IS AMERICAN DEMOCRACY ENDANGERED?

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ABSTRACT

Concerns have grown in recent years about the current health and future prospects of constitutional democracy in the United States. Many of the recent scholarly books and articles on this subject focus on the procedural aspects of that system. This Article explores the tension between those who think of democracy primarily in that way and those who tend to be more outcome-oriented when deciding whether constitutional democracy is performing well. That second group tends to see the decline of the American middle class—economically, politically, socially, and culturally—as proof that the American system of constitutional democracy is failing.

In order to evaluate the respective merits of those two schools of thought, this Article considers first what the American system was like during the two earlier eras in which the middle class was dominant. (The first stretched from the American Revolution through the mid-nineteenth century, and the second from the mid-1930s through the late 1960s.) Next it looks at how the American system of constitutional democracy has changed since the middle class began to decline in the early 1970s. The Article concludes by discussing recent debates over such things as presidential power, the nature of political representation, gerrymandering, limiting the right to vote, civics education, civility in public discourse, the role of the mass media, and the system of electing the President in order to understand why the democratic proceduralists think so differently about these aspects of American democracy than those who emphasize middle-class-friendly outcomes.

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I. INTRODUCTION

Concerns about the current state and future prospects of American democracy have proliferated in the last few years.[1] The news has been filled with stories about the various ways in which democracy has come under stress.[2] Some of the most common specific concerns have included the growth of presidential power; excessive influence over the nation's political system by the wealthy and elite interest groups; gerrymandering; growing limitations on the right to vote; a lack of basic knowledge of the Constitution and the American system of democracy among much of the citizenry; the lack of civility in public discourse; attacks upon the mass media for what many believe to be its political and class biases; and problems with the system of electing presidents, especially the Electoral College's role in that process. As the number of these problems has grown, so too has the sense that there is something fundamentally wrong with American democracy.[3]

One of the clearest indications that the concern is genuine has been the recent publication of several important popular and scholarly books about American democracy's current plight.[4] Other books look at democracy's travails not just in the United States but also globally.[5]

1. Juan Williams, Opinion, *Juan Williams: American Democracy in Peril*, HILL (July 9, 2018), https://thehill.com/opinion/white-house/396046-juan-williams-american-democracy-in-peril.

2. *Id.*

3. The Author gratefully acknowledges the assistance of Paul Beck and Ned Foley of Ohio State University's political science department and Moritz College of Law, respectively, who read and commented on an early draft of this Article.

4. *See generally* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008); BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY (2015); CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018); ROBERT KUTTNER, CAN DEMOCRACY SURVIVE GLOBAL CAPITALISM? (2018); KAREN ORREN & STEVEN SKOWRONEK, THE POLICY STATE: AN AMERICAN PREDICAMENT (2017).

5. *See generally* MADELEINE ALBRIGHT, FASCISM: A WARNING (2018); WILLIAM A. GALSTON, ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY (2018); JOSHUA KURLANTZICK, DEMOCRACY IN RETREAT: THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT (2013); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); EDWARD LUCE, THE RETREAT OF WESTERN LIBERALISM (2017); YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT (2018); DAVID RUNCIMAN, HOW DEMOCRACY ENDS (2018); TIMOTHY SNYDER, THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA (2018).

All of these books have their merits, and most have attracted wide reader interest.[6] The focus of this Article is somewhat narrower than these works. This Article is chiefly concerned with illuminating more clearly what has recently placed such a strain on American constitutional democracy.

Several of the works cited do, of course, address that topic, at least in passing.[7] What is missing, however, from most of the current discussion about whether American constitutional democracy is endangered is sufficient historical context. This is not meant to suggest that all of those who write about this issue have ignored history. There are, for example, some constitutional law scholars who have written historically informed analyses, such as Akhil Amar of Yale, author of *The Constitution Today: Timeless Lessons for the Issues of Our Era*, and Ganesh Sitaraman of Vanderbilt, whose latest book is entitled *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic*.[8] The second of these two is especially helpful because it connects the troubling declines in both the middle class and democratic norms.[9] However, even Sitaraman's book suffers from a kind of historical amnesia by focusing so much on the early years of the republic and the Progressive Era, rather than the nation's more recent history.[10] This Article is intended to fill that gap as it addresses the issue Sitaraman has rightly raised.

The fundamental problem today is the tension between democratic procedures adopted since the later 1960s that seem outwardly fair and socioeconomic outcomes that strike many people as manifestly unfair. The distinguished Stanford political scientist Bruce Cain argues persuasively in his recent book that the procedural reforms of recent decades have gone too far, producing undesirable consequences.[11] A team of distinguished political scientists headed by Ohio State's Richard Gunther studied 18 countries on 5 continents and found the heavy emphasis on procedures, rather than

6. *See, e.g.*, *The Retreat of Western Liberalism*, GOODREADS, INC., https://www.goodreads.com/book/show/34496942-the-retreat-of-western-liberalism (last visited July 25, 2018) (noting a rating of 4.1 out of 5 stars on Edward Luce's book).

7. *See, e.g.*, LUCE, *supra* note 5; MOUNK, *supra* note 5.

8. *See generally* AKHIL REED AMAR, THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA (2016); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017).

9. *See, e.g.*, SITARAMAN, *supra* note 8.

10. *Id.* at 111–60.

11. CAIN, *supra* note 4, at 1–2.

outcomes, when defining democracy was unique to the United States—suggesting America's thinking on this issue is skewed.[12] As income inequality has steadily grown and the middle class as a fraction of all Americans has shrunk, a sense of middle-class grievance about the outcomes produced by those procedural changes has increased.[13] That tension exists elsewhere in the world but has special resonance in a country like the United States, which has long thought of itself as a predominantly middle-class nation.[14] In order to understand why this perception exists, some sustained discussion of the historical record is needed and therefore follows.

II. THE AMERICAN SYSTEM DURING MIDDLE-CLASS-DOMINATED ERAS

Perhaps the most important point is that Americans have good reason to think their constitutional democracy is failing if the United States ceases to be predominantly middle class. At the time of the nation's founding, the American elite, unlike their European counterparts, were not members of an aristocracy.[15] There were, to be sure, wealthy Americans in 1776, but they had much smaller homes than the estates of their English equivalents.[16] Even the stately plantation houses of the southern planter class were dwarfed in size by the country houses erected in the eighteenth century by England's landed gentry.[17] As the Constitution was being written and ratified, the United States had a large class of people of middling social status who owned their own farmland; in Europe, almost all land belonged to the rich.[18] Inequality was far less extreme in America than in Europe.[19] The country's large number of slaves and Native Americans (not considered citizens then) constituted important exceptions, but in the rest of the population, the overall level of social equality was striking.[20] That's what South Carolinian Charles Pinckney was referring to during the Constitutional Convention of 1787 when he remarked that the United States had "a greater equality than

12. *See* VOTING IN OLD AND NEW DEMOCRACIES 206–08 (Richard Gunther, Paul A. Beck, Pedro C. Magalhães & Alejandro Moreno eds., 2016).

13. *Id.* at 207.

14. *Id.* at 207–08.

15. ALAN BRINKLEY, AMERICAN HISTORY: CONNECTING WITH THE PAST 68 (McGraw Hill 14th ed. 2012).

16. *Id.*

17. *See id.* at 84–85.

18. *Id.* at 162–63.

19. *Id.* at 84.

20. *See id.* at 147–48, 174.

is to be found among the people of any other country."[21] There was a regional dimension to that social reality too. The Framers of the Constitution, sweltering in Philadelphia that summer, were working in a state that, more than any other, had pioneered the idea of a great big middle class based primarily on small-scale family farming.[22]

As Americans spread westward into Ohio and beyond in the next century, the idea of a big middle class whose experience and values expressed the bedrock of America took on even greater prominence.[23] When Alexis de Tocqueville visited the United States in the early 1830s, among the nation's features he found most striking was the large fraction of society that was neither rich nor poor.[24] Especially in the North, Jacksonian America featured a large middle class that worked mostly on family farms and in other small businesses.[25] That core population struck Tocqueville as central to what he famously called "Democracy in America."[26] No country in Europe looked anything like that then.[27] In fact, many immigrants who were streaming into the United State came to the country precisely for that reason: it was a place where individuals could better their family's prospects, a place where they could join the middle class.[28] This is what made America a promised land for a large number of immigrants who played a major part in building the nation.[29]

In the late nineteenth and early twentieth centuries, that iconic feature of the American republic faded as the Industrial Revolution spread.[30] Small

21. Ganesh Sitaraman, Opinion, *Our Constitution Wasn't Built for This*, N.Y. TIMES (Sept. 16, 2017), https://www.nytimes.com/2017/09/16/opinion/sunday/constitution-economy.html; *see also* 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 1412–13 (Liberty Fund, Inc. 1995) (1888); GORDON S. WOOD, THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 189–212 (2011).

22. *See* BRINKLEY, *supra* note 15, at 54.

23. *See id.* at 222.

24. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 1–2 (Francis Bowen ed., Henry Reeve trans., Sever & Francis 3d ed. 1863) (1835).

25. MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF 35–41 (1957).

26. 1 DE TOCQUEVILLE, *supra* note 24, at 57–68.

27. *Id.* at 67.

28. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 116–18 (Francis Bowen ed., Henry Reeve trans., Sever & Francis 2d ed. 1863) (1840).

29. BRYCE, *supra* note 21, at 1412–13.

30. 2 ERIC FONER, GIVE ME LIBERTY! AN AMERICAN HISTORY 633–34 (Steve Forman ed., 3d ed. 2011).

family farms declined and factories filled with low-wage laborers, while the rise of big banks and businesses brought vast fortunes to the world of the Carnegies, the Morgans, the Rockefellers, and the Vanderbilts.[31] Reformers during the Progressive Era attempted to reverse the trend toward greater socioeconomic inequality, but without much success.[32] By the late 1920s, the notion that the United States was a predominantly middle-class country was dead.[33] The United States had become a nation where the privileged had most of the power and influence, and many other Americans were barely making ends meet.[34] Had that situation persisted, the notion of the United States as a middle-class country by design would have come to seem farfetched—but it did not.[35]

Instead, what transpired was a spectacular middle-class comeback over the following 40 years.[36] This was not so much an entirely new kind of America being born as it was the revival, in new form, of an American class distribution that would have looked familiar to its Founders.[37] To the astonishment (and dismay) of many affluent citizens who had become accustomed to paying low rates of taxation and accumulating large amounts of wealth, their class of Americans shrank, and middle-class America, socioeconomically speaking, expanded.[38] The huge increases in federal taxation during World War II worked the most redistributive results (and aroused the most resistance among upper-income Americans), but they were simply part of a longer-term process of leveling.[39] During the 1930s, '40s, and '50s, income inequality shrank, and the fraction of the population that could fairly be described as neither rich nor poor grew in size and influence.[40] These were people living in the middle three-fifths of the income distribution, most of whom had once been poor or nearly so. Some of them

31. *Id.* at 638–42.
32. *See id.* at 659–62.
33. *See id.* at 822–23.
34. *See id.*
35. BRYCE, *supra* note 21, at 1412–31, 1508–10.
36. FONER, *supra* note 30, at 918–20, 992–93.
37. *See* BRINKLEY, *supra* note 15, at 68.
38. FONER, *supra* note 30, at 991, 1004–05.
39. *Id.* at 1004–05; JULIAN E. ZELIZER, TAXING AMERICA: WILBUR D. MILLS, CONGRESS, AND THE STATE, 1945–75, at 84–85 (1998).
40. *See* FONER, *supra* note 30, at 991.

were lower middle class and some were upper working class, which were distinct worlds in many ways then.[41] But even though the first group tended to prefer book clubs and the second group bowling leagues—to give only one example of that difference in lifestyle—their incomes were not very different, and both gained ground relative to those whose income placed them in the top fifth.[42] By the 1960s, these more affluent people of middling income were dictating American tastes in everything from housing to movies to what books were published.[43] The economic foundations of this historic shift were well-paid jobs in manufacturing and services at big companies and in the burgeoning public sector.[44] And as in the early years of the republic, that situation did not apply equally with respect to race and region. Nonwhites, who were slightly more than a tenth of the nation's population then, participated much less in the broad middle class.[45] Those living in the South and the Mountain West also participated much less, and a lot of overlap existed in terms of those racial and regional categories.[46] But most Americans were neither nonwhite nor Sunbelters.[47] For the large majority, the great big middle class was a very real phenomenon during the middle third of the twentieth century.

The extraordinary expansion of the middle class during and after World War II did not mean, of course, that affluent Americans—the class of people who had been running the country for many years—lost their powers completely.[48] Something more subtle happened: in order to succeed in this, once again, strongly middle-class country, the rich had to understand the

41. *Id.* at 999.

42. *See* Claire Fallon, *Ladies Who Book Club Have Always Been the Glue of Resistance*, HUFFPOST (July 6, 2017), https://www.huffingtonpost.com/entry/ladies-who-book-club-have-always-been-the-glue-of-resistance_us_595db02de4b02e9bdb0a3454; Nicholas Lemann, *Kicking in Groups*, ATLANTIC, Apr. 1996, at 22, 22–26, https://www.theatlantic.com/magazine/archive/1996/04/kicking-in-groups/376562/.

43. *See* JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 333–34, 338–41 (1996).

44. FONER, *supra* note 30, at 916–18, 992.

45. *Id.* at 1001; *Tom Mesenbourg, Deputy Director, Appeared on C-SPAN's "Washington Journal" to Discuss the Upcoming Release of 1940 Census Records by the National Archives*, U.S. CENSUS BUREAU (Mar. 30, 2012) [hereinafter *Mesenbourg*], https://www.census.gov/newsroom/cspan/1940census/ (follow "PRESENTATION" hyperlink).

46. *Mesenbourg*, *supra* note 45.

47. *Id.*

48. GLENN. C. ALTSCHULER & STUART M. BLUMIN, THE GI BILL: A NEW DEAL FOR VETERANS 110–11 (2009).

middle class better.[49] And, as luck would have it, they had very effective means to do so: through the related worlds of military service and higher education.[50]

Beginning in the early 1940s with the arrival of World War II, the draft brought upper-class men into close and continuing contact with their middle-class counterparts, often for the first time and in a situation that forced people to bond and rise above their differences.[51] After the war, when returning veterans from upper-class America went to college, they often encountered middle-class men who were there in force for the first time due to the G.I. Bill.[52] In barracks and classrooms, social divisions based on income and education did not disappear, but they narrowed, and the classes were mingling as they almost never had before.[53] Many of these college students were somewhat older than the usual ones and already married, which meant that women as well as men from these two worlds mixed with each other on a daily basis.[54]

One way to imagine the overall process of social change is to picture a very well-attired family descending a department store escalator while passing an upward-bound one carrying another family, also neat and respectable in appearance but noticeably less formally and expensively dressed. The directions they were moving and the overall similarity in how respectable they looked, despite their obviously different incomes, reflect the narrowing of the class gap (between top and the middle) that took place from the 1930s through the mid-1950s.[55] Before that socioeconomic revolution happened, those two families would not have shopped in the same places and would have looked far more distinct. By the mid-1950s, they were both riding the escalators at stores like Macy's, and neither looked out of place there.

That basic change could be seen across the social landscape. In 1929, President Herbert Hoover and his wife dressed for dinner every night and ate an elaborate meal in the formal White House dining room, even when

49. *See* BARTELS, *supra* note 4, at 1–2.
50. ALTSCHULER & BLUMIN, *supra* note 48, at 110–11.
51. *Id.* at 111.
52. *See id.*
53. *See id.* at 86.
54. *Id.* at 96.
55. *See* FONER, *supra* note 30, at 994–95.

they were eating alone.[56] By the mid-1950s, Ike and Mamie Eisenhower were eating chicken à la king from trays in the White House library while watching *I Love Lucy* on television.[57] The aspirations of Americans had been transformed in less than a generation.

Another example has to do with family formation. In the 1930s, the normal age of marriage and the number of children couples had varied greatly across the population; by the mid-1950s, marrying in one's early twenties and having three children had become the new national norms, even for families in cities, where formerly only rich families could afford to grow that big.[58] Beginning in 1946, the trend of young adults of ordinary income having big families quickly snowballed into what became known as the Baby Boom. [59]

Changing patterns in public health provided another clue to the seismic shift at work. In 1929, upper-class America had enjoyed much better health and longer lifespans than the rest of the population.[60] That gap narrowed significantly by the mid-1950s. Instead of a nation with a minority of unusually healthy people and a majority of unhealthy ones, by the Eisenhower years, the United States had become a country in which most people were in pretty good health. [61]

Housing underwent a significant shift too. In 1929, most upper-class Americans lived in cities and owned their own homes; almost everyone else (except farmers) rented.[62] By the mid-1950s, home ownership—often in suburbia—was becoming the new normal.[63] Instead of a country where a small, rich minority lived in very large houses and a majority were crammed into rented urban apartments, a new era was arriving in which a majority

56. *See* JANE ZIEGELMAN & ANDREW COE, A SQUARE MEAL: A CULINARY HISTORY OF THE GREAT DEPRESSION 145–46 (2016).

57. WARREN G. HARRIS, LUCY AND DESI: THE LEGENDARY LOVE STORY OF TELEVISION'S MOST FAMOUS COUPLE 204 (1991).

58. PATTERSON, *supra* note 43, at 76–78.

59. *Id.*

60. Dora Costa, *Health and the Economy in the United States, from 1750 to the Present*, 53 J. ECON. LITERATURE 503 *passim* (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4577070/.

61. *Id.*

62. *See* PATTERSON, *supra* note 43, at 72.

63. DAVID GOLDFIELD, THE GIFTED GENERATION: WHEN GOVERNMENT WAS GOOD 224 (2017).

lived in their own modest houses—the kind that Levittown made famous.[64] The suburban ranch house of the 1950s was, in a very real sense, simply a new and improved version of the log cabin that was so popular with middle class people a century earlier. [65]

The big new middle class took over popular culture, lapping up middlebrow art, music, movies, books, and magazines and making wild successes of Norman Rockwell, Bing Crosby, Bob Hope, and Walt Disney.[66] The Book of the Month Club was picking books for the public to read, while *Time*, *Life*, *The Saturday Evening Post*, and *Reader's Digest* delivered news and stories in an easy-to-grasp form.[67] Radio and television networks and major movie studios reached ever wider audiences with messages that appealed most to middle-class people, and this newly influential class with money to spend was suddenly the audience that advertisers and movie studios wanted to attract.[68] As more Americans listened, watched, and were influenced by middlebrow popular culture, the number of people who thought, spoke, and acted middle class steadily grew.[69]

American politics also shifted from polarized extremes to a growing center. The two major parties moved with the voters, and more extreme political viewpoints became marginalized.[70] In the early to middle 1950s, a majority actually approved of both of the two major parties' presidential candidates (Dwight Eisenhower and Adlai Stevenson) and showed it by

64. PATTERSON, *supra* note 43, at 72–73.

65. *See id.* at 72–74 (discussing the features and popularity of suburban homes from the 1940s to the 1960s). Both the suburban ranch house of the 1950s and the log cabin were simple, rectangular structures inhabited mostly by people who were neither rich nor poor. *See id.* at 73. The suburban ranch was, to be sure, much more technologically advanced, with its indoor plumbing, central heating, electrical appliances, separate bedrooms, and indoor bathroom. *See id.* It was also prefabricated using mass production techniques, which was very different from the log cabin made by hand by the family that lived there. *See id.* at 72. Even so, the striking thing about these two kinds of dwellings was how affordable they were for the vast middle of the population. Both brought a single-family detached home within reach of that group, and became its most iconic feature. *See id.* at 72–73.

66. *See id.* at 344–48.

67. *See id.* at 345.

68. *See id.* at 348–53; JOHN PATRICK DIGGINS, THE PROUD DECADES: AMERICA IN WAR AND IN PEACE 1941–1960, at 187–90 (1988).

69. *See* PATTERSON, *supra* note 43, at 351–54.

70. *See* MICHAEL BARONE, OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN 246 (1990).

turning out to vote in record numbers.[71] Another sign of the time came on election night in 1956, when Eisenhower's bipartisan appeal helped him carry the staunchly Democratic city of Chicago on his way to a landslide re-election victory.[72]

The Great Depression and, more specifically, the pervasive economic insecurity it created had frightened the country.[73] Increased demands for more economic security prompted a vast expansion of the welfare state during the 1930s, primarily in the forms of Social Security and private, employer-provided pensions.[74] Mass joblessness in the 1930s and inadequate savings for old age built public support for Social Security; its design tended to shift the way Americans lived and worked and affected different kinds of people in different ways.[75] Social Security required people to hold stable jobs over a long period of time to accumulate an adequate old-age pension, which pressed people once they had jobs to keep them.[76] Employer-provided pension plans, most commonly found in big businesses, inclined male breadwinners to choose work at large, financially healthy companies that seemed likely to provide lifetime employment.[77] The Social Security benefits and private pensions such men earned encouraged women to get married to them and to stay married because the Social Security system provided a better deal for surviving widows (based on what their husbands had made) than women could typically achieve by having worked themselves.[78] Additionally, most private pension plans were aimed at men, not women.[79]

Insecure and often low-paying employment in the 1920s and '30s also prompted workers in the Depression and beyond to stick with one seemingly safe employer and to demand better wages and better treatment on the job

71. *See id.*

72. *Id.* at 283–93.

73. *Id.* at 45.

74. *See id.* at 75–77.

75. *See id.* at 95.

76. *Id.*

77. David Stebenne, *Social Welfare in the United States, 1945–1960* [hereinafter Stebenne, *Social Welfare in the United States*], *in* THE LIBERAL CONSENSUS RECONSIDERED: AMERICAN POLITICS AND SOCIETY IN THE POSTWAR ERA 108, 118 (Robert Mason & Iwan W. Morgan eds., 2017).

78. *See* BARONE, *supra* note 70, 301–02; Stebenne, *Social Welfare in the United States*, *supra* note 77, at 113.

79. Stebenne, *Social Welfare in the United States*, *supra* note 77, at 113.

according to what those firms could best afford to provide.[80] Once gained, employment security encouraged a more moderate work ethic to emerge. Rather than working long hours and six-day or seven-day weeks in good times and languishing involuntarily during bad ones (the way many workers had during the 1920s), by the mid-1950s working Monday through Friday, 9:00 to 5:00, became the norm for the average American male breadwinner.[81] Recessions could disrupt that pattern, but economic recessions at that time tended to be shorter and shallower than they were previously.[82]

The federal government's policies on trade and immigration (which were considerably more restrictive in the 1930s, '40s, and '50s than they are today) shielded better-paid and better-treated American workers against the labor forces of foreign competitors and poor immigrants who were typically willing to work longer and harder for less pay.[83] Tightened restrictions on immigration also increased the fraction of all Americans who could be considered white and spurred the cultural assimilation of ethnic minorities, such as Italians, into a more homogeneous, white middle class.[84] The share of the U.S. population that was nonwhite fell to an all-time low of about 10 percent in the early 1950s, and the foreign-born population fell to an all-time low of about 5 percent in the mid-1960s.[85]

World War II, followed almost immediately by the start of the Cold War and an intense arms race with the Soviet Union, sparked the growth of a very large national security state. This meant heavy government spending on the military, a durable draft, and a generous system of veterans' benefits, including a legally sanctioned preference for veterans in employment.[86] All of this contributed to the promotion of male breadwinning and the growth of a middle class organized on that basis.[87]

Much more federal government spending, primarily on things related to the military, spurred higher economic growth.[88] Among the most

80. *See, e.g.*, DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 21–24 (2001).

81. *See* PATTERSON, *supra* note 43, at 322.

82. DIGGINS, *supra* note 68, at 181.

83. *See* PATTERSON, *supra* note 43, at 314–15.

84. 4 D. W. MEINIG, THE SHAPING OF AMERICA: A GEOGRAPHICAL PERSPECTIVE ON 500 YEARS OF HISTORY 130–34, 233 (2004).

85. *Id.*

86. *See* ALTSCHULER & BLUMIN, *supra* note 48, at 52–60.

87. *See id.* at 57.

88. PATTERSON, *supra* note 43, at 314.

important examples is what is currently referred to as infrastructure: the building of highways, bridges, tunnels, and dams that facilitated the rise of mass suburbia after 1945.[89] Even the heavily subsidized construction of the new mass suburbs themselves was justified partly on national security grounds: a population dispersed, rather than crowded into cities, would be less vulnerable to aerial bombardment of the sort that had killed so many people in Europe and East Asia during World War II.[90]

A system of high and progressive income taxation financed this vastly expanded and much more expensive public sector and helped narrow the distance between the affluent and everyone else.[91] And major institutions—corporate, governmental, religious, and others—were growing to meet the unusually strong desire for stability and security that ran so deep in people shaped by the Depression and World War II.[92]

Almost all these changes were hard on outliers, including political radicals of various sorts; women (and men) uninterested in living like the middle class; gays and lesbians; racial minorities, most notably blacks; and people who did not function well in large groups.[93] The system was also hard on the most exceptionally able because its emphasis on making things work well for average people made major meritocratic advancement more difficult.[94] To express that thought another way, the era provided not just a firmer floor to support the average person but also a more confining ceiling for the exceptional ones.[95] Thus, the making of a predominantly middle-class country and culture was inclusive and appealing in some ways, and exclusive and frustrating in others.[96] The seismic shifts in American life as it became more middle class began to produce all kinds of problems by the late 1950s,

89. *See id.* at 274.

90. *Id.* at 71–78; *see* KENNEDY, *supra* note 80, at 744.

91. *See* BARONE, *supra* note 70, at 31; PATTERSON, *supra* note 43, at 165–66.

92. BARONE, *supra* note 70, at 153–55, 164–66, 204–07; PATTERSON, *supra* note 43, at 321–23, 331–32.

93. *See, e.g.*, PATTERSON, *supra* note 43, at 378–86, 672–74.

94. *See id.* at 639–40; *see also* BARONE, *supra* note 70, at 124 (summarizing conservative pushback to big government policies even in the height of the Depression), 161 (noting the rise in wages that accompanied a rise in unions created a new fear for some voters: the powerful union).

95. *See, e.g.*, PATTERSON, *supra* note 43, at 337–40 (discussing how the rise of a middle class and "suburbia" robbed the United States of the "individualistic and entrepreneurial drives that had made America great").

96. *See, e.g.*, *id.* at 338 (noting prominent critiques).

which only intensified thereafter.[97] These trends converged in the late 1960s to produce a new era of social upheaval and the end of an ever more middle-class America.[98]

The history of this remarkable period helps us understand democratic dilemmas of the twenty-first century. In fact, the more America has moved away from that era, the more the conditions that gave rise to it in the first place have returned. In some respects, 2018 looks surprisingly like the later 1920s. High economic inequality and looming national security problems, to give only two major examples, were conspicuous features of the American landscape then and have returned to haunt us today.[99] What the parallel suggests is that the related debates over the decline of the middle class and of democratic procedural norms ought to be framed—much more than they are now—around an understanding of what that earlier period of middle-class dominance was like.

III. THE CURRENT CLASH BETWEEN DEMOCRATIC NORMS AND OUTCOMES

With this history in mind, this Article now considers the strange new world of contemporary American politics and the stress it is placing on America's constitutional democracy. One of its most striking features is how old most nationally prominent politicians have been lately, which affords a clue as to what is going on with respect to the state of American democracy.[100] At first glance, Donald Trump and the recent leading stars of American presidential politics in the Democratic party (Hillary Clinton, Joe Biden, Bernie Sanders, and Elizabeth Warren) appear to have little in common. But they do share one crucial thing: their distinctive generation. All five were born in the 1940s and grew up in a country that looked, felt, and actually was predominantly middle-class.[101] Their respective

97. *See id.* at 375–406.

98. *E.g.*, BARONE, *supra* note 70, at 350–63.

99. *See* KENNEDY, *supra* note 80, at 23–25, 434–64.

100. Christopher Ingraham, *Yes, Congress Is Getting Older—But So Are the Rest of Us*, WASH. POST (Apr. 1, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/04/01/yes-congress-is-getting-older-but-so-are-the-rest-of-us/?noredirect=on.

101. *See, e.g.*, Megan McArdle, *What Really Happened to Income Inequality in the 20th Century*, ATLANTIC (May 14, 2012), https://www.theatlantic.com/business/archive/2012/05/what-really-happened-to-income-inequality-in-the-20th-century/257156/ (noting historical data shows an "implausible" 91 percent increase in income for the nation's bottom 20 percent between 1940 and 1943).

hometowns—Queens, New York;[102] Park Ridge, Illinois;[103] Scranton, Pennsylvania;[104] Brooklyn, New York;[105] and Oklahoma City, Oklahoma[106]—were not close together geographically, but they likely felt that way socially and culturally.

Americans never had more in common than they did during that era, whether it was the size of the cars they drove and houses they lived in, the kind of food they ate, or the type of television shows they watched.[107] However different Trump, Clinton, Biden, Sanders, and Warren are, the commonalities of the era shaped all of them profoundly. Some of their families were affluent, some struggling, but all of them—and most of their generation in mainstream America—thought of themselves as middle-class people when they were young.[108] Even Trump, who went to private schools, lived in a world apart from the really rich of Manhattan.[109] Trump's father built his business on the construction of middle-class apartment buildings in what well-to-do Manhattanites like to call, somewhat snobbishly, "the outer boroughs."[110] The original Trump Towers of the Baby Boom Era were monuments to middle-class living, not '80s excess.[111] Fred Trump wanted son

102. *Donald Trump*, BIOGRAPHY, https://www.biography.com/people/donald-trump-9511238 (last visited Oct. 6, 2018).

103. *Hillary Clinton*, BIOGRAPHY, https://www.biography.com/people/hillary-clinton-9251306 (last visited Oct. 6, 2018).

104. *Joe Biden*, BIOGRAPHY, https://www.biography.com/people/joe-biden-39995 (last visited Oct. 6, 2018).

105. *Bernie Sanders*, BIOGRAPHY, https://www.biography.com/people/bernie-sanders-02032016 (last visited Oct. 6, 2018).

106. *Elizabeth Warren*, BIOGRAPHY, https://www.biography.com/people/elizabeth-warren-20670753 (last visited Oct. 6, 2018).

107. *See supra* notes 40–69 and accompanying text (discussing economic development post-WWII).

108. *See* Betty Boyd Caroli, *Hillary Clinton: United States Senator, First Lady, and Secretary of State*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Hillary-Rodham-Clinton (last updated Aug. 17, 2018); *Joe Biden*, HISTORY, https://www.history.com/topics/us-politics/joe-biden (last visited Aug. 15, 2018); Gregory Lewis McNamee, *Bernie Sanders: United States Senator*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Bernie-Sanders (last updated Sept. 4, 2018); Jeff Wallenfeldt, *Elizabeth Warren: United States Senator*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Elizabeth-Warren (last updated Aug. 27, 2018).

109. MICHAEL KRANISH & MARC FISHER, TRUMP REVEALED: THE DEFINITIVE BIOGRAPHY OF THE 45TH PRESIDENT 32–33 (2017).

110. *Id.* at 28.

111. *Id.* at 51–52.

Donald to learn the business, which meant that father and son spent time together doing such things as collecting overdue rent from Trump tenants and interacting with the construction crews who built Trump's apartment complexes.[112] Quality time with Dad literally revolved around interactions with middle-class people, giving Donald Trump a kind of connection to them that Donald's generation of New York real-estate developers typically does not have.[113]

It was no accident that Trump and his leading Democratic rivals devoted so much of their 2016 campaign rhetoric to what could be done to revitalize the middle class. As income inequality has grown and the middle class has shrunk since the 1970s, the clamor to reverse those trends has grown louder.[114] Donald Trump's campaign slogan—emblazoned on a baseball cap that hardly ever left his head—made that point memorably to the older white voters of modest means who rallied to his cause.[115] He did not call for making America great; he called for making it great *again*. They understood what he meant (and so did his leading Democratic rivals): to make America more like the predominantly middle-class country they knew when they were young.[116]

Trying to accomplish that very challenging goal is the thing that, more than anything else, is placing such a strain on democratic norms today. The single best book on how those norms are eroding is the one by Harvard political scientists Steven Levitsky and Daniel Ziblatt called *How Democracies Die*. Levitsky and Ziblatt emphasize above all else the decline in two norms they see as crucially important to American constitutional democracy: mutual tolerance and institutional forbearance.[117] In their words:

112. *Id.* at 51, 68.

113. *Id.* at 51.

114. *See, e.g.*, Andrew Soergel, *Long Live the Middle Class*, U.S. NEWS & WORLD REP. (May 20, 2016), https://www.usnews.com/news/articles/2016-05-20/in-politics-long-live-middle-class-voters.

115. *See* William H. Frey, *The Demographic Blowback that Elected Trump*, BROOKINGS INST. (Nov. 10, 2016), https://www.brookings.edu/blog/the-avenue/2016/11/10/the-demographic-blowback-that-elected-donald-trump/?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=FeedBlitzRss&utm_content=The+demographic+blowback+that+elected+Donald+Trump.

116. *See* JUSTIN GEST, THE NEW MINORITY: WHITE WORKING CLASS POLITICS IN AN AGE OF IMMIGRATION AND INEQUALITY 192–95 (2016). For data on the widening gap in income between those in the middle class and the top class over the past 50 years, see BARTELS, *supra* note 4, at 9.

117. LEVITSKY & ZIBLATT, *supra* note 5, at 212, 217.

"Treating rivals as legitimate contenders for power and underutilizing one's institutional prerogatives in the spirit of fair play are not written into the American Constitution. Yet without them, our constitutional checks and balances will not operate as we expect them to."[118] While insightful in many ways, *How Democracies Die* suffers from its narrowness of vision. To Levitsky and Ziblatt, constitutional democracy is mostly about process, not outcomes.[119] In other words, the controlling assumption in the book is that if the system of elections and governance appears to be procedurally fair, then the societal outcomes it helps produce are, by definition, democratic.[120] The corollary is that trying to undermine that system is undemocratic.[121]

Many Americans—especially ones old enough to remember the middle-class-dominated era of the middle twentieth century—disagree with that way of thinking. To them, the acid test of whether there is constitutional democracy in America is an outcomes-oriented one.[122] If the American system is operating in such a way as to create and sustain a big, prosperous, and secure middle class, then there is "Democracy in America" in the sense that Tocqueville meant.[123] If not, then constitutional democracy in America is broken.[124]

The fundamental disagreement about procedural norms versus outcomes has been further confused by the misconceptions many people have today about the era in which Donald Trump and his contemporaries grew up.[125] Some say that era teaches us nothing useful about current democratic dilemmas because it was a highly unusual time of little relevance to twenty-first century America.[126] Others argue that since the social and

118. *Id.* at 212.

119. *See id.* at 213 (arguing that adherence to procedural principles is as important as constitutional structures).

120. *See id.* at 217 (arguing that if Democrats resorted to "hardball" tactics the damage done to normative processes would cause greater harm in the long run).

121. *See id.* at 212–17.

122. *See, e.g.*, MARTIN GILENS, AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 194–98 (2012) (arguing pushes for policy with broad public support often result in gridlock and suggesting lawmakers are becoming more responsive to a wealthy minority).

123. *See* 1 DE TOCQUEVILLE, *supra* note 24, at 1.

124. *See* GILENS, *supra* note 122, at 70, 93.

125. *E.g.*, GEST, *supra* note 116, at 150, 153, 158.

126. *See* Robert J. Shiller, *The Economy Grew Even Faster in Truman's Presidency. So What?*, N.Y. TIMES (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/business/the-economy-grew-even-faster-in-trumans-presidency-so-what.html.

economic rise of the middle class in the mid-twentieth century produced a social crisis by the later 1960s, that era is not worth our consideration now.[127] Another view, more recently popular, is rooted in historical amnesia: There never was a more middle-class era in the sense of the middle-class being a truly mass phenomenon.[128]

Not surprisingly, these ways of thinking about what the United States became from the 1930s through the 1960s have been most popular with the people and places that have gained the most since the middle class began to decline. People who chafed at the era's restraints on getting rich, as opposed to simply becoming (or staying) middle class, were not fans of that era then or now.[129] People who did not want to marry early, have kids, and lead a conventional middle-class existence also tended to reject the period and its values then and now.[130] Many of the most exceptional people, of all kinds, grumbled, then and now, about an era that so heavily favored average people.[131] Many people in the South and the Mountain West—the two regions that experienced the rise of the broad middle class during the mid-twentieth century the least and became more prosperous afterward—have long believed such an era never really existed because they did not witness it in their daily lives.[132] As the power and visibility of those regions has increased, so has the pervasiveness of that very misleading view. [133]

Rather than write off mid-twentieth-century America's predominantly middle-class era as anomalous, unsuccessful, or imaginary, Americans would do better to see it as having grown out of a certain set of conditions, as having

127. *See supra* notes 97–98 and accompanying text.

128. *See, e.g.*, ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR 503 (2017) (noting the period between 1940 and 1970 created a new type of middle class heretofore unseen); *see also* MARTY JEZER, THE DARK AGES: LIFE IN THE UNITED STATES 1945–1960, at 120–21 (1982).

129. *See* BARTELS, *supra* note 4, at 23–25 (illustrating how America lags behind other Western democracies in discussing class and suggesting it fails to do so at its own peril).

130. *See, e.g.*, Joyce Johnson, *Remembering Jack Kerouac*, SMITHSONIAN.COM, https://www.smithsonianmag.com/arts-culture/remembering-jack-kerouac-162156771/ (last visited Sept. 17, 2018) (reflecting on the rejection of 1950s middle-class culture by writers and artists of the "Beat Generation").

131. *See* ELIZABETH TANDY SHERMER, SUNBELT CAPITALISM: PHOENIX AND THE TRANSFORMATION OF AMERICAN POLITICS 31–32 (2013).

132. *See id.* at 226–27.

133. *See id.* at 227–29.

achieved certain kinds of successes, and as having faded when the changes the era set in motion helped create or revive other kinds of problems. Neoliberal reform in the 1960s and '70s and the rise of the Sunbelt model associated with the New Right together addressed those problems, but those agendas have also created or revived greater income inequality, the feminization of poverty, and the return of a less stable international order.[134]

All of that helps clarify how constitutional democracy is changing today. Take, for one example, the highly charged issue of presidential power. Limiting that power has been seen as democracy enhancing in the writings of many historians, political scientists, and constitutional law scholars since the late 1960s.[135] But those seeking the revival of a more middle-class-dominated America tend to favor a stronger Presidency out of a belief that only it can produce more democratic outcomes at home and abroad.[136] On the home front, that means a middle-class-dominated country.[137] And overseas, that means a policy of promoting peace through military strength.[138] The view of the strong Presidency as democracy enhancing in those ways was more prevalent in the Progressive and New Deal Eras, when it was promoted by Theodore and Franklin Roosevelt.[139] They saw themselves as champions of the people fighting to restrain the excessive power and abusive behavior of the socially irresponsible rich at home and the threats to middle-class democracy posed by military aggressors abroad.[140]

A similar conception of the Presidency was also popular in the 1830s when Tocqueville visited the United States to write his seminal study.[141] That was the political era dominated by Andrew Jackson, the first American President who had not grown up in an upper-class household.[142] The basic idea is that if wealthy elites become overly dominant and disregard the people's priorities, only a strong Presidency can rectify that situation by

134. *Id.* at 270–71.

135. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 380–87 (1986).

136. *Id.* at 282.

137. *See id.* at 315–16.

138. *See id.* at 289–90.

139. JOHN MORTON BLUM, THE REPUBLICAN ROOSEVELT 56–57 (2d ed. 1977); *see* KENNEDY, *supra* note 80, at 131–59.

140. *See* BLUM, *supra* note 139, at 55–57; KENNEDY, *supra* note 80, at 131–37.

141. *See, e.g.*, 1 DE TOCQUEVILLE, *supra* note 24; 2 DE TOCQUEVILLE, *supra* note 28.

142. *The Rise of the Common Man*, USHISTORY.ORG, www.ushistory.org/us/24a.asp (last visited Aug. 20, 2018).

countervailing against upper-class power.[143] (Related to this was the Founders' sense of the Presidency as the office, more than any other, that represented the interests of the people as a whole.)[144] And if armed conflict on the western frontier (or threats of secession from rebellious southerners) menaced the peace and security of the union, only a firm presidential response could restore order.[145] The greater ability of the Executive Branch than the Legislative Branch and Judicial Branch to act swiftly and decisively in an emergency contributed as well to that conception of the U.S. Presidency.[146] President Trump's fondness for images of Andrew Jackson seems to reflect his sense of himself as a twenty-first century expression of Jacksonian values.[147]

A second example of how differently people think about the relationship between democratic procedures and outcomes relates to the nature of political representation.[148] A system that enables the broad middle to exert the greatest amount of power is considered by people of ordinary social status as democratic in the sense of outcomes, even if aspects of that system appear defective in terms of procedural norms.[149] Thus, in the mid-twentieth century, party leaders, who mostly had middle-class backgrounds and perspectives, had more say in choosing nominees for the Presidency, and primary voters had much less say than they do today.[150] The key institutional reason for that difference was the lack of many primaries, which were used in the mid-twentieth century more to test a candidate's potential as a general-election vote-getter than to decide by themselves who the nominee should be.[151] As primaries have proliferated since the late 1960s and income distribution has become steadily less equal, the playing field in the

143. *See id.*

144. *See The Presidency: The Leadership Branch*?, USHISTORY.ORG, http://www.ushistory.org/gov/7.asp (last visited Aug. 20, 2018).

145. *See, e.g.*, THE FEDERALIST NO. 74, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

146. *See, e.g.*, *What War Powers Does the President Have?*, SLATE (Sept. 13, 2001), http://www.slate.com/articles/news_and_politics/explainer/2001/09/what_war_powers_does_the_president_have.html.

147. Louis Jacobson & Sarah Waychoff, *What's Up with Donald Trump and Andrew Jackson?*, POLITIFACT (May 2, 2017), www.politifact.com/truth-o-meter/article/2017/may/02/whats-up-with-donald-trump-andrew-jackson.

148. *See* GILENS, *supra* note 122, at 13–17.

149. *See id.* at 16–17.

150. *See id.* at 91–96.

151. *See id.* at 12–13.

nomination process has shifted in favor of those who have a lot of money (which is required to contest primaries in the big-population states with the most convention delegates).[152] Procedurally, the system is now more democratic in the sense that primary voters choose the nominees. In terms of outcomes, however, the system is less democratic because candidates who have (or can raise) the most money are heavily favored.[153] In that situation, the only kind of Populist who can hope to win is the rarest of ones: a person so rich as not to need other people's money or so adept at using free media that lots of money is not needed to win.

A third example of the disconnect over procedure and outcomes relates to congressional and state legislative redistricting after each census. In the mid-twentieth century era, small towns and rural areas enjoyed disproportionate influence in terms of seats in the U.S. House of Representatives as well as both houses of most state legislatures.[154] Before *Baker v. Carr* and its progeny, this was deemed constitutionally permissible.[155] One of the most important consequences was to enhance the political power of the more morally traditional areas of the states.[156] Many of the residents there enjoyed only a precarious hold on middle-class status, something that tended to make them risk averse in terms of lifestyle (both for themselves and their children).[157]

These small towns and rural areas used their enhanced political power in the pre-*Baker* era to obtain passage of legislation (in the social–cultural realm especially) that was protective of the more at-risk young people.[158] This was an era marked by stronger restrictions on gambling, drinking, and other kinds of things middle-class parents tend to consider harmful to their children, especially to children who lack self-control.[159] Among the biggest

152. *See id.* at 244.

153. *See id.* at 245.

154. *Background to* Baker v. Carr, UNIV. TENN. AT MARTIN, http://www.utm.edu/staff/rchestee/Baker_Carr/background.html (last visited Sept. 18, 2018).

155. *See id.*

156. *See id.*

157. *See* BARONE, *supra* note 70, at 119.

158. *See Prohibition*, HISTORY, https://www.history.com/topics/roaring-twenties/prohibition (last visited Sept. 7, 2018); I. Nelson Rose, *Gambling and the Law: Pivotal Dates*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/gamble/etc/cron.html (last visited Sept. 7, 2018).

159. *See Prohibition*, *supra* note 158 (discussing the origins of the prohibition movement); Rose, *supra* note 158 (discussing the outlaw of gambling in the U.S. during prohibition until Nevada relegalized in 1931).

beneficiaries were adolescent and young adult males, who were then, and still are, usually the most prone to engage in hazardous behavior. The predominantly patriarchal quality of small town and rural communities, which tends to make parents very focused on raising sons who can function effectively as breadwinners, reinforced that kind of attitude toward social–cultural legislation.[160]

That way of promoting middle-class power faded with the *Warren* Court re-apportionment revolution of the 1960s and, in particular, its requirement of equal-population districts for the U.S. House and state legislative bodies.[161] In recent years, however, it has revived in the form of ingeniously (and unnaturally) drawn equal-population districts that have tended to increase somewhat the power of small towns and rural areas—and with that the power of more morally traditional people.[162] As the most secular and liberal people increasingly pack themselves into major metro areas, creative redistricting of that sort has become even easier.[163] Former Pennsylvania Congressman Jason Altmire, in his very thoughtful book entitled *Dead Center: How Political Polarization Divided America and What We Can Do About It*, discusses that situation at some length.[164] To Altmire, investing a lot of time, money, and energy seeking court decisions overturning such redistricting schemes seems likely to yield very limited results given how packed liberal Democrats now are in the major metros.[165] To him, emulating the top-two system California has adopted seems more likely to reduce polarization in a system that endangers "small d" democratic governance.[166] The problem with that solution is that states with strong party organizations—of which there are many, Pennsylvania included—are likely to strongly resist the top-two solution. And, at least thus far, even that remedy has not yet conclusively proven its worth.[167]

160. *See* David Stebenne, *Re-Mapping American Politics: The Redistricting Revolution Fifty Years Later*, ORIGINS, http://origins.osu.edu/article/re-mapping-american-politics-redistricting-revolution-fifty-years-later (last visited Sept. 18, 2018) [hereinafter Stebenne, *Re-mapping American Politics*].

161. *See id.*

162. *See id.*

163. *See id.*

164. *See generally* JASON ALTMIRE, DEAD CENTER: HOW POLITICAL POLARIZATION DIVIDED AMERICA AND WHAT WE CAN DO ABOUT IT (2017).

165. *See generally id.*

166. *Id.* at 222.

167. *See* Stebenne, *Re-Mapping American Politics*, *supra* note 160.

What that has meant in Altmire's Pennsylvania is a focus on seeking judicial relief in the redistricting realm. But even he thinks the gains of such an approach will likely be limited, which suggests the new era of enhanced political power for small towns and rural areas is here to stay, at least for a while.[168] However, the legislative result has been a mixed bag, even from the point of view of middle-class people living in the heartland, where redistricting schemes that enhance the power of small towns and rural areas have been most common.[169] That is because increased economic inequality has strengthened elite interest groups' lobbying power so much as to block much of the desired result from the perspective of the middle class—namely, more laws tending to help them live their lives and raise their children successfully.[170]

A fourth example of efforts to produce outcomes favored by the center—economically, politically, socially, and culturally—has been the revival in new form of older approaches to limiting the right to vote.[171] In the mid-twentieth century era, those living toward the bottom of the social structure were often shut out of the voting process.[172] This was especially true in the poorest part of the country, which was the South, where the poll tax and other restrictions on voting kept almost all blacks and many poor whites from casting ballots.[173] Adoption of the Twenty-Fourth Amendment (which outlawed the poll tax) in 1964 and the Voting Rights Act of 1965 (which introduced federal voting registrars in the South to overcome state and local government resistance to registering blacks to vote) together dealt a death blow to that legal regime of franchise restriction.[174]

In recent years, however, it has returned in new forms. One approach to limiting voting by the poor is a requirement that all voters present proper identification before being allowed to cast a ballot.[175] The burden of that

168. Interview with Jason Altmire, Former Congressman, United States House of Representatives, in Columbus, Ohio (Mar. 20, 2018).

169. *Id.*

170. *Id.*

171. *See, e.g.*, Alexander Bolton, *Democrats Gear up for Legal Fight over Voter Suppression*, HILL (Aug. 21, 2018), http://thehill.com/homenews/senate/402761-democrats-gear-up-for-legal-fights-over-voter-suppression.

172. *See* BARONE, *supra* note 70, at 29.

173. *See id.* at 28–29.

174. PATTERSON, *supra* note 43, 584–88.

175. Stephen Henderson, Opinion, *The Disturbing Link Between Voter ID and Jim Crow*, DETROIT FREE PRESS (Aug. 6, 2016), www.freep.com/story/opinion/columnists/

requirement tends to fall most heavily on the poorest, who often lack such identification.[176] Much more consequential, at least thus far, is felon disfranchisement, which keeps so many poor African American men from voting that legal scholar Michelle Alexander identified it as one of the key parts of what she has famously labeled "the new Jim Crow."[177] James Forman has refined Alexander's thesis in his new book, *Locking Up Our Own: Crime and Punishment in Black America*, by making clear that many, perhaps most, middle-class blacks (and not just whites) supported passage of the draconian laws that have led to ever more felony convictions of such men.[178] The potent combination of voter-identification laws and felon disfranchisement have driven down voting by the poor, especially poor male minority group members.[179]

Two more examples of the effort to produce more middle-class-friendly societal outcomes have been efforts to revive civics education in the schools and civility in political debate.[180] The two are closely related.[181] Jason Altmire believes, over the long run, civics education's return would be very helpful by making the broad middle class more coherent and effective participants in civic life once again.[182] This idea can be contested, however, both for its cost and the belief that there is too much diversity in civic values to agree upon common ones. Also contested is the related effort to increase civility in political discourse, which moderate, middle-class people tend to like better than more extreme-wing people.[183] Not everyone in the wings is

stephen-henderson/2016/08/06/voter-id-jim-crow/88279764/ (arguing the new efforts supposedly aimed to prevent voter fraud are truly driven by race).

176. Sari Horwitz, *Getting a Photo ID so You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (Mar. 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?utm_term=.c14b5e9e90b9.

177. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 192–93 (rev. ed. 2012).

178. Horwitz, *supra* note 176.

179. ALEXANDER, *supra* note 177, at 190–200.

180. ALTMIRE, *supra* note 164, at 210–13.

181. *See id.*

182. *Id.*

183. *See* Kityana Harrison, *When Civility Is Violence: How We Talk About Sarah Sanders at the Red Hen*, MEDIUM (June 27, 2018), www.medium.com/s/story/when-civility-is-violence-ace7121a725b (arguing that calls for "civility" often pushed by so-called moderates or establishment politicians and journalists serve as a de facto defense of the status quo).

like that, though. Former California Congressman Barry Goldwater Jr. is troubled by the decline in civility, especially among professional politicians.[184] When he served in the U.S. House of Representatives from the late 1960s through the early 1980s, there were wide policy differences between members of the two parties in California's House delegation, the nation's largest.[185] Even so, he says, the delegation met once a month to civilly discuss issues of concern to all members from California.[186] "They don't do that anymore," he says, which is a sign to him that something is really wrong with American democracy today.[187]

The related trends of putting pressure on the existing process of American democracy to produce more middle-class-friendly outcomes (and resistance to that effort) can also be seen in the closely related realm of the mass media.[188] It was much more tightly regulated in various ways during the mid-twentieth century era of middle-class dominance.[189] The Supreme Court's 1964 decision in *New York Times v. Sullivan* and other similar rulings in the later 1960s removed many of the legal restraints on news and entertainment media.[190] During this deregulation, growing income inequality resulted in media messages that focused on the lifestyles and preferences of those in the top fifth of the income distribution.[191]

The result, beginning in the late 1960s and accelerating thereafter, was a flood of media messages that many middle-class people saw as unfriendly to them and their children.[192] Much of the new media environment encouraged disrespect for authority and the embrace of risky behavior, which is usually more harmful for the middle 60 percent than it is for the top 20 percent.[193] Today, even TV shows that purport to depict contemporary

184. Interview with Barry Goldwater, Jr., Former Congressman, United States House of Representatives, in Columbus, Ohio (Mar. 20, 2018).

185. *Id.*

186. *Id.*

187. *Id.*

188. *See* Harrison, *supra* note 183.

189. *See Media Regulation Timeline*, PBS (Jan. 30, 2004), http://www.pbs.org/now/politics/mediatimeline.html (detailing the history of media regulation).

190. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 244–46 (1991).

191. *See generally* DIANA KENDALL, FARMING CLASS: MEDIA REPRESENTATIONS OF WEALTH AND POVERTY IN AMERICA 40–44 (2005) (noting a component of the "American Dream" is to spend extravagantly).

192. *See id.* at 1–2 (illustrating how class can be framed differently in the media).

193. *See, e.g.*, Rae Alexandra, *Has Lena Dunham Accidentally Turned Us into*

middle-class life in positive ways, such as ABC's *Modern Family*, tend to communicate messages about consumer spending that are dysfunctional for the middle three-fifths of the income distribution.[194] (To live as comfortably as these supposedly middle-class people do is beyond the means of people in the middle three-fifths of the income distribution who save sensibly for college, old age, and unforeseen contingencies.)[195]

One of the most striking aspects of Donald Trump's campaign (and his Presidency) has been the popularity of his attacks on the mainstream media, which reflects a sense among his middle-class supporters that the media's gain in influence has come at their expense.[196] Much of the media, especially its most elite organizations, has resisted the effort to make it more attuned to the priorities of the middle class.[197] It seems likely some of that resistance is due to the increased social distance between most of those in the media and middle America.[198] Many highly-educated, affluent people who work in media have trouble understanding middle-class perspectives, and that incomprehension, one suspects, influences how the new populism is depicted there.[199]

The larger point of these various examples is to show the differing perspectives on what is happening to American democracy. To people who

Monsters?, KQED (Jan. 10, 2018), https://www.kqed.org/pop/98393/has-lena-dunham-accidentally-turned-us-into-monsters (exploring the tie between Lena Dunham and her successful television show *Girls* as a progressive, even radical, program with conflicts of racial and economic privilege).

194. *See* Daniel D'Addario, *"Modern Family" Is a Class-Blind Fantasy World*, SALON (Sept. 24, 2013), https://www.salon.com/2013/09/24/modern_family_is_a_class_blind_fantasy_world/.

195. *See id.*

196. *See* John Cassidy, *How to Counter Donald Trump's War on the Media*, NEW YORKER (Aug. 3, 2018), https://www.newyorker.com/news/news-desk/how-to-counter-donald-trumps-war-on-the-media (detailing how Trump truly believes the media to be the "enemy of the people").

197. *See id.*

198. Jack Shafer & Tucker Doherty, *The Media Bubble Is Worse than You Think*, POLITICO MAG., https://www.politico.com/magazine/story/2017/04/25/media-bubble-real-journalism-jobs-east-coast-215048 (last visited Sept. 18, 2018) (detailing how the mainstream media is increasingly confined to a handful of urban centers and cut off from so-called middle America).

199. MEDIA & DEMOCRACY 3–20, 29–34, 99–172 (Everette E. Dennis & Robert W. Snyder eds., 1998). *See generally* LAWRENCE K. GROSSMAN, THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE (1995); D'Addario, *supra* note 194.

tend to define our system of constitutional democracy mostly in procedural terms, the recent changes discussed here are all signs of democracy in decline.[200] To those who tend to evaluate the health of America's constitutional democracy by the standard of whether it is creating and sustaining a big, healthy middle class, these recent changes tend to be viewed—by Trump supporters especially—as democracy enhancing because they have the potential to strengthen middle-class influence.[201]

There are, of course, middle positions that do not fully embrace either of the two positions discussed above. A moderate perspective would tend to see the changes in law and life of the last generation as having gone so far as to produce some undemocratic results, while not agreeing entirely with the solutions pushed by President Trump and his supporters.[202] Taken too far, the Trumpian solutions could create other serious problems for constitutional democracy in the long run, such as authoritarian states dominated by executives who effectively make their own laws and who effectively repress people and institutions who disagree with them.[203] Another middle position is to argue social conditions have changed, both foreign and domestic, so as to require a stronger Presidency for now—but not forever—to address them.[204] To someone with those kinds of moderate views, finding ways to enhance the power and thus improve the size and health of the broad middle class without overdoing those reforms is the central challenge of our time.[205] But complete, coherent expressions of middle positions on the present state and future prospects of constitutional democracy in America are hard to find in our current polarized environment.[206]

200. *See, e.g.*, LEVITSKY & ZIBLATT, *supra* note 5, at 213.

201. *See generally* GEST, *supra* note 116, at 192–95.

202. *See, e.g.*, Callum Borchers, *Steve Schmidt, Never Trumpers and Life After the GOP*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/06/20/steve-schmidt-never-trumpers-and-life-after-the-gop/?utm_term=.f81de839cb18.

203. *See* Ryan Sit, *Trump Meets Every Criteria for an Authoritarian Leader, Harvard Political Scientists Warn*, NEWSWEEK (Jan. 11, 2018), https://www.newsweek.com/harvard-political-science-professor-donald-trump-authoritarian-how-democracy-778425.

204. *See* David Brooks, Opinion, *Strengthen the Presidency*, N.Y. TIMES (Dec. 12, 2013), https://www.nytimes.com/2013/12/13/opinion/brooks-strengthen-the-presidency.html.

205. *See id.*

206. Regarding the danger posed to American democracy by excessive executive power, see generally CAN IT HAPPEN HERE?, *supra* note 4.

And that situation has troubling implications for what is probably the most serious threat to American democratic governance today: the recent track record of the Electoral College. That institution has a curious history. When the Framers met in Philadelphia, the controlling assumption was that the man sitting front and center—Constitutional Convention Chairman George Washington—would become the nation's first President should the constitution they were writing be adopted.[207] Another widely shared assumption among the delegates was that once he had come and gone from that office, the nation would not usually have truly national figures to choose from as his successors.[208] The conventional wisdom, to make a bad pun, was that 19 times out of 20 there would not be candidates widely known across such a big country as to win an Electoral College majority.[209] When one keeps in mind the lack of political parties and modern means of mass communication in 1787, that way of thinking about the future of presidential elections after Washington makes more sense.[210] The result was the Electoral College compromise, which gave the body of Congress closer to the people—the U.S. House—the power to elect the President in the event no candidate for that office received an Electoral College majority.[211] The design of the presidential election process also reflected the power of the states and the desire to get the smaller ones to ratify the new Constitution, by giving each state's House delegation one vote in choosing the President.[212] The long, four-month interregnum between election (in early November) and inauguration (on March 4th of the following year) also helped, by giving the House time to figure out whom to vote for if no one won an Electoral College majority.[213]

What the Framers did not foresee were the problems this process would create as social conditions changed in ways they could hardly have imagined. The possibility that a nationally known candidate could finish first

207. STANELY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800, at 43–46 (1993).

208. *See generally* WOOD, *supra* note 21, at 131–39 (discussing the Framers' worry about local legislatures running amok rather than as national figures).

209. *See* Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 10, 2016), www.time.com/4558510/electoral-college-history-slavery (noting the Framers did not believe "ordinary Americans . . . would [have] sufficient information to choose directly and intelligently among leading presidential candidates").

210. *See* 2 BRYCE, *supra* note 21, at 57.

211. *Id.* at 59–60.

212. *See id.*

213. *See id.* at 118–19.

in the popular vote and second in the Electoral College tally is not one they appear to have considered. Also, it seems the Framers did not envision the rise of the two-party system or the expansion of the electorate to include almost all adults regardless of wealth, race, or gender.[214] Nor did the Framers likely foresee the decision to shorten the interregnum between the presidential election and inauguration to two and a half months, something that was prompted by the inability of the federal government to respond to the disastrous effects of the Great Depression in the winter of 1932–1933, when President Hoover had been electorally rejected but remained in office.[215] Adoption of the Twentieth Amendment in 1933, which moved Inauguration Day from March 4th to January 20th, solved one problem but created another because it left much less time to resolve a disputed presidential election of the sort America experienced in 2000.[216] And as the power of the American Presidency has grown since the 1930s and the nation's role in the world has expanded, the seriousness of the problems created by the American system of electing its President has dramatically increased.[217]

To clarify just how problematic the American system of electing its President has been—even in the republic's early years—we must return, once again, to Andrew Jackson because he was the first winner of the national popular vote to be denied the Presidency (when he ran the first time) in 1824.[218] Jackson was a western Populist whose candidacy horrified the coastal political establishment of his day.[219] The coastal political establishment used its clout in the House of Representatives to elect eastern elitist John Quincy Adams, thereby blocking the accession to the Presidency

214. *See, e.g.*, RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840, at 2 (1969). *See generally* Steven Mintz, *Winning the Vote*: *A History of Voting Rights*, GILDER LEHRMAN INST. AM. HIST., https://www.gilderlehrman.org/history-now/winning-vote-history-voting-rights (last visited Sept. 13, 2018).

215. Edward J. Larson & Jeff Shesol, *The Twentieth Amendment*, CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-xx (last visited Sept. 18, 2018); s*ee* BRINKLEY, *supra* note 15, at 678–80.

216. *See* BRINKLEY, *supra* note 15, at 890–91.

217. *See, e.g.*, KENNEDY, *supra* note 80, at 135–38 (describing the torrent of efforts by the new, proactive Roosevelt Administration in 1933 that would lay the foundation for a historic strengthening of the Executive Branch).

218. SCHLESINGER, JR., *supra* note 135, at 320.

219. *See* BRINKLEY, *supra* note 15, at 231.

of a man most upper-class Americans viewed as unworthy of the office.[220] To the extent we can tell in an era without public opinion polling, the backlash against that outcome in 1824 brought about both the creation of the Democratic Party and the election four years later of Andrew Jackson as President.[221] In other words, it seems that whatever the political establishment may have thought, by the 1820s the great mass of ordinary Americans—ordinary in terms of where and how they lived—believed the presidential candidate who got the most popular votes deserved to win the election.[222] To the extent we can tell, the great mass of ordinary Americans have believed that ever since.[223] And yet twice in the past 18 years, the loser of the national popular vote has won the presidential election.[224] And given how packed Democrats now are into the nation's major metro areas of the two coasts, which somewhat dilutes the strength of their presidential candidates in the Electoral College tally, the likelihood of that happening again in the near future is not low.[225]

That situation has prompted one nationally known election-law expert, Edward B. "Ned" Foley of Ohio State's Moritz College of Law, to search for a viable solution.[226] He is working on a new book, based on careful historical research, that concludes that even the Framers, who did not think about these issues a lot for the reasons already mentioned, did have a sense that giving all of a state's electoral votes to a candidate who won less than a majority of the state's presidential election popular vote seemed wrong.[227] That sense was reflected in state laws in the early years of the republic that awarded electoral votes on a proportional basis when no presidential

220. *See id.* at 230.

221. *Id.* at 231.

222. *See id.* at 230–31; MEYERS, *supra* note 25, at 4–5.

223. *See* CAIN, *supra* note 4, at 110–12, 198–204 (discussing a general trend toward an expansion of voting rights aimed at minimizing interference of pluralist institutions, such as the Electoral College, and strengthening a sense of majority rule).

224. Rachael Revesz, *Five Presidential Nominees Who Won the Popular Vote but Lost the Election*, INDEPENDENT (Nov. 16, 2016), https://www.independent.co.uk/news/world/americas/popular-vote-electoral-college-five-presidential-nominees-hillary-clinton-al-gore-a7420971.html.

225. CAIN, *supra* note 4, at 110–11.

226. Edward B. Foley, *The Electoral College and Majority Rule: Restoring the Jeffersonian Vision for Presidential Elections* 1 (Moritz C. L., Ohio St. Univ., Working Paper No. 429, 2017).

227. *Id.* at 3.

candidate received a majority of the popular vote.[228] It was the Jacksonians who pushed through changes at the state level, creating the modern system in which the plurality winner of the popular vote receives all of a state's electoral votes.[229] That reform seems to have stemmed from the backlash against what happened in 1824 and, perhaps, a sense that the simplicity of the rule that whoever gets the most votes wins all of a state's electoral votes was easier for voters of ordinary intelligence and education to grasp.[230]

Professor Foley is now pushing a change to the Jacksonian approach. He proposes that each state in which no presidential candidate won a majority would hold a runoff between the top two vote-getters in the first round.[231] Whether that would be a good solution to this problem is not entirely clear, in part because there is not much time to hold runoffs given how short the interregnum between election day and Inauguration Day now is. It is true, though, states could make this kind of change on their own (no amendment to the U.S. Constitution would be needed), and that makes the idea more viable than other proposed solutions that require a constitutional amendment.[232]

One suspects, however, the likelihood of achieving even Ned Foley's reform in the short term is very low, given how stressed and polarized America's system of democratic governance now is.[233] President Trump's stand on the issue is instructive. Before he ran for President, Donald Trump used to say the presidential candidate who gets the most popular votes deserves to win.[234] In uttering that sentiment, he was authentically Populist. When he became a presidential candidate, however, and the possibility that

228. *See* BRINKLEY, *supra* note 15, at 230.

229. Foley, *supra* note 226, at 38.

230. *See* BRINKLEY, *supra* note 15, at 230–31.

231. Foley, *supra* note 226, at 38.

232. *Id.* at 68–69.

233. *See, e.g.*, Reid Wilson, *GOP Legislators Seek to Take Power from North Carolina's Dem Governor*, HILL (Aug. 26, 2018), http://thehill.com/homenews/state-watch/403536-gop-legislators-seek-to-take-power-from-north-carolinas-dem-governor (detailing how state Republicans, unhappy with the Democrat's takeover as Governor, are pushing for an amendment to strip his office of traditional powers).

234. Glenn Kessler, *Trump's Flip-Flop on the Electoral College: From 'Disaster' to 'Genius'*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/11/15/trumps-flip-flop-on-the-electoral-college-from-disaster-to-genius/?noredirect=on&utm_term=.d2126e75ece6 (detailing President Trump's evolving, yet dubious, position on the integrity of the Electoral College).

he might win with less than the most votes existed, Trump's view changed.[235] And why? Not just because he wanted to win regardless of the national popular-vote margin, but also because he, like many of his supporters, saw the existing system as rigged against genuine Populists.[236]

Restoring a sense in middle America that our constitutional system produces democratic outcomes is an essential prerequisite for dissolving that resistance to the needed reform of the Electoral College. The central political question of our time—in the United States and other similar societies—is whether such restoration is possible.[237]

235. *Id.*

236. *See* GEST, *supra* note 116, at 192–95.

237. *See, e.g.*, KURLANTZICK, *supra* note 5, at 3–8 (detailing the democratic crisis in Thailand as an example of the global crumbling of democratic institutions and a rise in authoritarian regimes).