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Two Ways Law Professors Can Defend American Democracy

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TWO WAYS LAW PROFESSORS CAN DEFEND AMERICAN DEMOCRACY

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I. INTRODUCTION

The theme of the 2024 Association of American Law Schools ("AALS") Annual Meeting was "Defending Democracy"[1]—but defending democracy how and against whom?

Surely, not against those on the political Right. The rioters at the Capitol on January 6, 2021 were there because they were told—and most of them believed—that the 2020 election was stolen by Joe Biden and the Democrats.[2] Hence, they thought they were defending democracy. In fact, even Republican state legislators expressed that in passing laws requiring voter ID, limiting ballot

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1. *See 2024 AALS Annual Meeting*, THE ASS'N OF AM. L. SCHS., www.aals.org/about/publications/newsletters/aals-news-summer-2023/2024-aals-annual-meeting/ [perma.cc/5SWN-K5K9] (last visited July 17, 2024). The Association of American Law Schools ("AALS") is an association of 176 member and 18 fee-paid law schools, which "enroll most of the nation's law students and produce the majority of the country's lawyers and judges, as well as many of its lawmakers." *About AALS*, THE ASS'N OF AM. L. SCHS., www.aals.org/about/ [perma.cc/C8F8-G5AX] (last visited July 27, 2024). The Annual Meeting is the largest single gathering of law professors in America. *About the Annual Meeting*, THE ASS'N OF AM. L. SCHS., am.aals.org/about/ [perma.cc/J84R-XB49] (last visited Aug. 20, 2024).

2. Ryan J. Reilly, *For Jan. 6 rioters who believed Trump, storming the Capitol made sense*, NBC NEWS (June 20, 2022, 3:32 AM), www.nbcnews.com/politics/donald-trump/jan-6-rioters-believed-trump-storming-capitol-made-sense-rcna33125 [perma.cc/2BE9-P6SR].

drop-off boxes, and opposing automatic voter registration, they were defending democracy.[3]

Surely, not against the people on the political Left. Jay Sekulow, a well-known conservative legal figure and chief counsel of the American Center for Law & Justice, claimed that the Left was threatening democracy. He announced in a recent fund-raising email, that the "radical Left" is engaging in "the biggest threat to election integrity [he had] ever seen" when it invoked the Insurrection Clause of the Fourteenth Amendment to keep President Donald Trump off the ballot.[4]

Most proponents of this theory, however, would undoubtedly agree with Ilya Somin—not himself a Left-wing law professor—that "it's not undemocratic to use the Fourteenth Amendment to keep him off the ballot."[5]

It is evident that both sides of the political aisle claim to be defending democracy even when their actions appear anti-democratic. It follows that the phrase, "defending democracy," by itself, is empty.

To truly defend democracy, one must first determine *how* and *why* American democracy is failing. Only then will one be able to curate the proper steps to defend it.

The simple answer to the question of *how* democracy is failing—and the one most individuals from both sides would give—is that the "other" side will stop at nothing to gain power and keep it. They are even willing to destroy democracy to gain political advantage—"my side, heretofore too decent to use ruthless tactics, must thwart them by any means necessary." *This* is the path of all-out political war. And *this*, unfortunately, is the approach to which both sides in American politics often resort. Now, Americans of varying political beliefs even speak of civil war.[6]

One ought to consider the following possibility: what if this very attitude of all-out conflict is *how democracies die*?[7]

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3. Ryan Chatelain, *Debate over photo voter ID laws is enduring—and complex*, SPECTRUM NEWS (July 15, 2021, 11:44 AM), ny1.com/nyc/all-boroughs/politics/2021/07/14/debate-over-photo-voter-id-laws-enduring-and-complex [perma.cc/F2QX-PHMP].

4. E-mail from Donald J. Trump for President 2024, to Potential Donors (Dec. 5, 2023), (on file with the author).

5. Ilya Somin, *Yes, Trump Is Disqualified from Office,* CATO INST. (Dec. 1, 2023), www.cato.org/commentary/yes-trump-disqualified-office [perma.cc/U4DE-T3VM]; *see also* Mark A. Graber, *Donald Trump and the Jefferson Davis Problem*, N.Y. TIMES (Nov. 29, 2023), www.nytimes.com/2023/11/29/opinion/trump-president-candidate constitution.html [perma.cc/8R3R-FWYF].

6. *'These are conditions ripe for political violence': how close is the US to civil war*, THE GUARDIAN (Nov. 6, 2022, 4:00), www.theguardian.com/us-news/2022/nov/06/how-close-is-the-us-to-civil-war-barbara-f-walter-stephen-march-christopher-parker [perma.cc/XLC9-89YH].

7. *See generally* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (modeling a downward spiral of norm violations that lead to the death of democracy).

As to *why* American democracy is failing (that is to say, why it is failing now), the common response is that the "other side" is filled with some really evil people who care nothing for the future of this country—not all of them, of course, as some are merely misled.

One ought to also consider the following possibility: what if Americans' attitude that their political opponents are their mortal enemies is *why American democracy is failing*?

The goal of this article is to suggest a new approach to defending democracy—one that, based on the latest social science research and philosophical investigation, answers the *how* and *why* questions very differently from the conventional political wisdom. The article proposes that American law professors can best defend democracy first—this is the *how*—by creating a bipartisan institution under the leadership of the AALS that objectively criticizes political norm violations by both major political parties and, second—this is the *why*—by confronting the cultural nihilism and loss of faith in the future that has rendered politics an all-encompassing, zero-sum game.

In Parts II-IV, this article sets forth the model of "how democracies die," as discussed by social scientists Steven Levitsky and Daniel Ziblatt (i.e., a downward spiral of norm violations by both political sides), applies that model to the American experience, and proposes an institutional response by law professors that self-consciously copies the model of the Committee for a Responsible Federal Budget. It would be called The Law Professor Caucus to Preserve Democracy ("LPCPD"). Parts V-VII argue that a change in cultural consciousness (i.e., the growth of nihilism in the wake of the Death of God) is the reason why the downward spiral began, demonstrate that this change represents the current American experience, and propose an experiment for skeptical law professors to approach the matter of objective values and a telos for the universe in a new way—thus opening a path to teaching law again.

Political struggle, litigation, legislation, critical theory, and all other arsenals of both the Left and the Right have been tried repeatedly since 2015. Each side can claim some successes.[8] On the whole, however, American public life is as bad as it has ever been and is close to catastrophic failure. So far, the responses by both sides are not effectively defending democracy. The 2024 AALS

8. Most notably, of course, Republicans elected Donald Trump as President in 2016 and Democrats defeated him and elected Joe Biden in 2020. But the fact that these two candidates are running again in 2024, and polls show that the election will be close, as were the two previous Presidential elections, demonstrates that neither side has gained any real advantage in all this time.

Since this footnote was written, President Joe Biden abandoned his reelection campaign and endorsed Vice-President Kamala Harris. Nevertheless, the point holds. Polls taken after the change previewed a very close election between Harris and Trump. *See Election 2024 Polls: Harris v. Trump*, N.Y. TIMES (Aug. 20, 2024) www.nytimes.com/interactive/2024/us/elections/polls-president.html [perma.cc/9EQN-WJZV].

Annual Meeting is more of the same and will, overall, only deepen American divisions.[9]

It is time to try a new approach. Of course, this new approach is not guaranteed to succeed, but more of the same is guaranteed to fail.

II. HOW DEMOCRACIES DIE: IN A DOWNWARD SPIRAL OF POLITICAL NORM VIOLATIONS BY BOTH SIDES

In American public life, where everyone claims to be defending democracy, it bears asking: *defending democracy from what?*

The political Left would answer, "from Republican attempts at undermining democracy." That would include, most dramatically, then-President Trump's absurd insistence that the 2020 election, in which he was defeated, was stolen and that its result should have been overturned. It would also include the more mundane restrictions on the franchise and gross political gerrymandering in which Republican-dominated state legislatures routinely indulge. Hence, to the Left, defending democracy means fighting back against these Republican attempts and ensuring that Democrats are elected instead.[10]

To this, the political Right would respond that Hillary Clinton engaged in similar conduct by joining the ludicrous 2016 Wisconsin recount effort. Furthermore, it would argue, there were partisan attempts to steal the 2020 election, including the lawless three-day mail-in ballot extension voted by four Democratic Justices on the Pennsylvania Supreme Court.[11] And anyway, both political sides gerrymander where and when they can, pointing to Maryland and New York,[12] and so-called restrictions on the franchise either amount to (1) common-sense identification measures that make it no more difficult to vote than to buy a bottle of wine, or (2) prevent coercion and fraud in activities like absentee voting.[13]

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9. *See* discussion *infra* Part IV (discussing the political bias of the AALS).

10. *See, e.g.*, *Taking Action to Defend Democracy*, JEWISH DEMOCRATIC COUNCIL OF AM., secure.everyaction.com/B6ljdp9GOEeVfvOGedeexw2 [perma.cc/3E7K-6ZH2] (last visited July 17, 2024) (explaining that major election reform legislation is likely only to be passed by Democrats). This is a statement by the Jewish Democratic Council of America, but really just as one example that could be endlessly repeated. *Id.*

11. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020).

12. *See* Andrew Prokop, *How Democrats learned to stop worrying and love the gerrymander*, VOX (Apr. 14, 2022, 6:00 AM), www.vox.com/22961590/redistricting-gerrymandering-house-2022-midterms [perma.cc/LZ6B-BGCN]; *see also* Zach Montellaro, *Maryland court strikes down congressional map as illegal Democratic gerrymander*, POLITICO (Mar. 25, 2022, 1:31 PM), www.politico.com/news/2022/03/25/maryland-court-congressional-map-illegal-democratic-gerrymander-00020518 [perma.cc/S2TG-NR52].

13. *See, e.g.*, Fred Lucas, *Voter ID Laws Are Popular for Good Reasons*, THE HERITAGE FOUND. (Jan. 17, 2023), www.heritage.org/election-integrity/commentary/voter-id-laws-are-popular-good-reasons [perma.cc/EH2H-WEZ9].

It is not my intention to judge the relative worth of these charges and counter-charges. Nor am I interested, here, in who started it. In fact, in the 2018 book, *How Democracies Die*,[14] social scientists Steven Levitsky and Daniel Ziblatt ("L&Z") argue that it is the justified responses to previous provocation that doom democracy. Bad actions by one side are not enough to destroy democracy because they can be countered within existing political norms and practices. Rather, democracies die when the opposing side responds to the provocation—an action which creates a new provocation, to which the first side then responds. This vicious cycle is what dooms democracy.[15]

In the view of L&Z, democracy is a shared practice that rests not so much on law as on formal and informal norms and practices.[16] In a healthy democracy, these norms can be reduced to one underlying directive—*forbearance*.[17] Employing forbearance involves politicians who do not use any means possible in their pursuit of their party's political advancement. Instead, they play the game of politics fairly and accept defeat within the existing structure, knowing that they will have further chances to gain power. That is why L&Z, who are not reluctant to name the Republican Party as generally more-at-fault for the current state of American public life,[18] urge the Democratic Party not to respond in kind.[19]

Politicians in a healthy democracy do not violate traditional norms and practices and they do not change the rules to favor themselves. One ought to think of Ronald Reagan and Tip O'Neill having a drink together after bashing each other in public.[20]

This ground norm of forbearance is expressed in a series of traditions that L&Z call "guardrails of democracy."[21] The authors describe the downward spiral that can result from the violation of basic political norms as follows:

> The erosion of mutual toleration may motivate politicians to deploy their institutional powers as broadly as they can get away with. When parties view one another as mortal enemies, the stakes of political

14. LEVITSKY & ZIBLATT, s*upra* note 7.

15. The authors illustrate this thesis in the American context with the norm violation and counter-norm violation that went on in America from Newt Gingrich's arrival in 1978 to the end of the George W. Bush Presidency. *Id.* at 146-57.

16. *Id.* at 101-102.

17. *Id.* at 106. The authors also note another base norm, mutual toleration. *Id.* at 102. But this norm turns out to be closely tied to forbearance. It means that my side will practice forbearance as long as your side does too.

18. *Id.* at 207-14.

19. *Id.* at 215.

20. Patrick Gavin, *Matthews book: O'Neill, Reagan bond*, POLITICO (Sept. 30, 2013, 10:16 PM), www.politico.com/story/2013/09/chris-matthews-book-tip-and-the-gipper-when-politics-worked-097585 [perma.cc/LZ53-7L2J].

21. LEVITSKY & ZIBLATT, *supra* note 7, at 112.

> competition heighten dramatically. Losing ceases to be a routine and accepted part of the political process and instead becomes a full-blown catastrophe. When the perceived cost of losing is sufficiently high, politicians will be tempted to abandon forbearance. Acts of constitutional hardball may then in turn further undermine mutual toleration, reinforcing beliefs that our rivals pose a dangerous threat.
>
> The result is politics without guardrails—what the political theorist Eric Nelson describes as a "cycle of escalating constitutional brinksmanship.[22]

To see how forbearance works on the ground, one may consider two guardrail practices in American political life: (1) the acceptance of the current structure of the Electoral College, and (2) the treatment of the other side after a Presidential election in which there is a power-transfer between political parties.

The selection of Presidential electors in America is nothing like a national election for President. The Constitution specifies that the electors who make up the Electoral College are to elect the President and Vice-President.[23] Hence, the Constitution assigns the responsibility of selecting these electors not to the people, but to the state legislatures. The reason the U.S. holds a Presidential election at all is that each state legislature has so decided by statute.[24]

State legislatures retain the ultimate authority to regulate the voting system, which is why forty-eight states select their Presidential electors in winner-take-all fashion, while two states divide the vote for electors.[25]

Thus, if a state legislature controlled by one party fears the possibility of a Presidential-election victory by the other party, it could theoretically pass a new elector-selection statute assigning the selection to itself, assuming the Governor is of the same party. There were even rumblings about doing something along those lines as part of Trump's desperate attempt to retain power.[26]

The norm of allowing the people to choose the President, even though that might be disadvantageous to one side, leads politicians to the practice of treating the current structure of the Electoral College as settled. This accords perfectly with L&Z's concept of forbearance.

And now, at a time when the full application of the Independent State Legislature Doctrine has been rejected by the U.S. Supreme Court,[27] such a blatant power grab by a state

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22. *Id.*

23. U.S. CONST. amend. XII.

24. *Id.* art. II, § 1, cl. 2.

25. *See* Lara LaBrecque, *Path to a Popular Vote: The Impact of State Faithless Elector Statutes on the National Popular Vote Plan*, 54 LOY. L.A. L. REV. 1299, 1306-07 (2021).

26. Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors to Vote for Trump? Not Likely*, N.Y. TIMES (Jan. 5, 2021), www.nytimes.com/article/electors-vote.html [perma.cc/2HZK-AENN].

27. Moore v. Harper, 600 U.S. 1, 37 (2023); *see generally* Bruce Ledewitz,

legislature might be blocked by a State Supreme Court pursuant to its state constitution.

But this matter does not have to remain abstract, as an actual plot to manipulate the Electoral College for partisan gain has been previously described, that was foiled very much in accordance with L&Z's account of the norms and guardrails of healthy democracies.[28]

In addition to all its other quirks, the current structure of the Electoral College—winner-take-all-of-the-delegates in forty-eight states—means that the votes of the losing Party gain no electors at all in most states. It does not matter, for example, how many votes there are for the Republican Presidential candidate in California, if most of the voters vote for the Democratic Party candidate. In that event, all the electoral votes go to the Democratic Party candidate. The same effect of suppressing the votes of the political minority, but in the opposite direction, applies to votes for the Democratic candidate for President in Texas, which now generally votes Republican in Presidential elections.

Because most of the Presidential electors are chosen in this way, the submersion effect on the losing votes largely cancels out. Thus, the winner of the national popular vote, which Americans think of as the normative democratic outcome,[29] has usually won the Presidency.[30]

The system does not have to be structured in this winner-take-all fashion, however. Two states, Maine and Nebraska, appoint individual electors based on the winner of the popular vote within each Congressional district and then two at-large electors based on the winner of the overall state-wide popular vote.

If all the states adopted this congressional district approach, the overall submersion effect would be lessened—there would be Republican electors from California and Democratic electors from Texas. It is estimated that this change would nationally aid the electoral chances of a Republican Presidential candidate in a close election—e.g., Mitt Romney would have defeated Barack Obama in 2012.[31] This would represent a marginal advantage for Republicans.

Moore News About the Independent State Legislature Doctrine, 62 DUQ. L. REV. 327 (2024).

28. *See* Bruce Ledewitz, *Taking the Threat to Democracy Seriously*, 49 U. MEM. L. REV. 1305, 1317 (2019)*; see also* discussion *infra*.

29. The PEW Research Center reported in September 2023 that 65% of Americans favored eliminating the Electoral College in favor of direct election of the President. Jocelyn Kiley, *Majority of Americans continue to favor moving away from Electoral College*, PEW RSCH. CTR. (Sept. 25, 2023), www.pewresearch.org/short-reads/2023/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/ [perma.cc/VX7T-UJBM].

30. But that trend may be changing. In 2000 and 2016, the winner of the popular vote did not become President. *Id.*

31. Philip Bump, *Romney would be president right now (if we linked electoral votes to congressional results*, WASH. POST (Feb. 3, 2015, 11:40 AM), www.washingtonpost.com/news/the-fix/wp/2015/02/03/mitt-romney-would-be-president-right-now-if-we-linked-electoral-votes-to-congressional-results/

And it would mean that the winner of the national popular vote would be less likely to win the Presidency.

But, if only Democratic-leaning states adopted the congressional district approach, or, if only Republican-leaning states did so, the effect on Presidential selection would be dramatic. If that were to occur, the submersion effect would still benefit one Party, but not the other one. The states that retained winner-take-all elector systems would be much more valuable to attaining a winning share of votes in the Electoral College than would the congressional district states. One Party could essentially ensure winning every Presidential election, given anything short of a landslide for the other Party in the national popular vote.[32]

Such an action would largely sever the connection between the national popular vote and the Presidential selection outcome, thus greatly reducing the democratic legitimacy of the American Presidential system. This was the principle behind the plot to steal the Presidency, launched in 2011 by the partisan organization, American Legislative Exchange Council ("ALEC"). Late in that year, ALEC endorsed allocation of electors based on the congressional district method.[33]

That this was a plot to steal the Presidency for the Republican Party, rather than a good faith effort at electoral reform, or even a modest partisan attempt to gain an advantage from a national change, is made clear by what happened next. Republican legislators in reliably Republican states like Texas did not consider changing their winner-take-all method. Instead, Republican legislators considered making the change in 2012 in three key states that Democrats aimed to win in 2012, but in which Republicans temporarily controlled the state legislature and the Governorship: Michigan, Pennsylvania and Wisconsin. In all, Republican state legislators considered making the change in five states—the three aforementioned ones, plus Virginia and Ohio—which the Democratic Party might also win under the prevailing winner-take-all system.

Considering the massive scale and fraudulent intent of this plot, it should have attracted a great deal of media attention, which might have thwarted it. As it was, the media paid little attention at the time. Almost no Americans were aware that the future of their democracy was at serious risk of being stolen in the early 2010s.

No one can say with certainty why the plot failed. But if the

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[perma.cc/5UKU-PFVS].

32. A more detailed explanation of how the plan would have worked, written before it failed is given here and criticized for its anti-democratic potential. Alan Abramowitz, *Republican Electoral College Plan Woud Undermine Democracy,* THE CTR. FOR POL. (Jan. 24, 2013), www.centerforpolitics.org/crystalball/republican-electoral-college-plan-would-undermine-democracy/ [perma.cc/8C8D-MTGJ].

33. *See* Ledewitz, *supra* note 28.

events that took place in Pennsylvania are at all representative, one can infer that the plot was stopped by honorable Republican leaders who thought democratic norms were more important than partisan advantage. In Pennsylvania, strong rumors indicated that the attempt to change the electoral system to congressional district selection was taking place behind the scenes of the General Assembly, but that then-Governor Tom Corbett, a Republican, put a stop to it.[34]

If the rumors were in fact true, it would support L&Z's prediction of how the norm of forbearance functions in a working democracy. Namely, that politicians understand that winning power is not the most important goal, and that they should not do everything in their power to win; sometimes the other side will win power. The most important thing in a working democracy is for the system to continue to function with legitimacy. That is democratic forbearance in practice.

Another form of democratic forbearance is even more deeply engrained in American politics—the tradition for Presidents to attend the inauguration of the incoming President, even when that person belongs to the opposing Party. This is the American tradition of the peaceful transfer of power.

The reason that this is a matter of democratic forbearance is that in a hard-fought and close Presidential election, in which there are even allegations of fraud, the losing Party could likely gain some political advantage from scorning the incumbent President as illegitimate. Instead, the presence of that Party's President at the inauguration legitimizes the incoming President as President of *all* Americans—Republicans and Democrats alike.

This situation occurred, for example, in the 1960 Presidential election, in which then-Vice President Richard Nixon vilified then-Senator John Kennedy as weak on the Communist threat, lost a narrow election tainted by allegations of fraud,[35] and then attended Kennedy's inauguration, along with outgoing President Dwight Eisenhower.

The legitimizing effect of the outgoing President's presence at the incoming President's inauguration is probably most crucial in the case of a challenger defeating an incumbent President—which

34. Gov. Corbett now teaches at my law school, Duquesne Kline, and I have asked him about these accounts. He acknowledges that there was an interest in making the congressional district change among some Republican legislators at the time, but refuses to take credit for ending it. He did say to me once, and I'm sure he would not mind my repeating it here, "you don't change basic structures for partisan advantage." This attitude is a perfect reflection of what Ledinsky and Ziblatt call forbearance as the guardrail of democracy.

35. Nixon reportedly said at the time, "We won, but they stole it from us." Jeff Shesol, *Did John F. Kennedy and the Democrats Steal the 1960 Election*, N.Y. TIMES (Jan. 18, 2022), www.nytimes.com/2022/01/18/books/review/campaign-of-the-century-kennedy-nixon-1960-irwin-f-gellman.html [perma.cc/6YQX-N29P].

is just what happened in the Presidential elections of 1976 and 1980. The principle of democratic forbearance was so deeply engrained in American politics that at the time, no one noted that Presidents Gerald Ford and Jimmy Carter attended the respective inaugurations of their successors. It was to be expected—and undoubtedly, it never occurred to either Ford or Carter that they might behave differently.

This deep-rooted expectation is what rendered then-President Donald Trump's 2021 decision to forgo attending the inauguration of incoming-President Joe Biden, as startling and unprecedented, given that he was the only president to do so—in the modern period, anyway.[36]

The power of the L&Z model for how democracies die is illustrated by considering what might happen in the future. According to the authors, it is not the violation of norms that dooms democracy, but rather, the spiral of norm violation.

The 2024 Presidential election will pit Kamala Harris against Donald Trump. But if we think about possible future outcomes, imagine that Harris had run against someone other than Trump. What if Harris had lost in that scenario? In that case, Joe Biden, as President, being the old pol that he is,[37] would almost certainly have ignored the slight of Trump's non-attendance and would attend the inauguration of his successor, even though that successor had defeated the Democratic candidate, her opponent. In reinstating the norm, Biden would be halting the downward spiral. Future Presidents would probably then return to the previous norm, notwithstanding Trump's violation. Trump's behavior would almost become an object lesson of what *not* to do after losing an election.

But what will happen if Harris loses against Trump? No one can be sure what Biden will do then, but it is easy to imagine him returning the snub from Trump and boycotting Trump's inauguration. If that were to happen, the norm violation of non-attendance might become the new normal for future Presidents. That is the downward spiral that eventually destroys democracy that L&Z are describing.

The question then becomes, can we see evidence of the

36. In the Nineteenth Century, three outgoing presidents—John Adams in 1801, John Quincy Adams in 1829 and Andrew Johnson in 1869—refused to attend their successors' inaugurations. Thomas Balcerski, *A history lesson on presidents who snub their successors' inaugurations,* CNN (Jan. 8, 2021, 3:58 PM), www.cnn.com/2020/11/11/opinions/presidents-history-skipping-inauguration-day-balcerski/index.html [perma.cc/E5UW-H6BN].

37. Unlike many other politicians in this hyper-partisan era, Biden is known for his willingness to cross the political aisle to make deals. His team considers this a major reason he won the Presidential election of 2020. *See* Alex Thompson, *Enemies, a Love Story: Inside the 36-year Biden and McConnell Relationship*, POLITICO (Jan. 22, 2021, 4:30 AM), www.politico.com/news/magazine/2021/01/22/joe-biden-mitch-mcconnell-relationship-460385 [perma.cc/8KL6-GC9H].

downward spiral of norm violation in recent American political life? The answer, unfortunately, is absolutely yes. That is why America is in danger of experiencing the death of democracy.

III. DOES RECENT AMERICAN POLITICAL LIFE ILLUSTRATE L&Z'S DOWNWARD SPIRAL OF NORM VIOLATION?

Two major examples—the abuse of the filibuster and the increasing use of impeachment—perfectly mirror L&Z's model of democratic breakdown through a downward spiral of reciprocal norm violation. These are well-known episodes with which the reader likely has some familiarity.

But I will begin with a lesser-known illustration: how the 2016 recount effort in Wisconsin—joined by the Hillary Clinton Presidential campaign—set the stage for Trump's massive and magical voter fraud charges after the 2020 election. The recount effort in 2016 was not a normal invocation of a state law that allows a recounting of ballots when the results are sufficiently close. Instead, the theory of the 2016 recount effort by the Green Party was that results were unreliable because of hacking by foreign operatives.[38] That claim would mean that any machine voting count could be considered unreliable. Thus, the recount effort could have undermined the confidence of Americans in voting results, generally.

On Saturday, November 26, 2016, the Clinton campaign announced that it would "take part in efforts to push for recounts in several key states, joining with Green Party" efforts in those states.[39] The most-targeted state was Wisconsin, followed by Pennsylvania and Michigan. Trump won these three states by 107,000 votes—a narrow victory, widely credited with providing Trump his Electoral College margin of victory.[40] The Wisconsin recount reaffirmed Trump's original win of the state, with Trump's lead over Clinton actually increasing by 131 votes in the recount.[41]

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38. Amanda Holpuch & Jon Swaine, *Jill Stein requests Wisconsin recount, alleging hackers filed bogus absentee ballots*, THE GUARDIAN (Nov. 25, 2016, 8:32 PM), www.theguardian.com/us-news/2016/nov/25/jill-stein-election-recount-clinton-trump-michigan-pennsylvania-wisconsin/ [perma.cc/7X9L-6GLW].

39. Eugene Scott, *Clinton to join recount that Trump calls 'scam'*, CNN (Nov. 28, 2016, 3:03 PM), www.cnn.com/2016/11/26/politics/clinton-campaign-recount/index.html [perma.cc/P5S7-433R].

40. Tim Meko, Denise Lu & Lazaro Gamio, *How Trump won the presidency with razor-thin margins in swing states*, WASH. POST (Nov. 11, 2016), www.washingtonpost.com/graphics/politics/2016-election/swing-state-margins/ [perma.cc/W9BE-KGAR].

41. Jason Stein, *Recount confirms Trump's victory in Wisconsin*, MILWAUKEE J. SENTINEL (Dec. 12, 2016, 8:58 AM), www.jsonline.com/story/news/politics/elections/2016/12/12/recount-drawing-close-wisconsin/95328294/ [perma.cc/D8VV-BXSL].

Federal courts denied requests for similar statewide recounts in Michigan and Pennsylvania.[42]

The Green Party's effort was mainly based on the claim that statistical analysis of the election results, in Wisconsin in particular, suggested that Russian hackers might have altered the counted vote. At the time, some called this whole idea "paranoia" and regretted that the Clinton campaign joined the effort, while at the same time admitting that there was no evidence supporting the charge.[43]

Accounts from the period echoed allegations of voter fraud in 2020, and the reactions to those charges by Republicans—particularly by the Trump campaign—are reminiscent of the reactions that Democrats and the Biden campaign previously had regarding the Trump campaign's later accusations. Trump called the Wisconsin recount a "scam," claimed that the election was over and that he had won.[44]

In similar fashion to the 2020 voter fraud allegations, allegations of a fraudulent result in 2016 began to circulate prior to the actual voting. At that time, election officials argued that the scenario of Russian hacking of voting machines was implausible because the voting machines and result transmission were not connected to the Internet.[45] Again, similar to what Republican election officials would later say in 2020, Democratic election officials dismissed claims of voter fraud after the 2016 election, even though such claims would have benefited their side.[46]

The whole 2016 fiasco sounded very much like the 2020 idea that Venezuela had programmed voting machines to switch votes from Trump to Biden—one of the more ludicrous claims of voter fraud after the 2020 election.[47]

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42. *Id.*

43. Bruce Ledewitz, *Perfect Paranoia—Jill Stein's Recount*, DUQ. SCHOLARSHIP COLLECTION (Nov. 27, 2016), dsc.duq.edu/ledewitz-hallowedsecularism/1052 [perma.cc/ D7MP-5KCU].

44. *See* Scott, *supra* note 39.

45. Tal Kopan, *No, the presidential election can't be hacked*, CNN (Oct. 19, 2016, 4:29 PM), www.cnn.com/2016/10/19/politics/election-day-russia-hacking-explained/index.html [perma.cc/DMK8-95KP].

46. These assurances were then challenged. *See* Kim Zetter, *The Myth of the Hacker-Proof Voting Machine*, N.Y. TIMES (Feb. 21, 2018), www.nytimes.com/2018/02/21/magazine/the-myth-of-the-hacker-proof-voting-machine.html [perma.cc/77UN-LAL8].

47. *Fact check: Dominion is not linked to Antifa or Venezuela, did not switch U.S. election votes in Virginia and was not subject to a U.S. army raid in Germany*, REUTERS (Dec. 14, 2020, 8:38 AM), www.reuters.com/article/idUSKBN2861T1/ [perma.cc/9MDW-6RHS]. Reuters thoroughly exposes the baselessness of the voting machine conspiracy theory. *Id.* But the best evidence of the absurdity of these claims is that FOX News agreed to a $787 million settlement for airing these claims and evidence showed that FOX hosts themselves did not believe these claims but aired them anyway. David Bauder, Randall Chase & Geoff Mulvihill, *Fox, Dominion Voting Systems reach $787 million settlement over false election claims*, PBS (Apr. 18, 2023, 5:11 PM),

As crazy as the effort was in 2016, in the terms of L&Z, it represented an important norm violation by the Clinton campaign. Right after the election, Clinton appeared to be following the tradition of gracious concession by the loser of an American election. Into the next morning, on election night, November 8, Clinton privately conceded in a phone call to Trump. But she held off a formal concession until an emotional address the following day. In those remarks, Clinton said the country, and her supporters, owed Trump "an open mind."[48]

These remarks reflected the norm of the peaceful transfer of power to which Americans were used, despite intense partisan hostility to Trump himself. In keeping with that norm—since the election result, though close, was clear, and there was no hint of impropriety—Clinton should have dismissed the Green Party effort, as the ludicrous nonsense that it was, and urged the county to unite behind the new President.

Instead, the Clinton campaign, though never actually endorsing the validity of the Russian hack story, insisted that the claims should be investigated to put any concerns to rest. This was the same sort of tone that some Republicans deceitfully took in 2020, arguing that they were merely pursuing investigations of voting irregularities that concerned their constituents.[49] Of course there would have been no such public concerns in 2020 without the false claims of fraud that nurtured unjustified doubts about election integrity.[50]

The Clinton campaign's failure to join with Trump in dismissing these concerns undermined the Trump presidency as illegitimate, where it could have otherwise been attributed to an act of serious, yet ordinary, error in political decision-making by American voters.

In all of its communications on the subject, the Clinton

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www.pbs.org/newshour/politics/fox-dominion-voting-systems-reach-settlement-over-false-election-claims [perma.cc/3UJK-263R].

48. Nolan D. McCaskill, *Clinton concedes to Trump: 'We owe him an open mind'*, POLITICO (Nov. 9, 2016, 12:58 PM), www.politico.com/story/2016/11/clinton-concedes-to-trump-we-owe-him-an-open-mind-231118 [perma.cc/9J2C-GBX5].

49. *See, e.g.*, Jane C. Timm, *Trump's voter fraud lies encouraged a riot. GOP are still giving them oxygen.*, NBC NEWS (Jan. 10, 2021, 11:51 AM), www.nbcnews.com/politics/donald-trump/trump-s-voter-fraud-lies-encouraged-riot-gop-allies-are-n1253509 [perma.cc/CH43-SZLG]. Sen. Josh Hawley, R-Mo. commented, "I will never apologize for giving voice to the millions of Missourians and Americans who have concerns about the integrity of our elections. That's my job, and I will keep doing it." *Id.*

50. "The 'big lie' reinforced by President Trump about the 2020 election results amplified the Russian efforts and has lasting implications on voters' trust in election outcomes." Gabriel R. Sanchez & Keesha Middlemass, *Misinformation is eroding the public's confidence in democracy*, THE BROOKINGS INST. (July 26, 2022), www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ [perma.cc/4RAU-BS3A].

campaign strategically alluded to the fact that Hillary Clinton won the popular vote by more than two million votes,[51] as if, in a different system, Trump would not have targeted California and New York to drive up Republican totals and cut that margin. These reminders of the irrelevant popular vote also contributed to the general sense of illegitimacy of the Trump victory that had actually been the result of an extremely well-run and focused campaign, combined with serious white working-class dissatisfaction with President Bill Clinton-era neoliberalism. This refrain of winning the popular vote was another example of the same norm violation concerning the obligations of a losing Presidential candidate in an American election. In contrast, in 1960, Nixon did not publicly grouse that the election had been stolen in Illinois, although he did complain in private.[52]

This does not imply that Clinton's mild sour grapes were anything like Trump's efforts to stay in power in 2020-21. But that is the very point of the L&Z model of a spiral of reciprocal norm violations—one side starts the slide, and the other side responds in kind, making things worse.

It is very likely that even if Clinton had maintained the gracious tone which she embodied in the immediate aftermath of the 2016 elections, treated the Trump victory with respect, and urged the country to do the same (as President Barack Obama and Michelle Obama gamely tried to do),[53] nothing would have changed.[54] Trump did not need Hillary Clinton's behavior to act the way he did in 2020 and afterward. But from the point of view of the L&Z model, the country had already seen the norm of the peaceful transfer of power violated. From then on, it would be easier for a losing candidate to claim that shadowy forces stole the Presidential

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51. This was the meaning of the reference to the "64 million people who voted for Clinton" in the Clinton campaign's statement about joining the Wisconsin recount. *See* Laura Wagner, *Clinton Campaign Says It Will Participate in Recount Efforts*, NPR (Nov. 26, 2016, 2:38 PM), www.npr.org/sections/thetwo-way/2016/11/26/503432822/clinton-campaign-supports-recount-efforts-in-battleground-states [perma.cc/R96E-7F2E]. Trump won far fewer popular votes than Clinton in the 2016 election. Gregory Krieg, *It's official: Clinton swamps Trump in popular vote*, CNN (Dec. 22, 2016, 5:34 AM), www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html [perma.cc/Q37X-CAM8].

52. *See* Shesol, *supra* note 35.

53. *See* Domenico Montanaro, *In Meeting At White House, President-Elect Trump Calls Obama 'Very Good Man'*, NPR (Nov. 10, 2016, 11:54 AM), www.npr.org/2016/11/10/501566466/in-surreal-moment-president-elect-donald-trump-meets-with-president-obama [perma.cc/DYN6-N7D5].

54. Indeed, Trump claimed in 2016 that there had been voter fraud, that millions of people had voted illegally and that without those illegal votes, he actually won the popular vote. *See* Reena Flores, *Donald Trump slams Hillary Clinton team over recount efforts in Wisconsin*, CBS NEWS (Nov. 27, 2016, 3:45 PM), www.cbsnews.com/news/donald-trump-angry-hillary-clinton-team-recount-efforts-wisconsin/ [perma.cc/UX9N-CFEF].

election, just as Trump later claimed.

The first of this article's other two illustrations of a downward spiral of norm violations is the filibuster in the Senate. From the constitutional beginning, a Senate rule existed that allowed a simple majority to cut off debate on a bill. In 1806, however, the Senate abolished this rule.[55] Since then, a determined minority in the Senate, of even one or two Senators, could theoretically delay or prevent any Senate action—simply by engaging in prolonged debate.

Over time, two innovations defined the filibuster, as it currently is known. First was the ending of the tradition of unlimited debate through the invocation of a cloture vote in 1917, which changed the Senate rules.[56] At that time, a two-thirds vote, i.e., sixty-seven Senators, was necessary to close debate. That number was later reduced to sixty votes.

The second change emerged in the 1970s, with the advent of the so-called silent veto. Instead of one or two Senators opposing a measure actually engaging in Senate-floor debate to prevent its passage, a group of Senators sufficiently large to defeat a cloture vote, currently forty-one Senators, could simply announce its intention to filibuster a measure. The Senate majority leader would then refrain from calling for a vote on the measure.

Although the filibuster emerged as a sort of historical accident—the 1806 rule change did not evince an intention to create unlimited debate to delay or bar passage of a bill—one could conceive of the filibuster as a norm that protects a minority in the Senate, and thus the country, from dramatic changes in law, unless there is more than a simple majority behind the change. That would make the filibuster a democratic norm of restraint.[57]

Admittedly, that view is tainted by the filibuster's history. Until 1962, the overwhelming occasions of its use were filibusters by Southern Democratic Senators against passage of civil rights legislation.[58] At the funeral of U.S. Representative John Lewis in

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55. Tim Lau, *The Filibuster Explained,* BRENNAN CTR. (Apr. 26, 2021), www.brennancenter.org/our-work/research-reports/filibuster-explained [perma.cc/A9ZR-YQMC].

56. This occurred in a special Senate session on March 8, 1917. *See Cloture Rule*, U.S. SENATE, www.senate.gov/about/powers-procedures/filibusters-cloture/senate-adopts-cloture-rule.htm [perma.cc/WH7E-UNBM] (last visited July 27, 2024).

57. *See* Lau, *supra* note 55.

58. *See* Zack Beauchamp, *The filibuster's racist history, explained*, VOX (Mar. 25, 2021, 10:20 AM), www.vox.com/policy-and-politics/2021/3/25/22348308/filibuster-racism-jim-crow-mitch-mcconnell [perma.cc/8HU5-6VE2]; *see also* STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 88-91 (2023). Levitsky and Ziblatt tell the story of how an early filibuster by southern Democrats in 1891 prevented passage of the Force Bill, which would have provided real federal protection for the voting rights of African-Americans in the South. *Id.* The year 1962 has been called "The Turning Point" in the use of the filibuster.

2020, President Barack Obama called the filibuster "a Jim Crow relic."[59] Until 1962, filibusters were not generally used except to block civil rights legislation. That year, with opposition to the creation of the semi-private satellite corporation, COMSAT, filibuster use began to extend to other types of legislations and actions.[60]

The example of the abuse of the filibuster involves two different norm violations. On one hand, what had once been considered a rare event resorted to by an embattled Senate minority, evolved into a partisan weapon whereby the major political parties, both of which typically have a minimum of forty-one votes in the Senate, are able to win a cloture vote. This use of the filibuster prevents passage of ordinary legislative initiatives of the Party with a majority in the Senate. This is a norm violation because in the past, the minority Party practiced forbearance and only invoked the filibuster when proposed laws involved major changes, rather than ordinary legislative initiatives.

The filibuster has been used more than 2,000 times since 1917, but about half of those occasions have occurred in the past six years.[61] The filibuster now routinely prevents passage of the majority's legislative priorities, which may have been a program that a majority of America voted to enact in the prior election. Over time, each Party has expanded its willingness to resort to a filibuster in this way in response to overuse by the other Party. This downward spiral of use and counter-use perfectly illustrates the L&Z model, and it has paralyzed American democracy. In effect, a Party now needs sixty votes in the Senate to ensure that its legislative priorities are enacted. Not only is this not the legislative system the framers of the Constitution envisioned, but it is also not, in any sense, a democratic system. Super majorities are not used for ordinary legislation, for good reason: such a requirement ensures that the ordinary work of democracy, which is that the will of the majority usually prevail, cannot function.[62] Not even rudimentary legislation can pass, let alone any of the difficult decisions that any political system must address. To use a simple example, without the

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Turning Point, U.S. SENATE, www.senate.gov/about/powers-procedures/filibusters-cloture/comsat-filibuster-defeated.htm [perma.cc/82GV-WGLC] (last visited July 17, 2024).

59. Maggie Astor & Shane Goldmacher, *At Lewis Funeral, Obama Calls Filibuser a 'Jim Crow Relic'*, N.Y. TIMES (July 30, 2020), www.nytimes.com/2020/07/30/us/politics/john-lewis-funeral-barack-obama.html [perma.cc/5G3C-5WSK].

60. *Turning Point*, *supra* note 58.

61. *Cloture Motions*, U.S. SENATE, www.senate.gov/legislative/cloture/clotureCounts.htm [perma.cc/E44C-WKBU] (last visited July 17, 2024).

62. Senator Bill Frist memorably called the routine use of the filibuster as "nothing less than a formula for tyranny by the minority." *See* Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule is Unconstitutional and What to do About it*, 55 B.C. L. REV. 39, 68-69 (2014).

filibuster, some resolution of the ongoing immigration issue would already have been found.[63]

The other norm violation has been the curtailment of the filibuster in response to the norm violation of its overuse—a second downward spiral of norm violation. The Senate has created 161 exceptions to the filibuster's supermajority rule,[64] the most important of which is budget reconciliation. Budget reconciliation was created by statute in 1974.[65] Although not originally planned as a general exception to the filibuster, it limited debate to twenty hours. It has been seized upon and expanded as a way around the filibuster for other than budget legislation.[66]

The other way that a filibuster can be curtailed without the requisite sixty votes for cloture is the so-called nuclear option—the name communicates the unprecedented action it denotes. Under this method, a senator raises a point of order that contravenes a standing rule—in this case Rule XXII. The presiding officer then overrules the point of order, which is then appealed. Appeals from rulings of the Chair on a point of order relating to nondebatable questions, such as cloture, are non-appealable. At that point, a simple majority vote ends the filibuster.[67]

The expansion of the nuclear option illustrates the downward spiral very clearly. In 2013, Democrats invoked it in response to the Republican Party using the filibuster to block various appointment votes in the Senate. But this instance exempted confirmation votes on Supreme Court nominations. Then, in response to a Democratic filibuster of Neil Gorsuch, itself an unjustified use of the filibuster,[68] Senate Republicans finished off the filibuster for those nominations as well. The whole series of actions and counter-actions around the filibuster has rendered the Senate a "Dadaist Nightmare" in terms

63. Indeed, Democrats tried to pass immigration reform in a budget bill in 2021 that was not subject to a filibuster, but the effort failed when it was ruled that immigration reform was not legitimately a budget issue. *See* Claudia Grisales, *In A Blow To Democrats, Senate Official Blocks Immigration Reform In Budget Bill,* NPR (Sept. 19, 2021, 10:30 PM), www.npr.org/2021/09/19/1038776731/in-a-blow-to-democrats-senate-official-blocks-immigration-reform-in-budget-bill [https://perma.cc/UU75-AB6A].

64. MOLLY REYNOLDS, EXCEPTIONS TO THE RULE 2 (2017).

65. Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

66. Ezra Klein, *The Senate Has Become a Dadaist Nightmare*, N.Y. TIMES (Feb. 4, 2021), www.nytimes.com/2021/02/04/opinion/democrats-senate-reconciliation.html [perma.cc/U3MJ-V5VC].

67. *See* Lau, *supra* note 55.

68. The Gorsuch replacement of Justice Scalia did not change the ideological orientation of the Supreme Court. In similar circumstances, Republicans did not mount filibusters of the nominations of Justices Kagan and Sotomayor. Democrats filibustered the Gorsuch nomination because of another norm violation—the refusal of Republicans to schedule a vote on the earlier nomination of Merrick Garland.

of passing legislation,[69] just as L&Z's model predicts.

The final illustration of a downward spiral of norm violation concerns the use of impeachment against a sitting President. As is well-known, prior to the Presidency of Bill Clinton, there were only two instances of an impeachment or a threatened impeachment of a President—Andrew Johnson in 1868 and the threatened impeachment of Richard Nixon, which led to his resignation in 1974.[70] Johnson was acquitted, and the impeachment of Nixon was never carried out. Then, in the recent period, Bill Clinton was impeached in 1998, and Donald Trump was impeached twice, in 2019 and 2021. Both were acquitted in the Senate. Most recently, in 2023, the House commenced an impeachment inquiry concerning President Biden.[71]

Obviously, the use of impeachment has increased recently, but the mere use of impeachment is not the point of this article. Rather, what has changed is the norm that impeachment should reflect a judgment by the House of Representatives that there is a likelihood that the President would be removed after trial in the Senate—as opposed to the current use of impeachment, which constitutes a punishment for the President in its own right.

To demonstrate that impeachment was not previously considered a stand-alone action, one may consider Justice Powell's defense of absolute immunity from damage actions for a sitting President in *Nixon v. Fitzgerald*:[72]

> A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment.[73]

It is clear that Powell meant removal after impeachment since he invoked the removal of Congress members as a parallel action by a two-thirds vote.[74]

In the case of Johnson, the removal votes in the Senate—there were two—were extremely close. In Nixon's case, a removal vote never took place, but members of Congress told the President that removal in the Senate was likely. The impeachment of Bill Clinton violated the norm that impeachment would not happen without a substantial possibility of conviction in the Senate. In the two votes for removal in the Senate, all forty-five Democrats voted to acquit

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69. Klein, *supra* note 66.

70. *See* Erin Daley, *What 2020 Really Needed: A New Standard for Impeachment*, 50 HOFSTRA L. REV. 427, 437-49 (2022).

71. Farnoush Amiri, *House approves impeachment inquiry into President Biden as Republicans rally behind investigation*, AP NEWS (Dec. 14, 2023, 6:10 AM), www.apnews.com/article/joe-biden-impeachment-inquiry-mike-johnson-94884b322da40ca9315ac5f4e73a3e86 [perma.cc/2MKM-6PGJ].

72. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

73. *Id.* at 757.

74. *Id.* at 757 n.39.

and neither vote came close to the two-thirds requirement.[75] Nevertheless, the Clinton impeachment vote in the House achieved some bipartisan support: thirty-one Democrats in the House joined with a unanimous Republican vote to impeach Clinton.[76] In an illustration of L&Z's downward spiral of norm violation, Trump's first impeachment vote in the House, unlike that of Bill Clinton, proceeded without any support from the President's own Party.[77]

I exempt the second Trump impeachment from the norm violation pattern. That second impeachment did gain some support from Republicans in the House, and there was at least a chance in the Senate that there might be a conviction, which really foundered over the issue of whether a non-sitting President could be convicted.[78]

However, the House impeachment inquiry concerning Biden shows the way in which the spiral of norm violation unfolds. The impeachment pattern has proceeded from clear instances of Presidential wrongdoing that even some members of the President's own Party recognized, in Clinton's case, to clear Presidential wrongdoing that the President's Party refused to recognize, in the case of Trump's first impeachment, to unclear wrongdoing at all, in Biden's case. Impeachment has now become a partisan weapon to criticize a sitting President.

This section has shown some instances of the L&Z downward spiral of norm violation in action. A multitude of other examples could have been used in their place.

This article cannot end here, however, with analysis. As previously stated, the theme of the 2024 AALS National Meeting is Defending Democracy. Thus, law professors are called to action. As Lenin might say, *What is to be done?*[79] What, if anything, can law

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75. Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, WASH. POST (Feb. 13, 1999, 12:00 AM), www.washingtonpost.com/politics/clinton-impeachment/senate-acquits-president-clinton/ [perma.cc/54BN-ZNY9].

76. Peter Baker & Juliet Eilperin, *Clinton Impeachment Inquiry Approved; 31 House Democrats Back GOP*, WASH. POST (Oct. 9, 1988, 12:00 AM), www.washingtonpost.com/politics/clinton-impeachment/clinton-impeachment-inquiry-approved-house-democrats-back-gop/ [perma.cc/NZ5U-MW5Z].

77. Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, N.Y. TIMES (Feb. 10, 2021), www.nytimes.com/2019/12/18/us/politics/trump-impeached.html [perma.cc/UE4Z-7HZ8]. That had been true of Andew Johnson's impeachment vote as well, but as stated above, there was a strong possibility of conviction in the Senate. *Id.*

78. *See* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SEC. (Feb. 15, 2021), www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/ [perma.cc/C6HH-FUJJ].

79. VLADIMIR ILYICH LENIN, WHAT IS TO BE DONE? (Joe Fineberg & George Hanna trans. 1902), www.marxists.org/archive/lenin/works/1901/witbd/ [perma.cc/R4UL-V55Y] (last visited July 17, 2024).

professors do to prevent L&Z's downward spiral from leading America to a catastrophic death of democracy?

IV. THE AALS-LED LAW PROFESSOR CAUCUS TO PRESERVE DEMOCRACY—THE LPCPD

This article proposes that professors create an AALS-led institution: the Law Professor Caucus to Preserve Democracy, or the LPCPD.

The legal academy has attempted to respond to the current crisis in American public life. In 2022, fourteen of the most influential law school deans in the country published essays in a book about the January 6 attack on the Capitol: *Beyond Imagination*.[80] Then, in May, 2023, the AALS held a virtual Conference on Defending Democracy. And, of course, Defending Democracy is the theme of the 2024 Annual Meeting.[81]

In light of these efforts, this article considers three broad responses to the crucial question, *what should law professors do in response to this crisis?*

The first, and overwhelming response given is to win. It is no secret that the legal academy as a whole, and the AALS and its leadership, trend politically-Left.[82] Legal academics as a group regard Trump, Republicans and conservatives as primarily responsible for the crisis and as a malign influence in American public life generally.[83] Therefore, most of the speakers and contributors above propose efforts to protect vulnerable groups against Right-wing attack, to win elections against the aforementioned groups, and to litigate on behalf of progressive causes.

From this vantage point, the other side represents the vestiges and legacy of white supremacy, misogyny, heteronormativity, and

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80. MARK C. ALEXANDER ET AL., BEYOND IMAGINATION?: THE JANUARY 6 INSURRECTION (2022).

81. *See 2024 AALS Annual Meeting*, *supra* note 1.

82. *See* Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, scholar.harvard.edu/files/msen/files/law-prof-ideology.pdf [perma.cc/8B6Y-V3CR].

83. Dean Mark Alexander of Villanova University Charles Widger School of Law wrote in the Introduction to *Beyond Imagination*?, a compilation of 14 law school deans that certainly reflects the mainstream legal academy view, that "This book is not a partisan undertaking." ALEXANDER ET AL., *supra* note 80, at viii. No one intended a partisan undertaking. But the book reflects the prevailing view that Trump and the Republican Party were solely to blame for the attack on the Capitol and related issues of democratic crisis. For example, the joint message at the beginning of the book states, "The effort to disrupt the certification of a free and fair election was a betrayal of the core values that undergird the Constitution." *Id.* at vii. A reader would not know that there were prior instances of Democratic Party representatives in Congress voting to reject certified votes in Presidential elections. That was not violent, of course, but it was still an unjustified attempt to disrupt certification of free and fair elections.

other unjust, traditional hierarchies. There is nothing to be done with such people except to defeat them.[84]

I agree that winning is crucial, and I don't mean to conceal my own partisan leanings. However, this article aims to make clear that at least according to L&Z, one cannot save democracy by pursuing the strategy of winning at all costs. Winning at all costs, including violating democratic forbearance, is the very problem to be solved. As such, ideas of packing the Supreme Court and other so-called structural reforms advocated by the Left, serve to highlight the urgent need for Americans to attend to the message of L&Z. Such fighting at all costs is how democracies die.

The norms of American politics must be respected if the downward spiral to democratic disaster is to be avoided. It does not matter if the other side started the slide, and it does not matter if the norm violation is provoked by a norm violation by the other side. In the present American reality, both sides will feel, with some reason, that their own norm violations are justified. To defeat the spiral, one must refrain from norm violation. That is the lesson of the L&Z model.

So, without for a moment suggesting that Democrats and Republicans are equivalently to blame for the crisis in American public life, the only safe path forward is for both sides to stop violating norms. Both sides are going to have to step back and restrain their political competition. Winning at all costs will not do.

The second response, which is represented by Villanova Dean and President of the AALS Executive Committee, Mark Alexander, is that we must renew our dedication to democratic values, such as free and open debate and the rule of law.[85] This is indeed necessary. But, as I will discuss below,[86] it cannot happen without a significant change to the national philosophical and theological—that is, spiritual—context.

The third response is the one relevant to the immediate issue of what actions one ought to take right now. The Dean of Penn Law School, Theodore Ruger, suggests in *Beyond Imagination* that individuals pay careful attention to the ways in which democratic structures work, so as to create proper incentives for political actors to move away from extremism.[87]

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84. There are many instances of the political one-sidedness of AALS material. I am not suggesting that the book, *Beyond Imagination?*, should have been "even-handed" about the attack on the Capitol—what would that even look like? Rather, the Left's bias against the AALS manifests in linking something like the attack on the Capitol to any opposition to a progressive political agenda. *See, e.g.*, ALEXANDER ET AL., *supra* note 80, at 166-67 ("The roots of the January 6 insurrection are planted in the same soil as the roots of the waves of attacks against the 1619 Project and Critical Race Theory that are raging in the writing of this essay.").

85. *Id.* at 285.

86. *See infra* Parts V-VII.

87. ALEXANDER ET AL., *supra* note 80, at 117.

Here, this article suggests a proposed solution. In 1981, the former Democratic Party Chair and Ranking Republican member, Robert Giaimo and Henry Bellmon, respectively, founded the Committee for a Responsible Federal Budget. Their idea was that the country needed a bipartisan group to advocate for fiscal responsibility. Since that time, the Committee has been careful to criticize irresponsible spending and tax-cutting proposals in a bipartisan fashion.[88]

Given the Federal Government's precarious fiscal condition, e.g., increasing deficits and higher debt payment costs, it is evident that the Committee has not been very successful. Nevertheless, the Committee is a voice for fiscal restraint for the media and its national audience. Without its efforts, fiscal matters would only be worse.[89]

The Committee represents the correct model for law professors, led by the AALS, to pursue. Namely, law professors need to create a bipartisan institution that will oppose and publicly condemn further norm violations, whether committed by Republicans or Democrats. This can be done essentially through a meeting of the leadership of groups like the American Constitution Society and The Federalist Society, under the guidance of the AALS, to agree on a norm-reinforcing program and to select a representative and a prestigious national working Board to "hammer out" general principles and responses to ongoing political events and crises.

There are undoubtedly many questions concerning the LPCPD, but two specific problems have to be addressed before a serious effort in this direction can be made.

First, there is considerable suspicion on the Right of legal academia in general and the AALS in particular. That suspicion is quite justified. Some years ago, Randy Barnett, a leading constitutional conservative, returning from a gun control panel at the AALS Annual Meeting, announced to a Federalist Society group that the gun control panel had not contained a single pro-gun speaker, or even a speaker known to be somewhat sympathetic to gun rights. That has been the conservative experience of the AALS on many issues beyond gun rights.[90]

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88. *See, e.g.*, Press Release, Committee for a Responsible Federal Budget, The Committee Criticizes Abuse of the Budget Process for Both Tax Cuts and Spending Increases (May 11, 2006), www.crfb.org/press-releases/committee-criticizes-abuse-budget-process-both-tax-cuts-and-spending-increases [perma.cc/N7AE-RMU8].

89. Committee reports and analyses allow the media to more closely question political candidates on their taxing and spending proposals. For example, in the 2016 Democratic Presidential candidate debate, CNN Wolf Blitzer questioned Senator Bernie Sanders using Committee figures. *See Full transcript: CNN Democratic Debate*, CNN (Apr. 15, 2016, 12:11 AM), www.cnn.com/2016/04/14/politics/transcript-democratic-debate-hillary-clinton-bernie-sanders/ [perma.cc/CU52-F49U].

90. I was present in the room at the time of this episode. On the other hand,

Of course, the suspicion is mutual. Until the matter was concluded, no one from the Federalist Society, or from the Right generally, seemed to condemn the norm-violating refusal to take a vote on the nomination by President Obama of Merrick Garland to the Supreme Court. Nor was there much condemnation by conservative law professors in early 2021 of Trump's 2020 election fraud claims. While there is such condemnation now, the damage has been done. In other words, both sides in the legal academy have been thoroughly partisan.

So, can a bipartisan group that is sufficiently influential, actually be assembled? Members of such a group would have to manage the difficult tension between their continuing commitment to their own side's political success, while at the same time demanding that their own side limit the political competition to the existing rules of the game—including accepting the legitimacy of victory by the other side.[91]

That core problem alone is difficult. But even if the necessary goodwill could be attained and sustained over time—and it well might, given the nature of the emergency the nation faces—the second problem is more daunting. Simply put, *what are the existing rules of the game and what is a norm violation?* Unlike federal deficits, upholding existing political norms is ambiguous.

For example, are Republican state legislators limiting the franchise safeguarding the norm of no coercion in the assembling of absentee ballots or are they engaged in an unprecedented effort to suppress the votes of vulnerable groups? Similarly, at this point, would abolishing the filibuster altogether represent a further norm violation or would it, because of the paralysis of the Senate, return America to the norm of majority rule, as envisioned by the framers for the Senate?[92]

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times have clearly changed. At the 2024 AALS Annual Meeting, originalists played a prominent role, including Lawrence Solum and Randy Barnett.

91. Since these words were penned, a conservative legal group has organized—The Society for the Rule of Law Institute—as an outlet for criticism of anti-democratic and anti-constitutional actions on the Right that the Federalist Society has failed to counter. *See* George Conway, J. Michael Luttig & Barbara Comstock, *The Trump Threat Is Growing. Lawyers Must Rise to Meet This Moment.*, N.Y. TIMES (Nov. 21, 2023), www.nytimes.com/2023/11/21/opinion/trump-lawyers-constitution-democracy.html [perma.cc/RZ3W-N5LK]. The existence of this group would certainly facilitate the formation of an AALS-led law professor caucus. I doubt it would supplant the need to involve the Federalist Society in view of the prestige that organization has built on the right over the years. Nevertheless, the creation of this new group testifies to the general feeling that action of the type proposed in this paper is urgently needed.

92. This paper was written before the decision of the Colorado Supreme Court and the Maine Secretary of State decisions removing former President Donald Trump from the ballot pursuant to Section 3 of the Fourteenth Amendment. *See* Anderson v. Griswold, 543 P.3d 283 (Colo 2023), *rev'd*, 144 S. Ct. 662 (2024). This action raises exactly the kind of difficulty referred to above. Should the removal of Trump be regarded as part of the spiral of norm violations

Evidently, there is no simple answer to either problem; however, more of the same—i.e., more vituperative comments, more anger, more hostility, more condemnation, more charges and counter-charges, and finally, more alienation and distance from the other side—is bound to fail. The nation ought to do something new and innovative if it wishes to have a chance at saving democracy and revitalizing American public life. Agreeing that further norm violation is to be avoided, publicly reinforcing that decision, and attempting to apply it to day-to-day political life would go a long way to halting the current downward spiral that may end in democratic catastrophe.[93]

V. WHY DID THE DOWNWARD SPIRAL BEGIN AND WHY CANNOT COOLER HEADS PREVAIL TO STOP IT?

The previous sections describe the current downward spiral of norm violations in American political life and the threat that this poses to American democracy. This section of the article proposes a mechanism—a bipartisan, pro-democracy law professor caucus—that would help prevent the spiral from continuing.

But no one familiar with the nation's current condition can be confident that any action will truly help. Counselling restraint, which according to the L&Z account, is the best remedy, seems like a fool's errand.[94]

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that treats an opponent as an enemy to be thwarted at all costs, or as an attempt to prevent further norm violation by a political actor who resorted to violence to attempt to stay in power after losing an election? Is removal something to oppose or celebrate?

93. Social Science Research Council, *What Conventional Wisdom Gets Wrong About Political Polarization*, YOUTUBE (Oct. 27, 2023), www.youtube.com/watch?v=S8C37UbpTLU&t=321s [perma.cc/72GD-L4M2]. On a SSRC sponsored online lecture on Oct. 27, 2023, What Conventional Wisdom Gets Wrong About Political Polarization, noted political scientist David Broockman pointed to research suggesting that when partisan members of the public are accurately informed of the degree of democratic norm violation the other side has actually engaged in, they become less supportive of preemptive norm violation by their own side. *Id.* This suggests that a prestigious and bipartisan law professor group calling for norm restraint, as outlined here, might be effective in improving American public life, for two reasons. First, such a group might suggest to the public that there will be less norm violation tolerated in the future, which presumably would cause members of the public to accept norm faithfulness by their own side. Second, the very fact that such a group is functioning would mean that no surreptitious norm violation would go unnoticed. That would reassure the public that their own side need not violate norms first in order to avoid being ambushed by the other side.

94. Even Levitsky and Ziblatt may feel that way. In their latest book, *Tyranny of the Minority*, the authors explain that when writing *How Democracies Die*, they never anticipated the January 6 assault on the Capitol and the extent to which an authoritarian minority could attain power in America. LEVITSKY & ZIBLATT, *supra* note 58; LEVITSKY & ZIBLATT, *supra* note 7. The conclusion of the Introduction is almost the opposite of the thrust of the

But why is that? Given the scale of the threat to democracy, why should cooler heads not prevail? Why do the suggestions by Dean Alexander that the nation renew its dedication to democratic values, such as free and open debate and the rule of law,[95] seem so unrealistic?

The related question, one that would explain why halting the spiral is an arduous task, is why did it start in the first place? After all, even if one shares L&Z's belief that Republican norm violations started the spiral,[96] and that the vicious cycle is therefore the Republican party's fault, then, why did it start when it did, as opposed to starting at an earlier or later time? It is not as though reactionary forces suddenly appeared in American public life at that specific point in time—they have always been there.[97]

If one's response to this enigma is merely that the Republican Party is crazy, he or she must be able to explain why it became crazy when it did—because arguably, it was not crazy in 1960.

Similarly, if one were on the other side, and believed that Democrats started the spiral and are therefore at fault, he or she must be able to explain why Democratic norm violations accelerated to their current degree of provoking Republican retaliation now. Norm violations have been proposed on the Left since the 1930s—from Court packing to various forms of socialist experimentation.[98] But, somehow, these prior episodes calmed down before they could lead to an existential threat to American democracy.

To state things bluntly, no one had previously attacked the U.S. Capitol in an effort to prevent the peaceful transfer of power—everyone would have been horrified by such a thought, assuming that such an event would never take place in America. But it did.

Of course, people have been asking different versions of these questions since 2015: What Went Wrong and What Can We Do About It?[99] But asking these questions in that manner disregards the reality of the situation, which is that the spiral has been underway since the 1990s, at the very least. Trump is not the cause of America's problems. He is a symptom. A more fundamental and wide-ranging approach is needed to understand our situation.

Some of the reasons that people offer for the increasing political

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earlier book: "Our institutions will not save our democracy. We will have to save it ourselves." *Id*. at 11.

95. ALEXANDER ET AL., *supra* note 80.

96. *See* LEVITSKY & ZIBLATT, *supra* note 7, at 53, 145.

97. *See* Sean Wilentz, *American Carnage*, N.Y. REV. (Aug. 17, 2023), www.nybooks.com/articles/2023/08/17/american-carnage-homegrown-jeffrey-toobin/ [perma.cc/DE6R-4PZG].

98. *See* DONALD J. DEVINE, THE ENDURING TENSION: CAPITALISM AND THE MORAL ORDER (2021) (analyzing the tension between freedom and order that government interventions, like Lyndon Johnson's Great Society initiatives, threaten to unbalance).

99. *See* Bruce Ledewitz, *What Has Gone Wrong and What Can We Do About It?*, 54 TULSA L. REV. 247 (2019).

polarization and hyper-partisanship seem to be mere contributing factors: the creation of social media, growing economic inequality, stagnating wages, and so forth.[100]

Economic factors cannot account for the change because in the relevant period involved—i.e., the last third of the 20th century and the first few years of the 21st century—economic conditions were not as grim. Average wages were not growing significantly, and blue collar jobs declined, but conditions were not so dire that the overall system should have been in crisis. While it is true that the recession in 2008 was severe, the spiral was well-underway by that time.

Nor can social media be a major factor in starting the slide. Social media did not become popular until the early 2000s[101] and Rush Limbaugh and FOX News were already national phenomena by the late 1990s.[102]

In response to the question of why the spiral started, L&Z give a brief answer: prior to the Civil Rights revolution, the two major political parties had an unwritten understanding that white supremacy would not be fundamentally challenged.[103] That unwritten understanding contributed to restrained and limited competition between the parties—a competition in which norms were followed. When that unwritten understanding collapsed, the competition between the parties erupted to new dimensions and norms began to fall.[104]

President Lyndon Johnson indirectly endorsed L&Z's account when he predicted that the passage of the 1964 Civil Rights Act, which was his great achievement, would kill the Democratic Party among whites in the South.[105] The Act ended the so-called solid South.

L&Z end their explanation there. It would not be difficult, however, to extend their theory nationally, to the dominant groups of race, religion, gender and sexual orientation, who feel the threat to their dominance to a greater extent. L&Z would presumably

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100. For a fuller account of the argument that these material explanations cannot account for the decline in American public life, *see* BRUCE LEDEWITZ, THE UNIVERSE IS ON OUR SIDE: RESTORING FAITH IN AMERICAN PUBLIC LIFE, 30-49 (2021).

101. "MySpace was the first social media site to reach a million monthly active users – it achieved this milestone around 2004. This is arguably the beginning of social media as we know it." Esteban Ortiz-Ospina, *The rise of social media*, OUR WORLD IN DATA (Sept. 18, 2019), www.ourworldindata.org/rise-of-social-media [perma.cc/NQ4W-FMWZ].

102. *See* Sean Illing, *Rush Limbaugh and the echo chamber that broke American politics*, VOX (Feb. 26, 2021, 8:00 AM), www.vox.com/policy-and-politics/22151088/rush-limbaugh-trump-talk-radio-fox-news-paul-matzko [perma.cc/EV9S-XLX8].

103. LEVITSKY & ZIBLATT, *supra* note 58, at 175.

104. *Id.* at 143.

105. *See* Charles Kaiser, *'We may have lost the south': what LBJ really said about Democrats in 1964*, THE GUARDIAN (Jan. 23, 2023), www.theguardian.com/books/2023/jan/22/we-may-have-lost-the-south-lbj-democrats-civil-rights-act-1964-bill-moyers [perma.cc/7VEE-SVWV].

argue that these groups experience this threat as an existential one. They would say that America is becoming a truly multi-racial society with a much expanded role for women and an openness on all gender issues that has transformed society. Therefore, these formerly dominant groups will stop at nothing, not even violation of established norms, to maintain their place in society.[106]

In part, the L&Z account is clearly correct. The two major parties did not become ideologically coherent competitors until after the Vietnam War. In percentage terms, more Republicans than Democrats voted for the 1964 Civil Rights Act.[107] There were liberal Republicans in the Senate through the 1970s. Ronald Reagan's election in 1980 probably signaled the end of that era and the beginning of all-out political competition.

Nevertheless, the L&Z explanation cannot be the whole explanation for the beginning of the crisis in American public life, because there are two problems with it. First, it is unhelpfully deterministic. The explanation assumes that when stakes become very high, people violate fundamental political norms. That is not so much an explanation as a tautology. Important matters are always at stake in political systems. Only under extraordinary circumstances, however, do people decide that it is worth endangering the system to address those stakes. The question then becomes, *why does that happen and why did it happen in America when it did?*

Second, the L&Z account, which is widely shared among progressive thinkers in America,[108] is inconsistent with the increasing racial equality in American society. Contrary to popular belief, it is not clear that white Americans as a whole feel threatened by the arrival of a multi-racial society.[109] It is true that people talk more about racism than ever before, but that might be a sign of progress. It is actually very hard to know.[110]

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106. Actually, Levitsky and Ziblatt come close to saying all this in *Tyranny of the Minority*. LEVITSKY & ZIBLATT, *supra* note 58, at 100-02.

107. Brad Sylvester, *Fact Check: 'More Republicans Voted for the Civil Rights Act as a Percentage than Democrats Did'*, THE DAILY SIGNAL (Dec. 17, 2018), www.dailysignal.com/2018/12/17/fact-check-more-republicans-voted-for-the-civil-rights-act-as-a-percentage-than-democrats-did/ [perma.cc/3M4L-6HA3].

108. *See, e.g.*, Edward Lempinen, *Loss, fear and rage: Are white men rebelling against democracy?*, BERKELEY NEWS (Nov. 14, 2022), news.berkeley.edu/2022/11/14/loss-fear-and-rage-are-white-men-rebelling-against-democracy [perma.cc/SVR6-4CUB].

109. Levitsky and Ziblatt argue in their newest book, *Tyranny of the Minority*, that this apparent inconsistency is the result of an "authoritarian backlash" against the progress that has been made. LEVITSKY & ZIBLATT, *supra* note 58, at 5-6. But though there were undoubtedly racists present at the January 6 attack on the Capitol, that attack was not about race. Levitsky and Ziblatt are unable to broaden and deepen their analysis to encompass the deeper ways in which people today may feel that things are out of control.

110. This is a complex issue that is beyond the scope of this paper. But when

America has gradually become more racially tolerant during the very period at issue—from the 1970s until the present.[111] And this is largely true of the other demographic factors that might also be involved—gender, sexual identity, and so forth.

This reality may be ideologically unacceptable, but to someone old, like the author of this article, the reality is obvious. In the 1960s, when I grew up, interracial marriage and gay lifestyles were real flashpoints all over America. An interracial couple or a gay couple would routinely be hassled—or worse—almost everywhere in the country.[112] Now, these same couples have been converted to common advertising themes.[113]

Of course there is still real opposition to Trans life, as Bud Light found out,[114] but Trans life was not even on most people's minds in the 1960s. Nonetheless, the present-day hostility towards Trans life should not obscure the amazing level of progress that has occurred in other areas.

To put the matter more directly, while virulent white racists are undoubtedly a *part* of the Republican Party coalition, they are not the Republican *brand*—though many progressives would like to believe otherwise. Donald Trump may employ racist catcalls from time to time, but he clearly took great pride in the economic improvement enjoyed by workers of color during his Presidency.[115]

Plus, the Republican Party is doing better, not worse, among

Democrats on surveys report that race relations are worse than Republicans do, you have to wonder whether sensitivity to race discrimination might not be increasing in society, which would ironically be a sign of progress, not regression. *See* Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, PEW RSCH. CTR. (Apr. 9, 2019), www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/ [perma.cc/8N5B-CETP].

111. LEVITSKY & ZIBLATT, *supra* note 58, at 102.

112. Anti-gay violence in the 1950s was so pervasive that it often was not even noted in reports of crime. *See* James Polchin, *How True-Crime Stories Reveal the Overlooked History of Pre-Stonewall Violance Against Queer People*, TIME (June 4, 2019, 1:10 PM), www.time.com/5600232/lgbt-crime-history/ [perma.cc/XH78-UM2Y].

113. *See* Joanne Kaufman, *A Sign of 'Modern Society': More Multiracial Families in Commercials*, N.Y. TIMES (June 3, 2018), www.nytimes.com/2018/06/03/business/media/advertising-multiracial-families.html [perma.cc/S9BG-LAU9]; *see also* Chauncey Alcorn, *How gay couples in TV commercials became a mainstream phenomenon*, CNN (Dec. 20, 2019, 5:40 PM), www.cnn.com/2019/12/20/media/hallmark-zola-gay-ad/index.html [perma.cc/33RJ-KKE4].

114. *See* Jennifer Maloney & Lauren Weber, *How Bud Light Handled an Uproar Over a Promotion With a Transgender Advocate*, WALL ST. J. (May 22, 2023, 5:55 PM), www.wsj.com/articles/how-bud-light-handled-an-uproar-over-a-promotion-with-a-transgender-advocate-e457d5c6 [perma.cc/7ZP9-5QGC].

115. I am not arguing that Trump's statements were justified, just that he claimed credit for racial progress. *See* Calvin Woodward, Hope Yen & Arijeta Lajka, *AP FACT CHECK: Trump exaggerations on blacks' economic gains*, AP (June 7, 2020, 10:58 PM), apnews.com/article/american-protests-donald-trump-ap-top-news-politics-business-16a926cc5f932d984a16646fbdf7f4ea [perma.cc/Z3WJ-7ZWX].

minority racial groups. Trump polled more highly among such groups in 2020 than in 2016, and national Republican figures like Florida Governor Ron DeSantis enjoy wide multi-racial support.[116]

Resentment is definitely present among the white working class, but there is no reason to think of it as based on race, as opposed to class and education.[117] Something other than the Great Replacement issue must also be present to explain why the downward spiral began and why it is going to be challenging to stop.

And this "something" must also account for the sense of desperate struggle prevalent on both political sides, along with other phenomena associated with America's political decline, such as long-term decreasing respect of science and other institutions of authority.[118] That is, one ought to account for the nation's movement into a post-Truth age.

As this article will attempt to demonstrate in the next section, the underlying change in America during this period was a spiritual one, a change in cultural consciousness.[119] With the spread of the acceptance of the Death of God, America, which had uniquely religious foundations as a society, lost the foundation of its faith in reality. Indeed, Americans lost their sense of a rational, coherent and beneficial universe that had supported confidence in the future.[120]

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116. DeSantis's Florida 2022 reelection was a multi-racial and gender landslide. *See* Zac Anderson & Kathryn Varn, *Florida governor race: Ron DeSantis wins in a landslide over Democrat Charlie Crist*, TALLAHASSEE DEMOCRAT (Nov. 8, 2022, 8:07 PM), www.tallahassee.com/story/news/politics/elections/2022/11/08/fl-governor-race-results-ron-desantis-charlie-crist-florida-election/10615398002/ [perma.cc/CB3B-M4PZ].

117. *See* Bruce Ledewitz, *The rage of the essential worker*, TRIBLIVE (Nov. 3, 2023, 2:00 PM), www.triblive.com/opinion/bruce-ledewitz-the-rage-of-the-essential-worker/ [perma.cc/LU26-EJDR].

118. *See* Yuval Levin, *How Did Americans Lose Faith in Everything?*, N.Y. TIMES (Jan. 18, 2020), www.nytimes.com/2020/01/18/opinion/sunday/institutions-trust.html [perma.cc/P2KX-R8ZE].

119. *See infra* Part VI.

120. This argument is made at length in my book. *See* LEDEWITZ, *supra* note 100. But I want to answer one objection here. If the problem is that the Death of God undermined cultural morale and led to anger and chaos, then wouldn't religious people be immune? But, of course, churchgoers make up a large part of the support for Donald Trump and they are obviously just as angry as everybody else in America, if not more so. But this is not how the Death of God operates, as Nietzsche knew. Churchgoers, that is those people affiliated with organized religion, are affected as well. In a culture in which the Death of God is accepted, it is the rare person who retains genuine faith in reality based on continued confidence in God. In effect, the anger present among the religiously affiliated is evidence of the Death of God. This is the point that Russell Moore, a former top official in the Southern Baptist Convention was making in a recent interview with NPR. Moore told the story of pastors who quoted the Sermon on the Mount, only to be confronted by parishioners who respond, "yes, but that doesn't work anymore. That's weak." Scott Detrow & Russell Moore, *Russell Moore 'on altar call' for Evangelical America*, NPR (Aug. 5, 2023, 6:02 PM), www.npr.org/2023/08/05/1192374014/russell-moore-on-altar-call-for-

American norms of political restraint in the face of the loss of political power and acceptance of the rule of law had depended on the view of reality as making sense and having a kind of trajectory—a teleological understanding of the universe. Without the sense that the universe is on our side, human beings descend into chaos and conflict, which is what happened here.[121]

If the arc of the moral universe bends toward justice, as Martin Luther King, Jr. asserted[122] and Americans mostly used to believe, it results in one kind of politics. If it does not, it results in a different kind—a politics of intense struggle at all costs.

The suggestion of this article is not meant to promote a return to organized religion. I am a secularist myself and view the Death of God as here to stay, at least in the short and middle term, although of course it may not prove permanent. The last section of this article proposes a way for law professors, including secular ones, to address this spiritual crisis. The next section supports the claim that the Death of God had something crucially to do with our downward spiral of norm violations.

VI. RECENT AMERICAN EXPERIENCE SHOWS THAT A SPIRITUAL CHANGE EXPLAINS WHY THE DOWNWARD SPIRAL BEGAN AND WHY IT IS HARD TO STOP

On Friday, October 6, Anthony Mills, a senior fellow at the American Enterprise Institute, published a long op-ed[123] in The New York Times entitled, "The New Politics of Trust." Mills told a complex story, but his conclusion was straightforward:

> [M]any Americans, especially but not only conservatives, have grown highly distrustful of institutions of all kinds, creating fertile soil for conspiracies and other extreme views to take root.
>
> This, in turn, raises the disturbing prospect of a new politics polarized

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evangelical-america [perma.cc/4AAT-FPVP]. Moore concludes the story, "when we get to the point where the teachings of Jesus himself are seen as subversive to us, then we're in a crisis." *Id*.

121. It should not be hard to see that forbearance in the Levitsky and Ziblatt sense—that is, that I do not do everything I can to further my agenda—is premised on the general assumption of a beneficent future. That is why I can afford to lose an election. There will always be another election to win and there is a limit to the harm that my opponents will do in the meantime. What may be harder for people to understand, for lawyers to understand, anyway, is that this sense of regularity has a cosmic dimension and not just a political or legal one. In mythic terms the saying is, as above, so below.

122. MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 252 (James M. Washington ed., 1986).

123. The online edition appeared on October 3 and was more than 1600 words. M. Anthony Mills, *Why So Many Americans Are Losing Trust in Science*, N.Y. TIMES (Oct. 3, 2023), www.nytimes.com/2023/10/03/opinion/science-americans-trust-covid.html [perma.cc/6UFU-R6MQ].

> not so much around public policies but around trust itself — and the public figures who successfully mobilize trust or distrust. Restoring faith, therefore, may prove vital for a functioning society. To get there, experts must consider how and why so many Americans now consider them and the institutions they represent to be unworthy of their confidence.[124]

Mills pointed out that some Americans—college-educated Democrats—now report higher levels of trust in some institutions, science in particular, but he attributes that mainly to negative partisanship. Republicans were attacking science during the pandemic and its aftermath, so Democrats embraced science. He is probably right that trust in institutions has not actually grown among any group. After all, college-educated Democrats did not dismiss the 2016 Wisconsin recount as nonsense—they did not then "follow the science." Mills was not telling a new story. Americans' trust in most institutions—Congress, the media, business—has been falling for years.[125]

There are two things to note about Mills' conclusion above. First, if trust is to be restored, the reasons behind Americans' loss of trust in institutions must be determined. This article suggests that the loss of trust is tied to a loss of confidence in the universe itself—a very general feeling that things no longer make sense. American confidence in reality has lessened. This culture no longer has an account—a story—of what human life means.[126] The traditional story of God is no longer widely accepted, and no alternative has emerged. Thus, the loss of trust to which Mills is pointing has very little to do with misbehavior or incompetence within the institutions themselves.

Second, Mills moves easily—and undoubtedly, subconsciously—from the use of the word "trust" to "faith." Mills did not intend thereby to invoke a religious theme; the op-ed does not deal with the decline of religious belief and affiliation among Americans. Mills just meant that modern life requires faith in abstract systems run by experts whom people do not personally know, based on evidence and learning which people do not understand.

Nevertheless, there is a religious, or perhaps more comprehensively, philosophical, issue here. The opening salvo of the

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124. *Id.*

125. *See* Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, GALLUP (July 5, 2022), news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx [perma.cc/TG3M-T6UX].

126. In a general sense, this lack of a secular story is the reason that noted secularist Ayaan Hirsi Ali gave for her abrupt and surprising conversion to Christianity after abandoning Islam and, with great fanfare and at the risk of her very life, embracing secularism: "Atheism failed to answer a simple question: what is the meaning and purpose of life?" Ayaan Hirsi Ali, *Why I am now a Christian*, UNHERD (Nov. 11, 2023), www.unherd.com/2023/11/why-i-am-now-a-christian/ [perma.cc/2DBX-GDKL].

New Atheist onslaught in the early years of the 21st century was not Chris Hitchens's monumental best-seller in 2007, *God is Not Great*,[127] but Sam Harris's more subtly subversive entry in 2004, *The End of Faith*.[128] Harris argued that religious belief is not justified by evidence. God finally died in America because of a lack of proof.

It turns out, however, as Mills shows, that not very much of importance can be rigorously demonstrated. Most people don't understand the science of climate change any more than they understand the science that proclaims the existence of water under the surface of one of the moons of Saturn. Understanding the science is not why most people accept the reality of climate change.

Nor is personal experience why most people accept the idea of climate change. Yes, it has been getting warmer in Pittsburgh over the years, but it is not getting warmer everywhere.[129] One person's personal experience is not evidence of world-wide climate change. People certainly cannot see sea level rise personally. And, anyway, many people believed that climate change was happening back in the 1990s, before the catastrophes began, before there was much visible evidence of warming, because scientists said it was happening.

Americans, or anyway, most of us, do not follow the science. We should drop that phrase. We follow the scientists. That is the faith to which Mills is pointing, and which Harris and his New Atheist friends helped undermine. Faith in God had served as the unconscious, cultural foundation for other types of faith—faith in my fellow human beings, faith in the future and faith in the rule of law. When faith in God declined, these other faiths declined as well.[130]

The Death of God affects not just self-proclaimed atheists and

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127. CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007). Hitchens is widely credited with launching the New Atheist Movement in America in the early years of the 21st Century.

128. SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON (2004).

129. *See* Caitlyn Kennedy, *Does "global warming" mean it's warming everywhere?*, CLIMATE.GOV (Oct. 29, 2020), www.climate.gov/news-features/climate-qa/does-global-warming-mean-it's-warming-everywhere [perma.cc/KAA4-DJTG].

130. This was the unintended meaning of Sam Harris's book title, *The End of Faith: Religion, Terror and the Future of Reason*. *See* HARRIS, *supra* note 128. It turns out that average people cannot use reason to judge the truth of much of what goes on in the world. I don't have the education to judge scientific claims, or historical claims or much of what I rely on every day. So, when faith ends, as Harris puts it, everything goes, not just faith in God. That is why we are now at the mercy of absurd conspiracy claims. When somebody tells me that sun spots cause climate change, I "know" it is not true. But if a reputable scientist made the same claim tomorrow, I would genuinely consider the possibility that all we know about climate change might be false. That is how science works. But it is also how warranted faith works.

agnostics. It does not completely empty the churches, though it lessens attendance at most of them. The people who remain religiously affiliated are also affected by it.[131] Even in the religious community, anxiety over the future can replace confidence. Hatred of others can replace love. Human struggle can become crucial because God's lordship over history is in doubt.[132]

Making the case for a decline in faith as the answer as to why the downward spiral of norm violations began when it did and why it is so hard to stop is, like all other important matters, not susceptible of rigorous proof. This section is more like an invitation to look at things through a different lens to see whether any important insights emerge. It is suggestive, not dispositive.

This spiritual change in America helps explain why *Obergefell v. Hodges*,[133] the 2015 case that constitutionalized same-sex marriage, did not usher in an era of good feelings within the American Left.[134] One would have expected a wave of good feelings after such a victory. There was no joy even before the malign influence of Donald Trump poisoned the political atmosphere.

In contrast, there was a positive reaction nationally after *Brown v. Bd. of Education*[135] was decided, despite the massive resistance it sparked. There was a national feeling of rightness about *Brown* that only increased over time.[136]

But even though there was much, much less resistance to *Obergefell* than to *Brown*, the Left looked forward to the Presidential election of 2016, and the promise of adding Justices to the Supreme Court after that election, as a grim reckoning. Mark Tushnet published his aggressive and influential essay, *Abandoning Defensive Crouch Liberal Constitutionalism*, in May,

131. How does the Death of God affect people in religious life? On the Left, progressive religion collapses into politics. If you doubt this, ask yourself the last time you met a pro-life Unitarian. On the Right, the absolute obedience to God's will, which is the hallmark of theistic religious fundamentalism turns out to be God's will as previously objectively articulated. *See* Richard M. McDonough, *Religious Fundamentalism: A Conceptual Critique*, 49 CAMBRIDGE U. PRESS 561, 561 (2012). This means obeying God's will only in the sense of reading God's last will and testament after his death. That is why in fundamentalism religious practice and beliefs cannot change. There is no living God to change them. That is why fundamentalism is a modern phenomenon, a consequence and reaction to skepticism. The only way for a theist to remain a genuine believer is to try to discern God's will now, not in ancient terms—or as Jesus said, "discern the signs of the times." *Matthew* 16:3. But for such genuine believers, God is not dead.

132. *Id.*

133. Obergefell v. Hodges, 576 U.S. 644 (2015).

134. University of Virginia Law Professor Kim Forde-Mazuri's grudging reaction to *Obergefell* illustrates this tendency. Kim Forde-Mazuri, *Calling Out Heterosexual Supremacy: If* Obergefell *Had Been More Like* Loving *and Less Like* Brown, 25 VA. J. SOC. POL'Y & L. 281 (2018).

135. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

136. *See* Bruce Ledewitz, *Justice Harlan's Law and Democracy*, 20 J.L. & POL. 373, 400 (2004).

2016.[137] In it, he recommended that "Liberals should be compiling lists of cases to be overruled at the first opportunity on the ground that they were wrong the day they were decided."[138]

Imagine that. In 2016, after *Roe v. Wade*[139] and *Obergefell*, and so much else, Tushnet thought that liberals had been losing all these years and that a massive change was needed in Constitutional Law. It seems ridiculous now. But that is what all-out human struggle is like. You never win. You can never relax. You must always fight.

This sense of imminent apocalypticism—the idea of a final confrontation between the forces of light and the forces of darkness, a final chance of victory—was also present at that time on the Right. There, the 2016 Presidential election was represented as *The Flight 93 Election*—"charge the cockpit or you die."[140] This was a particularly desperate image since everyone on Flight 93 died. And its tone has defined the Trump era down to our present moment.[141]

All this rhetoric was enormously exaggerated but there was a core of truth to it on both sides. For example, some liberals really did expect to strip religious educational and other institutions that did not accept same-sex marriage of their tax-exempt status, which might have amounted to a death-knell for these institutions.[142] And many conservatives certainly hoped, and still hope, for an eventual national ban on abortion, binding all American women.[143]

There was, however, around the same time, a big exception to this heated rhetoric—the so-called Utah Compromise. In 2015, before the *Obergefell* decision, Utah effectively legalized same-sex marriage, while guaranteeing religious dissenters the right not to

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137. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKANIZATION (May 6, 2016), www.balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [perma.cc/MT6H-DK2A].

138. *Id.*

139. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

140. Michael Anton, *The Flight 93 Election*, CALREMONT REV. OF BOOKS (Sep. 5, 2016), www.claremontreviewofbooks.com/digital/the-flight-93-election/ [perma.cc/PDS3-92MY].

141. *See* Jonathan Chait, *How Michael Anton's 'Flight 93 Election' Essay Defined the Trump Era*, N.Y. MAG. (Dec. 11, 2020), www.nymag.com/intelligencer/article/michael-antons-flight-93-election-trump-coup.html [perma.cc/RTH8-ZCU6].

142. *See* David Bernstein, *The Supreme Court oral argument that cost Democrats the presidency*, WASH. POST (Dec. 7, 2016, 4:29 PM), www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/ [perma.cc/E5CA-9KNY].

143. This is why Trump faced criticism from the Right for his refusal to endorse a national abortion ban. *See* Steve Peoples, *Trump's abortion statement angers conservatives and gives the Biden campaign a new target*, AP NEWS (Apr. 8, 2024), www.apnews.com/article/abortion-trump-republican-presidential-election-2024-585faf025a1416d13d2fbc23da8d8637 [perma.cc/ENV6-S352].

participate.[144] This legislation was motivated by a real spirit of compromise.[145]

As we usually look at things, the Utah Compromise seems surprising. Utah is among the most religious states in the nation. We might expect the state legislature there to be the most fervently anti-same-sex marriage. But the Compromise illustrates the way in which *genuine* religious faith can promote restraint, recognition of the rights of others, and a charitable human solidarity.

That should not be shocking. The magic of Martin Luther King, for example, lay in his faith of a deeply religious universe, where there were no ultimate enemies—everyone was a potential ally.

The decline of faith in the rule of law, which is parallel to every other decline in trust, has been clear for a long time. Many law professors believe that "[i]t may no longer be possible to judge a Supreme Court ruling by anything other than result."[146] And that sentiment was written in 2009, not in 2022, when *Dobbs v. Jackson Women's Health Org.*[147] and other cases changed the face of American law.

Steven Smith located the source of the decline even earlier, in 2004, the same year that Harris declared the end of faith, in Smith's prescient book, *Law's Quandary*.[148] Smith did not emphasize the Death of God. He utilized philosophical, rather than religious, imagery and concluded that lawyers have an "ontological gap." The American ontology of materialism—i.e., that reality is composed of unknowing matter and forces—does not comport with any notion of the rule of law. In the American understanding of the universe, rights and law are not real, but rather, are the outcome of human struggle.

Smith's philosophical message turns out to be the same as the religious one concerning trust and the Death of God. The rule of law requires a faith that there is a right, or at least righter, answer to legal questions and that, at least over time, reasoned judgment about complex and controversial issues will lead to warranted conclusions. The common law never claimed to have attained truth—it only claimed to be moving in the *direction* of truth. In contrast, in law as in struggle, there can never be any judgment about legal outcomes other than their contribution to one's political

144. *See* Robin Fretwell Wilson, *Common Ground Lawmaking: Lessons For Peaceful Coexistence from Masterpiece Cakeshop and the Utah Compromise*, 51 CONN. L. REV. 483, 489 (2019).

145. *See* J. Stuart Adams, *Fairness For All in a Post-Obergefell World: The Utah Compromise Model*, 2016 U. ILL. L. REV. 1651, 1662-63 (2016).

146. J. Harvie Wilkinson III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 257 (2009); *see also* Eric J. Segall, *Teaching Constitutional Law in a Legal Realist World*, PITTSBURGH L. REV. (forthcoming) (quoting Jeffrey Abramson in an epigraph to Segall's article) ("I think we're seeing almost a virtual collapse of the ability to teach con law as law.").

147. *Dobbs*, 597 U.S. at 215.

148. STEVEN D. SMITH, LAW'S QUANDARY 2 (2004).

commitments.

Smith thought that lawyers could just live with the tension between their ontology and their commitment to the rule of law.[149] But now it is evident that the post-God ontology undermines the commitment to the rule of law.

Not all lawyers profess nihilism. Certainly, Ronald Dworkin did not.[150] But his influence has not lessened the power of nihilism in American law.

The author of this article has previously argued that legal nihilism has been dominant since at least 1992.[151] Even if that is not accepted, the current legal nihilism certainly became plain in the aftermath of *Dobbs* and the other changes brought about by the new conservative majority on the Supreme Court. On the Right, there was the pure cynicism that allowed a Texas law flagrantly violative of *Roe*, and of any notion of due process of law, to remain in effect.[152] On the Left, critics of these decisions would once have called these actions mistaken and predicted that they would be overturned in time—that is what Justice Harlan thought about wrongheaded Supreme Court cases.[153] Now critics talk of packing the Supreme Court, or installing term limits, instead.[154]

Americans generally now look at law through the lens of

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149. For a fuller discussion of these points, *see* Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 154-55 (2016) [hereinafter *The Five Days in June When Values Died in American Law*].

150. This is a tricky topic beyond the scope of the paper. I agree with David Gray Carlson that "the last thing Dworkin would want to establish is legal nihilism - the notion that there is no Law, only will." David Gray Carlson, *Dworkin in the Desert of the Real*, 60 U. MIAMI L. REV. 505, 529 (2006). Nevertheless, I also agree with Carlson that notwithstanding Dworkin's intention, there is actually a question about nihilism in his approach to legal interpretation.

151. *The Five Days in June When Values Died in American Law, supra* note 149.

152. *See generally* Travis K. Tackett, *The Procedural and Substantive Issues of Texas' Six-Week Ban on Abortion and the Future of* Roe v. Wade, 21 APPALACHIAN J.L. (2022) appalachian.scholasticahq.com/article/35487-the-procedural-and-substantive-issues-of-texas-six-week-ban-on-abortion-and-the-future-of-roe-v-wade [perma.cc/AWB7-RLNP]; *see also* Bruce Ledewitz, *Other Voices: I am resigning from the pro-life movement*, PITTSBURGH POST-GAZETTE (Sept. 11, 2021, 11:00 PM), www.post-gazette.com/opinion/Op-Ed/2021/09/12/Other-Voices-I-am-resigning-from-the-pro-life-movement/stories/202109120029 [perma.cc/7MZU-RMAT].

153. Ledewitz, *supra* note 136. Justice Harlan wrote of the entire corpus of constitutional law, "That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

154. *See, e.g.*, Sam Hananel, *5 Ways the Supreme Court Could Roll Back Rights and Damage Democracy*, CTR. FOR AM. PROGRESS (May 31, 2023), www.americanprogress.org/article/5-ways-the-supreme-court-could-roll-back-rights-and-damage-democracy/ [perma.cc/R969-ARDJ].

political victory and defeat. The strength of Eric Segall's recent essay, *Teaching Constitutional Law in a Legal Realist World*,[155] is that it correctly describes our current situation—almost all of us live in a legal realist world, which means, as Segall explains, that you cannot teach Constitutional Law accurately as anything other than the outcome of political struggle.[156] As far as most law professors are concerned, truth, reason and the overall movement of history have nothing to do with it.

This is not a new situation, and it is not the result of the actions of the current Justices. Years ago, Justice Scalia, for example, expressly located his textualism in his distrust of purported judicial judgment.[157] Originalism is generally skeptical of truth claims about values, despite its confidence in truth claims about historical events and their meaning. That value skepticism was the subject of critique in the 1990s by the conservative legal thinker Harry Jaffa.[158] It continues to be the subject of critique today by *Common Good Constitutionalism*.[159]

None of this is proof that the source of decline in American public life is nihilism after the Death of God, but it seems to me to make a very good case. Politics in America became a blood sport in the 1990s, just when a new generation of much less religiously influenced politicians came to power. Bill Clinton vs. Newt Gingrich was the first post-God political confrontation.

Assuming that there is something to all this, that there has been a spiritual change in America that is undermining law and democracy, what is to be done?[160] One cannot just put the God genie back in the bottle. Nor do law professors as a group want to do that. In the next section, I will suggest how a skeptical post-God generation of law professors might recapture objectivity and truth. Or, at the very least, how such a generation might again teach law.

VII. TEACHING LAW: THE SECOND ACTION LAW PROFESSORS CAN TAKE IN THE CURRENT CRISIS

I want to start by reiterating the stakes involved. The last two

155. Segall, *supra* note 146.

156. As Segall writes, "Personal preferences not law dictate most Supreme Court constitutional decisions." *Id.*

157. "[W]hatever answer *Roe* came up with after conducting its 'balancing' is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 982 (1992) (Scalia, J., concurring in part), *overruled by Dobbs*, 597 U.S. at 215.

158. HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994).

159. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

160. LENIN, *supra* note 79.

sections tried to show that the crisis in American public life roots in the soil of nihilism. So, cleansing that soil is crucial. Nihilism is inconsistent with democracy and the rule of law. If nihilism is inevitably our fate, then we will not have democracy or the rule of law.

Popular culture may be awakening to the danger of nihilism. The plot of the most recent Mission Impossible movie, Dead Reckoning, Part I, concerns an AI entity that achieves sentience. But the danger the movie points to is not war, or not just war, but that "Truth is vanishing."[161]

When Tom Cruise takes up your theme, you know you are onto something.

In the movie, and in the coming sequel, Cruise has it easy. All he has to do to avert the danger to truth is destroy the entity. Law professors do not have a similar capacity to cure the culture of its nihilism. All we can change are the practices in our own classrooms. However, in that way, we can at least better serve our students. And, maybe, in doing that, we will have a positive influence on the culture.

There is not much question that, as Segall assumes in his essay, the average classroom in American law schools is currently awash in nihilism.[162] It is for law professors, as Segall writes, a legal realist world.

This is why a recent *Harvard Law Review* Note refers to Justice Breyer as the last "Natural Lawyer" on the Court.[163] Natural law in this context is not a technical term invoking the tradition of Hugo Grotius. As Americans use the term, it roughly corresponds to anti-nihilism. The term approximates the great divide described by C.S. Lewis. Lewis wrote that "[T]he doctrine of objective value [is] the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are."[164] Lewis called this view "The Tao" "because all traditional value systems shared this viewpoint."[165] In The Tao, values can be analyzed empirically, as really so or not, as really consistent with the way things are, or not. Modern thought rejects objective value. Calling Justice Breyer the last natural lawyer

161. Paramount Pictures, *Mission: Impossible - Dead Reckoning Part One | Official Teaser Trailer (2023 Movie) – Tom Cruise*, YOUTUBE (May 23, 2022), www.youtube.com/watch?v=2m1drlOZSDw [perma.cc/ST2G-QUW8].

162. More broadly, Cathleen Schine refers to this phenomenon as "the self-conscious postmodern world of academia." Cathleen Schine, *The Voyage Out*, N.Y. REV. (Oct. 19, 2023), www.nybooks.com/articles/2023/10/19/the-voyage-out-after-sappho-selby-wynn-schwartz/ [perma.cc/M3XJ-YBQA]. Law schools are not immune.

163. *Justice Breyer: The Court's Last Natural Lawyer?*, 136 HARV. L. REV. 1368, 1368 (2023) [hereinafter *Last Natural Lawyer*].

164. C.S. LEWIS, THE ABOLITION OF MAN 6 (Interbooks 2022) (1943).

165. *See generally* BRUCE LEDEWITZ, HALLOWED SECULARISM 161 (2009).

means that Justice Breyer accepted objective value,[166] and is currently the last Justice to do so.[167]

When someone rejects objective value, then instead of empirical and evaluative judgment, emotive politics and subjective will dominate consideration of any legal outcome. Whether that is thought of as a positive or negative development, as I survey my colleagues, most American law professors consider the rejection of objective value to be obvious and inevitable. It is not something to be remedied or contested.

Even those law professors who might object that they themselves are not nihilists do not defend any account of objective value in their classrooms. We are not teaching that law is grounded in truth, even as a difficult-to-reach ideal. So, even if our nihilism is merely reflexive and unconsidered, it is still there.

Actually, I believe law school teaching of nihilism is more explicit than that. I accept that I could be wrong about this. In fact, I would be happy to be wrong about this. Nevertheless, in the absence of contrary demonstration, I would say law professors are actually teaching our students, as recently promoted by the noted political theorist Wendy Brown, that "no value system is ever true."[168]

Think about the implications of that claim. The assertion that slavery is wrong is not to be taken as a claim about truth, about the nature of the universe and of people, but as a purely emotive commitment. In Brown's view, being anti-slavery, or making a commitment to any other value, is a matter of sentiment, not study and argument.[169]

Of course, just because the modern view may have detrimental effects, does not mean the view is false. I am sure that the people

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166. *Last Natural Lawyer*, *supra* note 163. The Note refers to "moral realism" rather than objective value, but in context the terms are closely related. *Id.* at 1370. The Note shows how Justice Breyer practiced value judgment in his opinions. *Id.* at 1369. "Justice Breyer registered his agreement with this idea and with the broader reality that 'the law rests upon a body of hard-won and deeply embedded principles and policies.'" *Id.*

167. *Id.* at 1368. The question mark in the title is not about the current state of the law and the Supreme Court, but the faith that natural law inevitably returns. *Id.* at 1389. "And, while Justice Breyer may have frequently stood alone in his forthright quest to make the law "'work better and more simply for those whom it is meant to serve,' he was hardly the first to approach the law in this classical sense. He won't be the last." *Id.*

168. Brown argues that faculty "are obliged to help students understand why no value system is ever true." WENDY BROWN, NIHILISTIC TIMES: THINKING WITH MAX WEBER 95 (2023). Law professors are likely not doing that, but are probably simply asserting or implying in class *that* no value system is ever true.

169. *See* Kieran Setiya, *The Politics of Disenchantment: On Wendy Brown's "Nihilistic Times*,*"* L.A. REV. OF BOOKS (Apr. 27, 2023), www.lareviewofbooks.org/article/the-politics-of-disenchantment-on-wendy-browns-nihilistic-times/ [perma.cc/4J5F-6V53] ("Brown wants values to be studied not 'as normative positions with analyzable precepts and logical entailments' but in their affective dimensions and cultural homes.").

who agree with Brown's position, and teach it themselves, are sincere. So, how are law professors who believe that no value system can be true supposed to teach law as objective? How are skeptics going to defend the rule of law? Well, not by lying or by insincerity. Everyone agrees that we owe our students candor.

But there is a possible program for skeptical law professors. It has roughly three steps. I recommend it here at least as an experiment.

First, stop teaching nihilism dogmatically, by which I mean expressly telling students, or strongly implying, that value statements are not, and cannot be, objective. After all, how can we be certain that no value systems are true? Even if this is our understanding of reality, in the classroom we should leave it as a question. The strange thing about law professors is that we do not submit value skepticism to the same skepticism to which we submit claims of value objectivity. And the same advice would apply to the rule of law. Stop teaching legal realism as if it is so. Leave it as a question as well.

Given that the current conservative majority was confirmed to the Supreme Court specifically to overrule *Roe*[170], this advice may strike some readers as impossible to follow. Obviously, these Justices reflect the interests of the political coalition that put them forward. But *Dobbs* is not the only case, not even the only important case, that the Justices have addressed. And the concept of the rule of law may simply be less mechanical and more wide-ranging than is usually appreciated.

Consider, for example, the recent Dormant Commerce Clause case, *National Pork Producers Council v. Ross*.[171] The Court fractured in unusual ideological ways. Justice Gorsuch wrote the lead opinion, a majority in parts, joined fully only by Justice Thomas. They were doing their best to uphold a California law banning the sale of pork in California that had been raised in inhumane ways. They were implicitly limiting the role of courts in reviewing state business legislation, a traditionally liberal position.

Justice Jackson joined a partial dissent written by Chief Justice Roberts, and also joined by Justices Kavanaugh and Alito that would have kept a larger role for courts in interstate commerce burden cases. Justice Sotomayor concurred in part, joined by Justice Kagan, occupying a kind of middle ground. This middle ground was very close to the position espoused by Justice Barrett, who also concurred in part. If politics and ideology determined this lineup, it is hard to see how.

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170. This is not hyperbole. Trump admitted as much in his extraordinary statement, "I was able to kill Roe v. Wade." *See* Sahil Kapur, *Trump: 'I was able to kill* Roe v. Wade*'*, NBC NEWS (May 17, 2023, 11:37 AM), www.nbcnews.com/politics/donald-trump/trump-was-able-kill-roe-v-wade-rcna84897 [perma.cc/5XU3-3ET8].

171. Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).

It might be objected that in the cases that are really important to the Republican coalition—abortion, guns and religion—you do not see any breaks in the conservative lineup of Justices. This may be largely true, but it hardly throws away the rule of law. Yes, political forces sometimes coalesce to change the direction of the Court in certain areas of law. This happened in 1937, with the legal victory of the New Deal, and in 1953, with the beginning of the Warren Court. And of course, it happened again during President Trump's Administration. When this happens, changes in caselaw occur in dramatic fashion. One can see politics directly controlling legal results.

But the ultimate question for the rule of law is not this immediate ebb and flow but, as Justice Harlan understood, the longer view.[172] The Warren Court produced Brown. That case led to an unchallengeable consensus about race. The New Deal Court produced rational basis review of ordinary legislation under due process. That has also proved lasting. It may be that the new conservative majority will also produce lasting changes—or it may ultimately prove a flash in the pan. The rule of law is the long run, not the immediate result: "The common law worked itself pure."[173]

To paraphrase the observation made by the philosopher Hilary Putnam about the skepticism of Richard Rorty concerning metaphysical realism,[174] the legal realist may really just be a disappointed formalist who, if mechanical application of law does not always and in every case immediately determine everything, decides there is no rule of law at all. But this is an exaggerated and unjustified conclusion.

It is better to follow the teaching of Roberto Unger and take the participants in judicial activity at their word, at least as a first approximation.[175] If the Justices explain their decisions in legal terms, as unfolding from the tradition, let the students decide for themselves if the Justices are just charlatans.

When Justice Scalia urged the Court to get out of the way in abortion cases and let the voters work the matter out for themselves,[176] he was not necessarily doing politics. He might have been genuinely considering the limits of law. He may have considered the possibility that a political settlement would be more favorable to abortion rights overall than *Roe* had proved and recommended overturning *Roe* anyway. Whether he considered that or not, in the wake of *Dobbs*, political strengthening of the pro-

172. *See* Ledewitz, *supra* note 136.

173. WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION 172 (2007).

174. HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 101 (2002).

175. ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY 56-57 (1976).

176. "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Casey*, 505 U.S. at 1002 (Scalia, J., concurring in part), *overruled by Dobbs*, 597 U.S. at 215.

choice movement nationally is what seems to be happening.[177] So, was overturning Roe simply the victory of the pro-life movement or was it something more subtle?

This first step has to do with how law professors should teach given where they are intellectually. The next two steps concern changing our intellectual approach as law professors.

The second step is to stop assuming. We assume that there is no alternative to the ontology that Smith pointed to in *Law's Quandary*. We reflexively turn to value skepticism because objective meaning seems implausible. Obviously, as well, we assume that God does not exist. Thus, there is no alternative to some form of nihilism.

Assumptions like these are why nihilism is taught. It is not that law professors are trying to indoctrinate. They genuinely feel that matters like these are settled, and students should know about it.

I know this attitude because I shared it. But then, as Kant reported about his exposure to the thought of David Hume, the modern philosophers Bernard Lonergan and Alfred North Whitehead, in my case, woke me from my dogmatic slumber.[178] They showed me that my categories of thought had been too narrow. The universe might have a direction and a purpose after all, whether the traditional God exists or not, whatever "exists" might mean here.

I am not recommending these particular thinkers. I only mean that before concluding that certain matters are settled, law professors should consider alternatives in a serious way. None of the issues touching on values and the rule of law are philosophically settled at all. This openness will help keep the classroom open as well.

The final step, which follows from not assuming things, is that each of us should be engaged in a program of study. Ultimately, although the classroom must be kept open for inquiry by students, we law professors owe ourselves the effort to come to a decision concerning the nature of, and possibilities for, law.

The period of the 1950s through the 1970s was one of creative intellectual ferment among American law professors. This was the time that the positions we take for granted today were being worked out, from legal realism to Rawlsian reflexive equilibrium. In contrast, in law today there is only political controversy among law professors—law for us is politics by other means. These debates,

177. Eugene Robinson, *Republicans' longtime opposition to abortion is coming back to haunt them*, WASH. POST (Apr. 10, 2023, 6:27 PM), www.washingtonpost.com/opinions/2023/04/10/abortion-dobbs-ruling-republicans-blowback/ [perma.cc/MT2N-SR6S].

178. *Cf.* Graciela De Pierris & Michael Friedman, *Kant and Hume on Causality*, STAN. ENCYC. OF PHIL. (Nov. 4, 2018), plato.stanford.edu/entries/kant-hume-causality/ [perma.cc/4FZA-57UC].

such as they are, are stale.

When something genuinely new comes on the scene, such as Adrian Vermeule's *Common Good Constitutionalism*, it shakes up preexisting political commitments in a healthy way. That is what we should be aiming for.

Another such current creative effort is *The Realist Turn*, by Douglas Rasmussen and Douglas Den Uyl.[179] In this book, which is the third in a well-developed trilogy,[180] the authors seek to revive the secular natural rights tradition through an empirical, quasi-anthropological approach grounded in metaphysical realism. The authors start with the nature of human beings as self-directed seekers of human flourishing.[181]

The result, for me at least, is that very traditional sources like the Declaration of Independence come alive with tremendous force. And anthropological research and cosmological investigation in their popular forms, like Nicholas Christakis' *Blueprint*[182] and *The Universe Story*, by Thomas Berry and Brian Swimme,[183] suddenly become subjects for legal study.

The framers were conversant with the Newtonian universe of their time, and it influenced the checks and balances they created in the Constitution. Law professors today need to be similarly familiar with the intellectual movements of our time.

Whether Rasmussen and Uyl will change law and American public life is not my subject here.[184] The more basic idea is that we law professors have a lot to learn. There is a great deal going on.

When law professors become seekers, so will our students. And that seeking, wherever it leads, is the first step back from nihilism. As Marin Heidegger concluded, "Questioning is the piety of thought."[185]

Lonergan believed that in times of decline, seekers in a society could help break the downward cycle through their loosely connected efforts. He called such a grouping "Cosmopolis."[186]

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179. DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, THE REALIST TURN: REPOSITIONING LIBERALISM (2020).

180. *See also* NORMS OF LIBERTY: A PERFECTIONIST BASIS FOR NON-PERFECTIONIST POLITICS (2005); THE PERFECTIONIST TURN: FROM METANORMS TO METAETHICS (2017).

181. RASMUSSEN & DEN UYL, *supra* note 179, at 39-40.

182. NICHOLAS CHRISTAKIS, BLUEPRINT: THE EVOLUTIONARY ORIGINS OF A GOOD SOCIETY (2019).

183. BRIAN SWIMME & THOMAS BERRY, THE UNIVERSE STORY: FROM THE PRIMORDIAL FLARING FORTH TO THE ECOZOIC ERA, A CELEBRATION OF THE UNFOLDING OF THE COSMOS (1992).

184. *See* Bruce Ledewitz, *What Does The Realist Turn Mean for Originalism and American Public Life?*, 128 PENN ST. L. REV. PENN STATIM 133 (2023) (addressing this issue more generally).

185. MARTIN HEIDEGGER, BASIC WRITINGS 341 (David F. Krell ed., rev'd & exp'd ed. 1993) (1977).

186. BERNARD LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING 238-42 (1958).

American law schools need to become one such Cosmopolis.

VIII. CONCLUSION

American public life is in a terrible state. That much is not going to elicit objection from anyone. If America continues in its current trajectory, there is a good chance that this experiment in democracy will come to an end in some form of authoritarian intervention, military or otherwise.

Maybe the American experiment has run its course, has given the world what it has to offer, and is now just destined to crumble. I can accept that all experiments have a kind of shelf life. But I believe American law professors have an obligation to try to salvage our democracy even if it does not appear that the effort will succeed.

So, this paper urges two changes in our practice. The first part of the paper proposes a change in institutional framework in which our legal expertise is enlisted in the maintenance of political norms. Law professors would function like fingers in a dike.

The second part of the paper proposes a change in our intellectual framework, away from reflexive nihilism. The hope is that a community of seekers will influence our students and, ultimately, American life in general and point the way to healthier public life.

Time is short. And if we are to defend democracy, we will have to do so in new ways. The old ways of increased political commitment have not helped. They have only made things worse. It is time to try something else.