

## How to Lose a Constitutional Democracy

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### Abstract

*Is the United States at risk of democratic backsliding? And would the Constitution prevent such decay? To many, the 2016 election campaign may be the immediate catalyst for these questions. But it is structural changes to the socio-economic environment and geopolitical shifts that make the question a truly pressing one. This Article develops a taxonomy of different threats of democratic backsliding, the mechanisms whereby they unfold, and the comparative risk of each threat in the contemporary moment. By drawing on comparative law and politics experience, we demonstrate that there are two modal paths of democratic decay, which we call authoritarian reversion and constitutional retrogression. A reversion is a rapid and near-complete collapse of democratic institutions. Retrogression is a more subtle, incremental erosion that happens simultaneously to three institutional predicates of democracy: competitive elections; rights of political speech and association; and the administrative and adjudicative rule of law. Over the past quarter-century, we show that the risk of reversion has declined, while the risk of retrogression has spiked. The United States is not exceptional. We evaluate the danger of retrogression as clear and present, whereas we think reversion is much less likely. We further demonstrate that the constitutional safeguards against retrogression are weak. The near-term prospects of constitutional liberal democracy hence depend less on our institutions than on the qualities of political leadership and popular resistance.*

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## Introduction

To many observers, the 2016 election cycle was unique and noteworthy in the way that hitherto stable norms of American liberal democracy under the rule of law suddenly seemed fragile and contested.<sup>1</sup> But concerns about the health of our democracy are hardly new to the 2016 campaign.<sup>2</sup> Indeed, they stretch back to very the beginning of the republic.<sup>3</sup> But is today different? And if there are indeed pressures toward democratic decay, what in the text of the Constitution or its attendant jurisprudence would operate as frictions on that process? Would the basic law matter if or when democratic practice suffered a severe exogenous shock, or does democratic stability depend on the quiddities of particular leaders and their electoral coalitions?

This Article provides the first comprehensive analysis of the relationship between democratic backsliding and U.S. constitutional law. It aims to provide a clear analytic framework for evaluating both the risks and institutional resources to hand. Such a systematic examination of the constitutional predicates of democratic stability is needful, we think, given a trio of extrinsic, structural forces that place liberal democracy in the United States today under increasing strain—forces that operate independently of the particularities of today’s partisan conjuncture..

*First*, it has long been thought that liberal democratic rule within the rule of law requires a “strong liberal civil society” committed to that form of governance.<sup>4</sup> But over the past three decades, the proportion of U.S. citizens who believe it would be a “good” or a “very good” thing for the “army to rule” has spiked from one in sixteen to one in six.<sup>5</sup> Among the cohort of “rich young Americans” the proportion of those who look favorably on military rule is more than one in three.<sup>6</sup> Meanwhile there has been

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<sup>1</sup> For an analysis of relevant evidence, see *infra* text accompanying notes 370 to 371.

<sup>2</sup> See, e.g., Thomas L. Friedman, *Our Democracy Is at Stake*, N.Y. TIMES, Oct. 2, 2013, at A23 (“What is at stake in this government shutdown forced by a radical Tea Party minority is nothing less than the principle upon which our democracy is based: majority rule.”).

<sup>3</sup> For a collection of sources on this point, see Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 MISS. L.J. 431, 492 (2006).

<sup>4</sup> James Dawson, *The Fading Mirage of the ‘Liberal Consensus,’* 27 J. DEM. 20, 31 (2016); see also Francis Fukuyama, *The Future of History: Can Democracy Survive the Decline of the Middle Class?*, 91 FOR. AFF. 56 (2012). The role of civil society in democratic collapse is, however, complex. Cf. Sheri Berman, *Civil Society and the Collapse of the Weimar Republic*, 49 WORLD POL. 401, 408 (1997) (arguing that the strong Weimar civil society “served not to strengthen democracy but to weaken it,” but providing vehicles for Nazi mobilization).

<sup>5</sup> Roberto Stefan Fou & Yascha Mounk, *The Democratic Disconnect*, 27 J. DEM. 5, 12 (2016).

<sup>6</sup> *Id.* at 13.

anecdotal evidence of rising constitutional ignorance among the very same generation.<sup>7</sup> The popular support that works as democracy's rebar, that is, may be eroding with alarming speed.

*Second*, it is well established that economic inequality is associated with increasing acceptance of authoritarian rule.<sup>8</sup> Studies of democratic collapse show that inequality tends to be "significantly higher in democracies that eventually underwent a reversal."<sup>9</sup> This bodes ill for the United States. Income shares of the top and bottom quintile diverged sharply between 1970 and 2000, when the former saw their incomes rise 61.6% and the latter a measly 10.3%.<sup>10</sup> The structural forces producing wage stagnation across much of the income spectrum, moreover, are entrenched beyond speedy repair,<sup>11</sup> even without accounting for the distinctive polarization and paralysis of U.S. national politics. Economic trend lines thus disfavor democratic perseverance in the near and medium term, quite apart from any role that economic grievances may have played in this election.

*Finally*, developments in governance in other parts of the world do not remain confined overseas, but diffuse to shape and channel American practice.<sup>12</sup> Scholars of democracy have of late expressed concern about an "absence of democratic progress", "recession" or "minor decline" in democracy's march since the third wave of democratizations of the 1990s.<sup>13</sup> To some, democracy seems in full-blown "retreat."<sup>14</sup>

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<sup>7</sup> Tom Gerald Daly, *Constitutional Ignorance and Democratic Decay: Breaking the Feedback Loop*, INT'L J. CONST. L. BLOG, Nov. 17, 2016, <http://www.iconnectblog.com/2016/11/constitutional-ignorance-and-democratic-decay-breaking-the-feedback-loop>.

<sup>8</sup> Adam Przeworski, *The Poor and Viability of Democracy*, IN POVERTY, PARTICIPATION, AND DEMOCRACY: A GLOBAL PERSPECTIVE 129 (Anirudh Krishna, ed. 2008).

<sup>9</sup> Ethan B. Kapstein & Nathan Converse, *Why Democracies Fail*, 14 J. DEM. 57, 61 (2008).

<sup>10</sup> Am. Political Sci. Ass'n Task Force, *American Democracy in an Age of Rising Inequality*, 2 PERSP. ON POL. 651, 652-53 (2004); see also LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 31-32 (2008) (summarizing changing income distributions).

<sup>11</sup> See Robert J. Gordon, *Is U.S. Economic Growth Over? Faltering Innovation Confronts Six Headwinds*, NBER Working Paper No. 18315, Aug, 2015.

<sup>12</sup> See, e.g., DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 231, 496 (1998) (charting influences of British and German social welfare policies in the United States); Beth A. Simmons & Zachary Elkins, *The Globalization of Liberalization: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 1971, 1972-74 (2004) (demonstrating diffusion of trade liberalization policy).

<sup>13</sup> Marc. F. Plattner, *Is Democracy in Decline?*, 26 J. DEM. 5, 7 (2015); Alexander Cooley, *Authoritarianism Goes Global: Countering Democratic Norms*, 26 J. DEM. 49-63 (2015) (focusing on authoritarian mimicry of democratic form); Larry Diamond, *Facing up to the Democratic Recession*, 26 J. DEM. 141 (2015) (recession); see also JOSHUA KURLANTZICK, DEMOCRACY IN RETREAT 10 (2013) ("By 2010, ... nearly 53 of the 128 countries assessed by the index were categorized as 'defective democracies.'"). But see Steven Levitsky & Lucan Way, *The Myth of Democratic Recession*, 26 J. DEM. 45 (2015) (arguing that this perceived trend away from democracy is illusory).

<sup>14</sup> KURLANTZICK, *supra* note 13, at 6-10.

Recent moves away from democratic practices toward a more authoritarian model in Eastern Europe suggest that such retreat inflects governance even in seemingly stable democracies.<sup>15</sup> Hungary, Poland, and other countries have embraced populist leaders who promise to end the gridlock that is democracy's consequence. In the United States, candidates in the 2016 election and their supporters repeatedly gestured toward events outside the jurisdiction as evidence that their partisan side was in the ascendancy around the world.<sup>16</sup>

Liberal democracy, in short, is subject today to a plural array of corroding crosscurrents arising both from specific partisan formations and actors, and from cultural, socioeconomic or geopolitical dynamics of a structural nature.<sup>17</sup> Against these corrosive currents stands the Constitution. It is conventional wisdom that the checks and balances of the federal government,<sup>18</sup> a robust civil society and media, as well as individual rights, such as the First Amendment,<sup>19</sup> will work as effectual bulwarks against democratic backsliding. Yet such an analysis is hindered by the absence of any clear-eyed comparative analysis of how constitutional legal institutions and rules *in practice* either hinder or enable drift away from liberal democratic norms.

This Article reconstructs the role of constitutional institutions and doctrines in protecting democratic practice in light of new empirical and theoretical learning about the mechanisms of democratic failures of various sorts. That inquiry at the threshold requires a new taxonomy of threats to liberal democratic practice under the Constitution.<sup>20</sup> We propose a distinction between two threats, each with its own distinct mechanisms and end-states. We call these *authoritarian reversion* and *constitutional*

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<sup>15</sup> See *infra* text accompanying notes 202 to 209, and 221 to 224.

<sup>16</sup> See, e.g. Ian Buruma, *The End of the Anglo-American Order*, N.Y. TIMES, Nov, 29, 2016, [http://www.nytimes.com/2016/11/29/magazine/the-end-of-the-anglo-american-order.html?\\_r=0](http://www.nytimes.com/2016/11/29/magazine/the-end-of-the-anglo-american-order.html?_r=0) (documenting trans-Atlantic invocations of solidarity of this sort).

<sup>17</sup> The distinction between “agent-based or agentic theories” and “structural theories” of democratic rollback organizes much of the political science literature on the topic of democratic failures. Ellen Lust & David Walker, *Unwelcome Change: Understanding, Evaluating and Extending Theories of Democratic Backsliding* 8-9 (June 2015), [pdf.usaid.gov/pdf\\_docs/PBAAD635.pdf](http://pdf.usaid.gov/pdf_docs/PBAAD635.pdf). Our aim here is not to adjudicate between those two approaches, but to ask how legal institutions influence the pace of democratic retrogression under both agentic and structural strains. In any case, we think that the structural forces enumerated in the text are likely *causes* of antidemocratic and populist formations in politics.

<sup>18</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (describing the separation of powers as a “security against tyranny—the accumulation of excessive authority in a single Branch”).

<sup>19</sup> See Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1102 (2016) (“[A] broad consensus has emerged over the past half-century regarding the fundamental reason why the Constitution protects free speech: to advance democratic self-governance.”).

<sup>20</sup> Earlier treatments of democratic breakdown include BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010), and Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010). We develop, however, a different taxonomy, as well as different mechanisms, from these treatments.

*retrogression*. We define (and defend) this terminology in Part I, but a brief explanation is warranted here.

Authoritarian reversion is a wholesale, rapid collapse into authoritarianism. Think of a coup or the sudden declaration of a state of emergency. But not all backsliding is either sudden or complete. The existence of more subtle forms of institutional erosion requires a discrete concept. We deploy the term “constitutional retrogression” to capture a more incremental (but ultimately substantial) decay in three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the adjudicative and administrative rule of law necessary for democratic choice to thrive. Retrogression demands *simultaneous* change in these democratic predicates. In practice, it is distinct from reversion because it occurs more slowly through an accumulation of piecemeal changes, each perhaps innocuous or even justified in isolation. It is also, however, analytically distinct from other species of constitutional changes, such as the rise of a powerful executive, the growth or decay of national regulatory power as against subnational units, or the diffusion of new constitutional rights. These are not typically characterized by simultaneous degradation in rights, electoral competition, and the rule of law.

We demonstrate that legal scholarship, and some popular discourse after the election, has focused on the first risk of authoritarian reversion. But the second threat of constitutional retrogression may in fact pose a more pressing and consequential challenge. This has normative implications insofar as each threat is associated with a distinct set of constitutional design decisions, and may require different constitutional strategies to address.

With this in mind, we analyze the role of domestic legal and political institutions in managing the threat of constitutional retrogression. Here, we draw upon a wealth of political science and comparative constitutional scholarship to demonstrate that the usual confidence in entrenched domestic constitutional rules and institutions may well be misguided.<sup>21</sup> Whether one focuses upon longstanding and well-entrenched legal rules and institutions, or more locally on recent doctrinal developments, there is ample cause for concern that the Constitution provides at best a fragile friction against constitutional retrogression. Relevant aspects of constitutional law, we suggest, pursue one of two familiar strategies: using the *structure* of government to generate internal institutional diversity, and *rights* that shield the social ecosystem necessary for the persistence of democratic contestation. Contrary to prevailing wisdom, we suggest that

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<sup>21</sup> We focus on established constitutional rules and institutions to avoid concerns about endogeneity within our analysis. That is, if antidemocratic forces generate new constitutional rules that are destabilizing, then it would be misleading to ascribe the resulting effects on political outcomes to the Constitution (as opposed to the antidemocratic forces that have employed the Constitution to a certain end). To avoid this confusion, we focus on constitutional institutions and rules that predate the current political conjuncture.

not all structural principles or individual rights stabilize democracy. Some are likely to accelerate destabilization. But rights and structure do not exhaust the options for constitutional design. Drawing attention to the fact that constitutions are a form of inevitably incomplete contract,<sup>22</sup> we posit that there are also *gaps* that can be exploited to unravel a democratic equilibrium.

Our analysis suggests that when local partisan forces or an exogenous constellation of socioeconomic and transnational forces are threatening that political disposition, the Constitution as currently construed provides only feeble shelter. Democratic stability hence depends on the preferences of particular leaders, and under the right political conditions, constitutional retrogression is a clear and present risk to American constitutional liberal democracy.

Our argument has four steps. Part I introduces and clarifies our central concepts. Part II focuses on the threat of authoritarian reversion, suggesting the latter most often occurs through military coups or the misuse of emergency powers. It is not clear that authoritarian reversion presents the most pressing concern today. Part III focuses on the more-likely threat of constitutional retrogression. Our analytic strategy here is to deploy comparative constitutional experience to illuminate vectors whereby such retrogression occurs, and then to consider how American constitutional institutions and rules respond. Although the Constitution certainly contains some useful institutional resources, we demonstrate that to a surprising degree, longstanding institutions and rules are either irrelevant to the threat, or exacerbate it. Part IV concludes by reflecting on lessons for legal scholars, constitutional law, and the citizenry at large.

## **I. Constitutional Liberal Democracy and its Enemies**

Our argument relies upon a set of threshold conceptual premises, set out in this Part. These are first, a definition of ‘democracy,’ the institutional characteristic that is at risk of reversal, and second, a taxonomy of forms of democratic backsliding. Drawing upon an extensive literature in political science, we delineate two different forms of institutional decay.

### **A. The Baseline of Constitutional Liberal Democracy**

Much of the relevant political science literature on democratic reversal focuses on a simple concept of democracy identified closely with the fact of elections.<sup>23</sup> But the literature on democracy also recognizes that the concept is a multifaceted one that can

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<sup>22</sup> See, e.g., Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1191-1222 (2014) [hereinafter “Huq, *Article V*”] (modeling constitutional amendment rules as a response to an incomplete contracting problem); Rosalind Dixon and Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636 (2012) (same).

<sup>23</sup> See, e.g., Lust & Walker, *supra* note 17; Plattner, *supra* note 13, at 5-7; KURLANTZICK, *supra* note 13.

be described with various levels of thickness.<sup>24</sup> Our analysis requires a thicker conception. We call this *constitutional liberal democracy*. Our argument must begin by explaining and justifying our choice.

Democracy is frequently boiled down to the seemingly simple foundational requirement of competitive elections. This in turn entails that polls' results are ex ante uncertain, irreversible, and ex post repeatable.<sup>25</sup> We think these basic elements of competitive elections cannot be meaningfully untangled from a thick set of institutional and legal predicates.<sup>26</sup> Elections with only one feasible winner, either because only one entity competes, or because only one entity will be allowed to exercise power, are insufficient. Elections that happen once, never to be repeated, do not a democracy make.<sup>27</sup> For genuine electoral competition to be sustained, therefore, something more than a bare minimum of legal and institutional arrangements is necessary.<sup>28</sup> These include the civil and political rights employed in the democratic process,<sup>29</sup> and the availability of neutral electoral machinery, and the stability, predictability, and publicity of legal regime usually captured in the term "rule of law."<sup>30</sup>

To implement this more robust view of democracy, our analysis focuses on a triad of system-level properties of national institutions as a whole that, in our view, intertwine and interact closely. When present together, these three traits warrant the

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<sup>24</sup> Famously, Joseph Schumpeter described it as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (1942); see also Michael Coppedge et al., *Conceptualizing and Measuring Democracy: A New Approach*, 11 *PERSPECTIVES ON POLITICS* 247 (2011); Adam Przeworski, Michael E. Alvarez, Jose Antonio Cheibub, & Fernando Limongi, *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950-1990*, at 15 (2000).

<sup>25</sup> Adam Przeworski et al., *What makes democracies endure?*, 7 *J. DEM.* 39, 50-51 (2000).

<sup>26</sup> For criticisms of the minimalist definition, see Guillermo O'Donnell, *Illusions About Consolidation*, 7 *J. DEM.* 34, 38 (1996) (criticizing minimalist view on the basis that competitive elections do not of themselves act as a guarantee of inclusion of the public voice in politics, and arguing for a "realistic" definition of democracy). For more robust specifications of democracy, see, e.g., LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 10-12 (1999) (including vertical and horizontal accountability in a definition of democracy).

<sup>27</sup> Amb. Edward Djerejian, *The U.S. and the Mideast in a Changing World*, speech at Meridian House International, Washington, DC, June 2, 1992, [http://www.disam.dsca.mil/pubs/vol%2014\\_4/djerejian.pdf](http://www.disam.dsca.mil/pubs/vol%2014_4/djerejian.pdf) [last accessed Dec. 23, 2016] (coining the expression "one man, one vote, one time").

<sup>28</sup> SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 266-67 (1991) (articulating now famous "two-turnover" test for democratic consolidation); ADAM PRZEWSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 10 (1991) ("Democracy is a system in which parties lose elections ....").

<sup>29</sup> For examples of maximalist (or "realist") views of democracy on rights grounds, see Guillermo O'Donnell, *Illusions About Consolidation*, 7 *J. DEM.* 34, 38 (1996); ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 221 (1989).

<sup>30</sup> Marc Plattner, *From Liberalism to Liberal Democracy*, 10(3) *J. DEM.* 121, 121-123 (1999).



label of *constitutional liberal democracy*. This term is meant to capture three conceptually separate but functionally intertwined institutional elements. These are (1) a democratic electoral system, most importantly periodic free-and-fair elections, in which a losing side cedes power; (2) the liberal rights to speech and association that are closely linked to democracy in practice,<sup>31</sup> and (3) the stability, predictability, and integrity of law and legal institutions—i.e., the rule of law—functionally necessary to allow democratic engagement without fear or coercion. These three institutional predicates of democracy are, in our view, necessary to the maintenance of a reasonable level of democratic responsiveness and unbiased elections. In the absence of all three institutional predicates, we would anticipate levels of democratic responsiveness to fall.<sup>32</sup>

On the first element, we follow Schumpeter's dictum that meaningful elections with a genuine possibility of alteration in power is necessary to democracy.<sup>33</sup> As Przeworski pithily puts it, democracy is "a system in which parties lose elections."<sup>34</sup> Our conception of liberal rights focuses solely on the core "first generation" rights of speech, assembly and association, which directly facilitate democratic deliberation and contestation.<sup>35</sup> And we draw our conception of the rule of law from Lon Fuller, who focuses on a set of procedural requirements without including substantive concepts like rights or morality.<sup>36</sup>

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<sup>31</sup> Marc Plattner, *From Liberalism to Liberal Democracy*, 10 J. DEM. 121, 121-23 (1999) (arguing for a close relation between liberal rights and democratic practice); accord DAHL, *supra* note 29, at 221.

<sup>32</sup> Our focus is hence on the institutional predicates of democratic responsiveness, not the measurement of democratic responsiveness per se. This focus helps inform our analysis of backsliding-related mechanisms in Parts II and III, *infra*. One might instead focus directly on unbiased democratic responsiveness as a metric of constitutional liberal democracy. But there remains sharp debate about the appropriate measure of democratic responsiveness among political scientists. Jeff Manza & Fay Lomax Cook, *A Democratic Polity? Three Views of Policy Responsiveness to Public Opinion in the United States*, 30 AM. POL. RES. 630, 634-39 (2002) (cataloguing various metrics of responsiveness); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 300-02 (2014) (criticizing conceptualization of responsiveness measures). We take no position on the 'correct' responsiveness measure, although we think a constitutional liberal democracy as we define it should generally score well on most, if not all, such measures.

<sup>33</sup> SCHUMPETER, *supra* note 24.

<sup>34</sup> ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET 10 (1991); Adam Przeworski, *A Minimalist Conception of Democracy: A Defense*, in DEMOCRACY'S VALUE (Ian Shapiro & Casiano Hacker-Cordon, eds., 1999); see also Carlos Boix & Sebastian Rosato, *A complete dataset of political regimes, 1800–1999* (2001) and CARLOS BOIX, DEMOCRACY AND REDISTRIBUTION 61 (2003) (defining democracy as a system in which (1) the legislature is elected in free, multiparty elections; (2) the executive is directly or indirectly elected in popular elections and is responsible either directly to voters or to a democratic legislature; (3) suffrage extends to at least 50% of adult men).

<sup>35</sup> DANIEL J. WHELAN, INDIVISIBLE HUMAN RIGHTS: A HISTORY (2016) (explaining concept of indivisibility).

<sup>36</sup> LON L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969). We follow Joseph Raz's view that the rule of law is not the same as "the rule of the good law," and has no necessary relation to equality of justice. JOSEPH A. RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 211, 214 (1979).

These three elements—elections, speech and association rights, and the rule-of-law—are conceptually separate, and do not always run together. There are historical and contemporary instances of countries that have robust electoral democracies, even while the rule of law is weak and liberal rights lack social support.<sup>37</sup> Other countries have the elements of “thin” rule of law and civil liberties without genuine political competition.<sup>38</sup> And constitutionalism is feasible in the absence of either liberal entitlements or democratic rotation.<sup>39</sup>

But in the American context, each of these institutional elements reinforces the other. They are entangled in plural, mutually reinforcing ways in ways that have seemed to generate a stable democratic equilibrium for now. Hence, some elements of the rule of law and rights are surely necessary to sustain even the thin Schumpeterian concept of democracy. Meaningful elections require a bureaucratic machinery capable of applying rules in a neutral and consistent fashion over an extended territory.<sup>40</sup> Further, election rules must be clearly announced in advance to the public. There must be officials to organize and staff polls, certify ballot structure, and establish counting facilities. There must be adjudicative institutions to resolve disputes, both large and small, about the conduct of the election.

Beyond sound administration, constitutional rights to speech and association facilitate political competition. One cannot have meaningful political competition without the relatively free ability to organize and offer policy proposals, criticize leaders, and secure freedom from official intimidation.<sup>41</sup> In this sense, electoral democracy is

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<sup>37</sup> See, e.g., Edward Aspinall, *The Surprising Democratic Behemoth: Indonesia in Comparative Asian Perspective*, 74 J. ASIAN STUD. 889 (2015) (describing Indonesia as an inclusive democracy with weak rule of law); DONALD HOROWITZ, *CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA* (2013).

<sup>38</sup> See, e.g., JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE, AND LEGITIMACY IN SINGAPORE* (2012) (discussing authoritarian use of rule-of-law-forms).

<sup>39</sup> See Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 396 (2015) (distinguishing absolutist, authoritarian, and liberal constitutionalism); Zachary Elkins et al., *The Content of Authoritarian Constitutions*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES* 141 (Tom Ginsburg & Alberto Simpser eds., 2014) (identifying common characteristics of authoritarian constitutions).

<sup>40</sup> Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1458 (2007) (flagging the emergence of an “administrative law of democracy” in some national contexts). Electoral administration in the United States, however, is fragmented and institutionally weak because of “path-dependent state primacy over electoral regulation, the lack of existing federal infrastructure to monitor elections nationally, as well as the weak political will to establish robust federal electoral institutions.” Jennifer Nou, *Sub-Regulating Elections*, 2013 SUP. CT. REV. 135, 137 (2013); accord Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L J 118, 122-23 (2007).

<sup>41</sup> The Fourth Amendment, for example, was inspired by concerns about the use of state power to target and harass dissenting politicians—a function at some remove from its modal current operation as a source of authority for a federal law of policing. William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 396-403 (1995). Parliamentary immunity has a similar history, and was designed to shield political discourse from overweening prosecutions in medieval England.

deeply intertwined with the bill of rights.<sup>42</sup> Constitutional liberal democracy also typically rests on a delicate interplay between diverse state and civil-society institutions, which themselves depend on the enforcement of liberal rights.<sup>43</sup> By reducing the stakes of government, moreover, a zone of liberal rights also facilitates political competition.<sup>44</sup> The prospect of alternation of political power, in turn, incentivizes investment in constitutional rules and enforcement.<sup>45</sup> This virtuous circle suggests that there can be a robust equilibrium (i.e., constitutional liberal democracy) that emerges as a system-level consequence of the *interaction* between these different elements.<sup>46</sup>

It is hard to *quantify* such a system-level property. Nor does the Constitution itself create a ready gauge of its success.<sup>47</sup> We think of it as an ideal type, never perfectly achieved in practice, but useful for orientating our evaluation.<sup>48</sup> So conceived, it would be foolish to claim that the ideal has been perfectly realized in the United States. Long periods of our history have been characterized by narrowing franchise restrictions, malapportionment, and suppression of constitutional rights, along with the existence of subnational authoritarianism in parts of the country.<sup>49</sup> Even current electoral practice is characterized by numerous exclusionary and suppressive practices.<sup>50</sup> Rights-based liberalism is compromised by the systematic

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PARLIAMENTARIANS AT LAW: SELECT LEGAL PROCEEDINGS OF THE LONG FIFTEENTH CENTURY RELATING TO PARLIAMENT 4-8 (H. Kleineke, ed. 2008). See generally Daniel Chirot, *The Long Struggle*, 74 J. ASIAN STUDIES 863, 867 (2015) (“Ultimately it remains true that institutions, even strong ones, are weak in the face of crisis if there is not a core belief in the idea of individual freedom to think and choose.”).

<sup>42</sup>Cf. ERIC POSNER AND ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 116 (2010) (speculating whether founders were correct in arguing for a bill of rights and separation of powers.)

<sup>43</sup> But see Berman, *supra* note 4, at 408 (noting the potentially ambivalent role of civil society).

<sup>44</sup> Barry Weingast & Rui P. Figuieredo, *The Rationality of Fear: Political Opportunism and Ethnic Conflict*, in *CIVIL WARS, INSECURITY AND INTERVENTION* (Jack Snyder and Barbara Walter, eds., 1999).

<sup>45</sup> Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* (2003).

<sup>46</sup> See Robert Jervis, *SYSTEM EFFECTS* 6 (1997) (discussing system-level effects); Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 6 (2009) (“A system effect arises when the properties of an aggregate differ from the properties of its members, taken one by one.”); see also Caryn Devins et al., *Against Design*, 47 ARIZ. ST. L. J. 609 (2015) (arguing that a constitution is not a designed system).

<sup>47</sup> Recent historical work that stresses the Constitution’s elitist slant include TERRY BOUTON, *TAMING DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* (2007), and WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 14 (2007).

<sup>48</sup> Max Weber, *THE METHODOLOGY OF THE SOCIAL SCIENCES* (Edward Shils and Henry Finch, tr. & ed., 1997).

<sup>49</sup> EDWARD L. GIBSON, *BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES* (2012) (subnational authoritarianism in the US South).

<sup>50</sup> Consider, for example, the use of voter identification laws to suppress some elements of the electorate. See Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes* (2016), available at

underenforcement of many individual rights.<sup>51</sup> Politicians' efforts to entrench themselves are endemic not occasional.<sup>52</sup> As a result, large gaps remain between the law on the ground and the law on the books.<sup>53</sup>

Our definition of constitutional liberal democracy is consistent with a wide variety of institutional arrangements and policy preferences. It encompasses both the robust administrative state of the post-New Deal federal government and the looser arrangement of "parties and courts" that preceded it.<sup>54</sup> It can be accomplished through centralized or federalized governance, parliamentary or executive-led administrations. We thus reject the view that the mere fact of moving from a legislature-focused system to one organized around the president is ipso facto democratic derogation. It is also consistent with a wide range of solutions for democracy's so-called "boundary problem" of determining morally defensible limits to the democratic polity.<sup>55</sup> Because all democracies fall short of the ideal of enfranchising all those whose interests are affected by decision-making,<sup>56</sup> the practice of democracy always involves a series of excisions and limitations on the franchise. Finally, our concept of a constitutional liberal democracy does not require 'liberal' policy choices in the partisan political sense. To the contrary, it is consistent with illiberal policies, such as violations of racial, religious, and sexual-orientation autonomy, grave economic inequality or deprivation, or lack of social services provision. We assume a baseline that is *democratic*; but this is no guarantee of *good* governance in any robust normative sense. Our concept is thus not as thick as it could be. But by including some elements of liberal rights and the rule of law, however, we seek to recognize that even the minimalist conception needs some institutional context.

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<http://pages.ucsd.edu/~zhajnal/page5/documents/VoterIDLawsandtheSuppressionofMinorityVo>  
[<https://perma.cc/R3Q9-N68T> (presenting empirical evidence of effect of voter identification laws on partisan vote shares)].

<sup>51</sup> See, e.g., Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 4 (2015) [hereinafter "Huq, *Judicial Independence*"] (arguing that "the Court has developed a gatekeeping rule of *fault* for individualized constitutional remedies").

<sup>52</sup> Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 408-26 (2015) (documenting extensive range of formal and informal entrenchment strategies).

<sup>53</sup> See, e.g., Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 16-23 (2010) (cataloging many more entrenched practices in state criminal courts that violate defendants' constitutional rights).

<sup>54</sup> STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 29 (1982)

<sup>55</sup> Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, in *LIBERAL DEMOCRACY* 13, 13-14 (J. Roland Pennock & John W. Chapman eds., 1983).

<sup>56</sup> Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHI. & PUB. AFF. 40, 68 (2007) (recognizing the case for "giving virtually everyone everywhere a vote on virtually everything decided anywhere").

## B. Two Threats to Constitutional Liberal Democracy

The second foundational conceptual move we make is to decompose threats to the liberal constitutional order into two distinct types—each with its own mechanisms and threats. Drawing on a deep political science literature concerning transitions to and from democracy, we distinguish between two risks to a seemingly consolidated constitutional liberal democracy such as the United States—*authoritarian reversion*, or the risk of a rapid, wholesale collapse into authoritarianism, and *constitutional retrogression*, the risk of large (albeit incremental) reversals simultaneously along rule-of-law, democratic, and liberal margins.

### 1. *Authoritarian reversion*

Consider first the possibility that a democracy transitions *completely and rapidly* to authoritarianism, meaning some form of nondemocratic government.<sup>57</sup> The term “reversion” is appropriate here because democracy, as a historical matter, is the exception rather than the rule. Apart from a “very local Greek” phenomenon some 2,500 years ago, democracy “faded away almost everywhere” until about the last century.<sup>58</sup> Even when democracies have been established, they are not always enduring and can return to autocracy. As of 2005, roughly 75 democracies had experienced such events, which we call *authoritarian reversions*, to signal the wholesale character of the institutional change.<sup>59</sup> Such a wholesale movement away from democracy most often occurs through the mechanism of a military coup d’état (as in Thailand, Mali, and Mauritania)<sup>60</sup> or via the use of emergency powers (most famously, in Weimar Germany).<sup>61</sup>

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<sup>57</sup> See, e.g., Milan Svobik, *Authoritarian reversals and Democratic Consolidation*, 102 AM. POL. SCI. REV. 153 (2008) (analyzing the changing risk of authoritarian reversions in early- and late-stage democracies); SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 11-13 (1991) (using the term “authoritarianism” to refer to any form of government that is non-democratic).

<sup>58</sup> JOHN DUNN, *SETTING THE PEOPLE FREE: THE STORY OF DEMOCRACY* 13-14 (2005). In contrast, the “absolutist state” emerged in the West in roughly the sixteenth century as a “recharged and redeployed apparatus of feudal domination.” PERRY ANDERSON, *LINEAGES OF THE ABSOLUTE STATE* 18-19 (2d ed. 2013).

<sup>59</sup> Adam Przeworski, *Democracy as an Equilibrium*, 123 PUB. CHOICE 253, 263 (2005). We have updated Przeworski’s data to include Thailand 2006 (and 2009); Bangladesh 2007; Mauritania 2008; Bhutan, Guinea-Bissau, Kyrgyz Republic, Nepal, and Pakistan, 2009.

<sup>60</sup> Jonathan M. Powell & Clayton L. Thynne, *Global Instances of Coup from 1950 to 2010: A New Dataset*, 48 J. PEACE RES. 249, 249 (2011). Coups occur in both democracies and nondemocracies, but are more common in the former. Curtis Bell, *Coup d’État and Democracy*, 49 COM. POL. STUD. 1167, 1168 (2016).

<sup>61</sup> For an acute description of “Germany’s slippage into a kind of presidential dictatorship under Article 48 of the Weimar Constitution”, see Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1369-71 (2004). Emergency powers have been a mechanism of authoritarian reversal in other instances. See, e.g., Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, DEMOCRATIZATION, Winter 2003, at 46, 51-52 (describing the use of emergency powers in Colombia), and

Authoritarian reversions as we define them must be quick and complete, but they need not be permanent. For instance, India's retreat from democratic government in the wake of Indira Gandhi's use of emergency powers proved temporary because of her decision to hold new elections.<sup>62</sup> Chile's junta, operating in an environment in which legalism was powerful, held and lost a referendum that would have extended its rule for eight years, allowing a gradual return to democracy.<sup>63</sup>

As the incidence of outright coups has declined in recent years,<sup>64</sup> however, aspirational authoritarians have turned instead to formal constitutional amendments as means to dismantle democratic institutions in favor of competitive authoritarian or hybrid regimes.<sup>65</sup> Hence the need for another category of anti-democratic change.

## 2. *Constitutional Retrogression*

A constitutional liberal democracy can also degrade without collapsing. In both Hungary and Poland, for example, elected governments have recently hastened to enact a suite of legal and institutional changes that simultaneously squeeze out electoral competition, undermine liberal rights of democratic participation, and emasculate legal stability and predictability.<sup>66</sup> In Venezuela between 1999 and 2013, the regime established by Hugo Chávez has aggregated executive power, limited political opposition, attacked academia, and stifled independent media in ways align it with

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are often identified as the core threat to democratic stability, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1028 (2003) ("There exists a tension of 'tragic dimensions' between democratic values and responses to emergencies."); see also William E. Schuerman, *Emergency Powers and the Rule of Law After 9/11*, 14 J. POL. PHIL. 61, 68-74 (2006) (providing a useful survey of the legal scholarship on point up to 2006). The Weimar case is often the focal point of legal scholars. See, e.g., David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 598 (2009) (describing how the Nazis used their power within the government to "eliminate opposition and eventually repeal the entire Weimar constitution itself"); Levinson & Balkin, *supra* note 20, at 1811 (noting the use of emergency powers by the Nazis in the Weimar Constitution).

<sup>62</sup> See Aziz Z. Huq, *Uncertain Laws in Uncertain Times: Emergency Powers and Lessons from South Asia*, 13 CONSTELLATIONS 89, 93-95 (2006) [hereinafter "Huq, *Uncertain Laws*"] (discussing the timing and political economy of the Indian emergency).

<sup>63</sup> ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA AND THE 1980 CONSTITUTION (1998).

<sup>64</sup> Powell & Thynne, *supra* note 60, at 255, fig. 1 (presenting time trend in military coups); see also Peter Feavor, *Civil-Military Relations*, 2 ANN. REV. POL. SCI. 211, 218 (1999) [hereinafter "Feavor, *Civil-Military Relations*"] ("[W]hile coup success have not entirely disappeared, they are certainly less frequent in many regions, and the coup success rate has fallen.").

<sup>65</sup> David Landau, *Abusive Constitutionalism*, 47 U. C. IRVINE L. REV. 189, 211 (2013).

<sup>66</sup> See *infra* text accompanying notes 202 to 209, and 221 to 224. (discussing democratic retrogression in Hungary and Poland); see also Bojan Bugarcic & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEM. 69, 72-75 (2016) (summarizing retrogression in those contexts).

“classic authoritarian regimes.”<sup>67</sup> Modifications of term limits are frequent, but, as we show in Part III, there are a range of instruments in the toolkit.<sup>68</sup> Crucially, many of these practices are “conceal[ed] under the mask of law.”<sup>69</sup> Political scientists have a number of labels for this derogation from an existing set of practices, including “backsliding,”<sup>70</sup> “dedemocratization,”<sup>71</sup> and the shift to “democratorship.”<sup>72</sup> But whatever it is called, its modal end-point is a hybrid regime that is neither pure democracy nor unfettered autocracy, but includes elements of both. In rare cases, democratic elements recede sufficiently<sup>73</sup> that even in the absence of open regime change, the situation is properly characterized as an authoritarian.

How frequent is such incremental decay in democracies? Figure 1 shows trends in regime-type since the third wave of democracy began in the 1970s, using Freedom House categorizations.<sup>74</sup> While democracy has generally advanced over the period, hybrid regimes have also diffused. Recent years show an uptake in both authoritarian and hybrid regimes, with slight regression of the number of democracies globally.

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<sup>67</sup> Javier Corrales, *Autocratic Legalism in Venezuela*, 26 J. DEM. 37, 37-46 (2015); see also Kirk A. Hawkins, *Chavismo, Liberal Democracy, and Radical Democracy*, 19 ANN. REV. POL. SCI. 311, 314-17 (2016) (concluding that “since 2006 ... the regime has become a competitive authoritarian or electoral authoritarianism regime”).

<sup>68</sup> On the operation of term limits, and their failure, see Tom Ginsburg, James Melton and Zachary Elkins *On the Evasion of Executive Term Limits*, 52 WM AND MARY L. REV. 1807 (2011); Janette Yarwood, *The Struggle over Term Limits in Africa: the Power of Protest*, 27 J. DEM. 51 (2016)

<sup>69</sup> Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1685 (2015). Scholars have flagged both the use of ordinary law and constitutions to authoritarian ends. See Corrales, *supra* note 67, at 38 (defining “autocratic legalism” to include the “use, abuse, and non-use of the rule of law”); Landau, *supra* note 65, at 196 (defining “abusive constitutionalism; as the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before”).

<sup>70</sup> Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEM. 5, 5 (2016) (defining democratic backsliding as “the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy”). In one quantitative study, “backslides” are distinguished from autocratic reversions, by the number of Polity IV points lost in a given transition. José Alemán & David D. Yang, *A Duration Analysis of Democratic Transitions and Authoritarian Backslides*, 44 COMP. POL. STUD. 1123, 1136 (2011).

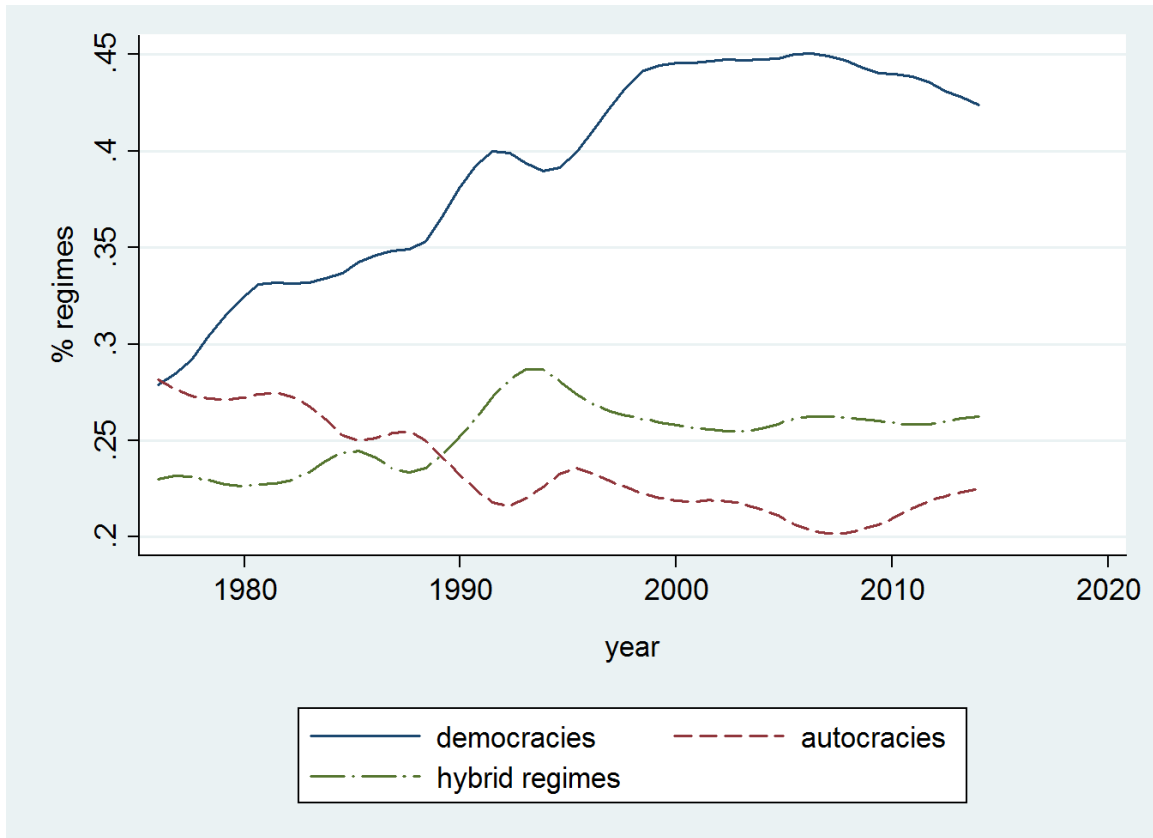
<sup>71</sup> Charles Tilly, *Inequality, Democratization, and De-Democratization*, 21 SOCIOLOGICAL THEORY 37, 40 (2003) (identifying structural conditions under which de-democratization occurs, although without providing a precise definition).

<sup>72</sup> Kim Lane Scheppele, *Worst Practices and the Transnational Legal Order (Or How to Build a Constitutional ‘Democratorship’ in Plain Sight)*, -- U.C. IRVINE L. REV. --, at 5 (forthcoming 2017) [hereinafter “Scheppele, *Worst Practices*”] (on file with authors).

<sup>73</sup> Lilia Shevtsova, *Forward to the Past in Russia*, 26 J. DEM. 22, 30-33 (2015) (describing Kremlin’s use of legal reforms to undermine democratic control).

<sup>74</sup> Freedom House, *Freedom in the World 2016*, [www.freedomhouse.org](http://www.freedomhouse.org), [last accessed Dec. 16, 2017].

Figure 1: Regime types in the Third Wave



Source: Adapted from Freedom House data 2016

We coin the term “constitutional retrogression,” or more simply “retrogression,” to capture this phenomenon. We borrow the term “retrogression” from the jurisprudence developed under §5 of the Voting Rights Act,<sup>75</sup> a statutory provision that (for now at least) lies in desuetude.<sup>76</sup> By splicing it together with the adjective “constitutional,” we aim to transpose a familiar concept employed at a local level to a national context.

We define retrogression as *a process of incremental (but ultimately still substantial) decay in the three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the rule of law*. It captures changes to the quality of a democracy that are (1) on their own incremental in character and perhaps innocuous, that (2) happen roughly in lockstep, and involve (3) deterioration of (a) the quality of elections, (b) speech and association rights, and (c) the rule of law.

<sup>75</sup> *Beer v. United States*, 425 U.S. 130, 141 (1976) (introducing retrogression standard).

<sup>76</sup> *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (invalidating the coverage formula that determined the scope of §5’s application).



Importantly, retrogression occurs only when a substantial negative change occurs along *all three margins*. This is because it is only when substantial change across all three institutional predicates of democracy that the system-level quality of democratic contestation is likely to be imperiled.<sup>77</sup> Moreover, while a negative shift on any one margin might reduce the quality of democratic performance, retrogression risks a larger shift toward an illiberal democracy,<sup>78</sup> or even an uncompetitive, one-party democratic system.<sup>79</sup> It is thus distinct from reversion for three reasons. First, it occurs slowly; second, it involves different mechanisms; and third, its *modal* end-point is a quasi-authoritarian (although a further slide to authoritarianism is possible, as the Russian example shows<sup>80</sup>).

Because retrogression occurs piecemeal, it necessarily involves many incremental changes to legal regimes and institutions. Each of these changes may be innocuous or defensible in isolation. It is only by their cumulative effect that retrogression occurs. A sufficient *quantity* of even incremental derogations from the democratic baseline, in our view, can precipitate a *qualitative* change that merits a shift in classification.<sup>81</sup> Hence, evaluations of retrogression demand a system-wide perspective. For just as democracy, liberalism, and the constitutional rule of law are properties of political systems as a whole, so too their degradation cannot be captured except from a systemic perspective.<sup>82</sup> As a result, there will be cases where disputes arise as to whether a sufficient aggregate amount of backsliding has occurred. But the

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<sup>77</sup> Might substantial decay occur in the rule of law and electoral competition without liberal rights to speech and association being affected, and would this be retrogression as we define it? Because our three institutional predicates of democracy are closely intertwined, we think it will be the rare case in which two of three collapse while the third is left unaffected. For the sake of clarity, we leave such cases aside.

<sup>78</sup> Fareed Zakaria, *The Rise of Illiberal Democracies*, 76 FOREIGN AFF. 22 (1997) (coining this term).

<sup>79</sup> In a leading analysis of democratization, Samuel Huntington has argued that “the sustained failure of the major opposition political party to win office necessarily raises questions concerning the degree of competition permitted by the system.” HUNTINGTON, *supra* note 28, at 8. On the incidence and operation of one-party ‘democracies,’ which of necessity lack for meaningful electoral competition, voter choice, accountability or periodic turnover, see ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT 59-69 (2000) (listing countries that have experienced one-party dominance notwithstanding democratic elections including, among others, Botswana, Burkina Faso, Egypt, Gambia, Ivory Coast, Madagascar, Senegal, South Africa, Honduras, Nicaragua, Bolivia, Mongolia, Pakistan, and Turkey).

<sup>80</sup> Recent events in Turkey suggest that country may be following the same path. Cf. Dexter Filkins, *The End of Democracy in Turkey*, NEW YORKER, Jan. 3. 2017, <http://www.newyorker.com/news/news-desk/the-end-of-democracy-in-turkey> (making this point about the Erdogan regime).

<sup>81</sup> For a similar argument, see Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559, 560-62 (2013) [hereinafter “Scheppele, Frankenstate”].

<sup>82</sup> See *supra* text accompanying notes 31 to 53.

existence of contentious border-line cases as a result of necessary vagueness, however, does not undermine the utility of the concept.<sup>83</sup>

Consider, for example, the New Deal's changes in federal governance. These have been characterized a catastrophic avulsion in the constitutional order, and also a redemptive moment in American history.<sup>84</sup> Those who would rank the New Deal as a retrogression might point to the derogation from an informal two-term limit on presidents, as well as fundamental changes in property rights and the rule of law.<sup>85</sup> The presidential effort to pack the Supreme Court represents a low point for the rule of law in the United States, and is a technique that has been followed by modern-day illiberal democrats.<sup>86</sup> They might also point to the creation of New Deal programs that engendered new constituencies supportive of the Democratic political coalition.<sup>87</sup>

But while conceding that these arguments have some force, we conclude that the New Deal does not meet our tripartite definition of retrogression (even if it is objectionable on libertarian or originalist grounds). We see little evidence that even with the abrogation of the unwritten norm against three-term presidents, the scope of electoral competition was damaged. Simply put, this was not a moment at which the government blocked partisan competition or narrowed the franchise. To the contrary, to the extent it had progressive redistributive effects, the New Deal may have *enabled* effectual democratic participation. Nor was the New Deal accompanied by losses of speech and association rights. And while political entrenchment occurred, it did not limit political competition. Rather, taking the democratic status quo as a baseline, there is a meaningful difference between constitutional change that operates through the conferral of benefits and a change that either eliminates democratic competition or liberal rights necessary for democratic competition. Because not all three institutional prerequisites of democracy were damaged in the New Deal, we think it does not fit our

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<sup>83</sup> More generally, we resist the proposition that for a concept to be useful it must be subject to quantification. So long as a concept's vagueness in application is recognized, we see no reason to reject a concept. The canonical examples of vague but useful concepts are baldness and a heap of sand. Dominic Hyde, *The Sorities Paradox*, in *VAGUENESS: A GUIDE 1-2* (G. Ronzitto, ed. 2011).

<sup>84</sup> Compare RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 45-71 (2014), with 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

<sup>85</sup> We recognize that by one influential definition of the rule of law, that of Hayek, the New Deal was the very antithesis of the concept. F.A. HAYEK, *THE ROAD TO SERFDOM* (1944). Our own working definition, drawn from Lon Fuller's eight criteria, would tolerate New Deal reforms as within the realm of the rule of law.

<sup>86</sup> See *infra* notes 201 (Hungary) and 201-207 (Poland).

<sup>87</sup> See, e.g., McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180-83 (1999) (describing the Administrative Procedure Act as deck-stacking). Many some state transformations have lock-in effects because the benefits that flow from newly created institutions or policies create supportive constituencies. PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 17-18 (2004). Examples include social security and the mortgage interest deduction.

definition of retrogression.<sup>88</sup> Even if readers disagree with this specific example, though, we hope that our definitional exegesis provides a useful frame for analysis.

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This Part has stipulated the two pivotal elements of our analysis. First, we have set forth an understanding of constitutional liberal democracy, which provides a normative benchmark from which our investigation starts. Second, we have distinguished two separate pathways along which democracies might erode. The first, authoritarian reversion, involves a quick and complete breakdown of democratic politics and replacement by authoritarianism. The second, constitutional retrogression, involves a more incremental deterioration in the quality of democratic regimes, which typically ends in a quasi-authoritarian status quo. In the following two Parts, we use comparative law and politics scholarship to examine the risk of each species of democratic failure. We then deploy familiar tools of legal and institutional analysis to evaluate the magnitude of each threat in the U.S. context.

## **II. America in the Shadow of Authoritarian Reversion**

This Part considers the risk of authoritarian reversion and the role of the U.S. Constitution in either stanching or exacerbating that threat. We begin by exploring comparative experience with authoritarian reversion, emphasizing the pivotal role that military coups and emergency powers play. We then turn to the domestic context, and consider whether the United States should be viewed as exceptional in the sense of being immune from such reversals. We conclude that there is no reason to think that *America* is exceptional, but ample reason to think that the mechanisms of authoritarian reversal are unlikely to have purchase here. In part, this is due to a secular decline in the rate of authoritarian reversals; in part, constitutional law (if not the constitutional text) has found ways to accommodate the risk of such reversals via military coup and emergency powers.

### **A. When Do Democracies Collapse Into Authoritarianism?**

Political scientists have documented a non-trivial set of cases in which a democracy reverts to an authoritarian regime. A canonical example is the abrogation of Weimar democracy by the Nazi party that occurred during the early 1930s in Germany.<sup>89</sup> More recently, on May 20, 2014, the Thai military suspended the

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<sup>88</sup> Perhaps the best example of retrogression in U.S. history is the end of southern Reconstruction, commonly called Redemption—a moment at which democratic space shrank, certain groups (African-Americans) were de facto excluded from politics, and the rule of law was violently flouted. C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913*, at 1-22 (1951).

<sup>89</sup> For a recent account Weimar's fall, see ERIC D. WEITZ, *WEIMAR GERMANY: PROMISE AND TRAGEDY* 331-60 (2007) (tracing the intellectual and political origins of the Nazi seizure of power).

constitution and ended democratic rule under a caretaker regime that had been calling for elections.<sup>90</sup> A year earlier, the Egyptian military ousted the then-elected president, Mohamed Morsi, and installed a general, Abdel Fattah el-Sisi, in his stead.<sup>91</sup> While the Thai junta has adopted a constitution promising a transfer of power to civilians, there is some speculation that the coup leader himself will engineer his own election. And in Egypt, the military regime currently remains in place with no meaningful prospect of democratic restoration in view.

Authoritarian reversals are characterized by a generally abrupt change in regime type from democratic to authoritarian. They are commonly associated with military coups<sup>92</sup> and the use of legal states of emergency.<sup>93</sup> Coups often occur in moments of crisis, when military leaders invoke legitimating constitutional provisions to claim the mantle of a neutral and moderating power.<sup>94</sup> Military subordination of democratic regimes can be accomplished through the mechanism of emergency powers.<sup>95</sup> Evaluating Latin American experience with emergency powers, one scholar has concluded that “[n]o elections, no delicately orchestrated set of presidentialist musical chairs, and no transitions from authoritarian to elected governments will succeed in consolidating constitutional democracy without drastic reform of these constitutional foundations of tyranny.”<sup>96</sup>

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<sup>90</sup> International Crisis Group, *A Coup Ordained? Thailand's Prospects for Stability* 16 (December 2014) [hereinafter “ICG, *A Coup Ordained*”] <https://www.crisisgroup.org/asia/south-east-asia/thailand/coup-ordained-thailand-s-prospects-stability> (describing May 22, 2014 coup).

<sup>91</sup> Eric Trager, *Egypt's Durable Misery*, FOR. AFF., July 2015, <https://foreignaffairs.org/articles/egypt/2015-07-21/egypts-durable-misery>

<sup>92</sup> PAUL BROOKNER, NON-DEMOCRATIC REGIMES 59 (2010) (discussing linkage between military coups and emergencies); Francis Fukuyama, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY 281-83 (2014) [hereinafter “FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY”] (discussing the role of military interventions in generating democratic instability in South America).

<sup>93</sup> See Arend Lijphart, *Emergency Powers and Emergency Regimes: A Commentary*, 18 ASIAN SURV. 401, 401 (1978) (noting that the “breakdown of democracy” is often “justified in terms of the existence of some emergency or another”).

<sup>94</sup> JUAN LINZ & ALFRED STEPAN, THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN AND REEQUILIBRATION 74 (1978).

<sup>95</sup> See BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA 173-75 (1993) (positing this linkage in the Latin American context).

<sup>96</sup> *Id.* at 9. Other scholars have argued that the extensive military misuse of emergency powers in the Latin American context does not reflect the undesirability of emergency powers per se, but instead the need for careful institutional design to limit their authoritarian risks. Gabriel L. Negretto & Jose Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797, 1811 (2000) (“While initially helpful during the period of state-building, emergency provisions in Latin America soon became, in many cases, an instrument to prevent the emergence of opposition movements, to restrict the levels of political competition, and to curtail civil liberties”).

Authoritarian reversals are quite rare. A 2011 study by Gero Erdmann of thirty years' experience of democratic backsliding of various sorts found 53 such national cases, out of which only five involved a full transition from democracy to an authoritarian regime.<sup>97</sup> Perhaps because these instances are relatively rare, the literature has developed the countervailing concept of democratic consolidation: the claim that after some time, democracy becomes "the only game in town" in a given national context, such that a reversion to authoritarianism becomes much less likely.<sup>98</sup> While consolidation has been fairly well studied, and seems to be best predicted by favorable socioeconomic conditions as well as a contagion effect,<sup>99</sup> the infrequency of authoritarian reversals creates an inference problem: In the absence of a sufficient number of cases, it is hard to draw secure inferences about what structural or situational factors conduce to democratic breakdowns.

Nevertheless, a few regularities emerge in the empirical and qualitative literature on given cases. First, none of the five cases of authoritarian reversal identified in Erdmann's 2011 study occurred in a high income country.<sup>100</sup> Similarly, Aléman and Yang find that "by far the best guarantor of democratic stability is a high level of economic development."<sup>101</sup> Recall, however, that Erdmann's study of 53 countries found evidence of democratic backsliding in 48 countries.<sup>102</sup> This suggests that democratic backsliding of some sort is far more common when the end-state is a hybrid or incomplete form of democracy.

Second, scholars find that the probability of authoritarian reversal declines with age.<sup>103</sup> According to Milan Svolik's careful study, "any country that has been democratic for 52 or more years as of 2001 is estimated to be consolidated with at least 90% probability."<sup>104</sup> Svolik also finds that the critical factor in predicting relapse is economic recession. Since then, however, the May 2014 military coup in Thailand, which deposed the populist Shinawatra government, shows that neither low income nor recession is

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<sup>97</sup> Gero Erdmann, *Decline of Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy*, in *DECLINE OF DEMOCRACY* 26 (Gerd Erdmann & Marianne Kneuer, eds. 2011) (noting also that four of these occurred before 1989); see also Lust & Waldner, *supra* note 17, at 5 (discussing Erdmann study).

<sup>98</sup> Andreas Schedler, *What is Democratic Consolidation*, 9 J. DEM. 91, 91-92 (1998); see also Svolik, *supra* note 57, at 164 (discussing democratic consolidation).

<sup>99</sup> Mark Gasiorowski & Timothy J. Power, *The Structural Determinants Of Democratic Consolidation Evidence From The Third World*, 31 COMP. POL. STUD. 741, 764 (1998) (discussing factors and also noting that high inflation undermines consolidation).

<sup>100</sup> Erdmann, *supra* note 97, at 34.

<sup>101</sup> Alemán & Yang, *supra* note 70, at 15. For similar findings, see also Przeworski et al., *supra* note 79, at 50-51; Kapstein & Converse, *supra* note 9, at 61.

<sup>102</sup> Erdmann, *supra* note 97, at 26.

<sup>103</sup> Svolik, *supra* note 57, at 166.

<sup>104</sup> *Id.* at 164.

strictly necessary for a sudden authoritarian reversal at the hands of the armed forces.<sup>105</sup> Further, there is some evidence that the current authoritarian swing in Thailand is deeper than in previous instances.<sup>106</sup> Even given the Thai counterexample, nations experiencing such reversals tend to have shorter and more insecure histories of political competition than the contemporary United States. Japan, for example, had a weakly institutionalized democracy in the 1920s that gave way to military dominance.<sup>107</sup> The Spanish Republic lasted just five years before Franco came to power in 1938.<sup>108</sup>

To make these points more concrete, Table 1 below presents data on a number of other instances of authoritarian reversals, drawing on definitions provided by the Polity database. We focus on the countries with the longest continuous experiences of democracy before reversal.

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<sup>105</sup> See ICG, *A Coup Ordained*, *supra* note 90, at i-ii. Claudio Sopranzetti, *Thailand's Relapse: The Implications of the May 2014 Coup*. 75 J. ASIAN STUD.299 (2016).

<sup>106</sup> Sopranzetti, *supra* note 105, at 309 (coup-leader institutionalizing paternalistic ideas of limited democracy).

<sup>107</sup> HIROSHI ODA, JAPANESE LAW 16-20 (1992).

<sup>108</sup> ANTONY BEEVOR, THE SPANISH CIVIL WAR 340-41(2001) (describing Franco's seizure of power).

**Table 1: Longest periods of democracy before reversal**

Country	Democracy years (inclusive)	Number of democracy-years	GDP per capita in year of reversion (Penn World Tables)	Cause of reversion
France	1876-1939	64	n.a.	Invasion/ coup d'état
Greece	1864-1914	51	n.a.	Coup d'état
Venezuela	1958-2006	49	\$9508	Consolidation of one-party dominance
Sri Lanka	1948-81	34	\$1067	Tainted election followed by repressive constitutional amendment and political violence
Uruguay	1942-72	31	\$4917	Coup d'état
Gambia	1965-93	28	\$1219	Coup d'état
Spain	1899-1922	24	n.a.	Constitutional dictatorship by general
Chile	1955-72	18	\$4248	Coup d'état
Ecuador	1990-2007	18	\$6074	Consolidation of one-party rule
Estonia	1917-33	17	n.a.	Coup d'état
Fiji	1970-86	17	\$3089	Coup d'état

Source: Polity IV Database; democracy is defined as ratings of 6 or above on the 20-point Polity Scale.

The question posed by this table, of course, is whether any of these examples provide pathmarking precedent for the United States. That most of these instances occur in poorer countries, with less rich democratic histories, is relevant though not definitive.

## B. The Risk of Authoritarian Reversion in the United States

We begin our analysis of the risk of authoritarian reversion by setting forth previous estimates. We then bring to bear both comparative and domestic analytic tools to provide a more closely argued and well-supported evaluation of that risk.

### 1. *Prior Estimates of Authoritarian Reversion Risk*

Is there any risk of wholesale democratic collapse in the United States? There are two standard approaches to this problem in the legal and constitutional scholarship. One sees a stark, clear, and present danger. The other rejects the possibility out of hand as alarmist. We set forth these competing diagnoses before presenting our own analysis. Unlike the standard accounts, we conclude that the risk of authoritarian reversion is small but non-zero. Comparative evidence and a close read of U.S. constitutional institutions and rules provide some ground for comfort that sudden democratic reversals are unlikely absent serious miscalculations by political leaders.

The scholarship in this area is polarized. On the one hand, there are a number of scholars who have expressed concern over the possibility of authoritarian reversion either through emergency powers or military coup. Among the most prominent of these is Bruce Ackerman, who has raised the prospect of a reversal via military coup.<sup>109</sup> As troubling harbinger, Ackerman flags the Goldwater-Nichols Act of 1986, which elevated the Chairman of the Joint Chiefs to a cabinet level position and thereby created a unified military voice on the National Security Council.<sup>110</sup> He also questions the resilience of civilian control of the military, especially in the face of presidential overreaching.<sup>111</sup> In a similar vein, Jonathan Turley expresses concern about “the expansion of the military into a largely autonomous and independent governing system” that is largely free of civilian control.<sup>112</sup> In respect to emergency powers, Jules Lobel canvassed the dense thicket of statutory emergency powers in 1989 and spied there “a grave danger of authoritarian rule in the conduct of foreign affairs.”<sup>113</sup> Finally, fear of authoritarian

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<sup>109</sup> BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 9-10, 24-36 (2010) (predicting “an increasingly politicized military” and describing the legal shifts that facilitate it). At least one military officer has expressed similar concerns. Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, *PARAMETERS: US ARMY WAR C.Q.*, Winter 1992-1993, at 2.

<sup>110</sup> ACKERMAN, *supra* note 109, at 45-63.

<sup>111</sup> *Id.* at 84-85.

<sup>112</sup> Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in A Madisonian Democracy*, 70 *GEO. WASH. L. REV.* 649, 657 (2002); *see also* ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* (2016) (developing a similar account of the military as an expansive institution deployed to an excessive number of military and non-military ends).

<sup>113</sup> Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1385, 1433 (1989).



tyranny has often coalesced around the rise of executive power.<sup>114</sup> There has been, as is oft observed, a secular and fairly continuous increase in executive power over the last several decades, much of it based on vague Congressional authorizations that respond to arguments about emergency or military necessity.<sup>115</sup> Much of this concern focuses not just on the executive branch in general, but on the President in particular.<sup>116</sup>

The risk of a military coup has received close attention in the political science literature. To stave it off, Samuel Huntington advocated “objective civilian control” of the military, which entailed “militarizing the military, making them the tool of the state.”<sup>117</sup> But Huntington viewed civilian control as “extraconstitutional, a part of our political tradition but not of our constitutional tradition,”<sup>118</sup> and not a function of the Constitution’s provisions speaking to the allocation of military powers. Indeed, Huntington viewed the separation of military-related powers between Congress and the executive as an error, because it worked as “a perpetual invitation, if not an irresistible force, drawing military leaders into political conflicts.”<sup>119</sup>

On the other side of the ledger, there is scholarship that embraces the prospect of democratic recession in favor of dictatorial powers, and some that doubts the risk is at all real. Most famously, Clinton Rossiter’s 1948 monograph on *Constitutional Dictatorship* embraced the possibility that “leaders could take dictatorial action in [democracy’s] defense” out of a concern that the state “not survive its first real crisis” in the absence of such an extraordinary power.<sup>120</sup> In that moment of crisis, Rossiter predicted a dictator could and should take any action necessary for “the preservation of

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<sup>114</sup> See, e.g., ACKERMAN, *supra* note 109, at 87-89.

<sup>115</sup> Levinson & Balkin, *supra* note 20, at 1789; see also Rebecca Ingber, *Obama’s War Powers Legacy and the Internal Forces Shaping Executive Decision-Making*, \_\_ AM. J. INT’L. LAW \_\_ (forthcoming 2016). Other accounts raise doubts about the perceived growth of presidential power, noting the frictional effect of conflict within the executive branch as a whole. Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. -- (forthcoming 2017) [hereinafter “Huq, *President and the Detainees*”] (documenting successful bureaucratic resistance and friction against a presidential agenda, which spilled over into interbranch conflict).

<sup>116</sup> Levinson & Balkin, *supra* note 20, at 1839 (arguing that in fact emergency powers are dispersed through the administrative state.)

<sup>117</sup> SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 83 (1957); *id.* at 68-69 (suggesting that civilians would set policy ends, while the military would supply “instrumental means”). A similar theme is to be found in the other leading theorization of civilian-military relations. Peter D. Feaver, *ARMED SERVANTS* 12 (2003) (noting that the “military subordination conception” is the “sine qua non of all civil-military theory”).

<sup>118</sup> HUNTINGTON, *supra* note 117, at 190 (drawing an analogy to the national political party system).

<sup>119</sup> *Id.* at 177; see also Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 824 (2012) (“For Huntington, the separation-of-powers reality that Congress may call on military officers to testify, for example, places officers who feel personal or professional loyalty to their Commander in Chief in a position that compromises their ability to offer unvarnished expert views.”).

<sup>120</sup> CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 13 (1948).

the independence of the state, the maintenance of the existing constitutional order, and the defense of the political and social liberties of the people.”<sup>121</sup> Alternatively, scholars such as Dean Trevor Morrison have responded to warnings such as Ackerman’s by labeling them as “exercise[s] in unwarranted alarmism.”<sup>122</sup> In a related optimistic vein, Professors Eric Posner and Adrian Vermeule have diagnosed what they view as an unhealthy dose of “tyrannophobia” in American political culture.<sup>123</sup> They trace this fear of executive tyranny back to concerns about the British throne, which infused the Founding period, and suggest that tyrannophobia itself cannot inhibit tyranny but is instead more likely to be epiphenomenal.<sup>124</sup>

Not all of these analyses, however, account for comparative experience with authoritarian reversion. Hence, they typically offer no baseline estimate of how great the risk of such a flip away from democratic control might be. Nor do they all account for the specific pathways that link government powers (such as emergency authorities or military policy-making) to democratic destabilization.<sup>125</sup> Lobel, for example, infers a risk of democratic derogation from the mere existence of broad statutory emergency powers. He does not provide a clear explanation of executive branch actors’ incentives to use these powers, or opponents’ incentives to resist them. Posner and Vermeule, by contrast, reject the possibility that widely held ‘tyrannophobic’ views in fact play an important role in resisting the slide away from democratic norms. Given the recent wearing away of popular aversion to military control in any case, their diagnosis may now need revision. As we explained in the Introduction, at least some percentage of the American population seems to be flirting with tyrannophilia in ways that alter the expected dynamics of political and institutional change.<sup>126</sup>

## 2. *Reconsidering the Risk of Authoritarian Reversion in a Comparative and Historical Light*

The risk of authoritarian reversion—a wholesale shift from civilian, democratic control to an authoritarian alternative—is in our estimate very low notwithstanding the demographic, socio-economic, and transnational trends described in the Introduction.<sup>127</sup>

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<sup>121</sup> *Id.* at 7.

<sup>122</sup> Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1693 (2011). Morrison, unfortunately, focuses on Ackerman’s account of the Office of Legal Counsel, rather than his concern with the ascendancy of the military.

<sup>123</sup> Eric Posner & Adrian Vermeule, *Tyrannophobia*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 321 (Tom Ginsburg, ed. 2012)

<sup>124</sup> *Id.* at 321 (expressing skepticism at the relationship).

<sup>125</sup> Ackerman is the main exception here, insofar as he sketches hypothetical trajectories by which a military coup could occur. Ackerman, *supra* note 109, at 63-64; *see also* Dunlap, *supra* note 109, at 2.

<sup>126</sup> *See* Fou & Mounk, *supra* note 5, at 13

<sup>127</sup> *See supra* text accompanying notes 5 to 7.

To call this risk small, however, is not to say that it is nonexistent. But given the lower transaction costs of constitutional retrogression demonstrated in Part III, we think that it is far more likely that democratic decay will be piecemeal and incremental rather than wholesale and rapid. Our conclusion flows from both the lessons developed through the application of a comparative lens, and also through close attention to the specific historical and constitutional mechanisms that regulate the risk of a military coup and the abuse of emergency powers.

To begin with, comparative and historical experience does not suggest that the United States is at the cusp of authoritarian reversion. As we have explained, the latter generally occurs in recently established and relatively impoverished democracies. The United States, despite its large economic inequalities, is neither of these.

Moreover, the history of the United States has seen some significant uses and abuses of emergency powers, ranging from Lincoln's suspension of the writ of habeas corpus without Congress, to Japanese internment.<sup>128</sup> While we do not wish to minimize the human cost of these historical instances, none of them has been accompanied by an actual reversal of democratic norms. History does not directly constrain. But the absence of democratic collapses in the historical record is not without significance in a national context where historical antecedents and constitutional custom have a measure of restraining precedential force.<sup>129</sup> Consistent with this intuition, cross-national studies suggest that histories of governmental instability are predictive of subsequent democratic collapse.<sup>130</sup> In terms of political incentives, the absence of a positive history of democratic suspensions creates a large measure of uncertainty over the distributive and political consequences of authoritarian reversion. This means there is no subset of interest groups that can confidently predict it will gain from democracy's caesura.<sup>131</sup>

A potential response to comparative evidence in particular is to parry with the claim that America is somehow "exceptional" and hence will follow idiosyncratic paths dissimilar to international comparators. We are skeptical of claims to uniqueness in

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<sup>128</sup> See generally GEOFFREY STONE, *PERILOUS TIMES: CIVIL LIBERTIES IN WARTIME* (2003)

<sup>129</sup> On the use of such practice by courts, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 453 (2012).

<sup>130</sup> Abraham Diskin, Hanna Diskin, & Reuven Y. Hazan, *Why Democracies Collapse: The Reasons for Democratic Failure and Success*, 26 INT'L POL. SCI. REV. 291, 303-04 (2005) (reporting results from logistic models of democratic survival).

<sup>131</sup> Our argument here is not that there are "positive returns" from the historical practice of democracy. Cf. PIERSON, *supra* note 87, at 20-21. It is rather that risk aversion interacts with an absence of historical exemplars to make some political choices less attractive. A prospective military leader in Thailand or Turkey, with a long history of coups, has much more information on the likely reaction of various forces in society.

general.<sup>132</sup> Absent some concrete reason to think otherwise, there is no ground to the view the United States as standing outside or beyond institutional and political dynamics of history. To the extent that the evidence supports a claim of American exceptionalism in our context, that claim must rely on the unusual longevity of the American constitution. At 229 years and counting, the Constitution is the oldest such national document in the world by a substantial margin.<sup>133</sup> National elections have persisted uninterrupted through both civil war and international conflict. To the extent that historical practice provides a guide for current participants in political life, there is a sense in which wholesale authoritarian reversion lies outside the “feasible choice set” of current political tactics.<sup>134</sup>

In summary, the weight of comparative and historical experience suggests that authoritarian reversion is not a substantial possibility in the contemporary United States. Even if characterized as a ‘tail risk,’ a sudden move away from democracy cannot be ruled out without better characterizing the relevant probability distribution.<sup>135</sup> To this end, we turn now to the relationship between the specific mechanisms of authoritarian reversion and the constitutional regulation of emergency powers and civil-military relations.

### 3. *Constitutional Barriers and Incitements to Authoritarian Revisions*

Comparative experience suggests that the most important mechanisms of authoritarian reversion involve either civilian abuse of emergency power or a military coup d’état. We consider how these risks are identified and managed in the constitutional text, and through both constitutional institutions and doctrines.

Consider first the question of emergency powers. Some 90% of constitutions in force today have some provisions on emergency powers.<sup>136</sup> Drawing on Machiavelli’s

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<sup>132</sup> Stephen M. Walt, *The Myth of American Exceptionalism*, FOREIGN POL., Oct. 11, 2011, available at <http://foreignpolicy.com/2011/10/11/the-myth-of-american-exceptionalism/>. Sometimes (mistakenly) attributed to Joseph Stalin, the phrase “American exceptionalism” emerged in communist circles to explain the apparent immunity of the United States to proletarian revolution. Ben Zimmer, *Did Stalin Really Coin “American Exceptionalism”?* SLATE, Sept. 27, 2013, [http://www.slate.com/blogs/lexicon\\_valley/2013/09/27/american\\_exceptionalism\\_neither\\_joseph\\_stalin\\_nor\\_alexis\\_de\\_tocqueville.html](http://www.slate.com/blogs/lexicon_valley/2013/09/27/american_exceptionalism_neither_joseph_stalin_nor_alexis_de_tocqueville.html) (explaining origins of the term.).

<sup>133</sup> ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 101 (2009).

<sup>134</sup> The term “feasible choice set,” we recognize, is “vague, ambiguous, and context dependent.” Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 314 (2008). We rely here on the idea of historical experience as a baseline for current political choice to give it content.

<sup>135</sup> Cf. Eric L. Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641 (2006) (“[Q]uantifying cataclysmic liability requires one to be able to say something about the probabilistic distribution of liability exposure, something I shall refer to below as “right-tail risk.”).

<sup>136</sup> Data from the Comparative Constitutions Project, <http://comparativeconstitutionsproject.org/> (on file with authors).

analysis of the Roman institution of a dictatorship,<sup>137</sup> many constitutions tend to anticipate the onset of an emergency and to provide temporally limited powers to address it.<sup>138</sup> Four out of five of these will also stipulate that declarations of emergency require at least two institutional actors identified in the Constitution, as a safeguard against unilateral abuse.<sup>139</sup> The increase in legal authority made available to the government during the state of emergency also varies, with a common approach being to carve out particular rules that may not be derogated from under any circumstances. These are not mere abstractions. Between 1985 and 2014, some 137 countries invoked a state of emergency at least once.<sup>140</sup>

Against this background, the U.S. Constitution is strikingly ambiguous on how emergencies alter the bounds of governmental powers, or redistribute authority between different parts of the body politic. Article I hence allows for Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,”<sup>141</sup> a power that formally shifts authority from the states to the national level. Another clause in Article I forbids the suspension of the right to file for habeas corpus “unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>142</sup> Although the text is not pellucid, it is generally agreed that this language allocates to Congress, not the president, decisions about emergency detention-related powers.<sup>143</sup>

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<sup>137</sup> See John Ferejohn & Pasquale Pasquino, *The law of the exception: A typology of emergency powers*, 2 INT. J. CONST. L. 210, 211-13 (2004) (discussing the Roman dictatorship).

<sup>138</sup> NICCOLO MACHIAVELLI, DISCOURSES ON LIVY 74 (Harvey C. Mansfield and Nathan Tarcov trans. 1996) (“republics should have a like mode [to the dictatorship] among their orders...a republic will never be perfect unless it has provided for everything with its laws and has established a remedy for every accident and given the mode to govern it.”)

<sup>139</sup> Comparative Constitutions Project, data on file with authors.

<sup>140</sup> Christian Bjørnskov and Stefan Voigt, *The Determinants of Emergency Constitutions* (2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2697144](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697144) (providing a history of the use of emergency powers in constitutions).

<sup>141</sup> U.S. CONST. Art. I, § 8, cl. 13.

<sup>142</sup> U.S. CONST. Art. I, § 9, cl. 2.

<sup>143</sup> Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 257-58 (2014) (“Scholars and courts have overwhelmingly endorsed the position that, Lincoln’s unilateral suspensions of the writ notwithstanding, the Constitution gives Congress the exclusive authority to decide when the predicates specified by the Suspension Clause are satisfied.”). Scholars have debated the legal effect of a suspension, and in particular whether it renders otherwise unlawful detentions lawful. Compare Trevor W. Morrison, Hamdi’s Habeas Puzzle: Suspension as Authorization?, 91 CORNELL L. REV. 411 (2006), with Amanda L. Tyler, Suspension as an Emergency Power, 118 YALE L.J. 600 (2009).

On the maintenance of democratic institutions, the Twenty-Fifth Amendment provides for vice-presidential succession,<sup>144</sup> but the constitutional text is otherwise silent as to disruptions of the presidential or congressional election process. Rather than providing for emergencies, the Constitution leaves to Congress and the several states the authority to establish a timetable for federal elections.<sup>145</sup> It gives no indication of how either derailing disruptions to voting (e.g. natural disasters or terrorist attacks) or ex post evidence of outcome-determinative fraud would be addressed. Finally, the Constitution guarantees that states must have a “republican form of government”, which might (if ultimately construed) prove salient to the threat of authoritarian reversion at the subnational level.<sup>146</sup>

In practice, this gap-filled textual regime allows the executive great latitude in crafting responses to emergencies that do not disrupt the political process. Consider the historical record of suspensions of the writ of habeas corpus. A cursory glance at this history undermines the Framers’ empirical assumption that Congress would be an active agent in policing the constitutional scheme. In practice, the executive generally takes the initiative while Congress remains a relatively passive actor. During the Civil War, Congress suspended the writ only after Lincoln had already de facto done so. President Ulysses Grant suspended the writ in some parts of the South pursuant to the Reconstruction-era Civil Rights Act.<sup>147</sup> And President Roosevelt suspended the writ in Hawaii during World War II under a 41-year old statutory authorization.<sup>148</sup>

Often, even minimal requirements of statutory authorization turn out to be parchment barriers. The executive, for example, has consistently asserted authority to use military force in emergencies even absent congressional permission.<sup>149</sup> Nor do enumerated individual rights provide a substantial restraint upon the executive. As a doctrinal matter, many individual rights have been glossed as containing an exigency exception,<sup>150</sup> or provide less resistance when emergency or security concerns are

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<sup>144</sup> U.S. CONST. amend. XXV, §1 (establishing that upon removal, death, or resignation of the President, the Vice President becomes President). The succession rules are otherwise governed by statute. See Presidential Succession Act of 1947, 3 U.S.C. §19(d)(1).19(a)(1), (b), 19(d)(1).

<sup>145</sup> U.S. CONST. Art. I, § 4, cl. 1.

<sup>146</sup> U.S. CONST. Art. IV, § 4. On subnational authoritarianism see GIBSON, *supra* n. 49.

<sup>147</sup> Barnett, *supra* note 143, at 254.

<sup>148</sup> *Id.* at 252; see generally HARRY SCHEIBER AND JUNE SCHEIBER, BAYONETS IN PARADISE: MARTIAL LAW IN HAWAII DURING WORLD WAR II (2016).

<sup>149</sup> Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CAL. L. REV. 1401, 1429, 1445 (2016) (discussing the shifting allocation of war powers in the more general context of interbranch relations).

<sup>150</sup> See, e.g., *Kentucky v. King*, 131 S. Ct. 1849, 1856-58 (2011) (allowing exigency exception to the Fourth Amendment’s warrant requirement to control even when police created the exigency).

proposed as the relevant governmental interest.<sup>151</sup> In any event, most constitutional remedies are generally only available when a clear constitutional rule has been willfully violated—a condition unlikely to obtain in exigent circumstances.<sup>152</sup>

As a result of these various considerations, constitutional bounds are quite elastic in real or purported emergencies, with little reason for officials to anticipate either ex ante injunctive barriers or ex post damages actions. In addition, Congress has enacted a wide range of statutory emergency powers of surveillance, detention, and force, that in net sustain and expand this elasticity.<sup>153</sup> As a result, it will be the rare instance in which a desired emergency response cannot be routed through existing statutory and constitutional channels. Hence, while legal elasticity in the context of exigency has the arguable cost of failing to limit prohibit or punish hasty, unwise, or discriminatory actions, it has the benefit of mitigating the need to adopt extra-legal measures.<sup>154</sup> Emergencies can be managed within the framework of ‘ordinary’ statutory, doctrinal, and textual frameworks: There is no cause for disruption of the democratic system in order to secure additional powers that might be perceived as necessary. Moreover, to the extent that Justice Jackson was correct that “emergency powers would tend to kindle emergencies,”<sup>155</sup> the constitutional scheme may have the benefit of limiting downstream destabilization after policy compulsions subside. In combination, these factors mean that security-related emergencies, even if they impose grave costs to individual welfare and rights, do not press toward political disruption. To be sure, this leaves open the somewhat smaller risk that an emergency proves an opportunity for an opportunistic leader to snuff out democratic competition with the aid of the military. But since much the same result can be achieved by means less likely to provoke popular mobilization, we think this is unlikely absent a gross miscalculation. In short, we think the current constitutional regime for emergencies does not engender substantial pressure toward authoritarian reversion because of its elasticity (even as, we stress, it does a rather miserable job of resisting violations of individual rights violations).

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<sup>151</sup> For an example of the flaccid application of strict scrutiny when the government invokes security as a justification for infringing on First Amendment rights, see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010); Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. Sidebar 16, 21-22 (2012) (criticizing the Court for its deferential attitude to the government’s security-related claims).

<sup>152</sup> See Huq, *Judicial Independence*, *supra* note 51, at 1-40 (describing current regime of constitutional remedies).

<sup>153</sup> See Special Senate Comm. on Nat’l Emergencies & Delegated Emergency Powers, 93d Cong., A Brief History of Emergency Powers in the United States, at v (Comm. Print 1974) (Frank Church & Charles McC. Mathias) (“Emergencies have become the norm”).

<sup>154</sup> *Cf.* Gross, *supra* note 61, at 1023-24 (advocating an “Extra-Legal Measures model” pursuant to which “public officials that they may act extralegally when they believe that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions” and then allow for public sanction). For criticism of this model, see Huq, *Uncertain Laws*, *supra* note 62, at 99-102 (criticizing the feasibility of this model).

<sup>155</sup> *Youngstown v. United States*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

On the other hand, the constitutional regime of presidential succession is underspecified, while doubts have been raised about the legality of the 1947 gap-filling statute<sup>156</sup> and the specter of disputes among potential presidential successors have been raised.<sup>157</sup> If an emergency succession after the incapacitation of both the president and the vice-president were to be derailed by litigation, the Constitution contains no provision for early elections as a democratic replacement option. It thus seems to us that there remains a risk of slippage into chaos because of the potentially imperfect legal regime for presidential succession.<sup>158</sup>

What, though, of the risk of a military coup d'état against a sitting president? A central bulwark against that eventuality is firm civilian control over the military. The Constitution here speaks with more clarity. A civilian president is "Commander in Chief."<sup>159</sup> His or her policy-making authority, moreover, has historically been understood to be hedged around by Congress' Article I authorities to enact military legislation.<sup>160</sup> As a result, absent some extraordinary (and historically unsupported) claim that the president stands above the statutory law when it comes to the military, the Constitution not only speaks against military usurpation but also presidential deployment of the military as an instrument of political aggrandizement.<sup>161</sup>

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<sup>156</sup> See Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995).

<sup>157</sup> William F. Brown & Americo R. Cinquegrana, *The Realities of Presidential Succession: 'The Emperor Has No Clones'*, 75 GEO. L.J. 1389, 1444-45 (1987) (describing such a conflict).

<sup>158</sup> What if Congress were subject to substantial disabling casualties? Article I, sections 2 and 3, vest authority at the state level to replace representatives and Senators by election and temporary appointment respectively. This diffuses the power to manage a legislative succession to geographically diffuse seats of governmental power. These are unlikely to all be simultaneously disrupted, but it is not hard to imagine that the process of reselecting federal legislators would take considerable time, creating a hazardous gap in federal decisional authority.

<sup>159</sup> U.S. CONST. art. II, §2 ("The President shall be Commander in Chief of the Army and Navy of the United States...."). The Supreme Court has viewed this clause as the locus of civilian control. *Parker v. Levy*, 417 U.S. 733, 751 (1974) ("The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors." (internal quotation marks omitted)).

<sup>160</sup> See, e.g., U.S. CONST. art. II, § 1, cls. 6 & 8. On the historical record, see Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 303 (2008) ("[There is a] vast body of legislation regulating how the Commander in Chief could (and could not) use the military. In the face of these laws, early Commanders in Chief saluted smartly, consistently deferring to Congress and never doubting the constitutionality of legislative micromanagement.").

<sup>161</sup> This corresponds to the policy concerns that were most salient at the time of the Founding. David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 527 (2008) (describing the Framers as animated by a "fear of military coups, the countervailing fear of civilian abuse of military power, and concern about adventurism").



We think that those risks still obtain today, especially in the wake of an exogenous shock such as a natural disaster or a violent attack, albeit in a weaker form than at the Founding.<sup>162</sup> Yet it is striking that the forms of military intervention in civilian political decision-making that concern contemporary commentators do not rise to anywhere near the level of an authoritarian reversion. Instead, they concern retail interventions, typically on matters that relate to the military's operation and missions.<sup>163</sup> That is, the current pattern and practice of behavior by military officials—and in particular the small-bore nature of their interventions into the civilian democratic process—are not consistent with the assumption of an armed force champing at the bit of civilian control, and seeing to usurp such control.

One reason to think that risk of a coup against the president is unlikely resides in the very organization of the armed forces, which is divided into services in intense competition with each other in a manner that increases the coordination costs that would be required to effectuate a coup d'état.<sup>164</sup> In addition, the continued ability of the President to manipulate the chain of command, through promotion, reassignment and even dismissal, has not yet been called into question.<sup>165</sup> On the other hand, as some commentators have noted with concern, it is also the case that the military's involvement "across a broad spectrum of heretofore purely civilian activities" could lead to the penetration of military personnel into civilian life.<sup>166</sup> To date, however, we see little evidence that that feared diffusion of military personnel has occurred, or that it is actively sought by any powerful interest group. Furthermore, to reiterate a point made above, the relatively unconstrained nature of executive power to respond to emergencies undermines the argument made in other countries that "only the military" is able to govern effectively in crisis.<sup>167</sup>

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<sup>162</sup> *Id.* at 532-33 ("Concerns about military interference with politics, presidential abuse of the commander in chief power, and military adventurism remain alive and well."); accord Feavor, *Civil-Military Relations*, *supra* note 63, at 230.

<sup>163</sup> See Luban, *supra* note 161, at 534 (discussing on-the-record statements by officers that might have had a political effect); Pearlstein, *supra* note 119, at 799-800 (discussing military lawyers' interventions on detention and interrogation policies during the second President Bush's time in office).

<sup>164</sup> The division into services originates in the National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified in scattered portions of the U.S. Code). Histories of the Act suggest that the division of the services not an attempt to identify an optimal design, but the play of interests among bureaucratic factions capable of influencing Congress at the moment of enactment. AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JSC, AND NSC 57-62* (1999).

<sup>165</sup> Rosa Brooks, *Obama vs. the Generals*, POLITICO, Nov. 2013, <http://www.politico.com/magazine/story/2013/11/obama-vs-the-generals-099379>.

<sup>166</sup> Dunlap, *supra* note 109, at 8. In other work, Dunlap worries that the military will come to be seen as a "deliverer" that can solve "economic and social problems [that] stubbornly defy civilian solution." Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 357 (1994).

<sup>167</sup> Were the would-be autocrat, however, to be erratic and lack strategic sense, the risk of a military coup rises substantially.

But the chain of command should not be fetishized. Consider the possibility of an elected civilian president who is willing to either use the military as a tool of repression, or is willing to defer completely to military commanders. In such a circumstance, in which there is perfect alignment between the president and the military, the effects will be exactly the same as if there were actual military rule. As has been observed in the context of the separation of powers between Congress and the executive, structural constitutional constraints may be less effective when preferences are aligned across institutions.<sup>168</sup> Unlike the interbranch context, however, there is no obvious mediating mechanism analogous to a political party that can align presidential and military interests. To the contrary, there is some evidence of strong historical connections between Congress and the military, based on shared interests in localized spending on military installations.<sup>169</sup> Such convergent interests might cut against the prospect of a presidential-military alliance to subvert or suspend democratic institutions.

#### 4. Summary

In short, while some fear authoritarian reversion in the United States, we conclude that there is little actual risk of such a development. In the next section we introduce a different modality, constitutional retrogression, and suggest that a rather different pattern obtains in that context.

Without anticipating the arguments developed below, it is worth underscoring a point about the coexistence of the two mechanisms that we have identified. To the extent that a political actor wishes to derogate from democracy, and there are two pathways open to her, the fact that one has lower attendant transaction costs will make the other trajectory comparatively less attractive. An easier path, that is, makes the hard road less desirable. A dynamic of this sort may well be at work in the interaction of authoritarian reversion and constitutional retrogression: If the latter turns out to enable much the same result at a substantially lower cost, then it would be unsurprising if it crowded out authoritarian reversion. Hence, the potentiality of the mechanism discussed in Part III below is salient too to an explanation of why the risk of American authoritarian reversion now seems relatively small.

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<sup>168</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312–16 (2006) (discussing interest convergence across institutions).

<sup>169</sup> REBECCA THORPE, *THE AMERICAN WARFARE STATE: THE DOMESTIC POLITICS OF MILITARY SPENDING* 5-6 (2014) (describing close linkages between legislators and the military based on shared interests in military spending). Congress, however, at times mandates spending on projects and capabilities that the military resists as functionally obsolete. Walter Pincus, *It Appears from the Hill that the Military Has Money to Spare*, WASH. POST, Dec. 19, 2012, at A19. The military's inability to resist such proposals points to a deeper lack on political capacity on its part. Cf. Kaija Schilde, *War Powers, Private Actors, and National Security State Capacity*, 95 B.U. L. REV. 1369, 1380 (2015) (“If the executive of a state wants to change the status quo by enacting and enforcing a policy choice and it cannot do so, then, through a comparative politics lens, we say that state lacks capacity.”).

### III. The Emerging Threat of Constitutional Retrogression

But not every wolf bares its teeth and claws, or stands outside the door baying for blood. Some threats to constitutional liberal democracies do not announce themselves, and are all the more dangerous for it. This Part explores the risk to democracy from slow, incremental, and endogenous decay as opposed to the rapid external shock of a coup or an emergency declaration. Constitutional retrogression, as we have defined it involves a simultaneous decay in three institutional predicates of democracy—the quality of elections, speech and associational rights, and the rule of law. It is retrogression, rather than reversion, that poses the greatest risk to democracy in the U.S. context.

We begin this Part by demonstrating that retrogression is the modal species of democratic recession across Latin America, Eastern Europe and Russia, and Asia. Drawing on comparative law and politics analysis of these cases, we then extract five specific mechanisms by which constitutional retrogression unfolds. These are (i) constitutional amendment; (ii) the elimination of institutional checks; (iii) the centralization and politicization of executive power; (iv) the contraction or distortion of a shared public sphere; and (v) the elimination of political competition. Our final contribution in this Part is to examine the role of the U.S. Constitution in either parrying or exacerbating these five threats. To avoid endogeneity concerns, we focus on relatively durable elements of constitutional structure and rights, as well as gaps in the text and doctrine that interact with the observed mechanisms of constitutional retrogression. We do not, that is, imagine constitutional rules an antidemocratic leader might induce. This analysis yields a mixed evaluation, with some elements of the current constitutional dispensation generating friction and some enabling incrementalist backsliding.

#### A. The Global Diffusion of Constitutional Retrogression

Constitutional retrogression is best understood as a partial substitute for authoritarian reversion. The incremental erosion of liberal democracy's institutional and social premises typically yields forms of concentrated state power immune from democratic oversight. The degree of concentration or immunity from democratic control, though, may be less than would be achieved through a coup or an emergency declaration.<sup>170</sup> But in expectation, constitutional retrogression may also be a more attractive path away from democracy because it attracts less resistance. Simply put, it is less costly to observe and evaluate a single rupture from democratic practice than it is to observe and evaluate the aggregate effect of a totality of incremental cuts into democratic, liberal, and constitutional norms. Because no democratic system is perfect, there will always be some quanta of such violations. The precise point, however, at

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<sup>170</sup> Cf. Bermeo, *supra* note 70, at 6 (“Backsliding can take us to different endpoints at different speeds.”). Again, there may be some exceptions. See *supra* note 79.

which the volume of democratic and constitutional backsliding amounts to constitutional retrogression will be unclear—both *ex ante* and a contemporaneous matter.<sup>171</sup>

At the same time, backsliding may involve a deliquescence of liberal democratic institutions into “fluid and ill-defined” arrangements, a condition in which uncertainty over both diagnosis and remedies is rampant.<sup>172</sup> Under such circumstances, there will be no crisp focal point that can supply diffuse social and political actors with a coordinating signal that democratic norms are imperiled.<sup>173</sup> The absence of a focal point will render popular and oppositional resistance to the antidemocratic consolidation of political power more costly and less effective. In short, it is precisely because it does not come dressed as a wolf that the threat of constitutional retrogression is so grave. Like the proverbial boiling frog, a democratic society in the midst of retrogression may not realize its predicament until matters are already beyond redress.

Given these dynamics, it is unsurprising that constitutional retrogression has come to dominate authoritarian reversion as the anti-democrat’s instrument of choice. In sheer numbers, a larger number of countries have suffered declines in democratic quality than have undergone some form of democratic collapse.<sup>174</sup> Scholars of comparative politics have been observing incremental regression in a wide range of countries, including Russia, Hungary, Poland, Thailand, Turkey, Ukraine, Venezuela and many others.<sup>175</sup>

The trend may be accelerating. Erdmann’s study of democratic trends between 1974 and 2008, for example, identified 53 instances in which a democracy shifted either to a “hybrid” or an “authoritarian” regime.<sup>176</sup> In 48 of the cases identified by Erdmann, the shift away from democracy was not absolute, but incremental and subtle; it has happened “in many different ways and for many different reasons.”<sup>177</sup> Salient to our

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<sup>171</sup> This is the case with vague concepts generally. See Hyde, *supra* note 83 at 7 (noting the difference between the possibility that “[n]othing can be known’ about vague concepts “has been rejected in favour of ‘The precise boundaries to knowledge itself cannot be known’”).

<sup>172</sup> Bermeo, *supra* note 70, at 6.

<sup>173</sup> See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54-55 (1960) (describing operation of focal points under conditions of multiple equilibria); Weingast, *supra* note 45 (coordination for constitutional enforcement); John M. Carey, *Parchment, Equilibria and Institutions*, 31 *COMP. POL. STUD.* 735 (2000) (describing constitutional text as a focal point).

<sup>174</sup> Erdmann, *supra* note 97, at 34-35; accord LARRY DIAMOND ET AL, *THE QUALITY OF DEMOCRACY* (2004).

<sup>175</sup> Levitsky & Way, *supra* note 13, at 45.

<sup>176</sup> Erdmann, *supra* note 97, at 34-35. Erdmann uses Freedom House categories, drawing on their ordinal scale. “Free” countries are those with a score of 1.0 to 2.5 on the index; “partly free” have scores from 3.0 to 5.0, and count as hybrid regimes; and “not free” autocracies have scores of 5.5 to 7.0.

<sup>177</sup> *Id.*; accord Lust & Waldner, *supra* note 17, at 5 (“[T]he vast majority of declines in the level of civil and political liberties are intra-regime changes.”).

inquiry here, the regularities that characterize authoritarian reversion—its correlation with younger and lower-income democracies<sup>178</sup>—do not hold in respect to constitutional retrogression. Older democracies (such as India and Venezuela) and high-income countries experience substantial losses in democratic quality, even though they do not experience authoritarian reversions.<sup>179</sup> A half dozen of Erdman’s cases were high income countries that backslid into hybrid regimes.<sup>180</sup> Moreover, as a historical matter, the United States has not proved immune from such backsliding, even if it has not and will not collapse into authoritarianism. Indeed, by the commonly used Polity measure, the United States suffered a decline in its democratic performance from 1850 through 1870.<sup>181</sup>

While it is hard to rigorously quantify the frequency of constitutional retrogression, one crude proxy is declines in the level of democracy, as measured by the POLITY database. Table 2 records all instances in which a democracy (measured by Polity scores of 6 and above) suffered a decline of quality, without experiencing total collapse. We measure the Polity score 5 years after the drop. If it falls into the range associated with autocracy (less than -5 on the polity scale), we discard the observation. This excludes all reversions, but it also means the estimate of retrogressions will be a lower bound. When two or more drops occur within a span of a decade, we aggregate them. Using this metric, we can identify 37 constitutional retrogressions in 25 different countries. This suggests that roughly one out of eight countries will, in its lifespan, experience constitutional retrogression.

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<sup>178</sup> See *supra* text accompanying notes 100 to 108.

<sup>179</sup> Erdmann, *supra* note 97, at 34; cf. Alemán & Yang, *supra* note 70, at 17 (“[A] high level of development is by far the best guarantor of democratic durability [against authoritarian reversion].”).

<sup>180</sup> Erdmann, *supra* note 97, at 43.

<sup>181</sup> Data on file with authors.

**Table 2: Democratic Retrogression**

<b>Country years</b>	<b>Polity score at outset</b>	<b>Polity score at end</b>	<b>Extent of retrogression</b>
Argentina, 1989	8	7	-1
Belgium, 2007	10	8	-2
Bolivia, 2003-2009	9	7	-2
Colombia, 1995	9	7	-2
Czechoslovakia, 1918	10	7	-3
Czech Republic, 2006	10	9	-1
Ecuador 1984	9	8	-1
Ecuador 2000	9	6	-3
Gambia 1981	8	7	-1
Georgia 2007	7	6	-1
India 1950	10	9	-1
India 1975	9	7	-2
Ireland 1921	9	8	-1
Ireland 1933	10	8	-2
Israel 1967	10	9	-1
Israel 1981	9	6	-3
Jamaica 1993	10	9	-1
Kenya 2007	8	7	-1
Madagascar 1997 -98	9	7	-2
Mali 1997	7	5	-2
Nigeria 1960	9	8	-1
Paraguay 1998	7	6	-1
Senegal 2007	8	7	-1
Solomon Islands 1978	10	7	-3
Somalia 1960	8	7	-1
Sri Lanka 1948	10	7	-3
Sri Lanka 1978	8	6	-2
Sri Lanka 2008-2010	6	4	-2
Turkey 1965	9	8	-1
Turkey 1993 -97	9	7	-2
Ukraine 1991	10	6	-4
Ukraine 2000	7	6	-1
Ukraine 2010 -14	7	5	-2
United States 1850-54	10	8	-2
Venezuela 1992	9	8	-1
Venezuela 1999-2001	8	6	-2
Venezuela 2004-2009	6	1	-4

These examples share an end-state: electoral authoritarianism, competitive authoritarianism,<sup>182</sup> illiberal democracy<sup>183</sup> semi-democracy, and hybrid regimes.<sup>184</sup> Whatever the label, the concept is at its core the same: regimes that use constitutional and democratic forms but are not close to fully democratic.<sup>185</sup> Whereas earlier authoritarian waves in Africa and Latin America took the form of military coups or revolutionary socialist regimes, the current wave of authoritarianism is strategic and sophisticated in its use of the democratic form. All are notionally governed under a constitution and according to the dictates of law. But rulers manipulate the law to reflect their interests, undermining the substance of democracy, albeit without losing its form. Even though most or even all of the individual steps are taken within constitutional limits, in sum they lead to qualitative changes in the legal and political systems.<sup>186</sup>

One way to capture the current extent of retrogression is to compare the number of jurisdictions that have seen advances as opposed to declines in the quality of their democracy. As Figure 2 demonstrates, they tend to move in parallel: when some countries deepened their democracy, others regress. In recent years, there has been an uptick in both phenomena, suggesting that retrogression at work in some countries, but not all.

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<sup>182</sup> Levitsky & Way, *supra* note 13, at 45.

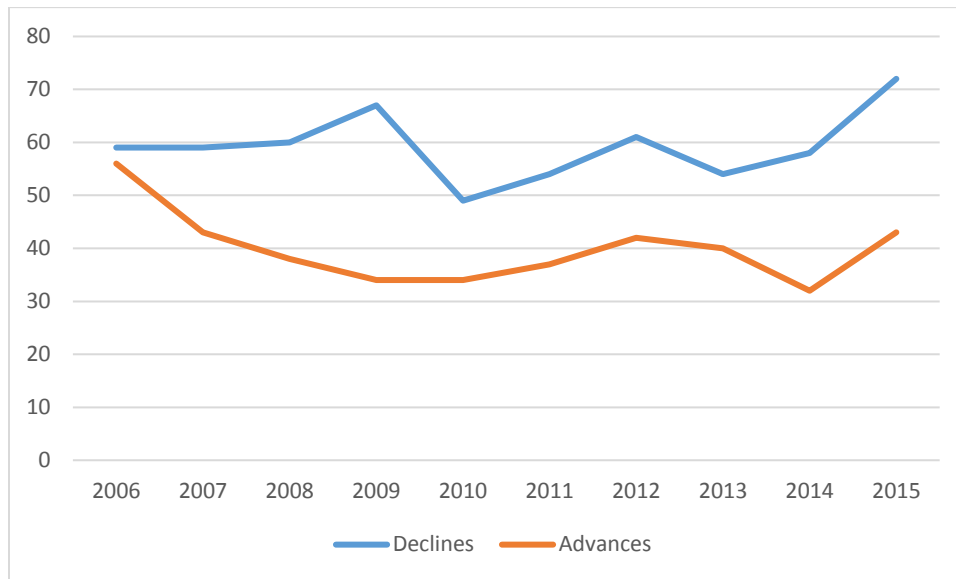
<sup>183</sup> Zakaria, *supra* note 78.

<sup>184</sup> Tushnet, *supra* note 39, at 395.

<sup>185</sup> JASON BROWNLEE, *AUTHORITARIANISM IN AN AGE OF DEMOCRATIZATION* (2006)

<sup>186</sup> Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 *GOVERNANCE* 559, 560 (2013) [hereinafter "Scheppele, *Frankenstate*"] ("When perfectly legal and reasonable constitutional components are stitched together to create a monster ... I call this a Frankenstate.").

**Figure 2: Democratic declines and advances**



Source: Freedom House data from Freedom in the World 2016

In short, the global rise of constitutional retrogression suggests that “focusing on the military and on classic coup politics as privileged objects of research may be morally, politically, and empirically questionable.”<sup>187</sup> We thus turn now to comparative experience with constitutional retrogression to better understand its specific institutional pathways and instruments.

## **B. Pathways of Constitutional Retrogression**

This section sets forth five pathways of constitutional retrogression: (i) constitutional amendment; (ii) the elimination of institutional checks; (iii) the centralization and politicization of executive power; (iv) the contraction of the public sphere; and (v) the elimination of political competition. In each instance, we supply examples from recent case studies. Our aim in so doing is to develop a clear understanding of the specific elements of constitutional design that either exacerbate or mitigate the risk of such democratic backsliding before applying this learning to the U.S. case.

### *1. Formal constitutional amendment*

The first and perhaps most obviously available pathway to democratic erosion uses formal constitutional amendment as a tool to disadvantage or marginalize political

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<sup>187</sup> Schedler, *supra* note 98, at 95.



opposition and deliberative pluralism.<sup>188</sup> Amendment of a Constitution's formal text can target institutional structures or liberal rights;<sup>189</sup> as such, it overlaps with the four functional categories described below. We agree, however, with David Landau that the typically distinctive nature of constitutions makes their amendment a unique avenue of democratic backsliding that warrants separate treatment.<sup>190</sup>

Perhaps the most straightforward use of constitutional amendments for anti-democratic ends concerns the alteration of term limits designed to forestall individuals' entrenchment in positions of supreme authority. For example, President Putin, when confronted with a term limit that would put him out of office, simply arranged for a constitutional amendment that would strengthen the powers of the prime minister, an office he duly occupied for a term before resuming the presidency.<sup>191</sup> Sri Lanka's President Mahindra Rajapaksa engineered a constitutional amendment in 2010 to allow him the chance to run again in 2016, while aggregating appointment power that had previously been dispersed among independent commissions.<sup>192</sup> Similar dissolutions of constitutional term limits are observed from Azerbaijan to Uganda.<sup>193</sup> Whereas in an earlier era, simply ignoring the constitution was a typical way of proceeding, since 1989, more than 75% of attempts at term limit extension proceed through constitutional amendment.<sup>194</sup>

Constitutional amendments can also be used to accomplish the other four categories of retrogression. In Hungary, Viktor Orban and the Fidesz party exploited a brief supermajority, abetted by serious seat-vote bias in the electoral system, to adopt a new constitution in 2011 that entrenched the Fidesz party's position in power.<sup>195</sup> Constitutional changes altered the composition and operation of the Constitutional Court, created a new National Judicial Office, and strengthened government power over

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<sup>188</sup> Landau, *supra* note 65, at 191 (arguing that "the use of constitutional tools to create authoritarian and semi-authoritarian regimes is increasingly prevalent"). .

<sup>189</sup> *Id.* at 196 (noting that anti-democratic constitutional amendments typically concern "(1) the electoral sphere and the extent to which incumbent and opposition figures compete on a level playing field, and (2) the extent to which the rights of individuals and minority groups are protected").

<sup>190</sup> *Id.* at 191.

<sup>191</sup> Ginsburg et. al., *supra* note 65, at 1812 ("Vladimir Putin opted to step down from the Russian presidency in favor of an informally empowered prime ministership, which provided him with an unlimited tenure, or at least one at the mercy of a sympathetic legislature controlled by his party.").

<sup>192</sup> Const. Sri Lanka (1978), 18<sup>th</sup> amendment.

<sup>193</sup> Ginsburg, et al., *supra* note 65, at 1811-12.

<sup>194</sup> Data on file with authors, drawing on Ginsburg, et al., *supra* note 65 (36% of pre-1990 attempts used amendment, whereas 75% of those thereafter do so.)

<sup>195</sup> Landau, *supra* note 65, at 209 (noting that the amendments "undermine [ ] horizontal checks on the majority and may help it to perpetuate itself in power indefinitely"); Miklós Bankuti, Gábor Halmai, and Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEM. 138 (2012).

the Electoral Commission, Budget Commission, and Media Board.<sup>196</sup> In this instance, constitutional amendment was employed alongside a number of subconstitutional mechanisms—an illustration of the complementarity of diverse antidemocratic tools.

## 2. *The elimination of institutional checks*

The practice of liberal democracy benefits from a measure of institutional heterogeneity within government. Concentration of authority within the state lower the cost of misuses of power and law violations. Although modern scholars are skeptical about the most ambitious claims on behalf of institutional separation between branches of government,<sup>197</sup> it remains the case that legislatures and constitutional courts have the capacity to play a restraining function, slowing down the centralization of state authority and the closing of democratic space. Drawing on examples from Mongolia, Bulgaria, and the Ukraine, for example, Samuel Issacharoff has documented “the distinct role of constitutional courts in maintaining the vibrant competitiveness of new democracies.”<sup>198</sup> The “antiparliamentary” turn of the Weimar chancellorship after the 1932 fall of Heinrich Brüning presaged and catalyzed the collapse of constitutional democracy in the wake of a period of effective legislative constraint of the presidency.<sup>199</sup> Institutional capacity, it is worth emphasizing, does not entail institutional will. Weimar courts, for example, never exercised an effectual restraining force on post-1932 presidential aggrandizement,<sup>200</sup> But in the absence of either de facto or de jure incentive gaps between different branches of government, there is no chance of a frictional constraint from constitutional structure against democratic backsliding.

Recent case studies of constitutional retrogression provide a number of instances in which interbranch checks have been systematically and deliberately dismantled. East Europe provides particularly vivid examples. In addition to seeking constitutional amendments, the Hungarian government also used legislation to weaken the courts and narrow the Constitutional Court’s jurisdiction.<sup>201</sup> It also expanded the number of judges on that bench, and then more generally used appointment powers to pack the independent oversight institutions meant to ensure the rule of law.

In Poland, the Law and Justice Party (PiS) won both presidential and parliamentary (Sejm) elections in 2015. Unlike its counterpart in Hungary, it lacked a sufficient majority to amend the Constitution. Nevertheless, it was able to manipulate

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<sup>196</sup> Landau, *supra* note 65, at 209-10.

<sup>197</sup> See, e.g., Levinson & Pildes, *supra* note 168, at 2312–16.

<sup>198</sup> SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN AN ERA OF CONSTITUTIONAL COURTS 200 (2015) [hereinafter “ISSACHAROFF, FRAGILE DEMOCRACIES”]; accord Bugarcic & Ginsburg, *supra* note 66, at 71.

<sup>199</sup> Lindseth, *supra* note 61, at 1363.

<sup>200</sup> Karl Loewenstein, *Law in the Third Reich*, 45 YALE L.J. 779, 788 (1936).

<sup>201</sup> Bugarcic & Ginsburg, *supra* note 66, at 73 (enumerating legislated changes).

institutions to its benefit, launching “a frontal assault” on the Constitutional Tribunal.<sup>202</sup> It was helped, in part, by the outgoing legislative majority, which in June before the elections passed a new Constitutional Court Act that, *inter alia*, sought to accelerate appointments to five impending vacancies on the Constitutional Court.<sup>203</sup> However, after the elections, the new PiS President refused to seat the newly appointed judges on the grounds that the law was unconstitutional. This created ambiguity about the status and composition of the Court. The PiS then amended the Constitutional Court Act, allowing for the Sejm to appoint new justices, and also declared the prior appointments invalid.<sup>204</sup> Further amendments in December 2015 required that all cases be decided by the plenary bench of the Court, that decisions be taken by a 2/3 vote, and that 13 out of 15 judges be present to form a quorum. Since less than 13 judges had unambiguous appointment status, this meant that the Court would be unable to make any valid decisions. Furthermore the amendments required the Court to hear cases in the sequence they arrived at the Court, so no priority could be given to urgent cases. The Court thus faced a crisis of personnel and procedure: Should it accept the amendments it would be unable to hear a challenge to the very law disabling it.<sup>205</sup> In response, the Court struck the amendments in March 2016.<sup>206</sup> The government, in turn announced that it would ignore this ruling, which it declined to publish in the official gazette.<sup>207</sup> As the honorary speaker of parliament said, “it is the will of the people, not the law that matters, and the will of the people always tramples the law.”<sup>208</sup>

The procedural sophistication of the PiS shows how, even operating within normal constitutional rules, a determined actor can paralyze and undermine safeguards of legality. While Europe’s institutions expressed concern about the erosion of the rule of law, the PiS’s and Fidesz’s observance of formal legality allowed both to remain within the broad framework of European governance.<sup>209</sup>

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<sup>202</sup> Joanna Fomina & Jacek Kucharczyk, *Populism and Protest in Poland*, 27 J. DEM. 58, 62-63 (2016).

<sup>203</sup> Lech Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland)* in TRANSFORMATION OF LAW SYSTEMS IN CENTRAL, EASTERN AND SOUTHEASTERN EUROPE: LIBER AMICORUM PROF. DR. DRES. H.C. RAINIER ARNOLD 63, 65 (Andrzej Szmyt and Boguslaw Banaszak, eds. 2016)

<sup>204</sup> *Id.* at 67.

<sup>205</sup> *Id.* at 71-72.

<sup>206</sup> Bugarcic & Ginsburg, *supra* note 66, at 72-73.

<sup>207</sup> *Id.*

<sup>208</sup> Tamas Gyorfı, AGAINST THE NEW CONSTITUTIONALISM 62-63 (2016) (quoting Tomasz Tadeusz Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, Int’l J. Const. L. Blog, Dec. 6, 2015, at: <http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense> )

<sup>209</sup> Marco Dani, *The “Partisan Constitution” and the Erosion of European Constitutional Culture*, in THE PARTISAN CONSTITUTION. THE FUNDAMENTAL LAW OF HUNGARY AND EUROPEAN CONSTITUTIONAL CULTURE (Marco Dani and Roberto Toniatti, eds. 2014).

### 3. *Centralizing and politicizing executive power*

Effectual constraints on self-dealing by elected officials to entrench themselves in office can emerge from within the executive branch, as much as from outside it. Of necessity, executive branches are plural, and potentially pluralist, institutions.<sup>210</sup> The design of specific subelements or the interaction between those elements can either facilitate constitutional retrogression or retard it. As a result, the internal ecosystem of institutional arrangements within the executive branch provides another site of potential incremental movement toward constitutional retrogression.

A central feature of effective governance is autonomous bureaucratic capacity, insulated from political control at the day-to-day level. Bureaucracies that “operated according to written rules and created stable expectations” have been an essential component of the powerful centralized state since the Chinese Qin dynasty.<sup>211</sup> At first blush, the relationship between bureaucratic capacity and democratic preservation is hard to discern. Indeed, it might be thought instead that effective bureaucratic operation requires a certain measure of insulation from redistributive politics: That is, where bureaucratic positions and favors are allocated on the basis of political connections, there is no particular reason to expect effectual government. In the late nineteenth century, for example, the U.S. federal government was characterized by a high-degree of “party-managed clientism,” constantly at risk of evolving into “pre corruption.”<sup>212</sup> As a result “democracy and state quality were clearly at odds.”<sup>213</sup>

But bureaucratic autonomy does not only stand in tension with democratic impulses. It also *facilitates* and *preserves* democracy in three distinct ways. *First*, early bureaucracies from the Chinese to the Prussian model evolved formal rules that restricted state power, for example by “clearly establish[ing] the boundary between private and public resources.”<sup>214</sup> Even the Chinese emperor, typically depicted as the embodiment of “oriental despotism”, was in fact highly constrained by the system of rules in which the state operated.<sup>215</sup> Bureaucracies are thus institutionally pivotal barriers to the misuse of state power either for the private gain of officials or for the

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<sup>210</sup> For a discussion of this point in the American context, see Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 352 (2016) (“The three branches of the federal government do not ... operate as monoliths. Rather, they are enveloped and infused by a teeming ecosystem of institutional, organizational, and individual actors within as well as outside of government.”).

<sup>211</sup> FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY, *supra* note 92, at 75.

<sup>212</sup> *Id.* at 144, 148.

<sup>213</sup> Francis Fukuyama, *Why is Democracy Performing so Poorly?*, 26 J. DEM. 11, 17 (2015).

<sup>214</sup> FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY, *supra* note 92, at 83-84.

<sup>215</sup> KARL WITTFOGEL, ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER (1957)

electoral gain of a ruling faction. It is this basic insight that underwrites the growing literature on the “internal separation of powers” in American administrative law. Of particular importance in this regard is the role of “various professionals—lawyers, scientists, civil servants, politicians, and others” who are “directly and indirectly” empowered.<sup>216</sup>

*Second*, bureaucracies tend to be conservative, even Burkean institutions. This quality both hinders rapid democratic change and makes democratic decision-making feasible by preserving decisions beyond the life of the enacting coalition. The bias toward the status quo is symmetric: Just as bureaucratism may make progressive reform difficult to achieve, it also slows down rapid shifts away from liberal democratic norms in the face of political movements that seek to challenge them.

*Third*, in the absence of an effectual bureaucracy, a potential antidemocrat can use a patronage-based state structure to “buy support from political elites and citizens” in ways that undermine the efficacy of electoral mechanisms.<sup>217</sup> Distinguishing normatively troubling clientism—the “larger-scale exchange of favors between patrons and clients [via] a hierarchy of intermediaries”<sup>218</sup>—and appropriate democratic responsiveness in the form of pork-barreling and mundane interest-group politics presents difficult line-drawing questions. But in the case where state resources have the practical effect of creating high or insuperable hurdles to electoral rotation, then it seems plausible to describe patronage as an instrument of constitutional retrogression. In contrast, it has long been noted that a meritocratically selected bureaucracy is in fact a vehicle for mobility and political representation of groups that might otherwise be shut out of politics.<sup>219</sup> There is little doubt, for example, that the U.S. federal bureaucracy is more representative of the average American than, say, the elected Congress.<sup>220</sup>

Across the various nations that have experienced constitutional retrogression in recent years, the power to appoint officials has been an instrument used to “neutraliz[e]” potentially resistant elements of government, “particularly the transparency and accountability agencies.”<sup>221</sup> In Hungary, for example, Fidesz reorganized the Media Council, the Budget Counsel, the National Bank, the Elections Commission, and the Ombudsman Office in moves that were “frequently accompanied

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<sup>216</sup> Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011).

<sup>217</sup> Dawn Brancati, *Democratic Authoritarianism: Origins and Effects*, 17 ANN. REV. POL. SCI. 313, 317 (2014).

<sup>218</sup> Fukuyama, POLITICAL ORDER AND POLITICAL DECAY, *supra* note 92, at 86.

<sup>219</sup> Norton Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808 (1952); *see also* Ali Farzamand, *Bureaucracy and Democracy: A Theoretical Analysis*, 10 PUB. ORG. REV. 243 (2010).

<sup>220</sup> Long, *supra* note 219, at 219.

<sup>221</sup> Scheppele, *Worst Practices*, *supra* note 72, at 16.

by the removal of incumbent officials.”<sup>222</sup> In the gaps that remains, Fidesz took “the existing patronage system” to an “extreme” such that only companies and individuals with connections to the ruling party could obtain contracts or support from the state.<sup>223</sup>

Turkey provides another useful example of a country wherein a robust state apparatus is being systematically undermined. The bureaucracy, along with the military and judiciary, have been the central institutions of the modern Turkish state. Judicial reforms in Turkey under Recep Tayyip Erdogan’s leadership have vested the president with “more control over those who would select the ordinary judges and prosecutors.”<sup>224</sup> In the wake of an alleged coup attempt in July 2016, the Erdogan government purged or detained 9,000 police officers, 21,000 private school teachers, 10,000 soldiers, 2,745 judges, 1,700 university deans, and 21,700 Ministry of Education officials.<sup>225</sup> This is merely the overt form of a measure that tacitly occurs in the context of many constitutional retrogressions.

#### 4. *Degrading the public sphere*

The practical operation of liberal democracy requires a shared epistemic foundation.<sup>226</sup> A central claim of behalf of democracy’s comparative advantage as a strategy of governance is the claim, inspired by the Condorcet Jury Theorem, that larger pools of decision-makers are more likely to reach empirically accurate decisions.<sup>227</sup> Where information is systematically withheld or distorted by government so as to engender correlated, population-wide errors, democracy cannot fulfill this epistemic mandate.

One need not rely on Condorcetian premises, however, to posit epistemic minima for effectual constitutional liberal democracy. It suffices that democracy entails

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<sup>222</sup> *Id.*

<sup>223</sup> Zsolti Enyedi, *Populist Polarization and Party System Institutionalization: The Role of Party Politics in De-Democratization*, 63 *PROB. POST-COMMUNISM* 210, 214 (2016).

<sup>224</sup> *Id.* at 29. Alternatively, “judicial support networks” can be targeted. *Id.*

<sup>225</sup> Josh Keller et al., *The Scale of Turkey’s Purge is Nearly Unprecedented*, *N.Y. TIMES*, Aug. 2, 2016, [http://www.nytimes.com/interactive/2016/08/02/world/europe/turkey-purge-erdogan-scale.html?\\_r=0](http://www.nytimes.com/interactive/2016/08/02/world/europe/turkey-purge-erdogan-scale.html?_r=0).

<sup>226</sup> Elizabeth Anderson, *The Epistemology of Democracy*, 3 *EPISTEME* 8, 10 (2006). (“Epistemic democrats focus on the question of whether democratic institutions can be relied upon to make the right decisions, according to external criteria.”).

<sup>227</sup> For an early formulation of this position, see Bernard Grofman & Scott L. Feld, *Rousseau’s General Will: A Condorcetian Perspective*, 82 *AM. POL. SCI. REV.* 567 (1988); for criticism, see Anderson, *supra* note 226, at 11-13. The best recent defense of democracy as epistemically superior in comparison to oligopoly and dictatorship is Hélène Landemore, *Democratic Reasons: The Mechanisms of Collective Intelligence in Politics*, in *COLLECTIVE WISDOM* 251, 282 (Hélène Landemore & Jon Elster, eds., 2012) (“[T]he good thing about democracy is that it naturally economizes on individual intelligence, while maximizing through sheer numbers the key factor of cognitive diversity.”).

periodic electoral choices as to whether a specific coalition or official should maintain state authority. Elections bring coalitions to power, and those coalitions then enact policies with consequences in the world. Subsequent polls at which those coalitions seek renewed democratic authority would seem to be a mere formality in the absence of information about the consequences of enacted measures.<sup>228</sup> Elections must make “the elected an object of control and scrutiny.”<sup>229</sup> Hence, a continuous flow of information about the interaction between government policies and external conditions seems to be a minimal prerequisite for democratic judgment. To be sure, this epistemic foundation need not be flawless in coverage or quality.<sup>230</sup> But at some point, epistemological failure can become so extensive and asymmetrically tilted in favor of one coalition or candidate that it starts to render the exercise democratic choice futile.<sup>231</sup>

To render this point more concretely, imagine a government with that purports to produce public security by extensive use of detention powers targeting discrete minority populations. The government fails to disclose that its policy is not based on evidence that the minority in question in fact includes a meaningful number of individuals who pose a security threat. Moreover, it employs a divisive language of identity-based differences to both vindicate its policy and to raise political support among non-minority voters.<sup>232</sup> The absence of accurate information about the government’s policy not only facilitates grave violations of individual rights, it also allows the government to deploy those grave violations as a means of amplifying public support. Incomplete information thus not only leads voters to erroneous judgments, but allows government to promote exclusionary ideals and also to eliminate dissenting minorities from the electorate.

The recent retrenchment of democracy around the world provides concrete examples of how the shared epistemic foundation of democracy can be corroded. In 2000, the Chávez government enacted a media law that gave the government free rein to suspend or revoke broadcasting licenses as “convenient.”<sup>233</sup> Four years later, another statute barred the electronic transmission of material that could “foment anxiety in the

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<sup>228</sup> Anderson, *supra* note 226, at 12 (“Democratic decision-making needs to recognize its own fallibility, and hence needs to institute feedback mechanisms by which it can learn how to devise better solutions and correct its course in light of new information about the consequences of policies.”).

<sup>229</sup> NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH AND THE PEOPLE* 21 (2014).

<sup>230</sup> Cf. JASON STANLEY, *HOW PROPAGANDA WORKS* 50 (2015) (“[L]iberal democratic vocabulary is often used propagandistically, in states whose practices fall too short of its ideals.”).

<sup>231</sup> Stanley seems to take the view that the United States has already reached that threshold. *Id.* at 51. We evaluate the situation differently, although we are sympathetic to his identification of existing shortfalls in the American practice of liberal democracy.

<sup>232</sup> This hypothetical is based on the internment of Japanese-Americans during World War II. Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 651-57 (1997).

<sup>233</sup> Corrales, *supra* note 67, at 39.

public or disturb public order.”<sup>234</sup> By 2014, the Chávez regime had undermined press pluralism in favor of a “communicational hegemony ... in both print media and television.”<sup>235</sup> In Turkey, a long campaign against journalists was accelerated through the post-coup closure of about 100 media outlets in July-August 2016.<sup>236</sup> Indeed, Turkey has become one of the most repressive environments for journalists globally today.<sup>237</sup> And in Sri Lanka, the Rajapaksa government used the broad restrictions of the Official Secrets Act and the 1979 Prevention of Terrorism Act, including a prohibition on bringing the government into “contempt,” to suppress and intimidate journalists.<sup>238</sup>

In Poland, the PiS enacted a media law in December 2015 that required all broadcasters to have a board controlled by the government and “sidelined” a constitutional body charged with ensuring media independence.<sup>239</sup> It also “appointed a PiS spin doctor as president of public television” and “purg[ed] journalists and media workers suspected of lacking enthusiasm for the government’s political agenda.”<sup>240</sup> Similarly, in Hungary, at the same time that the Constitution was amended, the Fidesz-dominated Parliament enacted legislative measures narrowing the independence of media outlets.<sup>241</sup> Finally, in Russia, the Putin regime has harnessed the media to “gain insight into the fears and needs of particular groups,” and to create a simulacra of democratic back-and-forth via call-in sessions chaired by the President himself.<sup>242</sup>

Finally, an antidemocratic coalition or official can directly target the civil society elements—journalists, lawyers, NGOs, and foundations—that might mobilize to rest movement away from liberal democratic ideals.<sup>243</sup> Libel law and non-profit regulation provide instruments to achieve these ends.<sup>244</sup>

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 39-40.

<sup>236</sup> Keller, et al., *supra* note 225.

<sup>237</sup> *Media Freedom in Turkey: Sultanlic Verses*, ECONOMIST, Aug. 6, 2016, <http://www.economist.com/news/europe/21703375-turkish-governments-crackdown-extends-journalists-and-poets-sultanlic-verses>.

<sup>238</sup> Freedom House, *Press Freedom in Sri Lanka*, <https://freedomhouse.org/report/freedom-press/2015/sri-lanka>.

<sup>239</sup> Fomina & Kucharczyk, *supra* note 202, at 63.

<sup>240</sup> *Id.*

<sup>241</sup> Judy Dempsey, *Hungary Waves off Criticism Over Media Laws*, N.Y. TIMES, Dec. 25, 2010, [http://www.nytimes.com/2010/12/26/world/europe/26hungary.html?\\_r=0](http://www.nytimes.com/2010/12/26/world/europe/26hungary.html?_r=0)

<sup>242</sup> Brancati, *supra* note 217, at 316.

<sup>243</sup> Tamar Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281, 292 (2014).

<sup>244</sup> The selective enforcement of tax laws has also been used to control the media. Andrew S. Bowen, *How Putin Uses Money Laundering Charges to Control His Opponents*, THE ATLANTIC (July 17, 2013), <http://www.theatlantic.com/international/archive/2013/07/how-putin-uses-money-laundering-charges-to-control-his-opponents/277903/>; TINA BURRETT, TELEVISION AND PRESIDENTIAL POWER IN PUTIN'S RUSSIA 43-44



A recent suit of Russian legislation, enacted at the beginning of Putin's second term in office in 2012, demonstrates how registration and libel laws can be wielded for antidemocratic ends. Consider first libel law. In May 2012, the Putin government reintroduced criminal liability for libel, which had been repealed by the Medvedev administration.<sup>245</sup> This 2012 measure imposes large fines and sentences of up to 480 hours' forced labor on "the spread of false information discrediting the honor and dignity of another person or undermining his reputation."<sup>246</sup> The law also allowed retroactive reopening of previously suspended or terminated suits.<sup>247</sup> One commentator has described the subsequent use of the law as an "onslaught" of libel suits.<sup>248</sup> Earlier iterations of the same measure had been employed by regional governments to fine and imprison journalists who published stories about waste and abuse.<sup>249</sup>

In the same era, a suite of NGO and "anti-extremist" laws have been enacted under Putin with "deliberately ambiguous language" and wielded in "an unprecedented campaign of reprisals against civil society."<sup>250</sup> Foreign-backed NGOs, in particular, have been subject to harsher scrutiny and restrictions on foreign funding.<sup>251</sup> Under a 2012 law, such NGOs are required to register as a foreign agent; provide quarterly reports on their activity, funding, and expenditures; and submit to surprise inspections.<sup>252</sup> Many prominent NGOs, including Memorial and Transparency International, refused to comply with the measure, which was explicitly framed by its sponsors as an effort to

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(2011) (describing criminal prosecution of Vladimir Gusinsky for fraudulently withholding \$10 million from the government in connection with a privatization deal after Gusinsky's television channel criticized Putin over the Chechen war).

<sup>245</sup> Varol, *supra* note 69, at 1696.

<sup>246</sup> Thomas M. Callahan, *The Right to Reputation and the Case for Boris Nemtsov*, 39 *FORDHAM INT'L L.J.* 1289, 1315 (2016) (quoting and translating 2012 law).

<sup>247</sup> Varol, *supra* note 69, at 1996.

<sup>248</sup> *Id.* at 1697. Turkey's leadership has used libel law in a similar fashion. Tim Arango, *In Scandal, Turkey's Leaders May Be Losing Their Tight Grip on News Media*, *N.Y. TIMES* (Jan. 11, 2014), <http://www.nytimes.com/2014/01/12/world/europe/in-scandal-turkeys-leaders-may-be-losing-their-tight-grip-on-news-media.html>.

<sup>249</sup> *See, e.g.*, *Porubova v. Russia*, App. No. 8237/03, at 1, 4 (Eur. Ct. H.R. 2010) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94840> (appeal of 18 month criminal libel sentence levied on a journalist who published an article on corruption in a state railroad company).

<sup>250</sup> Shevtsova, *supra* note **Error! Bookmark not defined.**, at 30.

<sup>251</sup> Darin Christensen & Jeremy M. Weinstein, *Defunding Dissent: Restrictions on Aid to NGOs*, 24 *J. DEM.* 77 (2014).

<sup>252</sup> Chip Pitts & Anastasia Ovsyannikova, *Russia's New Treason Statute, Anti-Ngo and Other Repressive Laws: "Sovereign Democracy" or Renewed Autocracy?*, 37 *HOUS. J. INT'L L.* 83, 121 (2015).

undermine their credibility.<sup>253</sup> Registration, though, is not the sole hurdle foreign-funded groups face. Another related measure, an amendment to the treason statute also passed in 2012, treats dissemination of state secrets to foreign or multinational organizations (not just foreign governments) as a serious criminal offense.<sup>254</sup> Such a measure directly impinges on the work of organizations (including both Memorial and Transparency International) that monitor abusive state action and state corruption. Tellingly, the first entity to be charged with failing to register was Golos, a major election monitoring organization that revealed widespread voter fraud in 2011.<sup>255</sup>

The technology of restrictions on NGO funding and activities is diffusing and deepening. In 2013, the UN Special Rapporteur on Freedom of Expression noted that countries were exercising “increased control and undue restrictions” on civil society, in many cases to “silence the voices of dissent and critics.”<sup>256</sup> Notwithstanding these concerns, more countries are adopting restrictions: in 2016, China passed a restrictive new NGO Law, and even a democracy like Israel is now requiring disclosure of foreign funding.<sup>257</sup> Critics of the recent Israeli law argue that it is one sided, designed to restrict funding for pro-Palestinian NGOs but not for settlements in the Occupied Territories.<sup>258</sup> Even if not so designed, selective enforcement of such laws allows the state to shape the environment for public discourse. Indeed, it is a common theme of the wave of recent restrictions on NGO that they have particularly targeted human-rights NGOs.<sup>259</sup> This illustrates the interdependence of the various mechanisms we have identified: by restricting the public sphere, governments undermine the liberal rights that are essential for genuine electoral competition to operate.

The measures canvassed in this section narrow the public sphere, and undermine the existence of a shared high-quality epistemic basis available to all citizens for the evaluation of state actors’ behavior. Specific tools may include a mix of civil and criminal legislation, administrative rules requiring *ex ante* registration; and *ex post*

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<sup>253</sup> *Russian NGOs Refuse to Abide by Kremlin Law Ordering Some to Declare Themselves “Foreign Agents”*, CBS News (Sept. 28, 2012), <http://www.cbsnews.com/news/russian-ngos-refuse-to-abide-by-kremlin-law-ordering-some-to-declare-themselves-foreign-agents>.

<sup>254</sup> Pitts & Ovsyannikova, *supra* note 252, at 114 (quoting text of law and discussing its enactment).

<sup>255</sup> Bellona, *Russian NGOs Undergoing Unprecedented Kremlin Sweeps*, Apr. 2, 2013, <http://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2013-04-russianngos-undergoing-unprecedented-kremlin-sweeps>.

<sup>256</sup> Second report [cite]

<sup>257</sup> Peter Beaumont, *Israel Passes Law to Force NGOs to Reveal Foreign Funding*, THE GUARDIAN, July 12, 2016, <https://www.theguardian.com/world/2016/jul/12/israel-passes-law-to-force-ngos-to-reveal-foreign-funding>.

<sup>258</sup> *Id.*

<sup>259</sup> Thomas Carothers & Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support Under Fire*, Carnegie Endowment for International Peace, February 20, 2014.

penalties through tax and regulatory enforcement. Some steps may simply be designed to demoralize and intimidate. All, however, allow state actors either directly or indirectly to exclude or discredit news and news sources likely to report critically on incumbents' behavior and its consequences. This manipulation of the information environment not only extends political power, but it undermines the very basis on which an open society operates.

##### 5. *The elimination of political competition*

Finally, and perhaps most obviously, democracy relies on the possibility of alternation in power. At one extreme, entrenched one-party regimes cannot be ranked as proper democracies simply because they lack the electoral alternatives to facilitate a meaningful vote.<sup>260</sup> Where a meaningful opposition exists, though an antidemocratic official or coalition has a range of options that maintain apparent conformity with the law to limit its efficacy. The libel and treason measures identified above form one element of this arsenal.<sup>261</sup> But they hardly exhausted the available means to thwart and weaken democratic competition.

Each of the national contexts we have mentioned has adopted a slightly different array of measure. A mix of legislative measures, politicized law-enforcement discretion, corruption, and (occasionally) outright violence are observed. In Russia under Putin, for example, opposition parties have been legally proscribed for having too few members.<sup>262</sup> Individual opposition activists are arrested for minor offenses such as “[c]rossing the road in an unauthorized place,” “[s]moking in a public place,” “[i]nfringement of road transport regulations by a pedestrian,” and “[d]runkness.”<sup>263</sup> Given this extensive array of options, it is rather surprising political assassination is every needed in the Russia context (but it apparently is).<sup>264</sup> In contrast, the Hungarian Fidesz party has used its legislative control over the electoral system to enact measures that increase the majoritarian bias in the electoral system, promoting what a Hungarian Karl Rove might call a “permanent governing majority” for Fidesz. Recent Venezuelan elections, by contrast, transpired in “an electoral environment plagued by irregularities

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<sup>260</sup> See *supra* note **Error! Bookmark not defined.**

<sup>261</sup> Political opponents of the Singaporean authorities, for example, have been subject to “substantial monetary penalties” as a consequence of libel judgments; because people with undischarged bankruptcies cannot run for office, libel law in the South-east Asian city-state is doubly efficacious in suppressing political opposition. Tushnet, *supra* note 39, at 402.

<sup>262</sup> Luke Harding, *Supreme Court Ban on Liberal Party Wipes Out Opposition to Putin*, THE GUARDIAN (Mar. 24, 2007), <https://perma.cc/9SRF-VWN3>

<sup>263</sup> Alexandr Litoy, *A Guide to Political Persecution in Russia*, OPEN DEMOCRACY (Mar. 13, 2015), at <https://perma.cc/VB7T-AQYE>

<sup>264</sup> In 2015, leading liberal opposition figure Boris Nemtsov was assassinated. *Uncontrolled Violence*, ECONOMIST (Mar. 7, 2015), <http://www.economist.com/news/europe/21645838-assassination-boris-nemtsov-leaves-liberal-russians-fear-new-wave-violent>

and governed by a biased regulatory agency.”<sup>265</sup> Over the past decade, the Chávez government has created “Communal Counsels,” which are characterized as new forms of grass-roots participatory government, that have served in effect as “local partisan organizations during elections” in favor of the ruling coalition.<sup>266</sup> And in Sri Lanka, the Rajapaksa regime was regularly accused of election fraud, including colluding with the Tamil Tigers to prevent voting in the North and East of the country in 2005.<sup>267</sup>

Even if the illiberal democrat happens to lose an election, she can find ways to avoid losing power. For example, when an opposition figure Antonio Ledezma won the mayoralty of Caracas in 2008, Chavez’ government created a new “capital district” and transferred most of the budget and authority of the mayors office to the new entity.<sup>268</sup> This entity was of course controlled by Chavez’ party. (Ledezma was arrested some years later and held without charge for a year; he is currently on trial.) Similarly, when the ruling party lost 2015 elections to the National Assembly, it created a new legislature, the “National Communal Parliament” and sought to give it governing power.<sup>269</sup> Ultimately, the regime’s courts made the transfer of power unnecessary, as they constrain the legislature through the exercise of constitutional review.

## 6. Conclusion

The use of democratic, constitutional forms to achieve antidemocratic ends is nothing new. But the antidemocrat’s tool kit has become increasingly sophisticated of late. A careful review of available case studies suggests reveals how the rough playbook for would-be illiberal democrats works in practice. First, run a populist platform, in which the majority is portrayed as victims and the old order elitist. Such was the strategy of, for example, Orbán in Hungary and Erdogan in Turkey. Emphasize threats to national security or the purity of the homeland. Next, find ways to undermine opponents in state institutions, such as the judiciary or military. Perhaps use the courts to repress criticism via libel suits or the like. And don’t forget to manipulate the electoral institutions so as to ensure that future competition is limited. Then, attack civil society as foreign-funded elite carriers of foreign ideas. Ensure that the free media is intimidated, or diluted, so as not to provide an independent check. Also, undermine academic authority through underfunding or outright politicization. The effect of these

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<sup>265</sup> Corrales, *supra* note 67, at 43.

<sup>266</sup> Hawkins, *supra* note 67, at 316.

<sup>267</sup> *Sri Lanka’s Opposition Alleges Electoral Fraud*, Apr. 9 2010, <http://www.cbc.ca/news/world/sri-lankan-opposition-alleges-election-fraud-1.878438> [last accessed Dec. 26, 2016]

<sup>268</sup> Tamara Pearson, *Venezuelan President Designates New Caracas Head and Communications Minister*, VENEZUELA ANALYSIS, Apr. 16, 2009, <https://venezuelanalysis.com/news/4371>

<sup>269</sup> Daniel Lansberg-Rodriguez, *Maduro and his Imaginary Parliament*, FOREIGN POL., Dec. 22, 2015, <http://foreignpolicy.com/2015/12/22/president-maduro-and-his-imaginary-parliament-venezuela-elections/>.

measures is cumulative; even if one alone is insufficient to raise concerns about constitutional retrogression, when sufficiently numerous they should be viewed with alarm.

Table 3 below summarizes these strategies for several prominent cases of backsliding. In each case, save Sri Lanka, the program began with a populist election that brought to power hitherto weak interests. Notably, these populists relied heavily on rural support and in some cases on malapportionment schemes that favored the countryside over urban voters. In three of the cases (Venezuela, Hungary, and Sri Lanka), constitutional amendments were pursued that consolidated executive power and eliminated institutional roadblocks. In the others, legislative or executive strategies were pursued to the same ends. And all cases were accompanied by backsliding on rights as well as efforts to shape public discourse through media restrictions or intimidation.

**Table 3: Modalities of Constitutional Backsliding in Comparative Context**

Country	Prehistory of leader	Undermine institutional checks	Restrict electoral competition	Limit rights and restrict public sphere
<b>Venezuela 1998-2015 [Chavez-Maduro]</b>	Failed coup attempt by Chavez 1992	*Abolish Congress and Supreme Court, and replace with 1999 Constitution  *intimidate and pack judiciary and bureaucracy  *reliance on military personnel and immediate family members	*Secured 119/125 seats in 1999 constituent assembly  *abolish term limits 2009  *detain opposition leader 2013  *undermine 2008 Caracas election	*significant abuses of criminal process  *limit on NGOs  *revoke media licenses  *nationalize television  *censorship of press  *criminalize “disrespect” of public officials
<b>Thailand 2000-2014 [Shinawatra x2]</b>	Telecoms monopolist	*bribe and pack watchdogs  *manipulate tax law for personal gain	*vote-buying  *influence over election commission	*Extrajudicial killings campaign  *emergency rule in the South  *media intimidation
<b>Turkey 2003-present [Erdogan]</b>	Jailed political party leader	*attempt to pack the Courts 2006  *purge of government, army, academia and courts in 2016  *intimidate constitutional court	*local electoral fraud 2009, 2014  *proposal to extend term limits with new constitution	*mixed record—abolished death penalty and expanded voting rights; poor record on Kurdish issue  *arrests of opponents  *arrests & firing of journalists  *seizure of newspapers & revocation of licenses
<b>Sri Lanka 2005-2015 [Rajapaksa]</b>	MP	*governing through relatives  *centralized appointments, undermined civil service, and weakened independent bodies  *impeach chief justice 2013	*collusion with LTTE to block polls in Northeast  *jailed opponent in 2010 election  *abolished term limits in Constitution 2010	*war crimes and impunity  *takings of property in Northeast  *abduction and murder of journalists  *manipulation of GDP data
<b>Hungary 2010-present [Orban]</b>	MP	*constitutional reform 2011  *lowered retirement age for judges 2011  *In 2013 annulled all constitutional court rulings before 2011	*2014 election won 67% seats with 44% of votes	*NGO restrictions  *revisionist history curriculum  *criminalized “imbalanced news coverage” and “insulting the majority”
<b>Poland 2015 [Kaczyński]</b>	Prime Minister	*undermine constitutional court 2015  *civil service		*take over state media from independent commission
<b>India 1971-77 [Gandhi]</b>	Scion; war with Pakistan over Bangladesh	*abuse emergency power & rule by decree  *manipulate courts after <i>Kesavananda</i>	*imprison political opponents  *interfere with electoral machinery 1975	*mass arrests *repression of strikes  *censorship

It is worth emphasizing that not all of these efforts were completely successful in entrenching their proponents forever. Thailand's Thaksin was ousted in a coup in 2006, and has not been able to return to the country; although his sister Yingluck established a government in 2011, she too was overthrown after proposing an amnesty that many suspected would have led to the return of her brother.<sup>270</sup> Thailand is thus a case where constitutional retrogression led to an autocratic reversion. In Venezuela, the electoral machinery has continued to function, and allowed the opposition a victory in the National Assembly elections of 2015, though this has not hindered the regime much yet. This itself is a sign of the agglomeration of power in the executive under Chavez and Maduro. In a remarkable development in Sri Lanka in 2015, a member of Rajapaksa's own party, Maithripala Srisena, won the presidency, largely out of disdain for the corrupt and autocratic rule of his predecessor. Srisena then kept a campaign promise to push through a constitutional amendment effectively diluting his own power, and reverting toward a parliament-centered system such as the country had had until 1978.<sup>271</sup> In a symbolic move, he reinstated a Chief Justice that had been impeached by the Rajapaksa clique.<sup>272</sup>

We do not, thus, assert that shifts in the quality of constitutional democracy are unidirectional or permanent. Nevertheless, they do prove in many cases to be remarkably resilient, allowing some space for the opposition but not too much. The resulting style of authoritarian legality thus allows some genuine space for contestation, especially about issues which do not go to core regime interests. This in turn provides the regime with valuable information that may in fact extend its ability to govern, rather than undermine it. We observe, for example, that authoritarians that adopt constitutions endure longer than those that do not.<sup>273</sup> Those that "rule by law" are more stable than those that use purer forms of revolutionary action. Legal rules may also facilitate making credible commitments in the economic sphere, and help the regime to coordinate its behavior internally. Whatever its consequences, the spread of "illiberal democracy" around the world, a constitutionalized mode of government in which the forms of democratic institutions are preserved but the substance undermined, invites the question of whether the United States is indeed exceptional on this dimension.

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<sup>270</sup> Soprzanetti, *supra* note 105, at 299-300.

<sup>271</sup> Asanga Welikala, *The Rajapaksa Regime and the Constitutionalization of Authoritarian Politics in Sri Lanka*, ConstitutionUnit Blog, Feb 2, 2015, <https://constitution-unit.com/2015/02/02/the-rajapaksa-regime-and-the-constitutionalisation-of-populist-authoritarianism-in-sri-lanka/>

<sup>272</sup> *Id.*

<sup>273</sup> Michael Albertus & Victor Menaldo, *The Political Economy of Autocratic Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 53-82 (2014).

### C. Bringing Constitutional Retrogression Home

Our analysis of the risk of constitutional retrogression in the current U.S. context tracks the pathways we have just identified. We consider whether any of the five mechanisms of constitutional retrogression detailed in the previous section might have traction in the U.S. context. Our focus here is upon the durable institutional structures, seemingly entrenched rights, and textual gaps, and not the steps taken or proposed by the incumbent U.S. president: It is useful, in our view, to set forth crisply the interaction between extant constitutional rules and the threat of constitutional retrogression, without introducing potentially more contentious inquiries into a particular political figure.

#### 1. *Constitutional amendment*

Imagine that a political party had disciplined majorities in both houses of Congress and the 38 states necessary to utilize Article V. Or alternatively, suppose that the growing number of calls for a constitutional convention yield fruit.<sup>274</sup> It would then be feasible to amend the Constitution to reform core elements of the American Constitution. The content of such reforms is not hard to imagine. Perhaps, following patterns in other illiberal democracies, the target might be the twenty-second amendment, which constitutionalized term limits in the wake of Franklin Roosevelt's presidency. Or simply examine the various liberty-restricting constitutional amendments that have been proposed in Congress in recent years, mainly to overturn court decisions.<sup>275</sup> To be sure, there are other amendments that have been proposed that would enhance liberty. But the point is that there is nothing *structural* in Article V that prevents this disciplined majority with sufficient support from using constitutional amendment to entrench its power and restrict liberty.

Still, we do not think that constitutional amendment will play a significant role in promoting the retrogression of constitutional liberal democracy for two reasons. First, American political parties have historically lacked discipline relative to their counterparts in other democracies—a complex result of history, geography and our electoral system. And the very veneration of the Constitution suggests that amendments are likely to received a good deal of attention, working as focal points for constitutional resistance by regime opponents.<sup>276</sup> As a strategic matter, more subtle mechanisms are likely to be more effective and hence more likely to be deployed.

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<sup>274</sup> Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1513 (2010).

<sup>275</sup> See, e.g., S.J. Res. 180, 101st Cong., 1st Sess. (1989 (flag burning)).

<sup>276</sup> Carey, *supra* note 173; Weingast, *supra* note 173.



Second, Article V of the Constitution establishes “some of the most onerous hurdles in the world for the ratification of amendments.”<sup>277</sup> Indeed, it has been so rarely used that some scholars have argued that it has fallen into desuetude.<sup>278</sup> In most other contexts in which amendment has played a large role in enacting backsliding from democratic practices, by contrast, the amendment rule has been less demanding.<sup>279</sup>

There is an irony here: Article V has been condemned roundly by commentators, especially on the political left.<sup>280</sup> Yet the obduracy of the formal constitutional text takes off the table at least one potent instrument of constitutional retrogression at a moment when liberal commentators might well feel their priorities most imperiled.

## 2. *The elimination of institutional checks*

The most likely motor of antidemocratic dynamics in the American political system is the presidency, acting with the acquiescence of a co-partisan Congress. Neither legislative chamber nor the courts possess the presidency’s “comparative institutional advantages in secrecy, force, and unity.”<sup>281</sup> As in Hungary, Venezuela, and Russia, it is the executive, supported by an adjunct partisan formation in the legislature and the public sphere, that must be the focus of analysis. The strength of interbranch checks, and in particular judicial frictions upon presidential authority, is a matter that has occasioned considerable debate, albeit often in the distinct contexts of war and national security.<sup>282</sup> The question whether interbranch dynamics might generate frictions against a president’s antidemocratic policy agenda has not received the same level of attention. But we think that a measure of skepticism about the effectual force of such constraints is warranted.

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<sup>277</sup> Rosalind Dixon, *Partial Constitutional Amendments*, 13 U. PA. J. CONST. L. 643, 645–46 (2011); accord ELKINS et al., *supra* note 133, at 65; Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362 (1994).

<sup>278</sup> Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 BOSTON U. L. REV. 1029 (2014).

<sup>279</sup> Landau, *supra* note 65, at 192 (“In countries outside of the United States, amendment thresholds are often set fairly low, allowing incumbents to round up sufficient support for sweeping changes with relative ease. Even where amendment thresholds are set higher, incumbent regimes can reach requisite legislative supermajorities with surprising frequency.”).

<sup>280</sup> See, e.g., Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 321; John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV., 1929, 1954 (2003); Stephen M. Griffin, *The Nominee Is ... Article V*, 12 CONST. COMMENT. 171, 173 (1995). *But see* Huq, ARTICLE V, *supra* note 22, at 1168 (offering a qualified defense of Article V).

<sup>281</sup> POSNER & VERMEULE, *supra* note 42, at 31.

<sup>282</sup> The leading works include Posner and Vermeule’s monograph, *id.*; STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725 (1996).

There are two reasons for skepticism of the efficacy of Congress as a constraint. *First*, James Madison’s account of the federal government’s threshold design famously identified the distinct institutional “ambitions” of each branch as the engines of constraint.<sup>283</sup> But modern developments have “tied the power and political fortunes of government officials to issues and elections,” a dynamic that has fostered “a set of incentives that rendered these officials largely indifferent to the powers and interests of the branches per se.”<sup>284</sup> Absent partisan division between the branches, Congress as currently constituted is more likely to enable than restrain presidential agendas.

*Second*, Congress’s formal authorities to seek information and sue to enjoin ultra vires actions require a cameral majority.<sup>285</sup> Unlike other democratic legislatures, the federal model lacks for mechanisms whereby minorities or opposition parties can contest executive action by hearings<sup>286</sup> or by soliciting judicial intervention.<sup>287</sup> The disabling of legislative minorities is exacerbated by an odd asymmetry in the Supreme Court’s separation of powers jurisprudence. In superintending interactions between the branches, the Court has oscillated between a rigid formalism and a permissive functionalist approach.<sup>288</sup> Whereas the Court has taken a latitudinarian approach to the delegation of regulatory authority to the executive,<sup>289</sup> it has taken a pinched and prohibitory view of legislative efforts to counterbalance such delegations with a measure of post hoc oversight.<sup>290</sup>

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<sup>283</sup> THE FEDERALIST NO. 51, at 319-20 (James Madison) (Isaac Kramnick, ed., 1987) (advocating “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others”).

<sup>284</sup> Levinson & Pildes, *supra* note 168, at 2323; Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 670 (2011) (“Madison never explained why the branches of government, or the state and federal governments, would reliably have political incentives at odds with one another ....”).

<sup>285</sup> See, e.g., U.S. House of Reps. v. Burwell, 130 F.Supp.3d 53, 81 (D.D.C. 2015) (holding that the House as an entity “has standing to pursue its allegations that the Secretaries of Health and Human Services and of the Treasury violated Article I, § 9, cl. 7 of the Constitution when they spent public monies that were not appropriated by the Congress”); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 89-90 (D.D.C. 2008) (recognizing House of Representative’s power to seek information from the executive under Article I).

<sup>286</sup> In the German Bundestag, sufficiently large minority parties receive a certain number of committee chairs. In the British Parliament, there is an informal norm of granting losing political coalitions committee chair positions. Fontana, *supra* note 61, at 571-72.

<sup>287</sup> *Id.* at 580 (“Losing political coalitions are not only sometimes given, informally, the power to appoint judges, but also sometimes given special power to command the resources of a court by being given standing to bring lawsuits through generally applicable rules that permit losing groups to bring lawsuits.”). A common configuration is to allow a legislative minority of between ten and twenty percent an opportunity to challenge legislation in the Constitutional Court.

<sup>288</sup> See Huq & Michaels, *supra* note 210, at 357-80 (documenting oscillation across multiple doctrinal strands).

<sup>289</sup> *Id.* at 358-59 (summarizing doctrinal development).

<sup>290</sup> See, e.g., INS v. Chadha, 462 U.S. 919, 944 (1983).

Perhaps the most important legislative constraint emerges intertemporally. Statutes enacted under prior presidents impose positive obligations and negative prohibitions that may hinder antidemocratic agendas. In the current configuration, therefore, it is not without irony (once more) that arguments for executive flexibility in construing statutes' force have blossomed in the context of a Democratic White House facing a recalcitrantly Republican Congress,<sup>291</sup> whereas Republican arguments against implementation-related discretion have effloresced.<sup>292</sup>

In contrast to legislatures, federal courts as a whole are not aligned with discrete partisan formations, at least as a formal matter. It may instead be more accurate to say that the judiciary tends to be aligned with one of several successive "constitutional regimes" that "organize all of a society's fundamental political institutions," and that tend to be inflected with (but not wholly arranged around) partisan priorities.<sup>293</sup> Of course, over the medium term, a party with sustained control over the other two branches can reshape the judiciary in its image. But if partisanship is less of a concern in respect to the judiciary in the short term, there is still no reason to expect that the American courts will align closer to the Polish judiciary as a robust defender of democratic norms, rather than the subservient Weimar courts.

The federal judiciary has secured over the twentieth century a large measure of administrative and operational autonomy.<sup>294</sup> But its deployment of this discretionary autonomy has reflected above all its institutional interests in maximizing its jurisdiction over prestigious policy questions, while minimizing its obligation to engage in high-volume, retail vindication of individual constitutional rights.<sup>295</sup> Institutional self-interest has catalyzed a network of constitutional common-law doctrines regulating the availability of remedies. These impose exceedingly burdensome requirements on complainants alleging past constitutional harms. For instance, damages for

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<sup>291</sup> See, e.g., Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1552 (2016) (making "a normative case for forbearance as a particular form of delegation"); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 267 (2013) (describing and endorsing "the delegation ... of the power to waive Congress's rules").

<sup>292</sup> For criticisms of Democratic presidents' exercises of enforcement-based discretion based on statutory and constitutional grounds respectively, see Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241 (2016), and Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1756-57 (2016).

<sup>293</sup> Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 34 (1999); see also Karen Orren & Stephen Skowronek, *Regimes and Regime Building in American Government: A Review of Literature on the 1940s*, 113 POL. SCI. Q. 689, 698-99 (1998-99) (defining the relevant conception of a regime, and discussing their partisan construction).

<sup>294</sup> For synoptic historical accounts, see JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012); Kevin McGuire, *The Institutionalization of the U.S. Supreme Court*, 12 POL. ANALYSIS 128 (2004).

<sup>295</sup> Huq, *Judicial Independence*, *supra* note 51, at 1-40.

constitutional torts are often unavailable when federal officials violate constitutional norms, given a plethora of doctrinal carve-outs.<sup>296</sup> Even absent a carve out, the threshold defense of qualified immunity means “all but the plainly incompetent or those who knowingly violate the law” need not face the cost of trial, let alone any penalty.<sup>297</sup> Where anticipatory challenge is unavailable—for instance, because a policy is not crisply publicized in advance, or because Article III standing is lacking because the policy’s targets are *ex ante* uncertain<sup>298</sup>—then judicial intervention on constitutional grounds will have only a weak deterrent effect. And even where early judicial intervention is obtained, state actors have ample resources and opportunities to engage in foot-dragging, noncompliance, or obstruction.<sup>299</sup>

Unlike the new constitutional courts of Eastern Europe celebrated by Issacharoff and other comparativists,<sup>300</sup> therefore, the well-established federal judiciary lacks the institutional incentive to impede retrogression away from constitutional, democratic norms. The language of deference to political branches exercises a powerful sway. Much like the supinely partisan Congress, the path of institutional development observed over the twentieth century, coupled with now-entrenched doctrinal resistance to effectual constitutional remedies, delimit and define its role. The judiciary should not, then, be hailed as a substantial impediment to the prospect of constitutional retrogression.

### 3. *Centralizing and politicizing executive power*

Comparative experience suggests that antidemocratic officials and coalitions view professionalized bureaucracies as impediments to their agendas.<sup>301</sup> A parallel bureaucratic state has grown at the national level in the United States since the late 1800s. A quasi-constitutional body of administrative law aligns legality with the application of expert knowledge. Recent constructions of Article II of the federal

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<sup>296</sup> See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (private corporate defendants); *Meshal v. Higgenbotham*, 804 F.3d 417, 418 (D.C. Cir. 2015) (national security and extraterritoriality); *Vance v. Rumsfeld*, 701 F.3d 193, 199 (7th Cir. 2012) (en banc) (same); *Doe v. Rumsfeld*, 683 F.3d 390, 394-96 (D.C. Cir. 2012) (national security); *Lebron v. Rumsfeld*, 670 F.3d 540, 547-52 (4th Cir. 2012) (same). But see *Turkmen v. Hasty*, 789 F.3d 218, 234 (2d Cir. 2015), cert granted 137 S. Ct. 292 (Oct. 11, 2016).

<sup>297</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (quoting *Malloy v. Riggs*, 475 U.S. 335, 341 (1985)).

<sup>298</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 97 (1983) (denying standing in a suit for injunctive relief on this ground).

<sup>299</sup> This is true even in high-profile matters such as detention policy, see Huq, *President and the Detainees*, *supra* note 115, and school desegregation, see PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 109-10 (1988) (“The Supreme Court’s refusal to set deadlines for desegregation invited Southern officials to invent foot-dragging tactics, and frustrated the NAACP lawyers who had struggled for years with cautious and often hostile federal judges, most of them closely tied to [the] local power structures.”).

<sup>300</sup> See ISSACHAROFF, *FRAGILE DEMOCRACIES*, *supra* note 198, at 200-02; accord Bugarcic & Ginsburg, *supra* note 66, at 71.

<sup>301</sup> See *supra* text accompanying notes 221 to 225.

constitution, however, undermine bureaucratic autonomy for the sake of democratic control. To the extent these decisions facilitate antidemocratic mobilization, their legacy is precisely the inverse of their purported rationale.

The starting point for legal analysis must be a gap, rather than a positive element of constitutional law: The U.S. Constitution lacks formal, textual protection of bureaucratic autonomy. By contrast, many other constitutions provide for public service or civil service commissions to govern public employment and the operation of the bureaucracy, precisely because of the risk of partisan patronage.<sup>302</sup> This is an accelerating trend—but our eighteenth-century document, drafted before the rise of the administrative state, could not have contemplated the need for constitutional regulation.<sup>303</sup>

In the absence of constitutional protection, bureaucratic autonomy in the federal government takes root in Progressive era statutes. Reform was spurred in reaction to a Jacksonian “spoils system” in which presidents had a pivotal role in distributing government jobs as political favors.<sup>304</sup> Starting with the Pendleton Act of 1883, Congress fashioned by increments a civil-service system designed to promote meritocratic government and professional governance.<sup>305</sup> Most recently, the Civil Service Reform Act of 1978 prohibited agencies from taking personnel actions that undermine an emphasis on merit and installs an independent agency, the Merit Systems Protection Board, to hear appeals of personnel actions.<sup>306</sup> Since then, the Court has grafted a measure of First Amendment protection into the public employment context by prohibiting certain adverse employment decisions on the basis of party affiliation.<sup>307</sup>

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<sup>302</sup> Some 85 out of a historical sample of 822 constitutions have such commissions; of constitutions drafted after 1989, 23 out of 215 have such commissions. Data on file with authors.

<sup>303</sup> See EDWARD RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2015).

<sup>304</sup> Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 *YALE L.J.* 1836, 1185 (2015) (“Under th[e] “spoils system,” control over government employment lay with the political party of the President.”).

<sup>305</sup> Act of Jan. 16, 1883, ch. 27, 22 Stat. 403; see also ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* 192-226 (2014) (describing Progressive-era reform movements). The Pendleton Act was initially of limited effect insofar as it vested civil servants with no protection from termination, and did not mandate merit-based exams. STEPHEN SKOWRONEK, *BUILDING A NEW ADMINISTRATIVE STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 64-80 (1982). Civil service protections strengthened incrementally from the 1880s through to the 1930s. RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE* 48-73 (1994).

<sup>306</sup> 5 U.S.C. §§ 1201-1209, 2301-2305 (2000). Non-discrimination clauses in departmental hiring policies often disallow discrimination based on political affiliation as well. 28 CFR § 42.1(a).

<sup>307</sup> *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990); see also *O’Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996) (extending *Rutan* to independent contractors).

The strength of these protections and the success of the professionalization project, however, should not be overstated. Even in highly salient domains such as monetary policy, political insulation from presidential control remains a function of “conventions” rather than written law.<sup>308</sup> And, as Francis Fukuyama has noted, recent bureaucratic failures are strong evidence that “the US federal bureaucracy has fallen from the standard of a professional, impersonal, merit-based Weberian organization.”<sup>309</sup> Nevertheless, some 2.8 million federal employees in this system rely on these tenure protections, creating a formidable wall of potential resistance to quick changes in government programs.

Jennifer Nou has suggested that the resulting federal bureaucracy may be a significant source of resistance to novel presidential initiatives.<sup>310</sup> Bureaucrats, Nou explains, possess a range of tools, including the slowing down the implementation of programs; building an administrative record which compels particular outcomes, limiting the discretion of political appointees; manipulating information; leaking actions to the press; relying on inspectors-generals and other internal oversight bodies; and in the extreme seeking judicial recourse to avoid being compelled to violate the law.<sup>311</sup> Nou further identifies recent precedent for bureaucratic resistance to attempted politicization. When President George W. Bush’s administration sought to hire career staff on the basis of political affiliation, the Office of the Inspector General released a damning report, referring its findings to the U.S. Attorney’s Office.<sup>312</sup> It found that an administration official had not only violated the relevant rules but had given false testimony to the Judiciary Committee of the Senate. While the U.S. Attorney declined to prosecute the official in question, legal rules provided appropriate protection as a consequence of the “distinctive law-internalizing practices” of lawyers within the executive branch.<sup>313</sup>

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<sup>308</sup> Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1167 (2013) [hereinafter “Vermeule, *Agency Independence*”] (“The lens of convention ... explains the disparity between the written law of independence and the operating rules of independence in the administrative state.”).

<sup>309</sup> Francis Fukuyama, *Why We Need a New Pendleton Act*, AM. INTEREST (Nov. 3, 2013), <http://www.the-american-interest.com/2013/11/03/why-we-need-a-new-pendleton-act/> [[<https://perma.cc/5F7F-JFB9>].

<sup>310</sup> Jennifer Nou, *Bureaucratic Resistance from Below*, NOTICE AND COMMENT, November 16, 2016, available at <http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/>

<sup>311</sup> *Id.*

<sup>312</sup> Office of the Inspector General, Department of Justice, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*, <https://oig.justice.gov/special/s0901/final.pdf>.

<sup>313</sup> Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1133 (2013); Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 827 (2012) (“[L]awyers trained in this [legal] tradition currently staff the length and breadth of the executive branch.”).

The expertise enabled by civil service protection has its legal entailments. Agency actions receive judicial deference under the *Chevron* doctrine when they have emerged from certain relatively standardized and formal processes such as notice-and-comment rulemaking.<sup>314</sup> Many commentators argue that the resulting *Chevron* deference reflects judicial reliance on intra-agency expertise.<sup>315</sup> The failure to evince necessary expertise can result in a judicial halt (at least temporarily) of a policy initiative.<sup>316</sup> To the extent that an antidemocratic leader has a policy agenda that entails regulation likely to confront judicial review for its rationality and legality, therefore, there is an incentive to preserve the expertise-related capacity of the federal bureaucracy.

Notwithstanding these institutional predicates of bureaucratic autonomy, there are reasons why we should not be confident in the federal bureaucracy's role in resisting constitutional retrogression. *First*, as we have noted already, bureaucratic autonomy is not constitutional in nature.<sup>317</sup> Conventions are not "ironclad" and may be overcome in the face of "political contingencies,"<sup>318</sup> with what we believe will be greater ease than formal constitutional rules enshrined in text or precedent. *Second*, although the law provides potent resistance to attempts to politicize the bureaucracy, there are also significant tools available to political appointees to undermine it. At the most basic level, presidential appointment of a head of agency openly opposed to its mission signals a prospect of significant barriers for staff who wish to actively advance that mission. Staff cannot promulgate rules, conduct enforcement actions, or take any of the other routine steps without at least the acquiescence of the head of the agency. Those who wish to advance an agenda, or have been working on solutions to regulatory problems for some time, may find themselves unable to take affirmative steps in the absence of a cooperative head. In this fashion, an agency head opposed to an agency mission can preserve the status quo by resisting staff initiatives and derailing novel regulatory efforts.

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<sup>314</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>315</sup> See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 596 (1985); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2084 (1990); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1264 (1999).

<sup>316</sup> For descriptive accounts of expertise-forcing judicial review, see Aziz Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417, 419 (2012) (arguing that when a government actor makes a decision "that may impinge upon a liberty or equality interest[,]... a court should determine whether the component of government that made the decision has actual competence in or responsibility for the policy justifications invoked to curtail the interest," and providing examples); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA : From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007) (identifying "expertise forcing" Supreme Court cases that sought to combat "the politicization of expertise").

<sup>317</sup> One exception is the protection available under the Bill of Attainder Clause to bureaucrats who are targeted for hostile employment action by Congress. See *Lovett v. United States*, 66 F. Supp. 142 (1945), *aff'd*, *United States v. Lovett*, 328 U.S. 303 (1946).

<sup>318</sup> Vermeule, *Agency Independence*, *supra* note 308, at 1199.

*Third*, and most strikingly, a convergence of liberal and conservative Justices have argued for and installed into doctrine more robust presidential control over both appointments and removals of officials from the federal bureaucracy. In terms of appointments, a liberal coalition of Justices has recently vested the president with authority to make recess appointments even when the vacancy does not occur within a recess, and when the recess occurs during a congressional session.<sup>319</sup> A majority of conservative Justices, on the other hand, has reinvigorated the previously emasculated presidential claim under Article II of the Constitution to have exclusive authority to remove certain federal officials.<sup>320</sup> The marginal effect on presidential control of either of these decisions is difficult to estimate with precision.<sup>321</sup> Nevertheless, they exemplify a bipartisan drift toward greater presidential control over the bureaucracy that is at odds with the functional autonomy necessary for bureaucratic resistance to the antidemocratic project of constitutional retrogression.

In summary, to the extent that bureaucratic autonomy is available as brake on the gradual movement away from democratic practices, it is predicated on a statutory rather than a constitutional foundation. Indeed, to the extent that the available constitutional doctrine bears on the matter, it supports presidents' ability to set the bureaucracy aside.

#### 4. *Degrading the public sphere*

Democracy requires a shared epistemic foundation. Where the state exercises either direct or indirect veto power over the voices aired in the public sphere or the factual material therein available, antidemocratic actors and coalitions face lower barriers to the consolidation of authority. Analyzing the Constitution's ability to impede the democratic deconsolidation along this margin therefore requires inquiry in respect to several distinct mechanisms whereby the public sphere can be corroded: Can the government use formal means, such as libel and registration laws, to sanction critics by law? Are informal substitutes for formal prohibitions available? Alternatively, can the government selectively titrate information in ways that systematically undermine public understanding of the consequences of electoral choices? And where allies of the antidemocratic regime pollute the informational marketplace with false information with the aim of discrediting political opponents, are remedial responses available?

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<sup>319</sup> See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2600-06, 2610-17 (2014). In addition, the academic work of liberal Justices evinces the same commitment. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>320</sup> *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484-86 (2010); see also Huq & Michaels, *supra* note 210, at 364-67 (describing pattern of removal related cases in greater detail).

<sup>321</sup> See, e.g., Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 24-52 (2013) (analyzing the uncertainty around the effect of *Free Enterprise Fund*).



The U.S. Constitution performs well along some of these margins, but falls severely short in other respects. Certain pathways of democratic defenestration are shut. Others remain wide open.

To begin with, the Speech and Debate Clause<sup>322</sup> enables legislators to protest executive branch policies and disclose waste and abuse without fear of retaliation, hence enhancing the quality of public debate *if* legislators prove to have special incentives to speak or share information.<sup>323</sup> The Free Speech Clause of the First Amendment directly constrains the use of libel and associational regulation as overt instruments of viewpoint suppression.<sup>324</sup> Doctrinal protection of speech acts, on the one hand, is at its acme when the speech “deals with matters of public concern ... relating to any matter of political, social, or other concern to the community.”<sup>325</sup> On the other hand, as in many jurisprudential domains, associational claims tend toward fragility when the government invokes a national-security justification.<sup>326</sup>

In other ways, the First Amendment is not quite the loyal amanuensis of the democratic will that some have discerned.<sup>327</sup> Nothing in the Constitution or federal law otherwise prevents high officials from launching personalized attacks on the honesty and integrity of otherwise respected news sources as a means of prophylactically disabling sources of future discrediting information. Or consider the possibility that either a regnant regime or its allies (whether domestic or international) strategically propagate false news stories about political opponents that are effective in defaming or discrediting them. Relatedly, they can dilute the power of information by casting doubt on mainstream media sources.<sup>328</sup> The German Social Democratic government of Angel

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<sup>322</sup> U.S. CONST. art I, § 6, cl. 1.

<sup>323</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS 24-25* (1998) (noting a connection between the Speech and Debate Clause and the First Amendment's protection of freedom of speech).

<sup>324</sup> On libel, see *New York, Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that to obtain a libel recovery, public officials and public figures must prove statements were false, and made intentionally or with reckless disregard of their falsity, where the speech at issue deals with a matter of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (requiring falsity and negligence when the plaintiff is a private figure. On associational freedoms, see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (invalidating state court order to NAACP to produce membership lists).

<sup>325</sup> *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

<sup>326</sup> See, e.g., *Communist Party of the United States v. Subversive Activities Control Board (SACB)*, 367 U.S. 1, 115 (1961) (upholding the Subversive Activities Control Act, which imposed registration and disclosure requirements on “subversive” organizations). The modern iteration of SACB is the process of designating organizations as “foreign terrorist organizations,” which received the Court’s imprimatur in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010).

<sup>327</sup> For a collection of sources, see Bhagwat, *supra* note 19, at 1103 (“[T]he fundamental reason why the Constitution protects free speech [is] to advance democratic self-governance.”).

<sup>328</sup> Jeremy W. Peters, *Wielding Claims of “Fake News”, Conservatives Take Aim at Mainstream Media*. N.Y. TIMES, Dec. 26, 2016.

Merkel has recently mooted legislation that would require social media sites to remove fake news.<sup>329</sup>

Whether such a measure would be effective depends on institutional conditions, and in particular, the availability of an independent arbiter resistant to state capture.<sup>330</sup> But the First Amendment likely forecloses even any experimentation of such institutional possibilities. In particular, consider the Supreme Court's recent decision in *United States v. Alvarez*, invalidating a conviction under the Stolen Valor Act for falsely claiming military honors.<sup>331</sup> The plurality opinion in *Alvarez* is animated by bromidic nostrums to the effect that "[t]he remedy for speech that is false is speech that is true," and that as a general matter "suppression of speech by the government can make exposure of falsity more difficult, not less so."<sup>332</sup> After *Alvarez*, "broad laws targeting false speech stand little chance of being upheld regardless of topic."<sup>333</sup>

Further, the Constitution imposes little constraint on the selective disclosure (or nondisclosure) of information by the state in ways that can shunt public debate away from questions that would embarrass or undermine political leaders. Proposals that the First Amendment be glossed to include a "right to know" rest in desuetude.<sup>334</sup> At least three state constitutions, by contrast, contain rights to know.<sup>335</sup> And some 40 percent of

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<sup>329</sup> Horand Knaup & Marcel Rosenbach, *Fake News im Internet: Koalition will Facebook Meldestelle gesetzlich vorschreiben*, DER SPIEGEL, Dec. 16, 2016, <http://www.spiegel.de/netzwelt/netzpolitik/thomas-oppermann-plant-gesetz-gegen-fake-news-a-1126182.html>

<sup>330</sup> Indian courts regulate election speech for appeals to communal violence that might spark violence, and seem to err on the side of excessive caution. ISSACHAROFF, *FRAGILE DEMOCRACIES*, *supra* note 198, at 86-91. This seems that there is no categorical reason to think such speech regulation mechanisms will be distorted. Of course, once a substantial risk of constitutional retrogression is on the cards, adoption of an insulated institutional setting may simply no longer be on the cards.

<sup>331</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (plurality opinion).

<sup>332</sup> *Id.* at 2550.

<sup>333</sup> Richard Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONTANA L. REV. 73, 69 (2013); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1453 (2015) ("Both the plurality and concurring decisions share the view that punishing 'falsity alone' is not permissible; instead, the government may only regulate false speech when there is some 'intent to injure,' or more precisely, some intent to cause a 'legally cognizable harm.'" (footnotes omitted)).

<sup>334</sup> See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489-93 (1985) (arguing that the "right to know" is a logical extension of the right to free speech, protected by the First Amendment to the Constitution).

<sup>335</sup> See MONT. CONST. art. II, § 9 ("No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure"); N.H. CONST. pt. 1, art. 8 ("Government ... should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."); FLA. CONST. art. I, § 24 (designating all public information from all three branches of government as open unless the legislature by a two-thirds vote determines otherwise).

national constitutions in force currently mandate access to government information.<sup>336</sup> In some countries, courts have created a constitutional “right to know” that provides a robust tool for policing information disclosure regimes.<sup>337</sup>

In the United States however, transparency mandates are like civil service protections. They are a fragile, non-constitutional function of post-ratification reform efforts, this time dating from the 1940s and culminating in the 1966 Freedom of Information Act.<sup>338</sup> The Act provides robust support even now for investigative journalism.<sup>339</sup> Of course, it is asymmetrical insofar as it does not preclude government from partial, misleading disclosures and leaks.<sup>340</sup> And in its enforcement, it has proved to be quite weak in the face of executive branch invocations of national security,<sup>341</sup> a feature it shares in common with many other features of American law and government.

Readily available state instrumentalities for epistemic defalcation to antidemocratic ends include the manipulation of government secrecy classifications; erosions in the perceived or actual quality of government data; and outright manipulation. There has been a secular increase in classification in recent years, and a growing consensus that rampant overclassification and pseudo-classification exist.<sup>342</sup> This has prompted various reactions, including the passage of the Freedom of Information Act itself, but the problem persists. Because classification schemes are passed pursuant to Executive Order, there is ample room for government manipulation

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<sup>336</sup> Data on file with authors.

<sup>337</sup> *See, e.g., Kaneko v. Japan (Hakata Station Film Case)* Sup.Ct. 1969.11.26 Keishu 23-11-1490 [Japan] (finding that the constitutional right to information includes a right to know.)

<sup>338</sup> 5 U.S.C. § 552 (2012). On the post-World War II political mobilization that culminated in the Freedom of Information Act, see MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY 1945-1975*, at 28-63 (2015).

<sup>339</sup> *See* JAMES T. HAMILTON, *DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM* 153-60 (2016) (finding that forty percent of the stories that prompt policy reviews are based at least in part on documents obtained via records requests).

<sup>340</sup> On the use of leaks as an instrument of policy control, see David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 *HARV. L. REV.* 512, 574 (2013).

<sup>341</sup> Susan Nevelow Mart, et al., *Dis-Informing the People's Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 *ADMIN. L. REV.* 725 (2014) (showing great judicial deference to executive branch invocation of Exemption One under the Freedom of Information Act.)

<sup>342</sup> *See* *Dubin v. United States*, 363 F.2d 938, 942 (Ct. Cl. 1966) (defining overclassification as excessive classification pursuant to a classification scheme laid out by statute or Executive Order); *see also* *Reducing Overclassification Act*, Pub. L. No. 111-258 (2010) (requiring the Department of Homeland Security to develop a strategy to prevent overclassification). Pseudo-classification refers to schemes generated by agencies for dealing with sensitive information, even when not authorized to do so by statute

of the information environment. The President, at the extreme, could simply deem by fiat much of the information produced by government to be classified. If accompanied by a compliant Congress, such a scheme could reduce the availability of even routine government data. When accompanied by willful manipulation of the *private* news environment, the undermining of government data is a way of ensuring there is no authoritative source of information.

Given this embarrassment of deceptive riches it is perhaps unsurprising that presidents have on occasion sought to manipulate information produced by government agencies. In 2003, for example, the Bush White House reworked an EPA report to replace language about global warming with misleading information.<sup>343</sup> We know very little about the extent to which reworking occurs; in that particular case the facts only came out through government whistleblowing.<sup>344</sup> In another instance, secret memoranda between the National Archives and Records Administration and the CIA led to reclassification of over 25,000 documents.<sup>345</sup> There is no reason now to expect an antidemocratic movement to resist the allure of selective disclosure as an instrument of minimizing the risk of electoral loss.

##### 5. *The elimination of political competition*

The prospect of official proscriptions of either political parties or individual candidates of the kind observed in Russia seems outlandish in the American context. We are skeptical that the forms of overt exclusion of political parties and candidates observed in other contexts of constitutional retrogression would arise in the U.S. context. But that is not to say that the Constitution cannot accommodate legal measures that would have the effect of stifling political competition. To the contrary, the current election regulation landscape is quite propitious for the antidemocrat seeking instruments that secure constitutional retrogression by inches rather than leaps.

It is a truism among election-law scholars that “politicians, parties, and political coalitions have always sought to design or manipulate democratic institutions and electoral rules in such a way as to augment or entrench their hold on power.”<sup>346</sup> Judicial

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<sup>343</sup> House Committee on Government Reform, Subcommittee on National Security, Emerging Threats, and International Relations, *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing*, 108th Cong. 2nd sess, Aug. 24, 2005 (statement of John F. Tierney).

<sup>344</sup> Susan Nevelow Mart, *Documents, Leaks and the Boundaries of Expression: Government Whistleblowing in an Over-Classified Age*, 35 DTPP: DOCUMENTS TO THE PEOPLE 30 (2007),

<sup>345</sup> *Id.*; see National Archives and Records Administration, Information Security Oversight Office, *Audit Report: Withdrawal of Records from Public Access at the National Archives and Records Administration for Classification Purposes*, Apr. 26, 2006

<sup>346</sup> Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 119-20 (2016); see also Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 668-69 (2002) (showing how incumbent

scrutiny of the electoral thicket has not changed this dynamic, or blunted (much) the efficacy of political self-dealing. While federal courts occasionally balk at especially egregious forms of self-dealing through election law, especially when tainted by racial entanglements,<sup>347</sup> in many instances they blink when confronted with anti-competitive, incumbency-enhancing effects.<sup>348</sup> In some instances, the anticompetitive effects of election arrangements are even embraced as a positive good. For example, the Court has endorsed the concentration of political authority in the two dominant political parties by permitting electoral regulations expressly aimed at ousting third parties and third-party candidates from effectual participation in balloting or electioneering in the public eye.<sup>349</sup> Compounding the weakness of judicial oversight, the United States is one of a handful of countries to want for a professionalized election administration.<sup>350</sup>

In this context of constant innovation in the manufacture of new forms of anti-competitive, exclusionary election devices—all falling short of proscription or overt violence—there is no shortage of ways in which constitutional retrogression might be pursued. Gerrymandering, the manipulation of registration and voting times, ballot-access rules, and the regulation of party primaries—all of these are ripe with anti-democratic possibility. By combining otherwise lawful measures, it is also possible that a substantial one-party “lockup”<sup>351</sup> might be achieved at the national level.

Even when a party loses elections, it can undermine its opponents. Consider an example from the state, rather than the federal government context. In a move eerily reminiscent of Hugo Chavez,<sup>352</sup> the North Carolina legislature recently sought to

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control of redistricting can further a “state’s interest in accurate or proportional representation could also be reformulated as an interest in diversity”).

<sup>347</sup> See, e.g., *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (invalidating several provisions of North Carolina’s Session Law 2013–381 as racially discriminatory).

<sup>348</sup> See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008). For a comprehensive listing of franchise restrictions and their partisan consequences, see Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 324-30 (2014).

<sup>349</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding Minnesota’s antifusion law, which prohibited candidates from appearing on ballot as candidate of more than one political party); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 SUP. CT. REV. 331, 331 (reading *Timmons* as a constitutional endorsement of a party duopoly); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679-83 (1998) (upholding public broadcaster’s exclusion of third-party candidate from a debate among House candidates). There are other instances in which the Court rails against incumbency-protection measures. See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 306 (2003) (Kennedy, J., concurring). How these various judicial pronouncements are reconciled (if at all) is unclear.

<sup>350</sup> See sources cited in *supra* note 40.

<sup>351</sup> Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 673 (1998).

<sup>352</sup> See *supra* text accompanying note 268.

redefine the powers of the governorship after Democrat Roy Cooper won the election in a close vote. The bill, currently under challenge in court, would remove the governor's powers to appoint trustees of the state university, would eliminate 80% of the governor's staff, and would require cabinet appointments to be approved by the state Senate.<sup>353</sup> It would also revamp election administration and require that the supervisory body be evenly divided between Republicans and Democrats—but with Republicans holding the chair in even years, when all state-wide elections are held. At a very minimum, such retroactive manipulation of the powers of office implies a kind of constitutional bad faith, but as David Pozen has recently noted, there is no doctrine in American constitutional law that proscribes such partisan interpretation of the text.<sup>354</sup>

Finally, should all these measures fail, a political leader intent on derailing an election might instead seek to deploy the prosecutorial might of the U.S. government to taint or despoil another candidate's reputation. Although U.S. Attorneys formally serve "at the pleasure" of the President, a historically strong informal convention precludes dismissal for reasons other than misconduct.<sup>355</sup> In December 2006, however, seven U.S. Attorneys were dismissed without obvious good cause. Subsequent inquiries strongly suggested (without confirming) the seven had been singled out by the White House for declining to pursue partisan agendas in their choice of indictments.<sup>356</sup> Whatever the facts of the 2006 events, it is quite possible to imagine today a fresh wave of politically motivated firings of federal prosecutors, followed by indictments targeting political opponents. Evidence of partisan motives in the removal of prosecutors has proved very difficult to find given the difficulty of extracting information from the White House. And evidence of improper motives in the context of individual prosecutions would be equally beyond reach given the Supreme Court's refusal to allow discovery about improper prosecutorial motive except in exceptional cases.<sup>357</sup> In sum, there is little beyond the thin tissue of convention to prevent the tremendous powers of the federal prosecutorial apparatus to be swung against selective political contestants on partisan grounds.

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<sup>353</sup> Richard Fauset, *North Carolina Governor Signs Law Limiting Successor's Power*, N.Y. TIMES, Dec. 16, 2016, <http://www.nytimes.com/2016/12/16/us/politics/pat-mccrory-roy-cooper-north-carolina.html>.

<sup>354</sup> David Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 907 (2016) (describing nonenforcement of good faith requirement in the separation-of-powers context).

<sup>355</sup> John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265 (2008).

<sup>356</sup> *Id.* at 275-76.

<sup>357</sup> *United States v. Armstrong*, 517 U.S. 456, 459, 470 (1996) (limiting discovery of improper prosecutorial motive); see also *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (same in immigration context).

## 6. Federalism

The United States has one institutional characteristic that is sometimes thought to be a distinctive safeguard against centralizing tyranny—the constitutional diffusion of governmental authority between the national government and the several states, or federalism.<sup>358</sup> Federalism is both anointed as democracy’s savior,<sup>359</sup> and also condemned as a handmaiden of local tyrannies.<sup>360</sup> The North Carolina election law, for example, provides some cause for the latter concern.<sup>361</sup>

The existence of subnational entities wielding substantial regulatory authority and possessing considerable regulatory capacity means that states and certain localities will play a necessary role in any process of constitutional retrogression—or in the narrative of a failed attempt at such backsliding—at least in terms of the negotiations they force from the federal government.<sup>362</sup> But we think it is uncertain *ex ante* how federalism (or localism) will influence the trajectory of retrogression. It is possible that states serve either as salutary platforms for alternative, anti-authoritarian politicians and coalitions in the manner that Heather Gerken has suggested.<sup>363</sup> For many policy areas, states and cities have the power to slow implementation and even nullify federal law.<sup>364</sup>

Alternatively, it is also possible that a concatenation of state electoral results and policy actions in the voting rights domain in particular will entrench an antidemocratic coalition, and render it nationally unassailable. Patterns of diffusion, whereby policies and institutions adopted in one state can spread to others, need not differentiate between pro- and anti-democratic content. One can imagine institutional innovations such as those adopted in North Carolina spreading around the country, creating a series

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<sup>358</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954) (noting that “federalism must appear to many peoples as the sole alternative to tyranny”).

<sup>359</sup> Jeffrey Rosen, Op-Ed, *States’ Rights for the Left*, N.Y. TIMES, Dec. 3, 2016, <http://www.nytimes.com/2016/12/03/opinion/sunday/states-rights-for-the-left.html>.

<sup>360</sup> Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 800-01 (2006) (“States’ rights have been associated historically with conservative causes ....); see also Gibson, *supra* note 49 (subnational authoritarianism).

<sup>361</sup> See *supra* text accompanying notes 353 to 355.

<sup>362</sup> For an account of such negotiation, see Aziz Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1635 (2014).

<sup>363</sup> Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102 (2005); Heather Gerken, *We’re About To See States’ Rights Used Defensively Against Trump*, VOX, Dec. 12, 2016, <http://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative>.

<sup>364</sup> KYLE SCOTT, FEDERALISM: A NORMATIVE THEORY AND ITS POLITICAL RELEVANCE 94-115 (2011) (discussing nullification).

of one-party states. If a sufficient number of states fall into that category, national electoral competition would be severely limited.

It is not, in short, that federalism is irrelevant. Far from it. It is rather than before the fact it is very hard to know whether devolution will accelerate or retard the advent of an authoritarian or quasi-authoritarian regime at the national level. As in so many other areas, the Constitution provides less protection than one might have expected.

## 7. *Conclusion*

Contrary to what might one might assume given the robust celebration of the U.S. Constitution, that document and its common-law glosses have an ambiguous and uncertain relationship to the risk of constitutional retrogression. Many of the key features of constitutional doctrine are not found in the text, which is replete with gaps and ambiguities. This invites selective formalist reinterpretation of the Constitution to advance particular partisan goals. Constitutional rights, usually thought to provide the paradigm set of protections from tyrannical rule, work only at the margin, and are dependent on courts asserting their institutional heft in variable ways across American history. And structural protections, such as federalism or bureaucratic autonomy, may not be robust in the face of steps taken the undermine them.

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To reiterate, our claim is not that observation of *only one* of these mechanisms amounts to constitutional retrogression. Our definition demands substantial backsliding in the quality of electoral competition, rights, *and* the rule-of-law simultaneously. Some degree of institutional calcification, partisan entrenchment and manipulation, and exclusionary public-sphere management are likely discernable in most democracies. But it is a mistake to reason that just because some slippage from an (unrealizable) ideal of democratic governance under the rule of law is inevitable, that *any* amount of slippage is conceptually homologous, or normatively untroubling. Sometimes, a large number of even small quantitative differences add up to qualitative change.

## IV. **Is American Constitutional Democracy Exceptional?**

A survey of comparative experience, set against the legal and institutional resources of U.S. constitutional law suggests that the latter provides a tolerably good safeguard against authoritarian reversion, but not constitutional retrogression. This Part takes up the contemporary implications of this analysis. We ask first whether recent events indicate a substantial risk of retrogression. Second, we consider what might be done if that risk exists.



## A. Evaluating the Risks

We have defined constitutional retrogression as a substantial negative movement that happens simultaneously across three margins: electoral competition, rights of speech and association, and the rule of law. To ask whether there is a risk of such retrogression today is not to idealize contemporary American democracy. We recognize, of course, that this has been no golden age. The quality of our constitutional democracy has risen and fallen across time. Broadly speaking, however, the trend over the course of the twentieth century has been toward expansion of the franchise, the deepening of the constitutional rights required for the effective exercise of political choice, and the institutionalization of the rule-of-law in the administrative state, along with the expansion of judicial power. Yet, just as some have recently speculated the long era of American growth has run its course, it is possible that we have reached not just the limit of available marginal improvements in democratic quality, but an inflexion point at which movement shifts toward the other direction.<sup>365</sup>

How grave is the concern now? Consider the current array of warning signs . For the first time, for example, one of the two major party candidates attacked a sitting federal judge's integrity on the basis of his national origin; refused to disclose tax documents showing his financial interests and potential conflicts of interest; threatened to prosecute and imprison his opponent; and explicit refused to commit to accepting a loss at the polls.<sup>366</sup> His campaign staff harassed and threatened press perceived as hostile; some journalists received a barrage of violent, sometimes anti-Semitic threats, from the candidates' supporters.<sup>367</sup> And once that candidate prevailed at the polls, he continued to threaten to denaturalize or imprison those who protested his victory, even as he complained of (non-existent) voter fraud against him. Against a background a surge in popular abuse, vandalism, and violence targeting racial minorities, ethnic minorities, gay, and transgender individuals, his surrogates warned they would investigate social movements committed to advancing the interests of ethnic and religious minorities, and his allies in the House of Representatives have started to install measures that would radically undercut bureaucratic autonomy.<sup>368</sup>

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<sup>365</sup> Cf, Gordon, *supra* note 11, at 1-4 (documenting the end of high-growth era for United States).

<sup>366</sup> See Steven Levitsky & Daniel Ziblatt, *Is Donald Trump a Threat to Our Democracy?*, N.Y. TIMES, Dec. 16, 2016, at SR5, <http://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html>.

<sup>367</sup> Erik Wemple, *Megyn Kelly's Personal Horror Stories*, WASH. POST, Nov, 13, 2016, [https://www.washingtonpost.com/opinions/megyn-kelly-divulges-her-own-private-horrors-of-donald-trump/2016/11/11/01f2da30-a82f-11e6-8042-f4d111c862d1\\_story.html?utm\\_term=.27f348778af2](https://www.washingtonpost.com/opinions/megyn-kelly-divulges-her-own-private-horrors-of-donald-trump/2016/11/11/01f2da30-a82f-11e6-8042-f4d111c862d1_story.html?utm_term=.27f348778af2)

<sup>368</sup> Jenna Portnoy & Lisa Rein, *House Republicans revive obscure rule that allows them to slash the pay of individual federal workers to \$1*, WASH. POST, Jan 5, 2017, [https://www.washingtonpost.com/local/virginia-politics/house-republicans-revive-obscure-rule-that-could-allow-them-to-slash-the-pay-of-individual-federal-workers-to-1/2017/01/04/4e80c990-d2b2-11e6-945a-76f69a399dd5\\_story.html?utm\\_term=.533a84e426f6](https://www.washingtonpost.com/local/virginia-politics/house-republicans-revive-obscure-rule-that-could-allow-them-to-slash-the-pay-of-individual-federal-workers-to-1/2017/01/04/4e80c990-d2b2-11e6-945a-76f69a399dd5_story.html?utm_term=.533a84e426f6).

We think these indicia of hostility to the institutional predicates of democracy are sufficient to raise the specter of retrogression. What would this look like in operation? We do not see constitutional amendment to formally entrench retrogressive policies as being likely. But a president with authoritarian impulses, acting with an acquiescent Congress, could easily disable other branches' institutional checks. A new president with an aligned Congress is unlikely to face inquiries or demands for information. Federal courts, to the extent they are not indifferent to that president's agenda, may lack incentives or confidence to intervene in any but incremental ways. We are also less sanguine than others about the possibility of bureaucratic resistance posing a sustained form of drag, especially given that many of the existing civil service protections are merely statutory or customary in nature. It is not inconceivable that an authoritarian administration might go substantially further than earlier ones in aggressively politicizing the prosecutorial arm of the Department of Justice and the Internal Revenue Service in ways that compromise effective democratic competition. Threats and intimidation against journalists seeking to follow basic canons of journalistic ethics, as well as aggressive efforts at misinformation by the White House on matters of signal national concern, would constitute further evidence of retrogression. The resurgence of hate speech targeting dissenting voices and minorities (or proposals to single out such people) also contract the public sphere (and are objectionable on their own terms). Finally, retrogression would be quite plain if administrative, prosecutorial, or epistemic capacities of the federal government were turned against a White House's political competitors, supplementing existing efforts to rewrite the rules of partisan competition in ways that undermine prior norms of reciprocity.<sup>369</sup>

Given the absence of strong institutional safeguards against retrogression, much depends on the idiosyncratic disposition and intentions of a particular president and her political coalition. Accordingly, our analysis points toward a need to pay close attention to the specific winning candidate in presidential elections, their incentives, and their beliefs. In this regard, we note that some have called President-elect Trump's approach to governance "unconstitutional."<sup>370</sup> Others have said that he "either disdains the principles enshrined in the United States Constitution or pretends the document does not exist altogether."<sup>371</sup> If proved true in practice, these would be grounds for grave concern.

In summary, we think these various steps, in the aggregate, *do* suggest that there is a present danger of constitutional retrogression. The quality of democratic

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<sup>369</sup> See *supra* text accompanying notes 352 to 354.

<sup>370</sup> Daly, *supra* note 7; see also Orin Kerr, *Trump Wants to defend Article XII of the Constitution, Volokh Conspiracy* WASH. POST, July 7, 2016 (reporting on meeting with House Republicans).

<sup>371</sup> T. Conerty, *Donald Trump's Constitutional Ignorance*, OUTSET, June 27, 2016, <http://outsetmagazine.com/2016/06/27/donald-trumps-constitutional-ignorance/>.

contestation has already suffered; while liberal rights that are central to democratic practice have survived, they operate in a public sphere that is under threat. And the institutions of the rule of law, while holding for the moment, are vulnerable to politicization much as they have been elsewhere. A handful of judicial appointments, combined with an aggressive uptick in the activity levels of the Supreme Court, could produce a judiciary which decidedly part of the governing coalition, rather than a distinct check upon it. Should the rule of law begin to be undermined, the risk will materialize. Democratic elections will continue in the United States; but they may be serving a constitutional liberal democracy that is qualitatively weakened. And this, in turn, has important consequences for American soft power and the global pursuit of the national interest.

## **B. Navigating Constitutional Retrogression**

If our analysis is correct, what is to be done? A central problem is that many of the institutional choices that create vulnerabilities to constitutional retrogression in the U.S. are long-standing. They are baked into the constitutional design at the outset of our nation's history or fashioned by a Court that was focused on different political realities. Had other choices been made then, the risk of retrogression today might be different. But should the risks inherent in our particular constitutional design materialize, attempts at institutional recalibration will be too late, as proposals will likely not be incentive-compatible with the interests of national leaders who are already well lodged in place.

Perhaps the most useful implication, therefore, concerns attitudes rather than institutions. Posner and Vermeule have argued that the American people are excessively fearful of "tyranny", and the present article might be read as an exercise in tyrannophobia.<sup>372</sup> They argue that presidents will not abuse their authority because of a concern to maintain their credibility through costly signaling of their sound motives.<sup>373</sup> Our analysis points in a different direction. It suggests that the constitutional and legal safeguards of democracy are, in fact, exceedingly thin, and would prove to be fairly easy to manipulate in the face of a truly antidemocratic leader. Strategies that have availed antidemocratic leaders in other nations are readily at hand here, but countervailing checks are not in place. Credibility, which Posner and Vermeule emphasize, provides weak restraint given a sufficiently weak public sphere, sufficient partisan venality, or a reasonable modicum of presidential *sang froid* about the weakness of forthcoming democratic contests. Popular mobilization against even incremental evidence of retrogression, on the other hand, is hindered by the fact that there will never be a

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<sup>372</sup> Posner & Vermeule, *supra* note 123, at 321.

<sup>373</sup> Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 867-68 (2007) ("By tying policies to institutional mechanisms that impose heavier costs on ill-motivated actors than on well-motivated ones, the well-motivated executive can credibly signal his good intentions and thus persuade voters that his policies are those that voters would want if fully informed.")

singular moment when the United States tips over from robust democracy into a quasi-authoritarian state.

Institutional pluralism, we think, has an important role to play. The United States still has a vigorous press, and a judiciary that generally seems inclined to stand up to direct attacks upon the press. The more immediate threat to a robust public sphere based on a shared epistemic ground is the delegitimation and marginalization of news sources that (by and large) hew to norms of empirical verification and nonpartisanship.<sup>374</sup> The willingness of socioeconomic elites to demand high-quality news, and to decry exogenous efforts to distort the informational environment either by official or unofficial means, will be of much importance.

The United States has two political parties that (by and large) remain committed to democratic politics, rather than to the securing of permanent, entrenched governmental power. But there is no guarantee that either party will remain committed to the democratic game. The decisions of party leaders and activists *on both sides* to prioritize the continuance of democracy as an ongoing concern, and their willingness to allow transient policy triumphs to offset concerns about antidemocratic behavior, will be of dispositive importance. When partisan agendas overwhelm commitment to the institutional predicates of democratic competition—where, in effect, one party becomes an *anti-system* formation—retrogression becomes substantially more likely. This suggests that to the extent the new President presents a threat of retrogression, the pivotal choices will not be taken by his opponents—but by his putative partisan allies.

Under what circumstances do political actors maintain fidelity to democratic politics, rather than seek to try to entrench themselves into permanent power? Norms of reciprocity are likely to do some work, but their persistence must also be explained. One story is that the political actors fear that they will be punished should they violate the constitutional norms of democracy. Arguments of this kind about the robustness of constitutional protections ultimately fall back upon claims about the people themselves.<sup>375</sup> Constitutions, after all, just pieces of paper that take their force from the intersubjective understandings of elites and citizens. It is this quality that leads us to suggest that the current moment may be a dangerous one, and to identify public support for the norms and conventions of democratic politics as the critical factor. Whether this is a cause for optimism is a matter of legitimate debate. Constitutional veneration may be high in the United States, but popular constitutional knowledge

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<sup>374</sup> Again, we think there is a qualitative difference between the partisan skew of a *New York Times* or the *Wall Street Journal*, and the fact-free partisanship of some online sources.

<sup>375</sup> LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2006).

remains exceedingly poor.<sup>376</sup> In a recent poll, for example, only a quarter of Americans could name all three branches of government; a third could name none at all.<sup>377</sup>

Even if popular knowledge of the Constitution were better, constitutional enforcement requires the kind of intersubjective agreement on violations that is difficult to obtain, especially under mutative and precarious political conditions. Given the availability of piecemeal, incrementalist pathways to weakened democratic structures, the public will lack for obvious threshold moments or focal points around which to mobilize. This absence of legal safeguards, coupled with the difficulty of pro-democracy mobilization, suggests that seemingly excessive concern about retrogression away from democratic practices may well be quite sensible at the current moment. To the effect it persuades, moreover, it may be the only effectual friction on an antidemocratic agenda.

Yet shifts in the quality of constitutional liberal democracy are not unidirectional or permanent. The history of post-reconstruction “Redemption” in the South, an earlier instance of retrogression, shows that what falls can also rise. But the mobilization required to effectuate reversals in the direction of change is costly, and especially challenging in an era of epistemic fractionalization. It is as easy today to imagine sustained retrogression as it is a more contested period of give and take.

### Conclusion

The threat to constitutional liberal democracy in the U.S. context is not well understood. Scholarship in law and politics has focused on threats from the military or emergency powers, and the possibility of autocratic reversions. But we have argued that this focus is misplaced. There is a low risk, in our view, of either military coup or the institutionalization of permanent emergency rule, at least assuming a strategic would-be authoritarian. The threat of constitutional retrogression is more substantial, we think, and more insidious. Perhaps the most important immediate contribution in this Article has been to isolate and define this threat, and to describe its mechanisms. This cartographic exercise provides clarity, we hope, on the nature of the current shadow over democracy.

But we are under no illusion that such a mapping exercise itself provides a remedy. The coming years, we conclude, will be ones of stress and turmoil for American liberal democracy. Whether it survives depends less on the robustness of our formal, institutional defenses—which, we conclude, are not particularly strong—but on the decisions of discrete political elites, and the contingent and elusive dynamics of popular

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<sup>376</sup> Mila Versteeg and Nicholas Stephanopolous, *The Contours of Constitutional Approval*, 94 WASH U. L.Q. 1 (2015).

<sup>377</sup> Annenberg Public Policy Center, *Americans’ Knowledge of the Constitution is Declining*, September 13, 2016, available at <http://historynewsnetwork.org/article/163845>

and elite mobilization for and against the conventions and norms that render democratic life feasible.

All this makes the case for American exceptionalism especially shaky. Even as they drew on Enlightenment ideals in their formation of the Constitution, the Founders believed that time would inevitably bring corruption and decay. While they hoped that decay could be postponed through careful institutional design, they also knew that the handiwork of the Constitution would be imperfect, and subject to significant pressures. They viewed the United States as a great experiment, but one also subject to the universal laws of history, which included the inevitable decline of republics. They surely would have been skeptical of subsequent claims of American exceptionalism. Today, surveying the risk of retrogression, we think they would see no cause to revise any of these views. Nor would they abandon their trepidation about the ideal of a democratic future . We should follow their lead.