages in initiating or resisting legal change.²⁷ Some of these resources are authorized by the language of the Constitution, others find warrant in statutes, and still more claim legitimacy solely from actual practice.²⁸ Yet this wealth of

supra note 23, at 184. Neustadt also distinguished between a President's “formal powers” conferred by the Constitution and laws, on the one hand, and softer “source[s] of power” such as “professional reputation” (impressions inside the Beltway) and “prestige” (i.e., “his public standing”). *Id.* at 185.

²⁵ See BALKIN, *supra* note 2, at 19-20.

²⁶ See *id.* at 161-62, 172.

²⁷ James MacGregor Burns put it this way: “The main determinant of the extent and exercise of executive leaders' power within organizations is the extent of their institutional and personal resources.” JAMES MACGREGOR BURNS, *LEADERSHIP* 373 (1978). For a deep dive into the intensification of executive discretion as a technique for making policy, see generally Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017).

²⁸ See NEUSTADT, *supra* note 23, at 160.

resources, powers, and alliances can also exacerbate the difficulty of discerning the difference between commitment and cosplay.

Confusion can be a strategy to obscure the sources and nature of authority. The feints and gestures offered by President Trump on immigration reform or healthcare, for instance, gave the impression that his Administration wanted Congress to enact legislation to help Dreamers²⁹ or take actions to improve healthcare coverage.³⁰ After all, past great Presidents exhorted Congress to take action in just this fashion. But the reality was very different after 2016: undermining progress toward universal healthcare and slowing migration from non-European countries were priorities of the GOP base, even if these objectives were not intensely desired by Americans overall.³¹

President Trump's head fakes obscured the fact that the real legal changes were driven by White House aides, grassroots immigration restrictionists strategically placed in government posts, and compliant agency heads.³² Sabotaging "Obamacare" and devising new rules aimed at deterring migration from non-White countries were carried out through the President's management of the administrative state and defensive litigation rather than congressional lawmaking. As incisive observers have pointed out, the overall goal was to "strip away depth" that insulates policies targeted by a Chief Executive³³—in this instance, social welfare programs and policies that promote liberal values such as proceduralism and equality.³⁴

²⁹ Adrian Carrasquillo, *The Mixed Messages of Trump's "Heart" on Immigration*, BUZZFEED NEWS (Mar. 3, 2017, 10:25 AM), <https://www.buzzfeednews.com/article/adriancarrasquillo/the-mixed-messages-of-trumps-heart-on-immigration> [<https://perma.cc/J7UP-9CUQ>].

³⁰ Alan Fram & Erica Warner, *Trump Gives More Mixed Signals in Bipartisan Health Deal*, PBS: NEWSHOUR (Oct. 18, 2017, 12:42 PM), <https://www.pbs.org/newshour/politics/trump-gives-mixed-signals-bipartisan-health-deal> [<https://perma.cc/83V8-AKHJ>].

³¹ Seung Min Kim, *Republicans Balk at Trump's Cuts to Legal Immigration*, POLITICO (Jan. 30, 2018, 3:36 PM), <https://www.politico.com/story/2018/01/30/trump-legal-immigration-republicans-378041> [<https://perma.cc/WZQ5-J5X4>] (describing pushback from Republican senators regarding Trump's proposed legislation to substantially cut legal immigration).

³² See, e.g., Camilo Montoya-Galvez, *Hardliners Gain Key Posts at Trump's Citizenship and Immigration Services Agency*, CBS NEWS (Nov. 21, 2019, 4:18 PM), <https://www.cbsnews.com/news/trump-immigration-policy-posts-hardliners-including-officials-who-worked-for-a-hate-group-gain-key-positions/> [<https://perma.cc/7VTB-HNAA>] (describing appointments of Ken Cuccinelli and John Zadrozny, who previously worked at FAIR, an SPLC-designated hate group, to United States Citizenship and Naturalization Services); see also *infra* notes 88-94 and accompanying text (discussing key players in Trump Administration's immigration policy).

³³ See STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 9* (2021).

³⁴ See *id.* at 143-46.

Harnessing the potency of social media, a modern President can shape public debate more effectively than Franklin D. Roosevelt once did over the radio.³⁵ These virtual fireside chats and electronic missives stir a sense of camaraderie in the breast of excited followers, identify allies and enemies, stoke anger, and build support for initiatives.³⁶ In the wrong hands, they are also a vehicle for antidemocratic values: conspiracy theories about stolen elections that prime the populace for authoritarian moves, dangerous narratives that stoke support for policies that target or fall hardest on racial minorities, and false signals of public virtue that obscure private self-interest and profiteering.³⁷

Thus, the central cultural role played by a President, coupled with new technology, can help set a virtuous example or a corrupt one, magnify divisions among an already polarized electorate or seek to repair them, advance constructive solutions that address inequality or promote policies that worsen it.

B. *The Danger of Unearned Transformation*

That Presidents can dominate public debate and send conflicting messages about political change raises a different problem: the risk of unearned transformation. Simply put, this is what happens when significant legal shifts occur without deep and broad public backing. Just as unelected judges can be too creative and engage in unearned jurisprudential expansions, so too can a President misread his political warrant and seek legal and bureaucratic changes that go well beyond any electoral mandate or contemporary support.

There are basically two kinds of legal changes that can take place: (1) “minoritarian” policies (policies not supported by a current majority of voters) entrenched through bureaucratic power; and (2) transformative reorderings of institutional relationships, practices, and interpretations.

The constitutional structure, which already lodges power indirectly in the hands of a small group of people operating in different institutions rather than a

³⁵ To be sure, a President must carefully consider whether and how to weigh in on controversial matters. Empirical evidence suggests that a President’s rhetorical intervention is likely to harden partisan views and so should be done sparingly. See, e.g., GEORGE C. EDWARDS III, ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT 241 (2003) (finding that “presidents typically do not succeed in their efforts to change public opinion”); Stephen P. Nicholson, *Polarizing Cues*, 56 AM. J. POL. SCI. 52, 53 (2012) (reporting that “partisan leaders did not persuade in-partisans . . . but instead significantly polarized the opinion of out-partisans”); B. Dan Wood & Soren Jordan, *Presidents and Polarization of the American Electorate*, 48 PRESIDENTIAL STUD. Q. 248, 248 (2018) (explaining that “statistical results show that post-1980 presidents have been central to electoral polarization generally and to polarization of both the president’s fellow and opposing partisans specifically”).

³⁶ See Gabriel Michael & Colin Agur, *The Bully Pulpit, Social Media, and Public Opinion: A Big Data Approach*, 15 J. INFO. TECH. & POL. 262, 273 (2018) (“The directness and flexibility of Twitter allows the president to bypass legacy media . . . and thus augment[] the power of the bully pulpit.”).

³⁷ See, e.g., Kevin Quealy, *The Complete List of Trump’s Twitter Insults (2015-2021)*, N.Y. TIMES: UPSHOT (Jan. 19, 2021), <https://www.nytimes.com/interactive/2021/01/19/upshot/trump-complete-insult-list.html>.

single, more populist organization, bakes in a risk of unearned transformation outside of Article V. It tries to diffuse that risk primarily through regular elections and checks and balances.

But the modern President's outsized role in everyday constitutional politics undermines those original checks and balances and allows him to evade internal and external obstacles. A President's ability to cow the judiciary or outrun the plodding pace and fact-specific nature of common law decision-making can make judicial accountability irrelevant—as the Trump Administration did for the Emoluments Clause cases and congressional subpoenas.³⁸ A President's ability to convince members of his own party to stymie legislative oversight can render Congress merely an adjunct to presidential lawmaking.

In an especially polarized environment,³⁹ maintaining party discipline and control of key institutions can be more important than securing voter support. Significant legal changes can take place through a President's power to manage the modern administrative state by acting through agency heads and White House aides. Those changes can be codified in places that don't always attract the attention of average citizens: e.g., agency rules, executive orders, presidential proclamations, internal legal memoranda, and court filings.⁴⁰

On top of breakdowns in checks and balances, a President's capacity to shape the news cycle could create a simulacrum of popular consent that may not exist. It also increases opportunities to engage in lawmaking in a nontransparent fashion and sometimes without direct accountability. When internal norms are broken or precedents are cleared away without much deliberation, the outcomes may not represent what voters signed up for.

A good example is corruption. Many of President Trump's supporters seemed to give him a pass in terms of complying with existing anti-corruption laws and

³⁸ After years of litigation, the Supreme Court vacated appellate court rulings against President Trump as moot after Biden's victory, leaving their precedential status uncertain. Adam Liptak, *Trump Emoluments Cases Are Dismissed as Moot*, N.Y. TIMES, Feb. 22, 2021, at A17.

³⁹ To be sure, some amount of polarization is baked into our form of government. As James Sundquist explained:

[I]f the president sends a proposal to Capitol Hill or takes a foreign policy stand, the opposition-controlled House or houses of Congress — unless they are overwhelmed by the president's popularity and standing in the country — simply *must* reject it. Otherwise they are saying the president is a wise and prudent leader. That would only strengthen him and his party for the next election . . . [.]

James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 POL. SCI. Q. 613, 629-30 (1988).

⁴⁰ Far from a practice that emerged fully formed in the 1930s, Mortenson and Bagley trace the practice of delegating legislative power to executives back to the colonial period. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021) (“[T]he Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control.”).

norms.⁴¹ He certainly spoke this way in dismissing objections and claiming, “the President can’t have a conflict of interest.”⁴² In a troubling fashion, government lawyers then joined his personal lawyers in defending him against allegations that his behavior violated the anti-corruption provisions of the Constitution.⁴³ Government lawyers raised a number of arguments that took a narrow definition of “emoluments” and invoked justiciability and immunity rationales that, if left in place, make it easier for successors to engage in even more blatant forms of self-enrichment.⁴⁴

Some executive-initiated legal changes are effortlessly altered by a successor. For instance, a person who campaigns for the presidency as a reformer could abandon a predecessor’s litigation positions, as well as adopt a broader definition of corruption for his administration. A President may also acquiesce to legislative reforms that restore or extend certain norms, such as transparency over a President’s finances or a prohibition on a President and his family profiting from government contracts while in office.

Other kinds of legal achievements are trickier to undo. Certain highly visible and politically salient changes, even when initiated by a President alone, can become lasting ones. By the time President Trump entered office, respect for same-sex marriage had become internal executive branch policy through the efforts of President Obama’s appointees⁴⁵ and was codified for the entire country in Supreme Court jurisprudence.⁴⁶ Rights create constituencies, and even Republican voters began warming to same-sex marriage over time.⁴⁷ The culture wars have since moved to different terrain: over the rights of transgender people

⁴¹ See Sean Illing, *Why Trump’s Base Probably Doesn’t Care About Corruption*, VOX (Mar. 29, 2018, 9:10 AM), <https://www.vox.com/2018/3/29/17113926/trump-corruption-cronyism-populism-europe-democracy> (suggesting supporters of populist leaders may perceive corruption differently).

⁴² Jeannie Suk Gersen, *Can the Constitution Reach Trump’s Corruption?*, NEW YORKER (June 9, 2020), <https://www.newyorker.com/news/our-columnists/can-the-constitution-reach-donald-trumps-corruption-emoluments>.

⁴³ See Jane Chong, *The Justice Department Has Had to Twist Itself in Knots to Defend Trump on Emoluments*, ATLANTIC (May 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/dojs-about-face-emoluments/612004/>.

⁴⁴ See *id.*; Suk Gersen, *supra* note 42.

⁴⁵ See Tsai, *Obama’s Conversion*, *supra* note 6, at 15-22.

⁴⁶ *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015).

⁴⁷ GOP support for same-sex marriage has increased over the last ten years and, in 2020, crossed into a majority for the first time. Sarah Polus, *Poll: Majority of Republicans Support Same-Sex Marriage for the First Time*, HILL (Mar. 23, 2021, 1:12 PM), <https://thehill.com/homenews/news/544500-poll-majority-of-republicans-support-same-sex-marriage-for-the-first-time> [<https://perma.cc/32K7-WWV5>]; see also Tsai, *Obama’s Conversion*, *supra* note 6, at 47-50 (elaborating on why “[r]ights transformations are usually asymmetrical”).

in the workplace, the military, and schools,⁴⁸ as well as those of evangelicals in resisting civil rights laws and public health regulations.⁴⁹

C. *Wither Regime Theory?*

By itself, regime theory does not tell us everything we need to know about whether a President's efforts to initiate major change are legitimate or supported by the people. What it can do is highlight discursive and decisional patterns.⁵⁰ These patterns in institutional and cultural practices—both convergences and disjunctions—can be contained within larger regimes or cut across them, and they are different from the cycles in which Balkin is interested. But we need more tools in order to evaluate their significance.

The fact that President Donald Trump lost the 2020 election despite the enormous advantages of incumbency tells us that a majority of Americans never warmed to his brand of leadership. But it may or may not tell us anything about whether President Biden's Administration can be an influential one. As Balkin points out, a new President doesn't guarantee that his time in office will inaugurate a new regime (or if you prefer, a new consensus of governing principles).⁵¹ Even if we are in a moment that is ripe for big change, a President must have an acute sense of history and seize the opportunities that arise.

Of course, the fact that we can only retrospectively identify the beginning and end of constitutional regimes reduces the utility of regime theory, or at least this version of it. That's because in Balkin's hands, a regime is characterized more by the conditions he associates with the general ascendance or deterioration of a regime rather than substantive principles of governance.⁵² Consider, for instance, Bruce Ackerman's theory of dualism which, for all its cumbersome features, contends that constitutional regimes are characterized by coherent legal principles articulated by the people and subsequently inscribed by judges or legislators.⁵³ Compared with Ackerman's, Balkin's approach isn't just antiformalist—it's actually nonformalist, untethered from criteria to legitimate beginnings and endings. To the extent Balkin's theory makes judgments about changes that occur, it comes from a precommitment to basic governance values, such as equality, virtue, and cooperation.⁵⁴

⁴⁸ See Matthew Laviertes, *How Transgender Rights Became the Focus of a U.S. Culture War*, REUTERS (Mar. 31, 2021, 1:19 PM), <https://www.reuters.com/article/us-usa-transgender-lawmaking-timeline-tr/how-transgender-rights-became-the-focus-of-a-u-s-culture-war-idUSKBN2BN2WH> [<https://perma.cc/9ANH-JNTH>].

⁴⁹ See David French, *How Can We Escape the COVID-19 Vaccine Culture Wars?*, TIME (June 8, 2021, 7:00 AM), <https://time.com/6071909/covid-19-vaccine-culture-war/>.

⁵⁰ See generally Tsai, *Reconsidering Gobitis*, *supra* note 6 (recounting FDR Administration's coordinated strategy to undermine *Gobitis*).

⁵¹ BALKIN, *supra* note 2, at 13.

⁵² See *id.* at 14.

⁵³ See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 20-21 (1998).

⁵⁴ See BALKIN, *supra* note 2, at 6.

II. RELATIVE POWER AND WORK-AROUNDS

Trump's presidency offered a vivid lesson that even obscure government actors' conduct can contribute to democratic rot by eroding conditions of good governance. Insofar as the Framers' original theory of ambition checking ambition made sense,⁵⁵ that organizing principle of stability depends heavily on other institutions matching one's exercises of prerogative. When repeated, aggressive actions are met with tepid responses, the paucity of firm pushback leads to new equilibriums. Troubling constitutional baselines and imbalanced relationships may result as those new equilibriums acquire constituencies around powers or rights.

The imbalanced status quo involving war powers is a classic example in which the ceding of power by Congress and the judicial validation of presidential aggression have augmented the President's place as first mover.⁵⁶ Furthermore, during the Trump years, the federal judiciary had many opportunities to enhance Congress's oversight authority but consistently found ways to reward the President's foot-dragging⁵⁷—even when it came to impeachment.⁵⁸ As for criminal investigations conducted by others, the Supreme Court was unwilling to erect new shields,⁵⁹ but by the time it handed down key rulings, the investigations were clearly stalled enough so as to not reveal any truly damaging information before the election.

An intriguing aspect of Balkin's thesis is his claim that the actual exercise of judicial review risks being even more antimajoritarian than usual in an age when

⁵⁵ See THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

⁵⁶ See generally BRUCE ACKERMAN, BEFORE THE NEXT ATTACK (2006) (proposing "emergency constitution" to prohibit President from declaring emergency without timely initial congressional approval and reauthorization); LOUIS FISHER, PRESIDENTIAL WAR POWER, at xiii (3d ed. rev. 2013) (contending that "[t]he contemporary definition of executive power—to send troops anywhere in the world whenever the President likes—would have astonished the framers of the Constitution"); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION (1990) (finding that "congressional acquiescence" and "judicial tolerance" have led President to generally win in foreign affairs).

⁵⁷ See, e.g., Trump v. Mazars, 140 S. Ct. 2019, 2035-36 (2020) (concluding that lower courts had not adequately considered "weighty concerns regarding the separation of powers" in ruling on congressional subpoenas seeking information on President Trump's personal finances).

⁵⁸ See, e.g., DOJ v. House Comm. on the Judiciary, 140 S. Ct. 2800, 2800 (2020) (mem.) (granting stay of D.C. Circuit ruling requiring release to House Judiciary Committee of redacted grand jury materials referenced in Mueller Report); Quinta Jurecic & Benjamin Wittes, *Trump's Former White House Counsel Will Testify Before Congress. What Now?*, LAWFARE (May 17, 2021, 1:27 PM), <https://www.lawfareblog.com/trumps-former-white-house-counsel-will-testify-congress-what-now> [<https://perma.cc/K2JM-33J7>] (describing "tortured," multiyear procedural history of House Judiciary Committee's lawsuit seeking to compel testimony of former White House Counsel Don McGahn).

⁵⁹ See Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) (holding that "the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need").

voters are deeply divided.⁶⁰ In such times, he says, “judicial review allows polarized political elites to win victories they can no longer win in the political process.”⁶¹ This is an elaboration upon Balkin’s earlier work on partisan entrenchment, which highlighted how every President will try to advance party interests by appointing jurists friendly to his policies.⁶² “[D]uring periods of constitutional rot,” he now says, “the judiciary tends to be part of the problem rather than part of the solution” because politicians search for jurists that might “ratify policies that increase income inequality or help entrench the dominant party in power.”⁶³

Balkin says that the tendency of judicial review to worsen democratic decline doesn’t mean that “the judges themselves are especially corrupt,”⁶⁴ but it’s worth reflecting on why this might be the case. I can think of several reasons. First, federal judges, especially Supreme Court Justices, see themselves as part of the national elite⁶⁵ and will tend to defer to the exercise of national power whenever possible.

Second, in a time of increased tolerance for corruption and inequality by political elites, the courts will tend to reflect, and even magnify, those tendencies, rather than see themselves as equipped to fashion comprehensive solutions. As I’ve argued elsewhere, institutional passivity when civic culture is in decline is itself a problem.⁶⁶ We actually need judges to be more creative in stemming illiberal tendencies, but it’s much harder to expect that will actually happen—at least without a wholesale reimagining of the judicial function.

Third, insofar as true believers will feel emboldened within institutions, jurists will similarly be tempted to match outcomes to party preferences, even if it means minimizing or reversing older doctrine to do so. As Balkin points out,

⁶⁰ See BALKIN, *supra* note 2, at 70, 112-34.

⁶¹ *Id.* at 70.

⁶² See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) (contending that partisan entrenchment is best explanation for changes in constitutional meaning over time).

⁶³ BALKIN, *supra* note 2, at 70.

⁶⁴ *Id.* at 71.

⁶⁵ See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 11-12 (2019).

⁶⁶ Robert L. Tsai, *Considerations of History and Purpose in Constitutional Borrowing*, 28 WM. & MARY BILL RTS. J. 517, 530 (2019) (“[I]f one’s diagnosis of America’s democratic condition is decidedly negative, then one would probably favor an approach that doubles down on egalitarianism and anti-corruption as essential features of an improved regime. . . . [L]eaving a vision of democracy unarticulated—in the background—leads to far more idiosyncratic outcomes, some of which could help arrest democratic disrepair, and others that may very well quicken the pace of decline.” (footnote omitted)). When political culture is dysfunctional, major programs of civic education will also be necessary to help slow degeneration and stir renewal. See generally Linda C. McClain & James E. Fleming, *Civic Education in Circumstances of Constitutional Rot and Strong Polarization*, 101 B.U. L. REV. 1771 (2021) (calling for civic education regime to address extreme polarization and constitutional rot).

“[i]n a strongly polarized system, the distinction between constitutional principles and partisan advantage tends to melt away.”⁶⁷

At the methodological level, for judges to arrest democratic backsliding, their decisions would have to become more purposive and consequentialist to counteract political actors’ troubling behavior. Resolving issues at a high level of generality or otherwise seeking refuge in evenhanded principles is apt to worsen corrupt or antidemocratic conditions by either validating bad conduct or closing down possibilities for political reform.

The difficulty is that the fractured environment will make it harder for consensus to emerge within multimember bodies like the Supreme Court over what to do. As Balkin points out, institutions built to foster a variety of approaches will be polarized over goals and methods at the very moment consensus is necessary to drive effective action.⁶⁸

Thus, in periods of stagnation or decline, transformative prodemocratic solutions from judges may be beyond the realm of possibility, and the best that can be expected are limited (or minimalist) answers that keep decline from accelerating. That’s one way to understand the Roberts Court, one that includes many former executive branch lawyers predisposed to preserve presidential leadership: the best that it can muster is the surprising *Census Case*⁶⁹ or its decision that standing rules prevent federal judges from entertaining charges of partisan gerrymandering.⁷⁰ But most of the time, the greater risk, especially after the addition of another Justice to Chief Justice Roberts’s right, is an outcome like *Shelby County v. Holder*⁷¹ or *Brnovich v. Democratic National Committee*,⁷² where different factions on an already conservative Court unite to drastically limit the effectiveness of the Voting Rights Act.⁷³

Balkin admirably discusses many of these episodes, mostly as illustrations of the risks of polarization and corruption.⁷⁴ But we can go further than he does:

⁶⁷ BALKIN, *supra* note 2, at 137.

⁶⁸ *See id.* at 118.

⁶⁹ Dep’t of Com. v. New York (*Census Case*), 139 S. Ct. 2551, 2574-76 (2019) (concluding that Commerce Secretary’s stated rationale for reinstating citizenship question on census was pretextual).

⁷⁰ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019) (concluding that “partisan gerrymandering claims present political questions beyond the reach of the federal courts”).

⁷¹ 570 U.S. 529 (2013).

⁷² 141 S. Ct. 2321 (2021).

⁷³ *See id.* at 2343-46 (finding no violation of Voting Rights Act where Arizona authorized discarding out-of-precinct votes and prohibited third parties from collecting and delivering mail-in ballots); *Shelby County*, 570 U.S. at 556-57 (declaring section 4(b) of Voting Rights Act unconstitutional).

⁷⁴ Pointing to the fact that Justices Thomas, Gorsuch, and Kavanaugh would have approved the Commerce Secretary’s odd reason for adding a citizenship question to the census in the *Census Case*, Balkin writes, “[i]f Republican elites do not see a threat to democratic norms, Republican-appointed judges, who are tightly connected to conservative elite networks, are likely to view the world through the same ideological lens.” BALKIN, *supra* note 2, at 145.

what these scenarios also underscore are the imbalanced powers and extensive opportunities enjoyed by one branch to worsen inequality and official malfeasance in the first place.

The *Census Case* involved a crucial component of the Trump Administration's plan to exclude the counting of undocumented noncitizens so as to entrench partisan power, despite the clear language of the Constitution.⁷⁵ Using the full force of his powers over relevant agencies, President Trump first tried to add a citizenship question to the census but was rebuffed by the judiciary.⁷⁶ He later tried to acquire data on undocumented noncitizens through executive order⁷⁷ and issued an accompanying memorandum to exclude these individuals from the census count for apportionment purposes.⁷⁸ However, he ran out of time to figure out how to operationalize this plan when the clock on his presidency expired.

If that presidential gambit had succeeded, it would have locked in partisan advantages in terms of representation and appropriations for at least ten years. It's only due to the clumsy justifications of the Secretary of Commerce and the last minute revelation of smoking-gun documents that Chief Justice Roberts changed his mind after oral argument.⁷⁹ If President Trump had won a second term, or Justice Ginsburg had passed away earlier, all bets would have been off.

A. *Work-Arounds*

The clandestine connections between key allies of President Trump in the Commerce Department and outside figures, such as longtime GOP redistricting strategist Thomas Hofeller,⁸⁰ underscore the networks of informal power a President can bring to bear on government policy and, in turn, on major initiatives and constitutional structure. Getting this census information was

⁷⁵ See U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

⁷⁶ Dep't of Com. v. New York (*Census Case*), 139 S. Ct. 2551, 2576 (2019).

⁷⁷ Exec. Order No. 13,880, 3 C.F.R. 339 (2020).

⁷⁸ Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 2020 DAILY COMP. PRES. DOC. 528 (July 21, 2020). Although the memorandum was later declared unlawful and its implementation enjoined, see *New York v. Trump*, 485 F. Supp. 3d 422, 481-82 (S.D.N.Y. 2020), the Supreme Court vacated the ruling in late 2020 on justiciability grounds. *Trump v. New York*, 141 S. Ct. 530, 536-37 (2020) (per curiam).

⁷⁹ See Robert L. Tsai, *Equality Is a Brokered Idea*, 88 GEO. WASH. L. REV. ARGUENDO 1, 9 (2020). I describe what took place and defend Chief Justice Roberts's opinion finding the Secretary of Commerce's justifications pretextual as a form of practical equality. See *id.* at 5-15.

⁸⁰ Hansi Lo Wang, *Emails Show Trump Officials Consulted with GOP Strategist on Citizenship Question*, NPR (Nov. 12, 2019, 11:37 AM), <https://www.npr.org/2019/11/12/778496494/emails-connect-trump-officials-and-gop-redistricting-expert-on-citizenship-quest> [<https://perma.cc/38EC-Z53S>].

deemed essential to the GOP's long-term plan to entrench partisan power.⁸¹ But the President's allies on the inside needed to bring that expertise from the outside, and then find a way to leverage that knowledge within the ambit of formal power without tipping off watchdogs, whistleblowers, lawyers, and skeptical employees within the government.

This example illustrates the rise of what I call *executive work-arounds*: creative alliances and ad hoc structures to circumvent existing bureaucracies and civil service employees that might be hostile to a President's agenda. These informal organizations and relationships can allow a President's allies to work expeditiously and often secretly. They simultaneously represent a response to bureaucratic inertia and a way of overcoming it. The downsides are that by circumventing protocol, their work may not be completely vetted, their moves are likely to be more ideologically pure or partisan in nature, and such projects will almost certainly push or exceed legal boundaries.

For instance, much of the legal infrastructure created within the Bush Administration for detaining and interrogating suspects after 9/11 came from members of a secret brain trust that included John Yoo, David Addington (Vice President Cheney's Counsel), and Alberto Gonzales.⁸² At times, Yoo's direct supervisors in the Office of Legal Counsel ("OLC") had no idea with whom he was meeting.⁸³ Information was shared on a need-to-know basis, and certain high-ranking figures such as Condoleezza Rice and Colin Powell were deliberately frozen out.⁸⁴

When it came time for legal memos to be signed, questions were certainly asked by superiors, but the impression created was of a train that had left the station at the behest of the President (though it was always unclear the extent to which President Bush was actually apprised of the enormous legal changes being authorized).⁸⁵

⁸¹ See *id.* (describing Hofeller's conclusion that data on undocumented immigrant populations would enable redistricting that advantaged "Republicans and Non-Hispanic Whites").

⁸² JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 22 (2007) (discussing secretive "War Council" that had "enormous influence" over anti-terrorism policy); Philippe Sands, *The Green Light*, VANITY FAIR, May 2008, at 218, 224 (describing Yoo, Addington, Gonzales, and others as "in effect, a torture team of lawyers, freeing the administration from the constraints of all international rules prohibiting abuse").

⁸³ See GOLDSMITH, *supra* note 82, at 24 (noting that although Yoo technically worked under OLC head Jay Bybee and Attorney General John Ashcroft, "he took his instructions mainly from Gonzales, and he sometimes gave Gonzales opinions and verbal advice without fully running matters by the Attorney General").

⁸⁴ See Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004 (§ 1), at 1.

⁸⁵ See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 62-70, 306-09 (Anchor Books 2009) (2008) (describing Administration's secretive, insular process for issuing "idiosyncratic" legal guidance).

Without following the usual hierarchy within the Department of Justice or working through existing interagency processes, this ad hoc group placed its stamp on a legal transformation based on the theory of the unitary executive.⁸⁶ Among other things, they redefined the meaning of torture under federal and constitutional law and rendered the Fourth Amendment no barrier to domestic anti-terrorism surveillance.⁸⁷

Similarly, many of President Trump's immigration policies were developed by a handful of trusted aides in consultation with external allies.⁸⁸ After a few key appointees disappointed him by not being hard-line enough,⁸⁹ he replaced them and appointed some agency heads without subjecting them to Senate approval. At one point, the two top officials at Homeland Security were Chad Wolf and Ken Cuccinelli, the first unconfirmed, the second viewed as unconfirmable.⁹⁰ For nearly two years, the agency was run by four different acting secretaries without full democratic vetting—from April 2019, when Kirstjen Nielsen was shown the door, to February 2021, when President Biden's pick, Alejandro Mayorkas, was finally confirmed by the Senate.⁹¹

Litigation challenging the legality of Wolf's appointment took months,⁹² as expected, and Wolf eventually resigned—but only after it was apparent

⁸⁶ *Id.* at 61.

⁸⁷ *Id.* at 46.

⁸⁸ President Trump's suspicion of experts coincided with his trust of people such as Stephen Miller who had proved their personal loyalty and willingness to disrupt the status quo. *See, e.g.*, Nick Miroff & Josh Dawsey, *The Adviser Who Scripts Trump's Border Policy*, WASH. POST, Aug. 18, 2019, at A1 (explaining that, "[b]ecause Trump has strong feelings about immigration but just superficial knowledge of how the immigration system works, the president relie[d] heavily on [Stephen] Miller to explain and interpret it for him"). Yet President Trump also was forced to lean heavily on a small circle of allies because he was unusually unprepared to take office given the surprising nature of his victory and the difficulty he faced recruiting talent precisely because of his style and objectives. SKOWRONEK ET AL., *supra* note 33, at 138.

⁸⁹ *See, e.g.*, Dara Lind, *Homeland Security Secretary Kirstjen Nielsen's Resignation, Explained*, VOX (Apr. 7, 2019, 6:46 PM), <https://www.vox.com/2019/4/7/18299585/kirstjen-nielsen-trump-dhs-homeland-security-resign-secretary-new>.

⁹⁰ Cuccinelli's ridiculous official title reflected the absurdity of the position: Senior Official Performing the Duties of the Deputy Secretary of Homeland Security. *See* Camila Domanoske, *Government Watchdog Says Homeland Security Leaders Were Not Legitimately Appointed*, NPR (Aug. 14, 2020, 1:06 PM), <https://www.npr.org/2020/08/14/902537541/government-watchdog-says-homeland-security-leaders-were-not-legitimately-appoint> [<https://perma.cc/JT32-5HDP>].

⁹¹ *See* Sabrina Rodríguez, *Mayorkas Confirmed as Secretary of Homeland Security*, POLITICO (Feb. 2, 2021, 6:40 PM), <https://www.politico.com/news/2021/02/02/mayorkas-confirmed-homeland-security-465036> [<https://perma.cc/N29K-5A3E>].

⁹² *See* Pangea Legal Servs. v. U.S. Dep't of Homeland Sec., 512 F. Supp. 3d 966, 973, 974 (N.D. Cal. 2021) (noting that "[t]his Court is now the fifth federal court to be asked to plow the same ground about Wolf's authority *vel non* to change the immigration regulations" and concluding that "the chain of succession the government invokes—from Nielsen to McAleenan to Wolf—does not hold together"); *see also* Maria Sacchetti, *Judge's Ruling on*

President Trump had lost the election.⁹³ In the meantime, Homeland Security played a major role in advancing the goals of immigration restrictionists, ensuring that the agency's public-facing activities pushed narratives favored by the movement.⁹⁴ The rest of the work was done by a Republican-controlled Congress sidelining itself on immigration matters. That left the Trump Administration's lawyers largely free to beat back judicial orders without having to fight on a second front.

Originally created after 9/11 with authority over matters of national security and immigration enforcement,⁹⁵ the Department of Homeland Security was also active in the President's reelection efforts: its agents and DOJ agents were deployed to various cities headed by Democratic mayors in the wake of George Floyd's murder to quell racial justice protests.⁹⁶ In this way, the Administration employed work-arounds to sharpen perceived partisan differences for electoral advantage. The Department of Homeland Security worked to put boots on the ground in American cities while Acting Secretary Wolf pressed talking points blaming Antifa and Black Lives Matter activists for widening unrest,⁹⁷ using bureaucratic resources to stem the success of the racial justice movement.

As these moves illustrate, interim appointments have emerged as effective "instruments of presidential control."⁹⁸ When personal loyalty is prized over policy expertise or agency experience, unconfirmed appointees subvert legislative desire for team play and steady administration. During President Trump's tenure, certain interim appointees acted as "unmediated extension[s] of the president's ego"⁹⁹ or "frictionless conduit[s] for the president's preferences."¹⁰⁰

Authority at DHS Could Have Implications for DACA, WASH. POST, Nov. 16, 2020, at A3 (reporting that district court judge in similar case found "the 'plain text' of the department's order of succession showed that Wolf's ascension to acting secretary did not follow established law").

⁹³ Nicole Narea, *Chad Wolf Just Resigned as Acting Homeland Security Secretary*, VOX (Jan. 11, 2021, 7:25 PM), <https://www.vox.com/policy-and-politics/2021/1/11/22225769/chad-wolf-resign-dhs-cabinet-trump>.

⁹⁴ Zolan Kanno-Youngs & Maggie Haberman, *White House, Pointing to Pandemic, Moves to Bolster Immigration Barriers*, N.Y. TIMES, June 13, 2020, at A16.

⁹⁵ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. §§ 101-601).

⁹⁶ See, e.g., Gillian Flaccus, *Oakland, Portland Sue Over Use of Federal Agents at Protests*, AP NEWS (Oct. 15, 2020), <https://apnews.com/article/san-francisco-lawsuits-oregon-racial-injustice-courts-5291c46cf916ab74d8814fa171a7cf21>.

⁹⁷ Acting Secretary Chad Wolf (@DHS_Wolf), TWITTER (June 1, 2020, 5:04 PM), https://twitter.com/DHS_Wolf/status/1267562571399344128 [<https://perma.cc/X4L9-HDCZ>] ("Evidence currently shows that left wing #ANTIFA-inspired groups are on the ground committing acts of violence – completely consistent with other statements from the Administration.").

⁹⁸ SKOWRONEK ET AL., *supra* note 33, at 139.

⁹⁹ *Id.* at 136.

¹⁰⁰ *Id.* at 145.

III. WHEN PRESIDENTS LEAN ON MOVEMENTS: UPSIDES AND DOWNSIDES

This brings us to a special kind of problem, a modern phenomenon that holds out the promise of bigger and quicker transformation but also risks great instability. Perhaps the most significant development in executive leadership during the last century has been more intimate interactions between Presidents and grassroots movements—a development that has paid enormous dividends but also introduced a new, disruptive element into American governance. Balkin has an optimistic view of social movements, contending that without robust mobilization the rights of working-class people will be “underprotected” and economic inequality will be hard to reverse.¹⁰¹

Yet while social movements reveal the wellsprings of popular discontent and at times the inadequacies of the constitutional order, they are not an unqualified good. As Sidney Milkis and Daniel Tichenor chart in their new book, *Rivalry and Reform*, Presidents have kept unruly movements at arm’s length for much of the nation’s history.¹⁰² When a President did interact with a social movement, he more often acted to suppress it than he did to embrace it.¹⁰³

The reasons for this conventional wisdom are simple: (1) as a matter of virtuous governance, a President should try to represent all Americans and not just narrow factions; (2) pragmatically, being perceived as too closely tied to radicals can erode popular support for other parts of an agenda; and (3) these relationships tend to have narrowing and intensifying effects—activists make strong demands and expect performances of ideological loyalty, whereas successful Presidents tend to prize flexibility in judgment and projection of an ethic of care.

At the same time, activists also have plentiful reasons to manage appearances carefully. They are more successful when they are able to avoid being co-opted by moderates, resist centrist solutions that don’t advance movement goals, and ensure that they retain the authenticity and moral clarity indispensable to mobilizing citizens to confront historical grievances.¹⁰⁴ In the competition for followers among civic groups, recruiting gains come from a sense that activists can exert influence, but recruiting losses come from a sense that a reform group has given up more than it has accomplished.

¹⁰¹ BALKIN, *supra* note 2, at 164.

¹⁰² MILKIS & TICHENOR, *supra* note 17, at 3.

¹⁰³ *See id.* at 4.

¹⁰⁴ Congressman John Lewis spoke to the challenges activist groups face in the context of his own involvement with the Student Nonviolent Coordinating Committee (“SNCC”). JOHN LEWIS WITH MICHAEL D’ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* 275-301 (1998) (recounting organizational fallout after 1964 Democratic National Convention). Describing the weeks leading up to Bloody Sunday, Lewis wrote:

It was important for us to hold the moral high ground, to maintain the principles of nonviolent action and response no matter what. Demonstrators may have begun fighting back elsewhere, some under the name of SNCC, but in Selma we were determined to stay the course that had gotten the movement this far.

Id. at 315.

President Lincoln's experience with abolitionists typified the general attitude of presidential wariness. The issue of slavery threatened to fracture the Republican party, and he worried that militants who turned to self-help and violence would end up tarring more gradual progress toward abolition.¹⁰⁵ Moreover, through a strategy of gradualism he sought to mediate between those who pushed for an expansive view of executive power in the name of liberating enslaved people and other figures within his party who believed in a legally constrained presidency.¹⁰⁶ In an era of strong congressional participation in political affairs, a President risked much by failing to heed institutional dynamics. For some movement figures, even the dramatic Emancipation Proclamation should have been denounced for its shortcomings.¹⁰⁷

If President Lincoln exemplified the classical model, then President Lyndon B. Johnson forged a new approach. Despite warnings from allies that his party would suffer electoral losses from allying the White House with the civil rights movement, President Johnson left his mark on history by doing the work of racial justice.¹⁰⁸ Since then, Presidents have continued to flirt with social movements in bids to creatively evade gridlock, as earlier skepticism about sustained interactions has broken down.

Today, a President must still manage a host of competing considerations and demands on his time, but in our de facto two-party system, modern parties already find themselves in loose arrangements with a variety of movements and interest groups. Grassroots organizers help stoke interest in core issues and identify the intensity of desire to move on particular issues. Their success in mobilizing voters helps elected officials not only decide what positions to take, but also which issues to prioritize. A President must still find ways to harmonize or transcend these arrangements, but he is not at liberty to ignore them completely. As certain movements come to dominate parties, we should expect a President to have to take their demands more seriously—and at times to displace what a majority of the party or electorate as a whole may want.

At least since Machiavelli, it has been understood that mixed constitutional orders presume the inevitability of social conflict and seek to channel conflict in ways that balance interests and prerogatives for the sake of order.¹⁰⁹ Wild swings

¹⁰⁵ See MILKIS & TICHENOR, *supra* note 17, at 58.

¹⁰⁶ See *id.* at 58-62.

¹⁰⁷ See *id.* at 63-64.

¹⁰⁸ As Senator Richard Russell apparently mused, "Lyndon Johnson was the most amazingly resourceful fellow . . . [H]e was a man who really understood power and how to use it . . . [W]e could have beaten John Kennedy on civil rights, but not Lyndon Johnson." ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* 465 (2012). President Johnson brought into the Oval Office several civil rights leaders—Roy Wilkins, Whitney Young, James Farmer, A. Philip Randolph, and Dr. Martin Luther King, Jr. *Id.* at 488. In his meetings with them, Johnson asked "if [they] would do the things required to be done to get it enacted," *id.* at 489, and remarked, "[w]e're going to go all out on this civil rights bill." *Id.* at 490.

¹⁰⁹ See NICCOLÒ MACHIAVELLI, *THE PRINCE* 38-42 (Harvey C. Mansfield trans., The Univ.

in who gets to rule and whose interests predominate do more than contribute to a general sense of disorder; they also create opportunities that can be exploited by demagogues and the corrupt. Such a conflict-centered account offers the best understanding of the reaction that has followed major gains in equality, rather than believing that regression is inevitable. It may also contribute to the impression that history operates cyclically rather than on a highly contingent basis.

A. *Social Movements and Minoritarian Governance*

One concern in a polarized environment is that a social movement may be more valuable to a President in retaining influence than his own party. Even a minoritarian President such as Trump, who was elected despite losing the popular vote and who never governed in a manner so as to garner fifty percent approval at any point during his term,¹¹⁰ nevertheless had an excellent shot at reelection because he kept key promises to his party's base. If he had not fumbled the government's response to the pandemic, he may well have been reelected because that crisis gave him a perfectly timed opportunity to make up ground with his detractors.

A leader may appear effective despite implementing deeply unpopular policies. The appearance of success may be sufficient to retain power when turnout is low or when enough party loyalists control key election posts. Gaining a stranglehold on base support not only tamps down internal opposition; it can also serve as a means of trying to govern under suboptimal conditions.

As Milkis and Tichenor point out, when President Trump's support dipped precipitously during his first impeachment trial, he doubled his efforts to reknit the bonds between his Administration and Evangelicalism.¹¹¹ This part of his coalition, more than any other, offered enthusiastic support even as some other members of his coalition began to edge away.¹¹²

Additionally, as his defeat began to sink in, President Trump turned to close allies he had pardoned, such as Roger Stone, Michael Flynn, and others with close ties to the militia movement, in order to stoke support for subverting the election.¹¹³ Indeed, several Oath Keepers—a paramilitary group whose

of Chi. Press 2d ed. 1998) (1532).

¹¹⁰ Alexandra Hutzler, *Donald Trump Is First President in Modern History to Never Reach 50% Approval in Gallup Poll*, NEWSWEEK (Jan. 19, 2021, 11:52 AM), <https://www.newsweek.com/donald-trump-first-president-modern-history-never-reach-50-approval-gallup-poll-1562653>.

¹¹¹ MILKIS & TICHENOR, *supra* note 17, at 312.

¹¹² See Sarah Jones, *White Evangelicals Made a Deal with the Devil. Now What?*, N.Y. MAG.: INTELLIGENCER (Dec. 6, 2020), <https://nymag.com/intelligencer/2020/12/white-evangelicals-made-a-deal-with-trump-now-what.html>.

¹¹³ Rob Kuznia, Curt Devine, Nelli Black & Drew Griffin, *Stop the Steal's Massive Disinformation Campaign Connected to Roger Stone*, CNN: INVESTIGATES (Nov. 14, 2020, 11:08 AM), <https://www.cnn.com/2020/11/13/business/stop-the-steal-disinformation-campaign-invs/index.html> [<https://perma.cc/V4JX-TU5N>].

members facilitated the storming of the Capitol on January 6, 2021—were serving as “security” for Stone at the rally, hours before apparently taking part in the insurrection.¹¹⁴ An arm of a Republican state attorneys general group also apparently collaborated with a broad range of right-wing groups to spread election disinformation under the banner of “stop[ping] the steal.”¹¹⁵

Oddballs peddling outlandish theories about voting machines changing results in favor of Biden became President Trump’s lawyers, campaign spokespersons, and confidants during his multistate campaign to overturn his electoral loss.¹¹⁶ They joined forces, to different degrees of proximity, with elected officials in several states and Senators Lindsey Graham, Ted Cruz, Josh Hawley, and Tommy Tuberville in an unprecedented effort to throw out electoral votes in close states and pressure a sitting Vice President to sow discord and usurp power.¹¹⁷

That President Trump ultimately failed and was impeached a second time may indicate the limits of allying oneself with conspiracists and antidemocratic positions. Future Presidents in similar circumstances will almost certainly adjust their strategy—either with more feints to the center or by racking up more popular achievements. But the genie is out of the bottle when it comes to ascending to national office in this fashion.

B. *Popular Frustration and Extremism*

A second, related concern is that as segments of the population become frustrated with the inability to dislodge legal accretions believed to be illegitimate, they will rely more frequently upon not just movements but movements committed to extreme ideologies and tactics. As Presidents look beyond party elites for popular support, or invite more radicals to share formal power, we should expect more elected officials endorsing quixotic and at times dangerous ideas. While popular movements have at times been useful to reform, it’s also possible the general dynamic could worsen polarization, corruption, and inequality.

¹¹⁴ Spencer S. Hsu & Devlin Barrett, *Authorities Probing Rioters’ Possible Ties to Stone, Jones*, WASH. POST, Feb. 22, 2021, at A12; Kyle Cheney & Josh Gerstein, *Another Oath Keeper with Links to Roger Stone Charged in Capitol Riot*, POLITICO (Mar. 9, 2021, 6:33 PM), <https://www.politico.com/news/2021/03/09/oath-keepers-capitol-riot-roger-stone-474865> [<https://perma.cc/2LM7-ZP5W>].

¹¹⁵ Jamie Corey, *Republican Attorneys General Dark Money Group Organized Protest Preceding Capitol Mob Attack*, DOCUMENTED (Jan. 11, 2021), <https://documented.net/2021/01/republican-attorneys-general-dark-money-group-organized-protest-preceding-capitol-mob-attack/> [<https://perma.cc/EN9J-V2BN>].

¹¹⁶ See Ali Swenson, *AP Fact Check: Trump Legal Team’s Batch of False Vote Claims*, AP NEWS (Nov. 19, 2020), <https://apnews.com/article/fact-check-trump-legal-team-false-claims-5abd64917ef8be9e9e2078180973e8b3> [<https://perma.cc/842Z-JLQJ>].

¹¹⁷ All told, 8 senators and 139 representatives voted against certifying President Biden’s win. Karen Yourish, Larry Buchanan & Denise Lu, *Those Who Objected*, N.Y. TIMES, Jan. 8, 2021, at A10.

For instance, staunch philosophical opposition to the administrative state or civil rights revolution has morphed from mainstream citizens leagues and states' rights organizations to the modern militia movement and various White identity and revanchist groups.¹¹⁸ Some of these groups operate entirely underground, others in plain sight. Conspiratorial communities with anti-statist ideas are more willing to support radical means of disabling effective governance.

Presidents who are ambitious or desperate will still be tempted to draw from the energy and organizational prowess of grassroots movements. They might not believe in a movement's values or have any deep commitment to its policy objectives but may choose to ape its members' ways of speaking, bask in the glow of their adulation, and envy how movement figures can command media attention. Even a carefully curated engagement will lend credence to movements based on irrationalism, nationalism, sectionalism, or militarism. More broadly, unhealthy, poorly mediated relationships between Presidents and movements could poison political culture rather than spur civic renewal.

Along these lines, we will be grappling with the darker aftershocks of the events of January 6, 2021, for some time to come. On the popular side of things, a number of movements have experienced a recruitment bonus from presidential-level interaction and support.¹¹⁹ Whether the criminal trials of insurrectionists will dampen that enthusiasm or merely create political martyrs will be important to the stability of the legal order.

The legacy for conventional politics may be more troubling. In the future, we may see more presidential aspirants arising out of movements. Even nonradicals will have to navigate movement-dominated party politics. As a result, the acquisition of formal power could require adopting the behavior and goals of movement insiders.

C. *Institutional Co-Optation*

A third problem is the heightened risk of co-optation. In the past, the danger that a movement would be co-opted by a President and his party was a significant possibility. Going forward, as anti-“Deep State” rhetoric opens the door to more unruly political behavior, a different possibility may materialize: a presidency co-opted by a movement. Such figures, blessed by a movement because they adopt its views and programs before they acquire formal power, will approach governance primarily as the instrument to realize movement objectives. By nature, a true movement leader will tend not to see his role as caretaker but as

¹¹⁸ See Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 TEMP. L. REV. 287, 287 (2014) (describing anti-New Deal group as predecessor of modern anti-government movements).

¹¹⁹ See, e.g., Tom Porter, *The Proud Boys Are Using Trump's 'Stand By' Remark as a Recruiting Tool, Rebranding to Incorporate What They See as His Call to Action*, BUS. INSIDER (Sept. 30, 2020, 10:54 AM), <https://www.businessinsider.com/proud-boys-are-use-trump-remark-to-rebrand-recruit-2020-9> [<https://perma.cc/23H5-X9GF>] (highlighting efforts by Proud Boys to capitalize on perceived “nod of encouragement from the president”).

chief disruptor. He will be more likely to overstep by treating narrow achievements as mandates for major reform and may miss or ignore the signs that he is too far ahead of the electorate. This was certainly the mindset brought to the Oval Office by Steve Bannon, one of the architects of President Trump's victory and who—as a self-described “Leninist”—hoped to smash the administrative state and forge a working-class conservative movement capable of ruling for generations.¹²⁰

In the past, even when a President brought a movement close, as LBJ did with civil rights leaders, he nevertheless did not come from among their midst and his interests did not align perfectly with the movement's aims. Presidents often used patronage positions to alleviate pressure from activists without always granting the influence necessary to shape national policy.¹²¹

Activists have gotten wiser. Today, movements try to capture key posts, whether it is the head of the Civil Rights Division of the Department of Justice or the head of Homeland Security. Affinity groups demand cabinet-level representation.¹²²

Establishment norms will limit the ability of movements to capture institutions, especially where there is a tradition of nonpartisan public service such as with the military or foreign service. Even so, it may be possible for a movement to infiltrate advisory councils and posts that do not require confirmation.

CONCLUSION

Jack Balkin has written an admirable book, one that highlights several conditions that threaten the future of America's experiment in democratic constitutionalism. Even if he's right that these conditions wax and wane, eroding a political order and spurring the birth of something new, this new order won't emerge all on its own.

Given a President's tremendous resource advantages, it is easy to imagine the Office thwarting constitutional reform. But it is harder to imagine wholesale change absent a prominent role played by a President. For a new regime to come into being, an American President will almost certainly have to play a central role in its construction.

¹²⁰ Ryan Lizza, *Steve Bannon Will Lead Trump's White House*, NEW YORKER (Nov. 14, 2016), <https://www.newyorker.com/news/news-desk/steve-bannon-will-lead-trumps-white-house>.

¹²¹ See, e.g., MILKIS & TICHENOR, *supra* note 17, at 84-87 (noting President Theodore Roosevelt's efforts to “navigate a middle path” between white supremacy and early civil rights activism by seeking Booker T. Washington's advice on patronage positions for Black Americans).

¹²² See Michael D. Shear & Annie Kami, *Heat on Biden over Diversity Grows Intense*, N.Y. TIMES, Dec. 13, 2020, Late Edition, at 1; Li Zhou, *Asian American Lawmakers Want More Representation in Biden's Cabinet*, VOX (Dec. 8, 2020, 5:00 PM), <https://www.vox.com/22163277/joe-biden-cabinet-asian-american-leaders>.

I close with a reflection by James MacGregor Burns, a faithful documentarian of FDR's transformative presidency and a scholar of leadership. He observes that revolutionary leadership, as a form of statesmanship, exhibits several qualities: "It is passionate, dedicated, single-minded, ruthless, self-assured, courageous, tireless, usually humorless, often cruel."¹²³ Further, "[i]t is committed to conflict."¹²⁴

We will still have to choose our leaders wisely. Our democratic ills spread and deepen conflict, but further social conflict will be necessary to put the country on a path toward political regeneration. That's because partisan division, inequities, and corruption all have their benefactors and beneficiaries. The people we choose to put our faith in, the ones we endow with the authority to mold institutions and policies, will tell us much about the prospects not only for legal change and social justice but also for political forgiveness and healing when the dust settles.

¹²³ BURNS, *supra* note 27, at 239.

¹²⁴ *Id.*