Two Ways Law Professors Can Defend American Democracy

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Introduction

The theme of the 2024 Association of American Law Schools (AALS) Annual Meeting is "Defending Democracy."[1] But defending democracy how, and against whom?

Surely not against the people on the political Right. The rioters at the Capitol on Jan. 6, 2021 were there because they had been told, and most of them believed, that the 2020 election had been stolen by Joe Biden and the Democrats.[2] They thought they were defending democracy. Even Republican state legislators passing laws requiring voter ID, limiting ballot drop-off boxes and opposing automatic voter registration say they are 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, announced in a recent fund-raising email, that the "radical left" is engaging in "the biggest threat to election integrity I've ever seen" by trying to keep former President Donald Trump off the ballot by invoking the insurrection clause of the Fourteenth Amendment.[4]

But most proponents of this theory would undoubtedly respond 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]

Both sides claim to be defending democracy even when their actions might appear to be anti-democratic. That is why the phrase, "defending democracy," by itself, is empty.

If we really want to defend democracy, we must first know how and why American democracy is failing. Only then will we be able to do something positive to defend it.

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[1] See 2024 AALS Annual Meeting Announcement, https://www.aals.org/about/publications/newsletters/aals-news-summer-2023/2024-aals-annual-meeting/.

[2] Ryan J. Reilly, for Jan. 6 rioters who believed Trump, storming the Capitol made sense, June 20, 2022, https://www.nbcnews.com/politics/donald-trump/jan-6-rioters-believed-trump-storming-capitol-made-sense-rcna33125.

[3] See generally, Ryan Chatelain, Debate over photo voter ID laws is enduring—and complex, Spectrum News, July 15, 2021, https://ny1.com/nyc/all-boroughs/politics/2021/07/14/debate-over-photo-voter-id-laws-enduring-and-complex.

[4] Email of 12/5/2023, on file with the author.

[5] Ilya Somin, Yes, Trump Is Disqualified from Office, Cato Institute, Dec. 1, 2023, https://www.cato.org/commentary/yes-trump-disqualified-office#. See also, Mark A. Graber, Efforts to Disqualify Trump Uphold Democracy, New York Times, Dec. 6, 2023, https://www.nytimes.com/2023/11/29/opinion/trump-president-candidate-constitution.html (only the print edition included that headline; the online version appeared on Nov. 29, 2023).

The simple answer to the question of *how* is democracy failing—and the one most people on 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 advantage. Therefore, 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. This is the approach both sides in American politics often resort to today. It is notable that Americans now sometimes speak of civil war.[6]

But what if that very attitude of all out conflict is *how democracies die*?[7]

As to *why* American democracy is failing, that is to say why this is happening now, the similar answer people give is that the other side today is filled with some really evil people who care nothing for the future of this country—not all of them, of course, some are just misled.

But what if the attitude that political opponents are mortal enemies is *why* American democracy is failing?

The goal of this paper 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 paper proposes that American law professors can best defend democracy first—this is the *how*—by creating a bi-partisan 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.

Parts I-III of the paper set forth the model of how democracies die by social scientists Steven Levitsky and Daniel Ziblatt—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—the LPCPD. Parts IV-VI argue that a change in cultural consciousness—the growth of nihilism in the wake of the Death of God—is the reason why the downward spiral began, shows that this is the case in the American experience and proposes 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 the rest of the arsenals of both the Left and the Right have been tried repeatedly since 2015. Each side can claim some successes. But on the whole, American public life is as bad as it has ever been and is close to catastrophic failure. The responses by both sides so far are not effectively defending democracy. The 2024 AALS Annual Meeting is more of the same and will, overall, only deepen American divisions.

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[6] 'These are conditions ripe for political violence': how close is the US to civil war, The Guardian, Nov. 6, 2022, https://www.theguardian.com/us-news/2022/nov/06/how-close-is-the-us-to-civil-war-barbara-f-walter-stephen-march-christopher-parker

[7] The reference here is to Steven Levitsky and Daniel Ziblatt, How Democracies Die (2018), which will serve in this paper as the model of a downward spiral of norm violations that lead to the death of democracy.

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.

I. How Do Democracies Die: In a downward spiral of political norm violations by both sides

In a context like American public life, in which everyone claims to be defending democracy, it bears asking, defending democracy from what?

People on the political Left would answer, from Republican attempts at undermining democracy, including 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, to the more mundane restrictions on the franchise and gross political gerrymandering in which Republican dominated state legislatures routinely indulge. Defending democracy means fighting back against these attempts and electing Democrats instead of Republicans.[8]

Republicans would respond that Hillary Clinton engaged in similar conduct by joining the ludicrous 2016 Wisconsin recount effort,[9] that there actually were partisan attempts to steal the 2020 election, including the lawless 3-day mail-in ballot extension voted by four Democratic Justices on the Pennsylvania Supreme Court,[10] that both political sides gerrymander where and when they can, pointing to Maryland and New York,[11] and that so-called restrictions on the franchise amount either to common sense identification measures that make it no more difficult to vote than to buy a bottle of wine or prevent coercion and fraud in activities like absentee voting.[12]

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*,[13] social scientists Steven Levitsky and Daniel Ziblatt (L&Z) argue that it is actually 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 other side responds to provocation, an action which is then followed by the first side responding to the that response. The consequent unfolding of a spiral of such actions is what dooms democracy.[14]

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[8] See e.g., this statement by the Jewish Democratic Council of America at https://secure.everyaction.com/B6ljdp9GOEeVfvOGedeexw2, but really just as one example that could be endlessly repeated.

[9] See discussion infra.

[10] Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020).

[11] See Andrew Prokop, How Democrats learned to stop worrying and love the gerrymander, Vox, April 14, 2022, https://www.vox.com/22961590/redistricting-gerrymandering-house-2022-midterms.

[12] See e.g., Voter ID Laws Are Popular for Good Reasons, The Heritage Foundation, Jan. 17, 2023, https://www.heritage.org/election-integrity/commentary/voter-id-laws-are-popular-good-reasons.

[13] Supra, n. __.

[14] 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 146-157.

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. In a healthy democracy, these norms can be reduced to one underlying directive—*Forbearance*.[15] That term means simply that politicians do not pursue political advancement of their side by any means possible. Instead, they play the game of politics fairly and accept defeat within the existing structure, knowing that they will have another chance next time to gain power. That is why L&Z, who are not reluctant to name the Republican Party generally as more at fault for the state of things in America public life, urge the Democratic Party not to respond in kind.[16]

Politicians in a healthy democracy do not violate traditional norms and practices and they do not change the rules to favor themselves. Think of Ronald Reagan and Tip O'Neill having a drink together after bashing each other in public.[17]

This ground norm of forbearance is expressed in a series of traditions that the authors call guardrails of democracy. Here is how the authors describe the downward spiral that can happen when basic political norms are violated:

> 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 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.
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> The result is politics without guardrails—what the political theorist Eric Nelson describes as a "cycle of escalating constitutional brinksmanship."[18]

To see how forbearance works on the ground, consider two guardrail practices in American political life: the acceptance of the current structure of the Electoral College and the treatment of the other side after a Presidential election in which power transfers from one party to the other.

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 actually elect the President and Vice-President. The Constitution assigns the responsibility of selecting these electors not to the people, but to the state legislatures. The reason we have a Presidential election at all is only because each state legislature has so decided, by state statute.

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[15] 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.
[16] Id., at 204-31.
[17] Patrick Gavin, Matthews book: O'Neill, Reagan bond, Politico, Sept. 30, 2013.
[18] Id., at 112.

State legislatures retain the ultimate authority to regulate the current system, which is why 48 states select their Presidential electors in winner-take-all-fashion, while two states divide the vote for electors.[19]

Thus, a state legislature controlled by one party, assuming the Governor is of the same party, fearing a victory in a Presidential election by the other party, could theoretically pass a new elector selection statute assigning the selection to itself. There were even rumblings about doing something along those lines as part of Trump's desperate attempt to retain power.[20]

The norm of allowing the people to choose the President, even though that might be disadvantageous to one side, leads to the practice of treating the current structure of the Electoral College as settled.

And, now that the full application of the Independent State Legislature Doctrine has been rejected by the U.S. Supreme Court,[21] such a blatant power grab by a state legislature might be blocked by a State Supreme Court pursuant to its state constitution.

But this matter does not have to remain abstract. I have elsewhere described an actual plot to manipulate the Electoral College for partisan gain that was foiled very much in accordance with the account of L&Z concerning norms and guardrails in healthy democracies.[22]

In addition to all its other quirks, the current structure of the Electoral College—winner-take-all-of-the-delegates in 48 states—means that the votes of the losing Party gain no electors in most states at all. It does not matter how many votes there are for the Republican Presidential candidate in California. All the electoral votes go to the Democratic Party candidate. The same effect, but in the opposite direction, applies for votes for the Democratic candidate for President in Texas.

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,[23] has usually won the Presidency.[24]

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.

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[19] See generally Lara LaBrecque, Note, Path to a Popular Vote: The Impact of State Faithless Elector Statutes on the National Popular Vote Plan, 54 Loy. L.Rev. 1299, 1306-07 (2021).
[20] Trip Gabriel and Stephanie Saul, Could State Legislatures Pick Electors to Vote for Trump? Not Likely, The New York Times, Jan. 5, 2021.
[21] Moore v. Harper, 143 S.Ct. 2065 (2023). See generally Bruce Ledewitz, Moore News About the Independent State Legislature Doctrine, __ Duq. L.Rev. __ (forthcoming).
[22] See Bruce Ledewitz, Taking the Threat to Democracy Seriously, 49 U. Mem. L. Rev. 1305, 1317 (2019).
[23] The PEW Research Center reported in September that 65% of Americans favored eliminating the Electoral College in favor of direct election of the President. https://www.pewresearch.org/short-reads/2023/09/25/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/.
[24] But that trend may be changing. In 2000 and 2016, the winner of the popular vote did not become President. Id.

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 nationally would aid the electoral chances of a Republican Presidential candidate in a close election—Mitt Romney would have defeated Barack Obama in 2012, for example.[25] This would be a marginal advantage for Republicans. 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 only Republican leaning states, 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.

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.

That principle was behind the plot to steal the Presidency that was launched in 2011 by the partisan organization, the American Legislative Exchange Council (ALEC). Late in that year, ALEC endorsed allocation of electors based on the congressional district method.[26]

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—those three plus two more, also at the time in play for a Democratic Party Presidential candidate, Virginia and Ohio.

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 for sure why the plot failed. But if the experience in Pennsylvania is representative, it was stopped by honorable Republican leaders who thought democratic norms were more important than partisan advantage. In Pennsylvania, the strong rumors at the time indicated that the attempt to change the electoral system to congressional district selection was

[25] Id.
[26] See Ledewitz, Threat to Democracy, supra n. __.

going on behind the scenes in the General Assembly, but that then-Governor Tom Corbett, a Republican, put a stop to it.[27]

If that is what happened, it shows exactly how L&Z would predict that the norm of forbearance in a working democracy functions. Politicians simply understand that winning power is not the most important goal and you do not do everything possible to win. It is a given that sometimes the other side will win power. The most important thing is that the system continues 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 that Presidents of the opposing political party 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 probably 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.

This situation occurred, for example, in the 1960 Presidential election, in which then-Vice President Richard Nixon vilified then-Sen. John Kennedy as weak on the Communist threat, lost a narrow election tainted by allegations of fraud[28] and then attended Kennedy's inauguration, along with outgoing President Dwight Eisenhower.

The legitimizing effect of the presence of the outgoing President at the incoming President's inauguration is probably most crucial in the case of a challenger defeating an incumbent President, which happened in the Presidential elections of 1976 and 1980. The principle of democratic forbearance has been so deeply engrained in American politics that no one noted at the time that Presidents Gerald Ford and Jimmy Carter attended the respective inaugurations of their successors. That was to be expected. Undoubtedly, it never occurred to either Ford or Carter that they might behave differently.

This is what rendered the behavior of then-President Donald Trump in not attending the inauguration of incoming President Joe Biden in 2021 so startling and unprecedented—in the modern period anyway.[29]

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[27] 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 L&Z call forbearance as the guardrail of democracy.

[28] 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, The New York Times, Jan. 18, 2022, https://www.nytimes.com/2022/01/18/books/review/campaign-of-the-century-kennedy-nixon-1960-irwin-f-gellman.html.

[29] 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

But the power of the L&Z model of 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 the spiral of norm violation.

In this example, consider what happens if Joe Biden runs for reelection in 2024 against a Republican nominee other than Trump and loses. Biden, being the old pol that he is, would almost certainly ignore the slight of Trump's non-attendance and would attend the inauguration of his successor, even though that person had defeated him. 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 would happen if Biden ran again against Trump and this time lost? I am not sure what Biden would do then, but it is easy to imagine his 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 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.

II. Does Recent American Political Life Illustrate L&Z's Downward Spiral of Norm Violation?

The two major examples I will point to—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 and probably most readers understand the pattern even without reading this section.

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 charges of vote fraud 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 Russian operatives.[30] Thus, the recount effort could have undermined the confidence of Americans in voting results generally.

On Saturday, Nov. 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.[31] The

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presidents who snub their successors' inaugurations, CNN, Jan. 8, 2021, https://www.cnn.com/2020/11/11/opinions/presidents-history-skipping-inauguration-day-balcerski/index.html.

[30] Amanda Holpuch and Jon Swaine, Jill Stein requests Wisconsin recount, alleging hackers filed bogus absentee ballots, The Guardian, Nov. 25, 2016, https://www.theguardian.com/us-news/2016/nov/25/jill-stein-election-recount-clinton-trump-michigan-pennsylvania-wisconsin.

[31] Eugene Scott, Clinton to join recount that Trump call 'scam,' CNN, Nov. 28, 2016, https://www.cnn.com/2016/11/26/politics/clinton-campaign-recount/index.html.

states being targeted were first, Wisconsin, with Pennsylvania and Michigan to follow. Those three states were narrowly won by Trump, by 107,000 votes, and were widely credited with providing Trump his Electoral College margin of victory.[32] The Wisconsin recount was held and it reaffirmed the original result of Trump winning the state; Trump's lead over Clinton actually increased in the recount by 111 votes.[33] Requests for similar statewide recounts in Michigan and Pennsylvania were denied by federal courts.[34]

The main basis of the Green Party's effort was 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, I called this whole idea "paranoia" and regretted that the Clinton campaign, which I supported, joined the effort while at the same time admitting there was no evidence supporting this charge.[35]

Accounts from the period weirdly echo allegations of vote fraud from 2020 and the responses to those charges by Republicans, and particularly by the Trump campaign, sound like responses by Democrats and the Biden campaign to the Trump campaign's later wild accusations. Trump called the Wisconsin recount a "scam" and said the election was over and he won.

In similar fashion to 2020, the allegations of a fraudulent result in 2016 had begun to circulate prior to the actual voting. At that time, election officials argued that the scenario of Russian hacking of voting machines could not occur because the voting machines and transmission of the results were not connected to the Internet.[36] Again, in a fashion similar to what happened in 2020 with Republican election officials, after the 2016 election, Democratic election officials dismissed claims of vote fraud that would have benefited their side.[37]

The whole fiasco sounded very much like the 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.[38]

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. On election night, Nov. 8,

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[32] Tim Meko, Kenise Lu and Lzaro Gamio, How Trump won the presidency with razor-thin margins in swing states, The Washington Post, Nov. 11, 2016, https://www.washingtonpost.com/graphics/politics/2016-election/swing-state-margins/.

[33] Jason Stein, Recount confirms Trump's victory in Wisconsin, Milwaukee Journal Sentinel, Dec. 12, 2016, [33] https://www.jsonline.com/story/news/politics/elections/2016/12/12/recount-drawing-close-wisconsin/95328294/.

[34] Id.

[35] Ledewitz, B. (2016). November 27, 2016: Perfect Paranoia—-Jill Stein's Recount. Retrieved from https://dsc.duq.edu/ledewitz-hallowedsecularism/1052

[36] Tal Kopan, CNN, No, the Presidential election can't be hacked, Oct. 19, 2016, https://www.cnn.com/2016/10/19/politics/election-day-russia-hacking-explained/index.html.

[37] These assurances were then challenged. See Kim Zetter, The Myth of the Hacker-Proof Voting Machine, The New York Times, Feb. 21, 2018, https://www.nytimes.com/2018/02/21/magazine/the-myth-of-the-hacker-proof-voting-machine.

[38] See Reuters, 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, Dec. 14, 2020, https://www.reuters.com/article/idUSKBN2861T1/.

actually early in the morning on Wednesday, 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."[39]

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

Instead, though never actually endorsing the validity of the Russian hack story, the Clinton campaign 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 are merely pursuing investigations of voting irregularities that concern their constituents.[40] 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.

The failure of the Clinton campaign to join with Trump in dismissing these concerns as untrue helped undermine the Trump presidency as somehow illegitimate, as opposed to being the result of a serious error in judgment, but still just ordinary political decision-making, by American voters.

In all of its communications on the subject, the Clinton campaign was careful to allude to the fact that she actually won the popular vote by over two million votes,[41] as if, in a different system, Trump would not have targeted California and New York to drive up Republican totals in those states 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.[42]

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[39] Nolan D. McCaskill, Clinton concedes to Trump: 'We owe him an open mind, Politico, Nov. 9, 2016, https://www.politico.com/story/2016/11/clinton-concedes-to-trump-we-owe-him-an-open-mind-231118.

[40]See e.g., Jane C. Timm, Trump's voter frau lies encouraged a riot. GOP are still giving them oxygen, NBC News, Jan. 10, 2021, https://www.nbcnews.com/politics/donald-trump/trump-s-voter-fraud-lies-encouraged-riot-gop-allies-are-n1253509. Sen. Josh Hawlye, 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."

[41] 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, https://www.npr.org/sections/thetwo-way/2016/11/26/503432822/clinton-campaign-supports-recount-efforts-in-battleground-states. Trump won far fewer popular votes.

[42] See supra n. __.

I am not suggesting that Clinton's mild sour grapes were anything like Trump's desperate and crazy efforts to stay in power in 2020-2021. But that is the point of the L&Z model of a spiral of reciprocal norm violations. One side starts the slide and the other side then responds in kind and makes things worse.

It is very likely that had Clinton maintained the gracious tone of the immediate aftermath of the 2016 vote, had treated the Trump victory with respect and had urged the country to do the same, as President Barack Obama and Michelle Obama gamely tried to do, nothing later would have changed.[43] Trump did not need Hillary Clinton's behavior to act the way he did in 2020 and later. 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. It would from then on be easier for a losing candidate to claim that shadowy forces stole a Presidential election, which is just what happened.

The first of my other two illustrations of a downward spiral of norm violations is the filibuster in the Senate. From the constitutional beginning, a Senate rule allowed a simple majority to cut off debate on a bill. In 1806, the Senate abolished this rule. Since then a determined minority in the Senate, or even one or two Senators, could in theory delay or prevent any sort of Senate action simply by engaging in prolonged debate.

Over time, two innovations defined the filibuster as it currently is known. The first was the ending of the tradition of unlimited debate by a change in Senate rules through the invocation of a cloture vote in 1917. At that time, a 2/3 vote, 67 Senators, was necessary to close debate. In 1975, that number was reduced to 60 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 debate on the Senate floor to prevent its passage, a group of Senators sufficiently large to defeat a cloture vote, currently 41 Senators, could simply announce its intention to filibuster a measure and the Senate majority leader would 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.[44]

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. At the funeral of U.S. Rep. John Lewis in 2020, President Barack Obama

[43] 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 over recount efforts in Wisconsin, CBS News, Nov. 27, 2016, https://www.cbsnews.com/news/donald-trump-angry-hillary-clinton-team-recount-efforts-wisconsin/.

[44] See generally, Tim Lau, The Filibuster Explained, Brennan Center for Justice, April 26, 2021, https://www.brennancenter.org/our-work/research-reports/filibuster-explained.

called the filibuster "a Jim Crow relic."[45] Until 1962, filibusters were not generally used except to block civil rights legislation. That year, with opposition to the creation of a semi-private satellite corporation—COMSAT—filibuster use began to be extended to other types of legislations and actions.[46]

The example of the abuse of the filibuster involves two different norm violations. On the 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 most of the time have at least 41 votes so as to be able to win a cloture vote, use the filibuster to prevent passage of ordinary legislative initiatives of the Party with a majority in the Senate. This is a norm violation in the sense that the minority Party in the past practiced forbearance and only invoked the filibuster on the occasions of proposed laws that involved major changes of some kind, 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.[47] The filibuster now routinely prevents passage of the majority's legislative priorities, which may have been the 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 in fact paralyzed American democracy. In effect, a Party now needs 60 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, it is not in any sense a democratic system. Super majorities are not used for ordinary legislation for a reason—such a requirement ensures that the ordinary work of democracy that normally the will of the majority prevail, cannot function. 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 filibuster, some resolution of the ongoing immigration issue would already have been found.[48]

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,[49] the most important of which is budget reconciliation. Budget reconciliation was created by statute in 1974. Although not originally

[45] Maggie Astor and Shane Goldmacher, At Lewis Funeral, Obama Calls Filibuser a 'Jim Crow Relic,' The New York Times, July 30, 2020, https://www.nytimes.com/2020/07/30/us/politics/john-lewis-funeral-barack-obama.html.
[46] Turning Point, U.S. Senate, https://www.senate.gov/about/powers-procedures/filibusters-cloture/comsat-filibuster-defeated.htm
[47] https://www.senate.gov/legislative/cloture/clotureCounts.htm
[48] 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, https://www.npr.org/2021/09/19/1038776731/in-a-blow-to-democrats-senate-official-blocks-immigration-reform-in-budget-bill.
[49] Molly Reynolds, Exceptions to the Rule (2017).

planned as a general exception to the filibuster, it limited debate to 20 hours. It has been seized upon and expanded as a way around the filibuster for other than budget legislation.[50]

The other way that a filibuster can be curtailed without the requisite 60 votes for cloture is the so-called nuclear option—the name communicates the unprecedented action it denotes. Under this method, a senator raising 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 nondebateable questions, such as cloture, are nonappealable. At that point a simple majority vote ends the filibuster.

The expansion of the nuclear option illustrates the downward spiral very clearly. In 2013, Democrats invoked it in response to Republican Party use of 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,[51] Senate Republicans then 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 of passing legislation,[52] 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. 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 Joe Biden.[53]

Obviously, the use of impeachment has increased recently, but the mere use of impeachment is not my point here. Rather, what has changed is the norm that impeachment should reflect a judgment by the House of Representatives that there is some likelihood that the President would be removed after trial in the Senate, rather than constitute a punishment of the President in its own right.

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[50] Ezra Klein, The Senate Has Become a Dadaist Nightmare, The New York Times, Feb. 4, 2021, https://www.npr.org/2021/09/19/1038776731/in-a-blow-to-democrats-senate-official-blocks-immigration-reform-in-budget-bill.

[51] 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.

[52] Ezra Klein, supra, n. __.

[53] Farnoush Amiri, House approves impeachment inquiry into President Biden as Republicans rally behind investigation, AP, Dec. 14, 2023, https://apnews.com/article/joe-biden-impeachment-inquiry-mike-johnson-94884b322da40ca9315ac5f4e73a3e86.

To see that impeachment was not thought of previously as a stand-alone action, consider Justice Powell's defense of absolute immunity from damage actions for a sitting President in *Nixon v. Fitzgerald*:[54]

> 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.[55]

It is clear that Powell meant removal after impeachment since he invoked as a parallel action the removal of members of Congress by a 2/3 vote.[56]

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 45 Democrats voted to acquit and neither vote came close to the 2/3 requirement.[57] Nevertheless, the Clinton impeachment vote in the House did achieve some bipartisan support. In all, 31 Democrats in the House joined with a unanimous Republican vote to impeach Clinton.[58]

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.[59]

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 and removed.

However, the House impeachment inquiry concerning Biden shows how 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.

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[54] 457 U.S. 731 (1982).
[55] Id., at 757.
[56] Id., at n.39.
[57] Peter Baker, The Senate Acquits President Clinton, The Washington Post, Feb. 13, 1999, https://www.washingtonpost.com/politics/clinton-impeachment/senate-acquits-president-clinton/.
[58] Peter Baker and Juliet Eilperin, Clinton Impeachment Inquiry Approved; 31 House Democrats Back GOP, https://www.washingtonpost.com/politics/clinton-impeachment/clinton-impeachment-inquiry-approved-house-democrats-back-gop/.
[59] Nicholas Fandos and Michael D. Shear, Trump Impeached for Abuse of Power and Obsruction of Congress, The New York Times, Dec. 18, 2019, https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html. 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.

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

We cannot end here, with analysis. The theme of the 2024 AALS National Meeting is Defending Democracy. Thus, we law professors are called upon to do something about all this. As Lenin might say, *What is to be done?*[60] What, if anything, law professors can do to prevent L&Z's downward spiral from leading America to a catastrophic death of democracy?

III. The AALS Led Law Professor Caucus to Preserve Democracy—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 Jan. 6 attack on the Capitol: *Beyond Imagination*.[61] 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 of which this panel is a part.

Reading and watching these efforts, I see three broad answers being proposed 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. 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. Therefore, most of the speakers and contributors in the above efforts 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 other unjust traditional, hierarchies. There is nothing to be done with such people except to defeat them.

I agree that winning is crucial. I certainly intend to be active politically in 2024 on behalf of the Democratic Party. But I hope it is clear by this point that, at least according to L&Z, you cannot save democracy by pursuing a strategy of winning at all costs. Winning at all costs, including violating democratic forbearance, is the problem to be solved. The more I hear about packing the Supreme Court or other so-called structural reforms advocated by the Left, the more I wish people would attend to the message of L&Z. 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 that the other side started the slide. It does not matter if the norm violation is provoked by a norm violation by the other side. In the situation we are in, both sides are going to 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.

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[60] Cf., Vladimir Ilyich Lenin, What Is To Be Done?, 1901, https://www.marxists.org/archive/lenin/works/1901/witbd/.

[61] Mark Alexander, et al, Beyond Imagination: The January 6 Insurrection (2022).

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 AALS 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.[62] This is indeed absolutely necessary. But, as I will discuss below,[63] this cannot happen without a significant change in the national philosophical and theological—that is, spiritual—context.

The third response is the one that is relevant to the immediate issue of what to do now. The Dean of Penn Law School, Theodore Ruger, suggests in *Beyond Imagination* that we pay careful attention to the way democratic structures work in order to create proper incentives for political actors to move away from extremism.[64]

Here, I want to follow up on this suggestion by describing one way to do that. 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 the country needed a bi-partisan group to advocate for fiscal responsibility. Since that time, the Committee has been careful to criticize both irresponsible spending and tax-cutting proposals in a bi-partisan fashion.

Given the Federal Government's precarious fiscal condition, with increasing deficits and higher debt payment costs, you would have to say that the Committee has not been very successful. Nevertheless, the Committee is a voice for fiscal restraint for the media and their national audience. Without the efforts of the Committee, fiscal matters would be even worse.

The Committee represents the correct model for law professors, led by the AALS, to pursue. We need to create a bi-partisan 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.

This is the AALS-led institution we need to create: the Law Professor Caucus to Preserve Democracy, or the LPCPD.

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[62] Mark C. Alexander, The Assault on American Democracy and a Path Forward, in Beyond Imagination, supra n. __, at 285.
[63] See infra, Parts IV-VI.
[64] Theodore W. Ruger, The Primacy of Electoral Politics and Our Outdated Checks and Balances, in Beyond Imagination, supra, n. __, at 117.

There are undoubtedly many questions concerning the LPCPD, but I want to mention two specific problems that would have to be addressed before a serious effort in this direction could 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 experience of many conservatives with regard to the AALS.

Of course, the suspicion is mutual. Until the matter was all over, I did not hear anyone from The Federalist Society, or from the Right generally, 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. There is now, but the damage has been done.

In other words, both sides in the legal academy have been thoroughly partisan.

So, can a bi-partisan group that is sufficiently well-known to be 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.[65]

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 we face—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, be returning America to the norm of majority rule envisioned by the framers for the Senate?

Obviously, there is no simple answer to either problem. But I can say that more of the same—more vituperative comments, more anger, more hostility, more condemnation, more charges and

[65] 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 Geore Conway, J. Michael Luttig and Barbara Comstock, The Trump Threat Is Growing. Lawyers Must Rise to Meet This Moment, New York Times, Nov. 21, 2023, https://www.nytimes.com/2023/11/21/opinion/trump-lawyers-constitution-democracy.html. 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.

counter-charges and, finally, more alienation and distance from the other side—is bound to fail. We must do something new and innovative to have a chance of 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.[66]

IV. 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 paper then proposes a mechanism—a bipartisan, pro-democracy law professor caucus—that would help stop the spiral from continuing.

But no one familiar with our current condition can be confident that any action will really help. Counselling restraint, which, according to the L&Z account, is the best remedy, seems like a fool's errand.[67]

Why is that? Given the scale of the threat to democracy, why should not cooler heads prevail? Why do the suggestions by Dean Alexander that we renew our dedication to democratic values, such as free and open debate and the rule of law,[68] seem so unrealistic?

The related question, one that would explain why the spiral is so hard to stop, is, why did it start in the first place? After all, even if you believe, like L&Z, that Republican norm violations started the spiral[69]—that all this is therefore their fault—why did it start when it did and not before—or later? It is not as if reactionary forces suddenly appeared in American public life. They have always been there.[70]

If your response is that the Republican Party is crazy, then why did it become crazy when it did? The Republican Party was not crazy in 1960.

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[66] 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. 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 exists 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.

[67] Even Levitsky and Ziblatt may feel that way. In their latest book, Tyranny of the Minority: Why American Democracy Reached the Breaking Point (2023), the authors explain that when writing How Democracies Die, they never anticipated the Jan. 6 assault on the Capitol and the extent to which an authoritarian minority could attain power in America. The conclusion of the Introduction is almost the opposite of the thrust of the earlier book: "Our institutions will not save our democracy. We will have to save it ourselves." Id., at 11.

[68] Mark C. Alexander, The Assault on American Democracy and a Path Forward, supra n. __.

[69] See generally, Chapter 3, The Great Republican Abdication, and Chapter 7, The Unravelling, in How Democracies Die, supra, n. __, at 53 and 145, respectively.

[70] See Sean Wilentz, American Carnage, The New York Review, August 17, 2023, at p. 17.

Similarly, if you are on the other side, and believe that Democrats are at fault, that they started it, why did their norm violations accelerate now to the extent that they provoked Republican retaliation, which is what the spiral is? Norm violations have been proposed on the Left since the 1930s, from Court packing to various forms of socialist experimentation.[71] But, somehow, these prior episodes calmed down and did not lead to an existential threat to American democracy.

To put the question bluntly, no one had previously attacked the U.S. Capitol to prevent the peaceful transfer of power. Previously, everyone would have been horrified by such a thought and would have assumed that such a thing could not happen here, in America. But it did.

Of course people have been asking these questions in a different form since 2015: What Went Wrong and What Can We Do About It?[72] But asking the questions that way ignores the fact that the spiral has been underway since at least the 1990s. Trump is not the cause of our problems. He is a symptom. A more fundamental and wide-ranging approach is needed to understand our situation.

Some of the reasons that people give for the increasing political polarization and hyper-partisanship seem to me to be merely contributing factors: the creation of social media, growing economic inequality, stagnating wages and so forth.[73]

Economic factors cannot account for the change because in the relevant period involved—the last third of the 20th century and the first few years of the 21st century—economic conditions were not that bad. Average wages were not growing very much and blue collar jobs declined, but conditions were not so dire that the system overall should have been in crisis. The recession in 2008 was severe, but the spiral was already well underway by then.

Nor can social media be a major factor in starting the slide. Social media did not become popular until the early 2000s[74] and Rush Limbaugh and FOX News were already national phenomena by the late 1990s.[75]

L&Z give a brief answer to the question of why the spiral started. They argue that prior to the Civil Rights revolution, the two major political parties had an unwritten understanding that white supremacy would not be fundamentally challenged.[76] That unwritten understanding contributed to restrained and limited competition between the parties, a competition in which norms were

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[71] See Donald J. Devine, The Enduring Tension: Capitalism and the Moral Order (2021) on the tension between freedom and order that government interventions, like Lyndon Johnson's Great Society initiatives, threaten to unbalance.

[72] See Bruce Ledewitz, What *Has* Gone Wrong and What *Can* We Do About It?, 54 Tulsa L.Rev. 247 (2019).

[73] 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).

[74] "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 (2019) - "The rise of social media". Published online at OurWorldInData.org. Retrieved from: 'https://ourworldindata.org/rise-of-social-media' [Online Resource]

[75] See Sean Illing, Rush Limbaugh and the echo chamber that broke American politics, Vox, Feb. 26, 2021, https://www.vox.com/policy-and-politics/22151088/rush-limbaugh-trump-talk-radio-fox-news-paul-matzko.

[76] How Democracies Die, supra, n. __, at 175.

followed. When that unwritten understanding collapsed, the competition between the parties became all-out and norms began to fall.[77]

President Lyndon Johnson gave a kind of endorsement to 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.[78] The Act ended the so-called solid South.

L&Z end their explanation there. But it would not be difficult to extend their theory to the dominant groups nationally in terms of race, religion, gender and sexual orientation who feel the threat to their dominance to an ever greater extent. L&Z would presumably argue that the threat is experienced by these groups as well as existential. They would say that America is truly becoming a 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, including violation of established norms, to try to hold on to their place in society.

In part, the L&Z account is clearly correct. The two major parties did not become ideologically coherent competitors until after the Vietnam War. More Republicans than Democrats voted for the 1964 Civil Rights Act. 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. 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 all political systems. Only under some extraordinary circumstances, however, do people decide it is worth endangering the system to address those stakes. What we want to know is 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,[79] 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. 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.[80]

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[77] Id., at 143

[78] See Charles Kaiser, 'We may have lost the south': what LBJ really said about Democrats in 1964, The Guardian, Jan. 23, 2023, https://www.theguardian.com/books/2023/jan/22/we-may-have-lost-the-south-lbj-democrats-civil-rights-act-1964-bill-moyers.

[79] See e.g., Edward Lempinen, Loss, fear and rage: are white men rebelling against democracy?, Berkeley News, Nov, 14, 2022, https://news.berkeley.edu/2022/11/14/loss-fear-and-rage-are-white-men-rebelling-against-democracy.

[80] This is a complex issue that is beyond the scope of this paper. But when 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 Race in America 2019, PEW Research Center, April 9, 2019, https://www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019/.

America has gradually become more racially tolerant and accepting during the very period at issue—from the 1970s until the present. 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 me, 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. Now, such couples are common advertising themes.[81]

Of course there is today real opposition to Trans life, as Bud Light found out,[82] but Trans life was not even thought of by most people in the 1960s. That hostility 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.[83]

Plus, the Republican Party is doing better, not worse, among minority racial groups. Trump polled higher among such groups in 2020 than in 2016 and national Republican figures like Florida Gov. Ron Disantis enjoy wide multi-racial support.

Resentment is definitely present among the white working class, but there is no reason to think of it as racial, as opposed to class and education based.[84]

Something other than the Great Replacement issue must at least also be present to explain why the downward spiral began and why it is going to be so difficult 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.[85] That is, we have to account for our movement into a post-Truth age.

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[81] See Joanne Kaufman, A Sign of 'Modern Society': More Multiracial Families in Commercials, The New York Times, June 3, 2018, https://www.nytimes.com/2018/06/03/business/media/advertising-multiracial-families.html and Chauncey Alcorn, How gay couples in TV commercials became a mainstream phenomenon, CNN, Dec. 20, 2019, https://www.cnn.com/2019/12/20/media/hallmark-zola-gay-ad/index.html.

[82] See Jennifer Maloney and Lauren Weber, How Bud Light Handled an Uproar Over a Promotion With a Transgender Advocate, Wall Street Journal, May 22, 2023, https://www.wsj.com/articles/how-bud-light-handled-an-uproar-over-a-promotion-with-a-transgender-advocate-e457d5c6.

[83] I am not arguing that Trump's statements were justified, just that he claimed credit for racial progress. See Calvin Woodward, Hope Yen and Arijeta Lajka, AP Fact Check: Trump exaggerations on blacks' economic gains, AP, June 7, 2020, https://apnews.com/article/american-protests-donald-trump-ap-top-news-politics-business-16a926cc5f932d984a16646fbdf7f4ea.

[84] See Bruce Ledewitz, The Rage of the Essential Worker, TribLive, Nov. 3, 2023, https://triblive.com/opinion/bruce-ledewitz-the-rage-of-the-essential-worker/.

[85] See Yuval Levin, How Did Americans Lose Faith in Everything?, The New York Times, Jan. 18, 2020, https://www.nytimes.com/2020/01/18/opinion/sunday/institutions-trust.html.

As I will try to demonstrate in the next section, the underlying change in America during this period was a spiritual one, a change in cultural consciousness. 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.[86]

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.[87]

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

My suggestion is not meant to promote a return to organized religion. I am a secularist 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. In the last section, I propose a way for law professors, including secular ones like myself, to address this spiritual crisis. In the next section, I will support the claim that the Death of God had something crucially to do with our downward spiral of norm violations.

V. Recent American Experience Shows that a Spiritual Change Explains Why the Downward Spiral Began and Why It Is Hard to Stop

On Friday, Oct. 6, Anthony Mills, a senior fellow at the American Enterprise Institute, published a long op-ed[88] in The New York Times entitled, "The New Politics of Trust." Mills told a complex story, but his conclusion was straightforward:

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[86] This argument is made at length in my book, supra n. __, 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." Russell Moore on 'altar call for Evangelical America,' https://www.npr.org/2023/08/05/1192374014/russell-moore-on-altar-call-for-evangelical-america. 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." See also, infra, n. __.

[87] It should not be hard to see that forbearance in the L&Z 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 also. In mythic terms the saying is, as above, so below.

[88] The online edition appeared on Oct. 3 and was more than 1600 words.
https://www.nytimes.com/2023/10/03/opinion/science-americans-trust-covid.html?searchResultPosition=1

> [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 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.

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.[89]

There are two things to note about Mills's conclusion above. First, if we want to restore trust, we must try to figure out why Americans lost trust in institutions. My suggestion is that this loss of trust has to do with 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.[90] The traditional story of God is no longer widely accepted and no alternative has emerged. Thus, the loss of trust that Mills is pointing to has very little to do with any misbehavior or incompetence within these institutions themselves.

Second, Mills moves easily, undoubtedly unconsciously, 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 we do not personally know, based on evidence and learning that we do not understand.

Nevertheless, there is a religious, or perhaps more encompassingly, philosophical, issue here. The opening salvo of the 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*,[91] but Sam Harris's more

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[89] See Confidence in U.S. Institutions Down; Average at New Low, Gallup, July 5, 2022, https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx.

[90] In a general sense, this lack of a secular story is the reason that 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?" Why I am now a Christian, Unherd, Nov. 11, 2023, https://unherd.com/2023/11/why-i-am-now-a-christian/.

[91] Christopher Hitchens, God is not Great: How Religion Poisons Everything (2007).

subtly subversive entry in 2004, *The End of Faith*.[92] 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. I don't understand the science of climate change any more than I understand the science that proclaims the existence of water under the surface of one of the moons of Saturn.

Nor is personal experience why I accept the idea of climate change. Yes, I have noticed that it is has been getting warmer in Pittsburgh over the years, but it is not getting warmer everywhere.[93] My own experience is not evidence of world-wide climate change. I certainly cannot see sea level rise personally. And, anyway, I 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.

We, or anyway, most of us, do not follow the science. We should drop that phrase. We follow the scientists. That is the faith that Mills is pointing to and that 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.[94]

The Death of God affects not just self-proclaimed atheists and 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.[95] 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.[96]

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[92] The End of Faith: Religion, Terror, and the Future of Reason (2004).

[93] See Caitlyn Kennedy, Does "global warming" mean it's warming everywhere?, NOAA Climate.gov, Oct. 29, 2020, https://www.climate.gov/news-features/climate-qa/does-global-warming-mean-it%E2%80%99s-warming-everywhere.

[94] This was the unintended meaning of Sam Harris's book title, The End of Faith: Religion, Terror and the Future of Reason. See supra, n. __. 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.

[95] 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, see Richard M. McDonough, Religious Fundamentalism: A Conceptual Critique, JSTOR, Vol. 49, No. 4, (Dec. 2012), https://www.jstor.org/stable/43659182?seq=1, turns out to be God's will as previously objectively articulated. This obeying God's will only in the sense of reading God's last will and testament after his death. That is why religious practice and beliefs cannot change. There is no living God to change them. The only way for a theist to remain a genuine believer is to try to discern God's will now, or as Jesus said, "discern the signs of the times." Matthew, 16: 3. But for such genuine believers, God is not dead.

[96] See supra, n. __ for discussion of this point.

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 to 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*,[97] the 2015 case that constitutionalized same-sex marriage, did not usher in an era of good feelings within the American Left. 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*[98] was decided, despite the massive resistance it sparked. There was a national feeling of rightness about *Brown* that only increased over time.[99]

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, 2016.[100] 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."

Imagine that. In 2016, after *Roe v. Wade*[101] 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 *The Flight 93 Election*—"charge the cockpit or you die."[102] 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.[103]

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

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[97] 576 U.S. 644 (2015).
[98] 347 U.S. 483 (1954).
[99] See Bruce Ledewitz, Justice Harlan's Law and Democracy, 20 J.L.Pol. 373, 400 (2004).
[100] Mark Tushnet, Balkanization, May 6, 2016, https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html
[101] 410 U.S. 113 (1973), overruled by Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2016).
[102] Michael Anton (writing under a pseudonym), The Flight 93 Election, Calremont Review of Books, Sep. 5, 2016, https://claremontreviewofbooks.com/digital/the-flight-93-election/.
[103] See Jonathan Chait, How Michael Anton's 'Flight 93' Election Essay Defined the Trump Era, New York, Dec. 11, 2020, https://nymag.com/intelligencer/article/michael-antons-flight-93-election-trump-coup.html.

death-knell for these institutions.[104] And many conservatives certainly hoped, and still hope, for an eventual national ban on abortion, binding all American women.

There was, however, around the same time, a big exception to this heated rhetoric—the so-called Utah Compromise. In 2015, before *Obergefell* was decided, Utah effectively legalized same-sex marriage while guaranteeing religious dissenters their right not to participate.[105] This legislation was motivated by a real spirit of compromise.

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 shows how 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 Dr. King, for example, lay in the faith that in his deeply religious universe, there were no ultimate enemies. Everyone was a potential ally.

The decline of faith in the rule of law that parallels 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."[106] And that sentiment was written in 2009, not in 2022, when *Dobbs v. Jackson Women's Health Org.*[107] 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*.[108] Smith did not emphasize the Death of God. He utilized philosophical, rather than religious, imagery and concluded that lawyers have an "ontological gap." Our ontology of materialism—reality is composed of unknowing mater and forces—does not comport with any notion of the rule of law. In our understanding of the universe, rights and law are not real but 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 thought it attained truth, but it did claim to be moving in that direction. In contrast, in law as struggle, there can never be any judgment about legal outcomes other than their contribution to someone's political commitments.

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[104] See David Bernstein, The Supreme Court oral argument that cost Democrats the presidency, The Volokh Conspiracy, Dec. 7, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/.
[105] See Robin Fretwell Wilson, Common Ground Lawmaking: Lessons For Peaceful Coexistence From *Masterpiece Cakeshop* and the Utah Compromise, 51 Ct. L.Rev. 483 (2019).
[106] J. Harvie Wilkinson III, Of Guns, Abortions and the Unravelling Rule of Law, 95 Va.L.Rev. 253, 257, (2009).
[107] 142 S.Ct. 2228 (2022).
[108] Steven D. Smith, Law's Quandary (2004).

Smith thought that lawyers could just live with the tension between their ontology and their commitment to the rule of law.[109] But now we can see that our post-God ontology undermines the commitment to the rule of law.

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

I have previously argued that legal nihilism has been dominant since at least 1992.[110] 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.[111] 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.[112] Now critics talk of packing the Supreme Court, or installing term limits, instead.[113]

We now look at law through the lens of political victory and defeat. The strength of Eric Segall's recent essay, *Teaching Constitutional Law in a Legal Realist World*,[114] 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.[115] 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 Antonin Scalia, for example, expressly located his textualism in his distrust of purported judicial judgment.[116] 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

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[109] 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).
[110] Id.
[111] See generally, Note, The Procedural and Substantive Issues of Texas' Six-Week Ban on Abortion and the Future of *Roe v. Wade*, 21 App. L.J. 1 (2022). See also, Bruce Ledewitz, Other Voices: I am resigning from the pro-life movement, Pittsburgh Post-Gazette, Sep. 12, 2021, https://www.post-gazette.com/opinion/Op-Ed/2021/09/12/Other-Voices-I-am-resigning-from-the-pro-life-movement/stories/202109120029.
[112] See Ledewitz, Harlan, supra, n. __. 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).
[113] See e.g., Sam Hananel, 5 Ways the Supreme Court Could Roll Back Rights and Damage Democracy, Center for American Progress, May 31, 2023, https://www.americanprogress.org/article/5-ways-the-supreme-court-could-roll-back-rights-and-damage-democracy/.
[114] Eric J. Segall, Teaching Constitutional Law in a Legal Realist World, file:///C:/Users/bruce/Downloads/SSRN-id4567025-1.pdf.
[115] As Segall writes, "Personal preferences not law dictate most Supreme Court constitutional decisions." Id.
[116] "[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 Se. Pennsylvania v. Casey, 505 U.S. 833, 982, (1992), Scalia J., concurring in part, overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

the subject of critique in the 1990s by the conservative legal thinker Harry Jaffa.[117] It continues to be the subject of critique today by Common Good Constitutionalism.[118]

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?[119] 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.

VI. Teaching Law: The Second Action Law Professors Can Take in the Current Crisis

I want to start by reminding readers of the stakes involved. The last two 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 point to is not war, or not just war, but that "Truth is vanishing."[120]

When Tom Cruise takes up your theme, you know you are on to 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.[121] It is for law professors, as Segall writes, a legal realist world.

This is why a recent Harvard Law Review Note refers to Stephen Breyer as the last "Natural Lawyer" on the Court.[122] Natural law in this context is not a technical term invoking the tradition

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[117] Harry V. Jaffa, *Original Intent and The Framers of the Constitution: A Disputed Question* (1994).
[118] Adrian Vermeule, Common Good Constitutionalism (2022).
[119] Cf. Lenin, supra, n. __.
[120] Mission: Impossible-Dead Reckoning Part One, Official Teaser Trailer (2023 Movie), https://www.youtube.com/watch?v=2m1drlOZSDw.
[121] More broadly, Cathleen Schine refers to this phenomenon as "the self-conscious postmodern world of academia." The Voyage Out, The New York Review, Oct. 12, 2022, p. 12. Law schools are not immune.
[122] Justice Breyer: The Court's Last Natural Lawyer?, 136 Harv. L.Rev. 1368 (2023).

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."[123] Lewis called this view "The Tao" "because all traditional value systems shared this viewpoint."[124] 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 Breyer the last natural lawyer means that Breyer accepted objective value[125] and is currently the last Justice to do so.[126]

When you reject 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."[127]

Think about the implications of 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 is a matter of sentiment, not study and argument.[128]

Of course, just because the modern view may have detrimental effects, does not mean the view is false. I am sure that the people who agree with Brown's position, and teach it themselves, are

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[123] C.S. Lewis, The Abolition of Man, 6 (2022 edition.).
[124] See generally Bruce Ledewitz, Hallowed Secularism, 161 (2009)
[125] Last Natural Lawyer, supra, n. __. The Note refers to "moral realism" rather than objective value, but in context the terms are closely related. The Note shows how Justice Breyer practiced value judgment in his opinions.
[126] Id. 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.
[127] 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.
[128] See Kieran Setiya, The Politics of Disenchantment: On Wendy Brown's "Nihilistic Times," Los Angeles Review of Books, Apr. 27, 2023, https://lareviewofbooks.org/article/the-politics-of-disenchantment-on-wendy-browns-nihilistic-times/.

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*, 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*.[129] 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.

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

[129] 143 S.Ct. 1142 (2023).

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 John Harlan understood, the longer view.[130] 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."[131]

To parallel the observation made by Hilary Putnam about Richard Rorty concerning metaphysical realism,[132] 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.[133] 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,[134] 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-choice movement nationally is what seems to be happening.[135] 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

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[130] See supra, n. __.
[131] William D. Popkin, Evolution of the Judicial Opinion, 172 (2007).
[132] Hilary Putnam, The Collapse of the Fact/Value Dichotomy and Other Essays, 101 (2002).
[133] Roberto Mangabeira Unger, Law in Modern Society, 56-57 (1976).
[134] "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).
Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 1002, 112 S. Ct. 2791, 2885, 120 L. Ed. 2d 674 (1992), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022)
[135] Eugene Robinson, Republicans' longtime opposition to abortion is coming back to haunt them, The Washington Post, Apr. 10, 2023, https://www.washingtonpost.com/opinions/2023/04/10/abortion-dobbs-ruling-republicans-blowback/.

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.[136] 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, 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.[137] In this book, which is the third in a well-developed trilogy,[138] 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.

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

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[136] Cf. *Kant and Hume on Causality*, Stan. Encyclopedia of Phil. (Dec. 11, 2013), http://plato.stanford.edu/entries/kant-hume-causality/ [perma.cc/4FZA-57UC].
[137] Douglas B. Rasmussen and Douglas J. Den Uyl, The Realist Turn: Repositioning Liberalism (2020).
[138] The first two books were Norms of Liberty: A Perfectionist Basis for Non-Perfectionist Politics (2005) and The Perfectionist Turn: From Metanorms to Metaethics (2017).

in their popular forms, like Nicholas Christakis' *Blueprint*[139] and *The Universe Story*, by Thomas Berry and Brian Swimme,[140] 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.[141] 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."[142]

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."[143] American law schools need to become one such Cosmopolis.

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.

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[139] Nicholas Christakis, Blueprint: The Evolutionary Origins of a Good Society (2020).
[140] 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).
[141] I address that issue more generally in Bruce Ledewitz, What Does The Realist Turn Mean for Originalism and American Public Life?, 128 Penn St. L. Rev. Penn Statim 133 (2023).
[142] Martin Heidegger, Basic Writings, 341 (David F. Krell ed., rev'd & exp'd ed. 1993).
[143] Bernard Lonergan, Insight: A Study of Human Understanding 238-42 (1958).

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.