

THE POSSIBLE FUTURES OF AMERICAN DEMOCRACY

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Everyone worries about democracy, although not everyone pauses to say what they mean by it. A *New York Times* poll shortly before the last election found that large shares of voters in both parties feared for democracy, although they didn't fear the same things.¹ In the run-up to the 2020 presidential election, about ninety percent of partisan voters said the country would suffer serious damage if the other guy won²; they presumably didn't have quite the same worries. Pollsters ask people whether they expect political violence in future elections, and voters respond that they do.³ Bookstores have been full of titles like *How Democracies Die*⁴ and *How Democracy Ends*⁵—yes, the field is crowded enough that those are different books. For many law students, this time of intense anxiety, which we can date to 2016, has been the only political climate you've known as an adult.

Now, a lot of this has been a reaction to some very specific events. In our superfast time, we hurry to confect political theory or historical analysis that elaborates our feelings about the headlines. Or, at least, we reward people who do.

I think we have been right to be worried, even if we have not always been worried in quite the right ways. Before 2016, we were living on the fumes of a few decades when democracy seemed to be the world's only future. Soviet-style socialism collapsed between 1989 and 1991, and the peoples of those countries seemed to race spontaneously to become what they poignantly called “normal countries” like the United States. The great contest about how to organize social and economic life seemed to be over, and our side had won—not by force, but by a great upwelling of popular desire to be free and prosperous—to be like us. Other

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¹ Nick Corasaniti, Michael C. Bender, Ruth Igielnik & Kristen Bayrakdarian, *Voters See Democracy in Peril, but Saving It Isn't a Priority*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/us/politics/midterm-election-voters-democracy-poll.html> [<https://perma.cc/6622-9Q6R>].

² See *Voters' Feelings About the Election and Possible Outcomes*, PEW RSCH. CTR. (Oct. 9, 2020), <https://www.pewresearch.org/politics/2020/10/09/voters-feelings-about-the-election-and-possible-outcomes/> [<https://perma.cc/2QVK-93WF>].

³ See, e.g., Anthony Salvanto, *Americans Increasingly Concerned About Political Violence—CBS News Poll*, CBS NEWS (Sept. 5, 2022, 8:58 AM), <https://www.cbsnews.com/news/political-violence-opinion-poll-2022-09-05/> [<https://perma.cc/KF96-QPHC>].

⁴ STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

⁵ DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* (2018).

countries, it was supposed, would come to be like us through market-led development: this was the future of a billion people in India, a raft of books argued during that country's economic liberalization in the 2000s and early 2010s. It was also thought to be the future of China: the great geopolitical gambit of the early twenty-first century was the American-engineered admission of China into the World Trade Organization, on the theory that free trade produces a prosperous middle class, which in turn both demands and anchors liberal democracy. No part of this formula now feels simple or reassuring. It is harder to feel confident that we know where world history is going, and it is not so clear we know what it would mean to be "like us," nor that it would be entirely good.

Throughout the era that ended in 2016, there was a feeling that democracy was more or less inevitable—it was what people wanted, and anyway there was nowhere else for history to go; but also that democracy was a little bit superfluous, because there were not a lot of big collective decisions to make, so there was not all that much at stake in elections. We knew how to be a normal country. And so we also did not need to think very hard about what democracy was: it was whatever we were already doing, more or less.

Now we know we have to think harder about it. And we have to try to think in a way that does not simply riff off the headlines or reiterate, louder than ever, what we and our friends already thought. We have to try to learn from events. That means remaining open to being surprised by them.

One way to learn is by spotting the tensions or difficulties that events have made visible in what might have seemed a smooth democratic fabric. Let me start with this one. Democracy is always a profoundly unnatural thing, an artificial achievement. This is because its core premise is that when basic questions have to be answered, and the answers will bind us all—for example, whether there is a national right to abortion or gun ownership are such questions, and the existence or nature of God, in our political system, is not—then the decision is made by the people who will live with it. The word democracy combines the Greek *demos*, people, and *kratos*, rule, the exercise of political power. And that ancient origin still fits.

But—and here is why it has to be artificial—a people is not the sort of thing that, in fact, makes decisions in any sense that we would normally recognize. Three hundred million individuals do not have a shared mind to make up. A democracy is always in practice a decision procedure, generally an election, whose result we treat as the voice of the people. And of course an election is an extremely crude way of making a decision: in practice, the ballot can only say, "Yes" or "No," "Her" or "Him," so—as students of politics have recognized for a long time—when the people are asked to speak, it's especially important who poses the question and how the alternatives are set up. Even if we happily accept that a majority vote is the decision procedure that best stands in for a decision by the people, it is very tricky to think about what it means to choose candidates democratically, or to set a legislative agenda democratically.

And precisely because all of this is so artificial, it isn't enough to set up a decision-making machine whose results we can then call democratic. For those

decisions to command legitimacy in practice—meaning if people who fiercely opposed a decision and still believe it was wrong are nonetheless willing to go along with it, treat it as binding on them—there has to be a willingness to identify with the other side that has just defeated you. It is a feeling of being in something together, and being committed to it: we could call it solidarity, or civic sympathy, or a kind of patriotism.

Although we seldom put it this way, the thought has to be something like: “The people have spoken, and although I disagreed, I am part of the people, so this decision goes for me, too.” This will seldom be one’s only thought—we will keep on talking and writing and marching about how it was the wrong decision; but at the end of the day, living under any political system means you do not always get the decision you want but must go along with the decision that has been made; and in a democracy, that means living with the decision that a majority of other citizens made, even if you hate and fear the result. For a democracy to command this kind of legitimacy, the people who live in it must view one another as—to put it in sort of an antique way—fit to rule them. Otherwise democracy will seem intolerable.

The last seven years have revealed stress lines in the ways American democracy addresses each of these tasks: making decisions, posing questions for decision, and getting ongoing consent to the decisions—in a phrase, how we “do democracy.” The Constitution has been at the center of how Americans do democracy, and aspects of it that used to be taken for granted have come under pressure.

Start with how we make decisions. The simplest version of a decision by “the people” would be a majority vote of the national electorate. We don’t decide anything that way. James Madison called one of the Constitution’s signal achievements “the total exclusion from government of the people in their collective capacity.”⁶ In the *Federalist Papers*, he even set that phrase in all-caps, like a very excited text message. If there were an emoji for boxing out direct democracy, he would have used it.

We do decide things by majority, but not by majority of the electorate. The people don’t choose the president, though they do choose the Electoral College electors who fill the White House by a majority vote of their number. The people don’t vote directly on legislation, or on party control of Congress, but they vote for the senators and representatives who settle these questions by majority vote. And although the Constitution claims to take its authority from “We, the People,” as its opening line goes, the living people definitely do not weigh in on the meaning of its clauses, not, in any direct way, on choosing the judges whose majority votes will settle—for now—what it means.

For many decades, this arrangement struck most observers as a good enough approximation to democracy. But in the twenty-first century, something has already happened twice that didn’t happen in the previous century: the loser of the popular

⁶ THE FEDERALIST NO. 63 (James Madison), <https://guides.loc.gov/federalist-papers/text-61-70#s-lg-box-wrapper-25493450> [<https://perma.cc/GDL9-6632>].

vote has entered the White House.⁷ This frustration of majority will rankled some partisans when it benefited George W. Bush in 2000 (with an assist from the Supreme Court in *Bush v. Gore*⁸). It rankled a good deal more when it let Donald Trump overcome a three-million vote deficit nationally to win in 2016. I think it is fair to say that it would have meant something nearer to a constitutional crisis if, in 2020, a few tens of thousands of votes in key states had let Trump win again despite losing the popular vote by seven million.⁹

Similarly, the Senate's overrepresentation of small states, which lets national minorities wield a majority in the upper house, has become much more salient, a topic of regular complaint. So has the political insulation of the federal courts, especially the Supreme Court. As recently as the beginning of Justice Kavanaugh's nomination, the *New York Times* explained to readers that the Court's legitimacy depended on its remaining above and independent of politics.¹⁰ Now the same constitutional structure strikes many more observers as a device for partisan entrenchment. In other words, all the ways we use political processes to create governing majorities—in the Electoral College, in Congress, on the Supreme Court—have seen their legitimacy come into question for the ways they depart from what seems to be the will of national majorities.

The gap was always there, at least potentially. How did it get to be so important? Partly, it's that geographic and demographic partisan polarization have made smaller, more rural, and whiter places overwhelmingly Republican, which gives the Senate and Electoral College—and through them the Supreme Court—a much more partisan valence. Consider that Republicans have won just a single presidential popular vote since George H. W. Bush did it in 1988,¹¹ yet Republicans have appointed six of the nine Supreme Court justices. (In fairness, it wasn't until Donald Trump appointed three Justices that this potential really bit.)

Partly, it's that what many Americans mean by democracy has gradually—and, I think, appropriately—shifted in recent decades toward universal ballot access. It's always striking for me to see commentators of an earlier generation,

⁷ In 2000, George W. Bush won the presidency despite losing the popular vote by around 450,000 votes. See *Election Years: 2000*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/2000> [<https://perma.cc/3RCD-TQ2J>] (last visited Jan. 30, 2023). In 2016, Donald Trump won the presidency despite losing the popular vote by just under 3 million votes. See *Election Years: 2016*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/2016> [<https://perma.cc/S6A8-YB7P>] (last visited Jan. 30, 2023).

⁸ 531 U.S. 98 (2000).

⁹ Cf. *Election Years: 2020*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/2020> [<https://perma.cc/4PMH-VZJU>] (last visited Jan. 30, 2023).

¹⁰ See, e.g., David Leonhardt, Opinion, *The Supreme Court Is Coming Apart*, N.Y. TIMES (Sept. 23, 2018), <https://www.nytimes.com/2018/09/23/opinion/columnists/supreme-court-brett-kavanaugh-partisan-republicans.html?searchResultPosition=6> [<https://perma.cc/LMT6-9NJE>].

¹¹ George W. Bush won the popular vote in 2004. See *Election Years: 2004*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/2004> [<https://perma.cc/D6YM-HE3L>] (last visited Feb. 3, 2023).

even progressives with clear anti-racist credentials, refer without qualification to the U.S. as a democracy in the Jim Crow era, or even the era of Jackson. To the extent democracy was a positive term, for a long time, into the modern era, it meant something like the idea that the will of the mass of the people would prevail over any ruling elite. Democracy seemed, from this perspective, compatible with extensive disenfranchisement. The electorate itself, like the constitutional offices that it filled through voting, was engineered with nothing like a clear commitment to equal participation or voice. As our ideal—if not always our practice—moves toward universal enfranchisement and the equal value of the vote, it is also more intuitive to say that something has gone wrong when a national majority is thwarted, or when votes for, say, senators have different weight in different states.

Another way that these institutions have come under pressure has more to do with the political culture and psychology of getting ongoing consent. Put simply, the idea of being ruled by the other side has become increasingly intolerable to voters who are at all strongly partisan. Campaigns in recent national elections reinforce this: the messages that produced voter turnout in 2020 higher than any since 1900 were all about saving the country from the other candidate. About ninety percent of each candidate's voters told pollsters the country would be gravely damaged if the other guy won.¹² These are the conditions in which denying that you really lost becomes more appealing. We see that most egregiously in Republican election denial, but it had its Democratic version in the wish to chalk up Trump's 2016 win to Russian interference; and, regardless, they focus attention on the majority-thwarting features of our system, which would be there as a matter of fact even if everyone were scrupulously truthful and empirical. And so far we have avoided the most volatile possibilities. Imagine the continuing storm if Trump had won the popular vote by five or six million votes but lost the Electoral College. Imagine, for that matter, the Democratic fervor to deny Trump's legitimacy if he had pulled out the Electoral College in 2020 despite Biden's seven million vote majority. In that counterfactual, we might be well down the road to broader kinds of constitutional crisis, such as states openly nullifying federal policy on, say, immigration or abortion.

What I've been pointing out is that intrinsic vulnerabilities in the way we do democracy have come under significant pressure in recent years, partly because the conditions in which our politics happens have changed. It may be helpful to pull back a little and take a broader look at those conditions. In a wonderful book called *The Principles of Representative Government*,¹³ Bernard Manin argued that modern democracy had moved through three very different eras, in which the system was anchored by different institutions and social realities. In eighteenth-century parliamentarism (think of the Britain of Edmund Burke) and well into the nineteenth century, the representatives who could claim to act on behalf of the people were part of a relatively coherent, wealthy elite, bound by education, marriage, and

¹² See *Voters' Feelings*, *supra* note 2.

¹³ BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (John Dunn, Jack Goody & Geoffrey Hawthorn eds., 1997).

interest, who confidently asserted that they acted on behalf of the nation. This was the sort of government the American framers largely thought they were creating, although it was never very stable here.

Over the course of the nineteenth century and into the twentieth, mass enfranchisement knocked out this class monopoly and brought waves of “new men” into politics, buoyed by a much broader electorate. What stabilized this early mass democracy was the rise of the political party as a means of giving a vision and purpose to the result of tens of millions of scattered and distracted decisions. Voters might be a sovereign that could only say “yes” or “no,” but parties could promise, plan, and act based on visions of the country’s conflicts and needs, and in saying “yes” to one vision and “no” to another, voters actually said quite a lot.

Writing in the 1990s, Manin thought the United States had passed from party democracy to “media democracy,” in which party discipline had receded and what guided popular judgment was the way mass media framed the charisma of certain candidates and narrated the country’s situation overall. Ronald Reagan’s film-star commandeering of U.S. politics was the paradigm: he presented the 1980s as a movie in which the United States was the heroic protagonist, and in doing so he confounded lines of party loyalty and brought much of elite as well as popular sentiment along with him. There is no doubt that the power of broadcast media in those decades was immense. An example: There was a populist, anti-globalization businessman who ran for president in 1992, called Ross Perot. For a while he was looking like a contender against both Bill Clinton and George H.W. Bush. Respectable media held him up as someone interesting, worth hearing; certainly, he sold copy and drew viewers. I vividly remember when the narrative changed, and the stories on him became like those on Trump in 2016: he was erratic, probably a fabulist, maybe in the grip of conspiracy theories, definitely lacking the judgment for the presidency.¹⁴ The difference between 1992 and 2016 is that, with no social media and no Fox News, the central institutions of media democracy kept their hands on the steering wheel. Today our media are so fragmented that there is no such thing as a steering wheel. Not a single major newspaper endorsed Donald Trump in 2016, and the legacy media coverage was largely of the “Oh, I can’t look away!” variety, but the narrative was in many other hands.

I don’t mean to be nostalgic for the gatekeeping role of traditional media. I mean to be analytic. In media democracy, these semi-official public narratives played an important role in posing the questions for political decision and in cultivating the stability and effective legitimacy of the result. Noam Chomsky and

¹⁴ See Molly Ivins, *The Troubles with Perot*, WASH. POST (July 15, 1992), <https://www.washingtonpost.com/archive/opinions/1992/07/15/the-troubles-with-perot/c57bb317-5952-4d70-b38b-c331137a3870/> [https://perma.cc/C532-UHXQ]; Michael Kelly, *The 1992 Campaign: Candidate’s Record; Perot Shows Penchant for Seeing Conspiracy*, N.Y. TIMES (Oct. 26, 1992), <https://www.nytimes.com/1992/10/26/us/the-1992-campaign-candidate-s-record-perot-shows-penchant-for-seeing-conspiracy.html> [https://perma.cc/7Y6M-AT22].

others famously called this process “manufacturing consent,”¹⁵ which makes it sound dubious; but if a political system needs consent to work, and its manufacturing breaks down, we might well ask how else we are going to get it. In recent decades, intensifying in the last seven years, the discipline of the political parties has grown weaker and more diffuse while media have turned to cultivating divergent, incompatible narratives—clashing ideas about what the country’s problems are, what needs to happen, and, critically, about whether the decisions emerging from our political system are even legitimate. All of this greatly intensifies pressure on the weak points in our political institutions—the gaps between majority votes or opinion and control of government, the ambiguities about local and national power. Where does this leave us?

I think it leaves us somewhere really interesting and difficult. We are facing an intensified version of the democratic problem. We might even say we are facing a purified version of it. Political cynics have often said that democracy, stripped of mystification, is a process by which one part of the political community—the majority—exercises power over another part—the minority. In this light, it is just another form of authoritarianism, one in which the dictator is a subset of the public. And in some sense this is right. We should not entirely run away from it. It is frightening because any political power over us is frightening; but political power, clearly understood, is necessary. We need answers to questions like what we will do about climate change and habitat preservation, how we will be taxed and policed, whether abortion is legal, what happens at our borders. You can wholesale dislike or want to reject the kinds of answers we have given to these questions, but no one can cogently deny that they will get answers. And democracy comes closest to the idea that the answers should come from the people who will live with them—from us. It makes us one another’s rulers on questions where, because there has to be an answer, and the answer has to come from somewhere, there will be a ruler, and the fundamental question is who, or where, it will be.

Can we stand to be ruled by one another? If not, what are our alternatives? Here are a few alternatives. One is that we hand off more decisions to independent, “expert” authorities. For example, some of the most important and creative political acts of the last two decades have been the ways the Federal Reserve and other central banks responded to the financial crisis of 2008 and 2009 and to the outbreak of COVID-19 in 2020. In both cases, public bankers improvised rather extraordinary measures, setting the pace and tone of policy.¹⁶ These policies had big side effects, such as the distributional effects of massive asset inflation, and quite possibly some long-term systemic destabilization whose effects we have not yet seen. They also likely saved the world from two deep crises. The power to rule belongs, in part, to whoever can use it—especially whoever can use it to keep the

¹⁵ See EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988).

¹⁶ See Matheus R. Grasselli, *Monetary Policy Responses to Covid-19: A Comparison with the 2008 Crisis and Implications for the Future of Central Banking*, 34 *REV. POL. ECON.* 420 (2022).

world from falling apart. Not surprisingly, influential commentators have argued that the central banks should also lead the way on climate change by underwriting an energy transition.¹⁷ In other words, the success of this nominally non-political expert policymaking has seemed to be a paradigm for policymaking more generally.

Another alternative is that some “side” builds up effective majorities large enough that it does not really have to deal with the other. This is the occasional fantasy of political strategists, and much more often the nightmare that each side has about the other. For liberals, Republicans are going to do it through voter suppression (though I think they overlook how much more our constitutional distortions do to weaken majority rule than any voting regulation passed so far). For conservatives, Democrats are going to do it through demographic change, or making Washington D.C. and Puerto Rico into states. I don’t mean to say these would be equivalent things to do—I would oppose some and might support others, for democratic reasons; my point is that no party or movement is likely to achieve a towering permanent majority. It is more accurate to say that we have two minority parties in the country, with neither one able to achieve national popular support and stable control of government. The various efforts to tweak institutions in their favor are marks of desperation more than indications of total victory around the corner.

A third alternative, a more likely one, is really no alternative. It is more of the same. We remain intolerable to one another. We get less done in politics than we need to do. We lurch from crisis to crisis, but most of our crises are expressions of political weakness, cries of frustration that reaffirm our dysfunction. The latest premonitions are very fresh in our minds: the House can’t elect a speaker,¹⁸ the country can’t handle its debt without periodic crises.¹⁹ Maybe in the next decade the defeated president has to be escorted out of the White House, and there is scattered violence and lots of anger from his supporters. Maybe Washington can’t get Texas, or California, to follow its immigration policy. Maybe governors will run on the promise to nullify Supreme Court decisions. This direction is already much too recognizable: dysfunction becomes our new normal.

Let’s ask into a fourth alternative: Could we make democracy more real and effective? In thinking about this question, I am going to try to avoid some ways of speaking that come to mind very readily—about renewing democracy, about

¹⁷ See, e.g., Philipp Hartmann, Agnese Leonello, Simone Manganelli, Melina Papoutsi, Isabel Schnabel & Jean-David Sigaux, *Central Banks, Climate Change, and Economic Efficiency*, VOXEU CEPR (June 10, 2022), <https://cepr.org/voxeu/columns/central-banks-climate-change-and-economic-efficiency> [<https://perma.cc/9PSQ-5E3Z>].

¹⁸ See, e.g., Maggie Astor, *Why Does the House Keep Repeating the Same Vote Over and Over?*, N.Y. TIMES (Jan. 6, 2023), <https://www.nytimes.com/2023/01/06/us/politics/speaker-voting-house.html> [<https://perma.cc/M5MP-MSL3>].

¹⁹ See, e.g., Josh Boak, *Lots of Sound and Fury on U.S. Debt, But Not a Crisis—Yet*, ABC NEWS (Jan. 27, 2023, 11:06 AM), <https://abcnews.go.com/Business/wireStory/lots-sound-fury-us-debt-crisis-96722246> [<https://perma.cc/2VN5-ZVND>]; Brad Plumer, *A Very Simple Timeline for the Debt-Ceiling Crisis*, WASH. POST (Oct. 8, 2013, 3:50 PM), <https://www.washingtonpost.com/news/wonk/wp/2013/10/08/a-very-simple-timeline-for-the-debt-ceiling-crisis/> [<https://perma.cc/TCG2-UJ9F>].

overcoming the erosion of democracy. These are attractive, but I think they are not quite right. The United States has been a democracy in a fairly minimal sense—universal enfranchisement—only since the full enforcement of the 1965 Voting Rights Act²⁰ ended effective racial disenfranchisement. That is going on sixty years—getting to be a long time, but still considerably shorter than an average lifespan. Other kinds of explicit disenfranchisement persist. The five million citizens who were ineligible to vote in 2020 because of a current or former felony conviction were more than the number who voted in the presidential election in forty-one states.²¹ Twelve to fourteen million legal noncitizen residents cannot vote, along with another ten to twelve million unauthorized migrants,²² many of whom make their lives here, pay taxes, depend on schools to help raise their children, and are otherwise deep inside the systems democracy is meant to keep accountable. My opinion—which is not standard but I think defensible enough that I want to put it before you—is that one does not have to have any particular view about prisons or borders in order to believe that the basic democratic principle is that the people who make their lives in a place and live with its laws should be the ones who approve its laws. I think it matters immensely for the state of our democracy that those who live here but cannot vote make up a population larger than any state’s except Texas and California.

Two questions are bound up together: How can we save democracy? And how can we make democracy more real? In a sense they’re paradoxical, because saving democracy means keeping up the limited system we have, and making it real may mean trying to disrupt and change that system in ways that make us cry foul when someone else does it. We just have to keep the difficulty in mind, and remember that at the same time we are speaking from our own ideas of democracy, we are also seeking a next version of our democratic institutions that we can agree to disagree around, the basis of our next productive fight. To borrow an old image, a democracy is always rebuilding its ship while at sea—and, at the same time, arguing over the destination and even the design.

There is no simple formula, but here is a direction. To make democracy work, how we live should reinforce, not undercut, the belief that we are fundamentally

²⁰ Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

²¹ Chris Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENTENCING PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/reports/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> [https://perma.cc/3HFF-ZZUF]; Christina Maxouris, *More than 5 Million People with Felony Convictions Can’t Vote in this Year’s Election, Advocacy Group Finds*, CNN (Oct. 15, 2020, 4:17 AM), <https://www.cnn.com/2020/10/15/us/felony-convictions-voting-sentencing-project-study/index.html> [https://perma.cc/5HLC-JSYL].

²² See Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> [https://perma.cc/A92K-6VC4]; *Who Can and Can’t Vote in U.S. Elections*, USA.GOV, <https://www.usa.gov/who-can-vote> [https://perma.cc/TX6B-UTY8].

equals who can make basic decisions together with our fellow citizens—taking turns ruling and being ruled (as Aristotle put it). They should present us to one another as political equals who can be trusted with shared power. I want to sketch what this might mean in three domains: the economy, cultural life, and constitutional law.

I'll say the least about the economy. The idea that to be co-rulers democratic citizens need to have a certain amount of independence, a place to stand without fear or domination—that idea is very old and cuts across ideological lines. In most times and places, people who don't have economic standing are also denied real citizenship. If we believe in universal citizenship, the question must be what it means for economic membership to be universal also. I believe we also have to consider the possibility that our economy can undercut our democracy—by leaving behind or grinding down whole populations and regions of the country where people have reason to doubt they are really economic citizens; by producing mega-wealthy classes that can imagine they don't need the rest of us, and professionals like many of us who can afford to cloister in our own cities and neighborhoods; by taking over big tracts of public debate for a profit model that holds attention by stoking fear, resentment, and self-righteousness; by creating financial crises, like the 2008 to 2009 collapse, that make people feel their world is out of control, a feeling that is never good for politics because it presents us to ourselves as both desperate and powerless. In short, the ideas that we could let the market take care of itself, and that market life and democratic life went hand in hand, were lazy. They made things seem easy that were, and remain, hard. Because this question is a lecture in itself, or a series of lectures, I'll leave it here: part of the reason to want democracy to work is that the economy does not take care of itself, and we need other ways—political ways—to take responsibility for the world we make together.

I will say more about constitutional law. This is a tricky area, partly because the Constitution is both the source of some of the strongest and most questionable anti-majoritarian features of our system and, in our political culture, the symbol of our ability to live together under a shared set of rules. It is what I called earlier the shared ground on which we agree to disagree.

I talked earlier about these structural divergences between constitutional rule and majority rule, and how they've come under pressure in our current polarization. To put my own cards on the table, I think this pressure is appropriate from a democratic perspective, even if the factors that drive it are less desirable. I do think majority rule is the best institutional proxy for democratic consent, and that the dangers of minority rule are generally worse than those of majority rule.

In this light: What would a democratic relation to the Constitution look like? To my mind, it would move toward a constitutional structure that better translated majority votes into governing majorities. I think it is better for democracy when elections have consequences for policy, policy has consequences for elections, and people know exactly how their votes count. Having said that, I think the most fundamental and interesting aspect of a democratic relationship to the Constitution would focus on the document itself.

Above all, it would give living generations the power to amend—or affirm—our fundamental law, so that its opening line, “We the People,” would refer to those of us who live with the Constitution today, not only those who ratified it in 1789.

Imagine that every twenty-seven years—once a generation—we held a constitutional convention. It would be structured to be both representative and deliberative, to include representatives of the elected political establishment but also citizens from outside it. The convention’s charge would be to consider the current Constitution and propose any amendments its members thought desirable. Those would then be voted up or down in a national referendum, the only act in American politics of “the people in their collective capacity,” to echo that line of Madison’s.²³

Is there a constitutional right to choose abortion, to spend money in politics, to race-blind college admissions? Or should these questions be left to Congress or to state legislatures? Living national majorities should be able to answer these questions. I don’t mean that the questions should necessarily be left up to legislatures, but that the question of what is entrenched in the Constitution should itself be a special kind of democratic decision. The generational decisions about some of these questions would provide a second tempo in American politics, behind and alongside elections. This tempo would remind us that we are each part of a system of popular sovereignty. Each generation would substantially live with a fundamental law that it had approved—even if that meant changing nothing.

When you come down to it, I believe there is no better way for the Constitution to be our Constitution, rather than the preferred interpretation of a majority of Supreme Court justices or the structural rule that seemed best, for very different people and probably very different reasons, in 1789. If your first response is that this is a dangerous, wild idea, it is worth at least asking: Why should the power to make fundamental law not belong to the living? Is it really a power that can only exist in the distant past or after revolutions? Or is it something we are capable of, if only we could trust one another and ourselves enough to do it? For this question—or any other ambitious prospect of saving or achieving American democracy—whether we can trust one another is key.

I will last say something about culture. When Trump came to power, liberals rallied to “norms,” the habits and implicit practices of political institutions that provided “the guardrails of democracy” by setting certain power moves off-limits: extreme partisan maneuvering over Supreme Court seats, for instance, or lying about election results.

Americans learned to think of democracy this way—as a web of cultural practices—at least partly through the Cold War revival of Alexis de Tocqueville’s *Democracy in America*.²⁴ Tocqueville insisted that rule by the people was not literally possible—majorities couldn’t think together or share intentions. But if people largely agreed on the major issues, they could feel that they were ruling themselves.

²³ See *supra* note 6 and accompanying text.

²⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

In the past I have sometimes criticized the focus on norms for elevating tradition over the democratic capacity for change. Today let me say a word in favor of norms, or, to use an older term, political virtue. When we talk about how to do democracy, we are starting an argument, and potentially a fight, over power. There is no productive way to fight over power without also sharing some civic solidarity, even affection, and sense of common purpose. And the public argument that shapes democratic decisions is also hard to imagine without some commitment to truth, enough that standards of evidence are common, lies are discrediting, and votes settle elections. The basic political virtue is the commitment to your practice of self-government continuing, fairly healthy and resilient, even when it does not give you what you want, even when it means your power fades and someone else's rises. It is political nihilism to say that you would rather see the system burn than see yourself lose. Citizenship requires the courage and integrity to lose.

Adam Smith remarked in his *Theory of Moral Sentiments*²⁵ that we care less about whether other people share our affections than whether they share our resentments. I think this is not necessarily true, but it can certainly become true, and we have been working hard at it. Past a point, this is how we become intolerable to one another as co-rulers, and so democracy itself becomes intolerable. That spirit forecloses a more democratic future.

In culture, we need to find ways to see one another not just as enemies or threats, but also as potential collaborators. There is nothing easy about this. Trust is easier to tear down than to build. The real contribution of democratic politics to common culture is often that it builds worlds in which we live and act together. In past generations, these have included unions, the great public universities, the peacetime draft, and the simple experience of living among people who could act cogently to solve their problems—such as when Congress responded to the environmental crisis of the late 1960s by passing the Clean Air Act, Clean Water Act, and Endangered Species Act in four years,²⁶ mostly by large majorities. Contrary to what you hear, culture is not always upstream of politics; good politics can help to build democratic culture.

The greatest challenge, on all these fronts, is how to get from our vexed and fragmented “here” to a more democratic “there.” Giving democratic majorities the

²⁵ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (1759) (“Love is an agreeable passion, resentment a disagreeable one; and accordingly we’re not half so anxious that our friends should adopt our friendships as that they should enter into our resentments”).

²⁶ The Clean Air Act of 1970 passed the Senate 73 to 0; the Clean Water Act of 1972 passed the Senate 74 to 0; and the Endangered Species Act of 1973 passed the Senate 92 to 0. E.W. Kenworthy, *Tough New Clean Air Bill Passed by Senate, 73 to 0*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/1970/09/23/archives/tough-new-cleanair-bill-passed-by-senate-73-to-0-a-tough-cleanair.html> [<https://perma.cc/U2CB-EWRM>]; Ellen Simon, *The Bipartisan Beginnings of the Clean Water Act*, WATERKEEPER ALLIANCE (Jan. 30, 2019), <https://waterkeeper.org/news/bipartisan-beginnings-of-clean-water-act/> [<https://perma.cc/C2KQ-AZ8P>]; Eric Holst, *Maintaining Our Bipartisan Wildlife History*, ENVIRONMENTAL DEFENSE FUND (Nov. 12, 2019), <https://www.edf.org/ecosystems/maintaining-our-bipartisan-wildlife-history> [<https://perma.cc/M6YN-S5B2>].

chance to rule themselves—ourselves—would touch on some of the greatest fears of both left and right. As the Republican party has come to rely existentially on a minority-rule strategy, right-wing candidates have portrayed simple democracy (as opposed to “a republic”) as an un-American menace that would put the wrong people in charge and threaten fundamental liberties.²⁷ By the same token, the Trumpist takeover of the Republican party has reinforced many Democrats’ suspicion that bigoted and violent masses are lurking out there in the hinterlands and need to be held back by strong institutional barriers.²⁸

Basic political change takes mobilization strong enough to shift the pillars of power, and also civic trust deep enough that people will accept the results of the change. If we don’t have both mobilization and trust, efforts at basic change will either fail to get off the ground or fail to make their results stick. Our dilemma is that, with political culture so divided, mobilization tends to deepen polarization and mistrust—witness the 2020 election, with the biggest turnout since 1900, issuing in conspiracy theories and warnings of civil war.²⁹

It is possible, for all these reasons, that Americans can’t deepen and reinvigorate our democracy. That would be bleak news. A deepened democracy requires everyone to find ways to accept their fellow citizens as their co-rulers, to accept that we must live with losing, and live with one another—live, indeed, with losing to one another. It is only if we have that willingness that we can also win a future we have chosen together.

And that, let’s remember, is the point: not to make this system work because it is the one we were born into, not to insist that people live up to some abstract concept of democracy, but to ask whether we believe we should live as political equals because we are also moral equals, and whether we believe we should choose our future together because any other path is a form of fate, unfree and almost certainly unfair. I think we would like to mean those things, and that to mean them also we have to make them real. That is the challenge.

²⁷ See, e.g., @SenMikeLee, Twitter (Oct. 7, 2020, 9:34 PM) (noting that “[America] is not a democracy”); see also Press Release, Senator Mike Lee, Of Course We’re Not a Democracy (Oct. 20, 2020), <https://www.lee.senate.gov/2020/10/of-course-we-re-not-a-democracy> [<https://perma.cc/DW3D-K3WA>].

²⁸ See, e.g., John Gramlich, *A Look Back at Americans’ Reactions to the January 6 Riot to the Capitol*, PEW RSCH. CTR. (Jan. 4, 2022), <https://www.pewresearch.org/fact-tank/2022/01/04/a-look-back-at-americans-reactions-to-the-jan-6-riot-at-the-u-s-capitol/> [<https://perma.cc/NKH5-JAVV>] (noting that 71% of Democrats said there needed to be harsher January 6 penalties, while only 19% of Republicans said there needed to be harsher penalties).

²⁹ Kevin Schaul, Kate Rabinowitz & Ted Mellnik, *2020 Turnout Is the Highest in a Century*, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/> [<https://perma.cc/25VU-P2GY>].