

TRUMPISM AND THE CONTINUING CHALLENGES TO THREE POLITICAL-CONSTITUTIONALIST ORTHODOXIES

MIGUEL SCHOR¹

ABSTRACT

Following Donald Trump's election, the 2016 British Brexit referendum, and the rise of populist authoritarianism around the globe, a wave of scholarship emerged that focused on democratic breakdown and erosion. Underpinning this literature is a fear that long-standing constitutional and democratic orthodoxies—ideas that are broadly accepted and therefore seldom questioned—are under considerable stress. This paper is a comparative constitutional study of democratic erosion in the United States.

Donald Trump's presidency was a gift to constitutionalists because it enabled them to observe the erosion of a long-standing, wealthy democracy. Prior to Donald Trump's election, constitutionalists faced a problem. The American constitutional order differs considerably from those of its peer democracies—those democracies continuously in operation since 1950—yet all those democracies appeared to function tolerably well. That claim is no longer sustainable. The United States elected a demagogue to the presidency of the United States. Consequently, it has gone

1. Professor of Law, Drake University School of Law. I would like to thank Gary Jacobsohn and Sanford Levinson for their comments on this paper. A very early version of this paper was presented at "The Future of Liberal Democracy" conference, February 21–23, 2019, University of Texas School of Law. This paper was also presented at the American Society of Comparative Law conference, October 16, 2020, and the Southeastern Association of Law Schools Conference, July 30, 2021. I would like to thank the participants at those conferences for their comments.

farther down the path of democratic erosion than its peer democracies. Trumpism challenges three political-constitutionalist orthodoxies: (1) that wealthy, long-standing democracies are immune to breakdown and should resist erosion; (2) that presidentialism works well in the United States even though it has largely failed abroad; and (3) that the peculiar form constitutionalism took in the United States is the cure for the excesses of democracy.

KEYWORDS: *Democratic erosion, American free speech exceptionalism, electoral college, separation of powers, presidentialism, parliamentarism, constitutionalism, militant democracy.*

I. INTRODUCTION

Following Donald Trump’s election, the 2016 British Brexit referendum, and the rise of populist authoritarianism around the globe, a wave of scholarly monographs emerged that focused on democratic breakdown and erosion (Balkin 2020, Ginsburg and Huq 2018; Graber et al. 2018; Howell and Moe 2020; Lepore 2018; Levitsky and Ziblatt 2018; Mettler and Lieberman 2020; Mounck 2018; Norris and Inglehart 2019; Posner 2020; Przeworski 2019; Runciman 2018; Sunstein 2018; and Weyland and Madrid 2019). Underpinning this literature is a fear that long-standing constitutional and democratic orthodoxies—ideas that are broadly accepted and therefore seldom questioned—are under considerable stress. This paper is a comparative constitutional study of democratic erosion in the United States.

The Trump presidency was a gift to constitutionalists, because it enabled them to observe the erosion of a long-standing, wealthy democracy. Prior to Donald Trump’s election, constitutionalists faced a problem. The American constitutional order differs considerably from those of its peer democracies—those democracies continually in operation since 1950²—yet all those democracies appeared to function tolerably well. That claim is no longer sustainable.³ The United States elected a demagogue to the presidency. Consequently, the United States has gone farther down the path of democratic erosion than any of its peer democracies. Trumpism challenges three political-constitutionalist orthodoxies: (1) that wealthy democracies

2. See Table 1: America’s Peer Democracies. The United States is an outlier as it did not become fully democratic until the enactment of the Voting Rights Act in 1965, 79 Stat. 437.

3. That claim is, of course, contestable when it comes to race (Graber 2018). Historically, there have long been authoritarian subnational enclaves primarily located, not surprisingly, in the American South (Gardner 2020).

are immune to breakdown and should resist erosion, (2) that presidentialism works well in the United States even though it has largely failed abroad, and (3) that the peculiar form constitutionalism took in the United States is the cure for the excesses of democracy.

Part II examines the global erosion of democracy. The scholars who write about democracy's current prospects are at once both overly and insufficiently alarmed. Democracies have overcome existential crises in the past, which provides grounds for cautious optimism. New information technologies present a different kind of threat than democracies have faced in the past, however, since they undermine the marketplace of ideas. The United States will find it more difficult to muddle through its current crisis than its peer democracies, because its speech environment is peculiarly susceptible to the harms flowing from new information technologies. Consequently, it increasingly looks like one of the flawed democracies once thought to be located only in the so-called developing world.

Parts III and IV examine how democratic erosion in the United States has been facilitated by two features of its constitutional order—presidentialism and constitutionalism—that differ markedly from global norms. The paradox of the American constitutional project is that these two features were designed to prevent, not facilitate, democratic erosion. The framers shared the concerns of contemporary democratic theorists, but they used different terminology to describe the ills that might flow from representative government. They feared demagogues and they feared the violence of factions. Although wealthy, long-standing democracies around the globe are facing considerable headwinds, they are blowing stronger in the United States than elsewhere due to contingent political developments and political underdevelopments facilitated by its exceptional Constitution.

II. DEMOCRACY AND WEALTH

The first orthodoxy is global. It is the idea that wealthy, long-standing democracies are immune to democratic breakdown and should resist democratic erosion. Democratic theorists consider these to be superman democracies. After surveying the data on democratic collapse, Przeworski (2019, 33) concludes that long-standing democracies are “impregnable in economically developed countries.” Democracy rests on two building blocks—elections and free speech—that are normatively superior to the alternatives. Wealth provides a deep reservoir of legitimacy and a buffer against bad times. A long pattern of democratic contestation habituates citizens to liberal norms and is thought to inoculate them from authoritarian appeals.

The presidency of Donald Trump and the rise of populism in the West, however, challenge this belief.

Thirty years ago, scholars were optimistic about democracy (Schor 2020b). The Berlin Wall fell in 1989. Scholars became busy writing about why democracy was spreading around the globe (Huntington 1991). Scholars disagreed over the processes of democratic emergence and how best to craft institutions, but they believed that democracy would ultimately prevail over authoritarianism (Fukuyama 1989). There were good reasons for that optimism. Democracies, at least in the past, functioned better than did dictatorships, as they were better able to muddle through crises. Constitutional orders that endure are flexible and adaptable (Elkins et al. 2009). Democracies make mistakes, but their susceptibility to popular pressure enables them to adapt. Runciman (2013) persuasively documents the fine long-term track record that democracies have in surviving crises such as war and economic depression by virtue of their flexibility and responsiveness. Elections and free speech, in short, are crucial to democratic survival.

Scholars today are pessimistic about democracy. They point to four exogenous shocks as the proximate cause of a global democratic recession: globalization, climate change, illegal immigration, and new information technologies (Mounk 2018). A fifth shock, a global pandemic, has recently emerged and has disrupted economies already under stress from globalization. Globalization and the robotization of work have led to the disappearance of many traditional forms of work and exacerbated income inequality (Howell and Moe 2020, 25–61). People in desperately poor countries are fleeing to wealthier ones to escape political mismanagement and the ravages of climate change. New information technologies have lowered the costs of spreading false information and extremist views while deepening political polarization.

These exogenous shocks created an opportunity structure that populist authoritarians exploited to attack and undermine institutions. Populist leaders have honed economic dislocation and immigration into effective ideological weapons with which to bludgeon governments and traditional parties for failing to protect the “true” people from “outside” threats. The playbook for populists around the globe is remarkably similar (Mudde and Kaltwasser 2017; Müller 2016). Charismatic leaders arise who claim that the true or real people are the sole source of legitimacy, that the people are being betrayed by elites, and that only strong leaders can fix the nation’s ills. Once in power they undermine institutions by attacking policy and scientific expertise while staffing the bureaucracy with sycophants and loyalists. Getulio Vargas, who at different times served as dictator and democratically elected

president of Brazil, succinctly summed up the political program of populism: “for my friends everything, for my enemies the law.”

New information technologies are the most worrisome of the exogenous shocks facing democracies because they undermine the advantages that democracies once enjoyed over authoritarianism. When the history of our era is written, 1991, which is when web servers first became publicly available, will turn out to be a more momentous date than 1989, which is when the Berlin Wall fell. Democracies have muddled through profound crises in the past, but they were able to count on a functioning marketplace of ideas (Rosenfield 2018). That may no longer be the case for two reasons.

First, new information technologies facilitate the transmission of false information (Vosoughi et al. 2018) while destroying the economic model that once sustained news reporting (Bazelon 2020a; Starr 2009; Sullivan 2020). False information spreads virally via social networks, as they lack the guardrails that print media employs to check the flow of information. Flooding tactics can be used to drown out democratic deliberation “through the creation and dissemination of fake news, the payment of fake commentators, and the deployment of propaganda robots” (Wu 2020, 15). New information technologies, moreover, have cannibalized the revenue streams that once sustained newspapers. The nation was once dotted with thriving, locally owned newspapers that provided a breakwater to our tendency to divide into two opposing national teams. Opinion journalism designed to outrage and entertain is thriving on the corpse of the news.

Second, these new technologies facilitate and deepen political polarization. Social media has accelerated the conjoined processes of information commodification and political disagreement. The old public spaces created by print media, radio, and television have been displaced by the vast small-*d* democratic fora of the internet. Instead of consuming information from shared public spaces, political partisans can now obtain information from sources that echo their views (Sunstein 2017). Social media relies on algorithms to sort out user created content that rewards polarizing content. The polls during the Trump presidency, unlike the polls for previous presidents, have moved within a narrow band because the competing factions get their information from polarized “news” sources (Klein 2020). Cheap online speech, moreover, enables “mobs to harass or abuse other speakers with whom they disagree” (Wu 2020). Humans are wired to divide themselves into competing groups (Mason 2018). Social media has supercharged that wiring system.

These trends do not bode well for democracy. Nonetheless there is reason for guarded optimism. Democracies have a fine, long-term track record of muddling through crises. New information technologies undoubtedly provide a different

challenge than past crises, since they disrupt the marketplace of ideas. America's peer democracies, however, are better situated to deal with these disruptions than the United States. Democracies abroad do not have an absolutist view of speech and believe that "protecting the citizenry from demonstrably false speech and bad ideas" is not "inconsistent" with a "robust commitment" to free speech (Krotoszynski 2015, 661). Consequently they are experimenting with regulatory mechanisms to deal with the supply of disinformation.⁴ In the United States, in contrast, courts have taken an absolutist position on speech, and it has been left up to social media companies, which are not limited by the First Amendment, to devise solutions to disinformation.

The challenge that new information technologies pose is particularly acute when it comes to speech-related electoral harms. Domestic and foreign political actors have powerful incentives to spread disinformation to sow electoral mistrust. America's peer democracies regulate hate speech and electoral disinformation while investing in public broadcasting stations that "score high in public trust and audience share" (Bazelon 2020b, 4). The United States Supreme Court, in contrast, employs strict scrutiny even when assessing regulations tangentially related to speech such as the flow of money into politics.⁵ Consequently, the United States is awash in money used to influence elections (Mayer 2017, 279–94) and awash in electoral disinformation.⁶ In the days leading up to the 2016 American presidential election, for example, "junk news was shared as widely" as "professional news" (Wu 2020, 30). The 2020 presidential election has been ceaselessly attacked by Donald Trump and his allies in the Republican Party who falsely claim that the election was fraudulent (Leonnig and Rucker 2021).

The problem the United States faces is that contemporary First Amendment doctrine is the functional equivalent of an overbuilt battleship constructed for the wrong war. America's speech protections were built to deal with the threat of government censorship. In the twenty-first century, the threat flows, however, from speech itself as it migrates to social media platforms (Pozen 2020). *United States v. Alvarez* (2012)⁷ illustrates the poverty of American speech exceptionalism. The Supreme Court concluded that false statements of fact enjoyed the same protection as core political speech for fear that the government would otherwise be empowered

4. See, e.g., European Commission (2021), <https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation>.

5. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

6. Browning (2020).

7. 132 S. Ct. 2537 (2012).

to create an Orwellian ministry of truth. The Court stood Orwell on his head by broadly protecting lies. Under the Trump presidency, the United States enjoyed an official ministry of truth in the form of the president's bully pulpit, which Trump used to normalize lying.⁸ Kellyanne Conway, Donald Trump's political adviser, has a surer grasp on how political speech operates than does the Supreme Court. When she injected the phrase "alternative facts" into the political lexicon in 2016, sales of George Orwell's *Nineteen Eighty-Four* took off.⁹

Orwell's exploration of how totalitarian regimes distort speech to maintain power requires two modifications to explain America's contemporary democratic dystopia. First, the government has not required that citizens watch propaganda on television screens located in every public space and in every home. Citizens voluntarily watch and listen to info-entertainment on a variety of fixed and portable devices. Freedom, in the form of an unregulated marketplace of ideas, is a necessary condition of democracy's collapse. Second, language has been debased, but not how Orwell imagined. Orwell's *Newspeak*, which was designed to effectuate totalitarianism, is embarrassingly rich in vocabulary compared to the language of populist autocrats. Populists around the globe employ the same rhetorical tropes. No new speak was required, moreover, to divide citizens into two camps each sincerely convinced that the other is the victim of an alternative reality. All that is required is a marketplace of ideas where businesses thrive by debasing and impoverishing the language of politics as a means of achieving market domination within a slice of the electorate.

Scholars have long divided the world's democracies into two categories. One category is reserved for democracies located in the "developing" world. These are known as flawed democracies or democracies with adjectives. These democracies have elections, but institutions are a poor check on power (O'Donnell 1994). Flawed democracies effectively operate along authoritarian pathways, since institutions offer few constraints and opposing political elites largely do not engage in bargaining. The second category is reserved for long-standing democracies located primarily in the "developed" world. These are called consolidated democracies. They have elections, a thick civil society, a free press, and robust institutions.

It turns out that speech has shrunk the constitutional and political distances that once separated the developing from the developed world, at least if the United States has something to teach the world. Flawed democracies share the following

8. As of August 27, 2020, when Trump accepted the Republican nomination for president, he had made 22,247 false or misleading statements since being sworn into office (Kessler et al. 2020).

9. Tamura (2017).

features: loyalty to the leader supplants loyalty to institutions;¹⁰ clientelist policies are used to buy votes;¹¹ electoral rules are manipulated to protect incumbents; and emergencies are normalized as a means of cementing power by exhausting voters and thereby weakening civil society. These phenomena are all at work in the United States.

In the flawed democracies located in the developing world, income inequality coupled with a lack of education relative to wealthier nations greased the pathway to power for authoritarian populists. The epicenter for (white) populist authoritarianism in the United States has long been the former states of the Confederacy (Posner 2020, 178–89), which suffer from government malperformance, deep racial inequality, and higher levels of illiteracy than any other region.¹² The United States has the highest level of income inequality of any wealthy, long-standing democracy.¹³ New information technologies coupled with an unregulated marketplace of ideas facilitate democratic erosion much like low levels of education have in the developing world. Political polarization and the normalization of falsehoods weaken accountability and provide an environment in which demagogues thrive. Speech, in short, has become a sort of kryptonite for at least one superman democracy.

III. UNITED STATES PRESIDENTIAL EXCEPTIONALISM

Presidentialism in the United States is exceptional. The democratic track record of presidentialism abroad is poor. (Norris 2008, 132–55). Among America’s peer democracies that have been in operation since 1950, only Costa Rica has presidentialism, and it underwent a civil war in 1948.¹⁴ Oddly, both supporters and critics

10. The only plank in the 2020 Republican Party platform is loyalty to Donald Trump. See https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf.

11. See Bump (2020).

12. See World Population Review, <https://worldpopulationreview.com/state-rankings/us-literacy-rates-by-state>.

13. See Table 1: America’s Peer Democracies. The only long-standing democracy with a higher Gini coefficient than the United States is Costa Rica. Costa Rica, however, is not a wealthy nation. Unlike the United States, moreover, Costa Rica has a remarkably high level of electoral integrity, which is on par with the Nordic countries that are considered the gold standard in running elections (Norris 2017, 28).

14. Costa Rica’s 1949 Constitution shows a remarkable degree of political learning from the root causes of its civil war. The Constitution outlaws the principal ant-democratic players—the Communist Party and the military—and creates a fourth branch of government, the Supreme Electoral Tribunal, to ensure clean elections (Booth 1998, 44–62). An amendment in 1975 removed the restrictions on the Communist Party.

of presidentialism agree that it works in the United States. Justice Scalia (2011), for example, argued, in a statement to the Senate on American exceptionalism, that what made the Constitution succeed was not the Bill of Rights, which in his estimation “every banana republic has,” but separation of powers and that Americans needed to learn to love gridlock. The political scientist Juan Linz (1990) argued in a seminal article entitled “The Perils of Presidentialism” that separation of powers facilitates democratic breakdown, but the United States was the exception to the rule.

Although the debate between the supporters and critics of presidentialism largely occurred before Donald Trump’s election, the terms of the debate, which revolve around phrases such as “presidentialism” and “separation of powers,” highlight an important aspect of constitutional orders, which is that institutions tend to emerge in clusters and the success or failure of these institutions is linked (Skach 2005, 128). Our Constitution illustrates this phenomenon. *The Federalist* begins and ends with a warning that the American people should not turn to demagogues. The institutional cure for this problem, or so the framers argued, is found in a set of linked institutions: the electoral college, separation of powers, and presidentialism.

Evolutionary changes driven by political competition and technological change have transformed these institutions so that they now facilitate the election of a demagogue to the presidency of the United States. Parts A and B below discuss the transformation of the electoral college and separation of powers. These changes, however, do not explain the pathways along which democratic erosion occurs. Democracies rest on a complex ecosystem of political understandings, which British constitutionalists call conventions, that channel and limit conflict. Part C explains why presidentialism, on balance, does a poorer job than parliamentarism in sustaining the informal norms needed to make democracy work.

A. The Electoral College

Throughout the course of the convention, the delegates believed that the president would be elected by the Congress (Dahl 2001, 64–66). If that proposed electoral system had been adopted, the United States would have ended up with a republican version of parliamentarism. Parliamentarism, however, was not on the table as a viable option in 1787, as it did not emerge in England until the nineteenth century (Schor 2020a). The framers had reservations about legislative election, moreover, as they desired an executive sufficiently powerful to counter the legislature, which they feared as the most dangerous branch (Klarman 2016, 213–37). Near the end of the convention, the delegates hit upon the electoral college as an eleventh-hour

compromise, which, unlike congressional election, ensured the independence of the executive.

The electoral college reflects the dim view the framers had of interest-group politics. Political parties did not yet exist, nor did the idea of a legitimate opposition (Hofstadter 1970). The framers believed and hoped that the branches would engage in deliberation over the common good rather than wage battle over votes. The solution to the evils that were thought to flow from politics was to reduce the linkages between citizens and elected officials while multiplying the number of elections needed to gain control of the new government. The electoral college illustrates the strategy of reduction.¹⁵ Hamilton in *Federalist* No. 68 (Wright 1788/1996, 441) argues that it is “desirable” that the “election should be made by men most capable of analyzing the qualities adapted to the situation, and acting under the circumstances favorable to deliberation.” The United States is the only presidential government in the world to rely on indirect elections (Przeworski 2018, 25).

A design that seeks to remove politics from the job of selecting the most important office in the new republic would prove a fantasy. George Washington, of course, was the consensus choice as the nation’s first president (Sloan 2004). Once he left office, party competition reduced the electoral college into a mechanism for vote counting.¹⁶ The electoral college was the first of the national institutions created under the Constitution to collapse under the hydraulic pressure of political competition. The effects of this change were masked for much of American history because political parties took over the task of weeding out unfit candidates (Ceaser 2011; Gardbaum and Pildes 2018; Kamarck 2018). Party elites played a disproportionate role in presidential nominations for most of our nation’s history. They have better knowledge of the candidates than do ordinary voters, and they tend to pick consensus candidates, as that is generally a winning strategy in a two-party political system. In the wake of the 1968 Democratic Convention, however, both parties weakened the power of party elites by making ordinary citizens the arbiter of who would be the party’s presidential candidate in political primaries. None of our peer democracies and few, if any, democracies around the globe give citizens so much power over who should be the candidate for the chief executive of the nation (Gardbaum and Pildes 2018).

15. The other institutions that reflect this strategy, of course, are the Senate, prior to the Seventeenth Amendment, and the Supreme Court.

16. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320 (2020).

B. Separation of Powers

If the electoral college reflects the strategy of reduction, separation of powers reflects that of multiplication, as different offices are selected during different moments in political time. The intended consequences of separation of powers, however, are shrouded in misinformation, none articulated more strongly than by Justice Scalia. In a speech on American exceptionalism given to the Senate Judiciary Committee, Scalia (2011) argued that separation of powers was intended to produce gridlock that Americans should learn to love, as this was the necessary price of freedom.

Justice Scalia was mistaken as to why the framers adopted separation of powers. The framers sought to constrain and channel democratic politics by separating the powers of government. They were not, however, fans of gridlock. The framers criticized the Articles of Confederation because “supermajority or unanimous support was required to enact many types of policy or constitutional change” (Binder 2003, 6). The framers believed that separation of powers would facilitate good government by preventing one branch of government from interfering with the other branches, as had occurred during the colonial period as well as under the Revolutionary state constitutions (Wood 1998, 446–53). Gridlock is the unintended consequence of a system of government designed to produce deliberation in the absence of national political parties.

Political polarization has normalized gridlock. Karol (2015, 208) observes that having “cohesive parties with divergent policy positions” has caused dysfunction in the United States but not in other “stable democracies.” America experienced polarized parties in the past, but dysfunction did not matter much because the government performed relatively few functions in the nineteenth century (Karol 2015, 211). The government grew following the Great Depression, but parties were not ideologically polarized from roughly the 1930s until the 1980s. Presidents either had majority support in Congress or could bargain with members of the opposing party. The parties became significantly more polarized, however, beginning in the 1980s (Drutman 2020, 58–106). Mann and Ornstein (2012) bluntly conclude that contemporary American parties are ideologically coherent and polarized, which makes separation of powers unworkable. The United States is embarked on a great experiment as the Constitution requires bargaining, but the parties are increasingly incapable of doing so.

Gridlock has profound institutional consequences. Gridlock empowers political minorities with intense preferences who are better able to navigate an overly complex constitutional system while systematically disempowering majorities with

diffuse preferences, given the costs associated with collective action (Olson 1965). Gridlock weakens Congress and strengthens executives who are forced to rely on executive orders to put in motion the policies on which elections are fought (Posner and Vermeule 2010). Courts gain power because they police the interactions between the branches and because their statutory interpretations cannot, as a practical matter, be overruled by a dysfunctional government. Voter anger at dysfunctional government facilitates the election of demagogues who promise that they alone can fix the nation's problems.

C. Presidentialism

Political competition and technological change have transformed the presidency. Tulis (2016) explains that presidents, who rarely spoke directly to citizens in the nineteenth century, began to actively court public opinion by the beginning of the twentieth century. The framers believed that three barriers were obstacles to demagogic ambitions: the electoral college, separation of powers, and the size of the republic. The first two collapsed under the weight of politics, and the third under the weight of politics and technology. Ambitious presidents developed a source of soft power in the form of public support to add to their relatively slender institutional powers. Technological changes such as railroads and telegraphs made it possible for presidents to fashion linkages to citizens. Those technological changes, of course, have accelerated with the advent of new forms of social media. The United States, politically speaking, has been shrunk to the size of the Athenian city-state that gave birth to the terms “democracy” and “demagogue.”

Although transformations in the electoral college, separation of powers, and executive soft power opened the door to Donald Trump's election, they do not explain the pathways along which democracies erode. There are two competing accounts of democratic erosion. One school of thought builds on ideas that have percolated since the founding of the American republic to argue that presidents act as tyrants when they overstep their constitutional bounds. James Madison provides the ur-text for this idea: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny” (Wright 1788/1996, 336). Institutionally oriented accounts of executive autocracy weave stories based on the growth of domestic power following the New Deal and the growth of the national security state following World War II. The increasing complexity of the issues facing the United States coupled with ability of presidents to act with energy and dispatch has enabled them over time to displace Congress. The vehicles for this displacement have been delegation and emergency

(Buckley 2015; Posner and Vermeule 2010). On this account, Trump is simply the fortunate beneficiary of long-term, evolutionary changes in the presidency.

The competing account of democratic erosion focuses not on formal institutions but on the unwritten norms that underpin democracy. British constitutionalists pioneered the idea that unwritten norms, which they call conventions, are critical for democracy to function (Marshall 1984; McLean 2018). Unwritten norms act as a glue keeping the forces of political competition from tearing the nation apart. The political scientists Levitsky and Ziblatt (2018) identify the critical democracy-protecting norms as mutual toleration and forbearance. These two norms matter both in keeping democracies afloat and in the emergence of democracy. For democracy to emerge, political actors need to learn to compromise and accept the opposition as legitimate. During the early American republic, for example, separation of powers worked because the branches deliberated over their respective authorities (Casper 1997). In addition, the nascent political parties learned to accept the opposition as legitimate (Hofstadter 1970). Democratic erosion, and breakdown, in contrast, occurs when polarization destroys these norms (Bermeo 2003). Bargaining and toleration are, in short, democracy-sustaining norms.

The Trump presidency provides compelling evidence for why scholars should pay more attention to democracy-sustaining norms. Democratic erosion operates along different pathways in long-standing, wealthy democracies than it does in new democracies. In new democracies, institutions are weaker and so is citizen attachment to institutions. This enables elected leaders to retain the veneer of electoral democracy while hollowing out institutions (Bermeo 2016). “Abusive constitutionalism” and “authoritarian legalism” are democratic tools that elected leaders wield to cement their hold on power (Landau 2013; Scheppele 2018). The complexity and age of the American system of government make it difficult for Trump to make the sweeping legal changes we are witnessing in new democracies.¹⁷ If one squints, American democracy under the Trump presidency bears a passing resemblance to American democracy under the Obama presidency.

The damage is occurring along the margins of institutions as informal norms or conventions are systematically eroded. American constitutionalists are learning a hard lesson long known to students of developing nations, which is that there is a political payoff to undermining government capacity (de Soto 1992). Populists thrive in an environment where government is unable to solve the nation’s

17. The picture is more complex at the subnational level. There has been little formal constitutional change even in those states that have most fully embraced the authoritarian turn in American politics (Gardner 2020). Some states, however, have manipulated electoral rules, packed courts, and changed the respective powers of the different branches to disempower the opposition.

problems. The journalist Michael Lewis (2018) documents how the Trump administration systematically damaged the capacity of government to keep citizens safe from harm. The Trump administration benefited, until the advent of the pandemic, by simultaneously eroding the competence of government agencies and attacking their professionalism and commitment to the rule of law as a deep-state conspiracy. Although the administration bore a heavy political cost for its failure to deal with the pandemic, its failures are part and parcel of its governing philosophy, which is to sow chaos (Pozen and Scheppele 2020).

The story of how the Trump presidency eroded American democracy matters because it does not fit neatly into existing accounts of democratic decay. Scholars who emphasize the role of soft norms in democratic breakdown largely ignore why institutions matter. There is evidence for this view since all institutional arrangements are susceptible to political polarization. Scholars who emphasize the institutional roots of democratic erosion downplay the role of informal norms. There is evidence for this view, since presidentialism is more susceptible to democratic breakdown than parliamentarism (Linz 1990; Norris 2008). This paper argues that our existing theories of democratic decay need to be rebooted to incorporate the lessons of the Trump presidency.

Institutions matter because they play a crucial role in the emergence and destruction of democracy-sustaining norms. Institutions are the battlefield around which political forces array themselves. Democracy-sustaining norms are born, evolve, and die largely in the arena of the political constitution, where political actors, not courts, hold power. Presidentialism is relatively rich in pathways that allow actors to destroy democracy-sustaining norms, whereas on balance, parliamentarism does a better job of sustaining these norms. Three reasons explain why parliamentarism does a better job of sustaining political-constitutional conventions than does presidentialism.

(1) Presidentialism is susceptible to capture by candidates short on political experience but long on media exposure. Candidates do not need a political party to run for the presidency, and in any case, the connection between a presidential candidate and a political party may be purely opportunistic. Political candidates who have not been socialized by service in elected office are likely to lack basic democratic norms such as the need to compromise and accept elections (Carreras 2014). Peer review by the political class plays a larger role in selecting candidates for chief executive in parliamentary systems, which helps weed out unfit outsiders (Bagehot 1865/1986, 67–75; Gardbaum and Pildes 2018). Prime ministers, moreover, unlike presidents, are elected and fired by the legislature. Parliamentary government is not immune from capture by unfit outsiders, but the cost of a hostile takeover is higher

than in presidentialism, as outsiders will have to form a political party to advance their ambitions.¹⁸

(2) Presidentialism multiplies the number of actors with the power to destroy democracy-sustaining norms. Presidents are not the only actors with the power to erode these norms. The Senate majority leader, Mitch McConnell, for example, has played a crucial role in undermining the ability of the judicial branch to act as an honest broker between the parties by engineering its capture by judges ideologically united in pursuing policies favored by the Republican Party (Wheeler 2018). Ideologically conservative judges have also played a critical role in destroying democracy-sustaining norms by contending that the pluralistic forms of interpretation favored by moderate judges are illegitimate because there is only one correct way to interpret the Constitution. The monistic interpretive ideology espoused by conservative judges—originalism—has destroyed the idea of legitimate *constitutional* disagreement.

Parliamentary governments, in contrast, are efficient because they fuse the executive and legislative branches (Bagehot 1865/1986). This efficiency proved attractive to European state builders in the nineteenth century who, unlike their American counterparts in the eighteenth century, had to fashion an institution sufficiently powerful to challenge monarchs and large standing armies (Selinger 2020). All democracies have a political constitution sustained by informal norms that are seldom enforced by courts (Ahmed et al. 2019). These norms are sustained if political actors find it in their self-interest to effectuate them. The paucity of veto points in parliamentary government facilitates the logic of mutually assured destruction. Parliamentary leaders worry that their opponents will one day win power and turn the tables on them. Somewhat paradoxically parliamentary efficiency has a democratic payoff.

The fusion of the two branches means there is no constitutional impediment to having the prime minister and the Cabinet answer questions from the opposition in Parliament. The practice of question time has evolved over time, but it diminishes the bully pulpit exercised by chief executives by providing counter-speech and narratives that citizens can consider (Setty 2008). The deliberative aspects of parliamentary debates were long considered one of its more democratically attractive features (Selinger 2020). In the United States, in contrast, the House of Representatives has found it impossible to conduct oversight because of extreme stonewalling by the executive and a slow-moving judicial system that has largely allowed the administration to evade oversight.

18. This is precisely what Silvio Berlusconi did to become Italy's prime minister (Stille 2007).

(3) There is a pay-off to separating the head of government from the head of state. Bagehot (1865/1986) observed that the British government consisted of a dignified portion to which citizens were attached—the Crown—and an efficient portion—Parliament, the Cabinet, and the prime minister—which did the work of government. This division of executive power proved attractive to European nations, which modeled themselves after the British government and many of which are also constitutional monarchies (Selinger 2020).¹⁹ The failure of separation of powers in the United States provides an important clue as to the advantage of dividing executive power in this fashion. Madison had hoped that separation of powers would work because elected officials would care more about their constitutional obligations than reelection. Party loyalty, however, has proved more powerful than institutional loyalty (Levinson and Pildes 2006). Heads of state, elected or nonelected, are tasked with the ceremonial aspects of governing and have incentives to care about conventions and unwritten norms. Heads of state represent the nation and typically are not members of a party. They can play the role of an honest broker when disputes arise between the parties (King 2017, 42-43) and speak to the better angels of our nature.²⁰ Elected heads of government, in contrast, have shorter time lines, which incentivizes them to demolish conventions when doing so serves their self-interest.

IV. CONSTITUTIONALISM

The root meaning of constitutionalism is that government power should be limited. The American colonists imbued this idea from the British, who were the first to operationalize it (Sartori 1962; Schor 2020a), but the idea has a long pedigree (McIlwain 1947). The break that the American revolutionaries made with the British constitutional tradition is that the people became the source of political

19. Each of the eighteen parliamentary regimes that been operating continuously since 1950 have a separate head of state and head of government. Each of those nations has a prime minister who is the head of government and either a constitutional monarch or an elected president who is the head of state.

20. Netflix's *The Crown* provides a charming example of this idea at work. When a young Queen Elizabeth was faced with her first major constitutional crisis, she directed her servants to find her school notes on Bagehot's *English Constitution*. She understood that her role was to remind political actors of the importance of abiding by conventions. A less literary but more practical example occurred when a now elderly Queen Elizabeth gave a rare and much praised speech to the nation on COVID-19 earlier this year. Courts could fill some of this gap in the United States but are unlikely to do so, since the dominant judicial ideology focuses on the meaning of words unmoored from how they operate to enhance or erode American democracy.

and constitutional legitimacy. Throughout the course of the twentieth century, near universal suffrage became the touchstone of democratic legitimacy around the globe, as has the role of the people in constitutional change. Even the United Kingdom now relies on ordinary citizens to vote on constitutional changes by increasingly relying on referenda to deal with knotty political-constitutional issues (Delaney 2018). Constitutionalism, in short, evolved into a political ideology that uneasily knits the idea of limits, typically found in written documents, and the *demos* together.

The global populist eruption suggests that the uneasy relationship between citizens and constitutions is coming apart at the seams. Democracies change more quickly than do constitutions which periodically gives rise to critical junctures that test existing institutions and may give rise to new ones (Schor 2018, 94). Democracies around the globe are facing considerable popular pressure to engage in fundamental change. Among wealthy, long-standing democracies, that problem is most acutely felt in the United States. The two big questions are (a) how to classify the mechanisms used by constitutions to put boundaries around the *demos* and (b) why the peculiar form American constitutionalism took is proving problematic.

A. Constitutional Checks on Democracy

Checks on democracy can be arranged along a spectrum. At one end of the spectrum is a political constitution that relies on conventions or political understandings reinforced by two layers of voting—the government’s responsibility to Parliament and Parliament’s to the electorate—to limit power. The bulk of contemporary democracies employ written bills of rights enforced by courts to limit majorities, but democracies abroad employ stronger checks and balances to limit national high courts than does the United States (Schor 2008).²¹ Some polities, however, employ stronger medicine in checking popular forces. Constitution makers can craft a tutelary democracy by empowering the government to restrict antidemocratic speech and parties or by means of constitutional provisions that make it difficult for majorities to govern.

This stronger medicine is illustrated by two of the most important sources of contemporary constitutional theorizing—Germany and the United States—though they took different routes to solving the problem that the *demos* poses to the constitutional order. The German constitution makes it possible, as is the case for

21. Even the United Kingdom, New Zealand, and Canada have adopted a form of judicial review (Gardbaum 2013).

all parliamentary governments, for parties to govern while seeking to prevent anti-democratic parties and voices from obtaining power and doing away with democracy. The United States Constitution, in contrast, makes it exceptionally difficult for parties to govern but neither prevents citizens from amending democracy out of existence nor polices antidemocratic speech or parties.

Germany coined the phrase “militant democracy” to describe the path it took to resolving the tension inherent in constitutionalism. The “radical break” that Germany’s Basic Law made with the past is that it privileged the constitution over democracy (Kommers 1991, 853). The architects of Germany’s postwar order believed that the flaw of the Weimar Constitution was that it did not limit “political and legal change enacted by the legislature” (Müller 2012, 1257). Germany’s Basic Law seeks to cure that deficiency by making the crucial components of the constitutional order unamendable via the so-called eternity clause of Article 79(3) and by empowering the government to adopt “illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime” (Müller 2012, 1253).²² The tools of militant democracy no doubt can be abused but are seldom employed in Germany (Müller 2012, 1258–61). Militant democracy is better understood as a set of political rather than legal restraints. These political restraints remind political elites and ordinary citizens that the law cannot be used to dismantle democracy and facilitate mobilization, which is a potent tool against incipient and existing dictatorships.²³

The framers of Germany’s constitution, unlike the framers of the America’s constitution, had actual experience in how citizens could use the tools of representative government to subvert it. The American framers, in contrast, were concerned that democratic majorities might enact laws to deal with economic dislocations such as those occasioned by the need to pay the debts of the Revolution. Klarman (2016, 606) concludes, “It is hard to overstate the extent to which the state crises over tax and debt relief in the 1780s influenced the agenda of the Philadelphia convention.” The federal Constitution was a marked departure from the more democratic, contemporaneous state constitutions that enshrined the right of the people to “alter or abolish” their government (Fritz 2008). It was no easy matter to convince the voters gathered in state conventions to adopt the plan of the

22. Similar restrictions have become common in many democracies around the globe (Issacharoff 2015).

23. This view of how rights should be enforced has become a minority view among contemporary American constitutionalists, but it played a critical role in the thought of the framing generation (Kramer 2004).

Constitutional Convention, as it “dramatically expanded the powers of the federal government” while “insulating it far more from popular political influence than most Americans at the time would have anticipated or desired” (Klarman 2016, 6). The Federalists understood the importance of hardball in establishing a tutelary democracy that entrenched the power of elites (Roche 1961).

Although constitution makers employ a wide variety of techniques in limiting democracy, the United States is exceptional in the degree to which it places training wheels on democracy. All of our peer democracies continuously in operation since 1950 have “adopted a constitutional system” more democratic than ours (Dahl 2001, 4). The exceptional features of America’s tutelary democracy include a political class that has the power to insulate itself from the electorate by gerrymandering and voter restrictions; staggered elections; strong bicameralism with two houses of equal strength; malapportionment in the Senate that privileges rural, small-population states; the electoral college; a Supreme Court poorly constrained by checks and balances; a federal government that may lack the power to solve national problems (at least according to a majority of the Supreme Court, given its current ideological makeup); and an extremely high bar to constitutional amendment. These undemocratic features, however, are generally considered a virtue rather than a problem since Americans tend to venerate their Constitution (Levinson 2008).

Germany adopted an eternity clause to protect the democratic features of its constitution. The United States has what amounts to an eternity clause that protects the undemocratic features of its political-constitutional order. Equal representation in the Senate, of course, is formally preserved against change in the Constitution. The other undemocratic features of the Constitution are protected by politics and the high bar to amendment. The rigidity that a broad eternity clause engenders was ameliorated in the wake of the Constitutional Revolution of 1937 when courts adopted two important principles. The first is that Congress should be afforded deference, or a margin of appreciation, when putting the structural features of the Constitution to work.²⁴ The second is the principle that heightened scrutiny should be employed when elected officials seek to manipulate electoral rules to entrench themselves in power.²⁵ The first principle was eroded by legal formalists on the Supreme Court, who began to undermine the ability of government to implement evolutionary innovations in the late twentieth century.²⁶ In the early twenty-first century, legal formalism has

24. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

25. *United States v. Carolene Products*, 304 U.S. 144, 152 fn. 4 (1938).

26. *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Clinton v. N.Y.*, 524 U.S. (1998).

been put on steroids by an ideology shared by a majority of the justices currently on the Supreme Court that privileges a selective and tendentious reading of the framing era to narrowly construe the structural features of the Constitution.²⁷ The second principle has been overruled *sub silentio*, as the Court believes that allowing unfettered electoral manipulation by incumbents fulfills the expectations the framers had of how politics would operate.²⁸

The exceptional degree to which the American Constitution is undemocratic and resistant to change should give anyone pause who thinks this design a virtue, since there is little evidence that Madison was right that a more democratic constitution would make the nation susceptible to the “violence of factions.” Elkins et al.’s (2009, 65) seminal study of constitutional endurance likens the American Constitution to Jeanne Calment, who lived until she was 122 on a diet consisting largely of chocolate, olive oil, and cigarettes. The key to constitutional endurance, Elkins is flexibility and adaptability. The United States Constitution is the exception that proves the rule, but that exception is pressing hard on contemporary Americans unhappy with the state of their democracy.

B. The Problems of American Constitutionalism

In *Federalist* No. 10, Madison observes that the “violence of factions” is everywhere the cause of democratic breakdown (Wright 1788/1996, 129). Madison argued that constitution makers could seek to solve this problem either by limiting liberty or by designing institutions to blunt popular forces. He argued that limiting liberty would destroy constitutional government, whereas institutional checks on democracy would preserve it. It turns out that Madison got this backwards. Putting soft limits on liberty as Germany did helps preserve the constitutional order, whereas putting excessive limits on the ability of citizens to govern corrodes institutions.

America’s exceptionally undemocratic Constitution is facilitating a severe problem of governmental legitimacy. Trust in America’s institutions is at historic lows as majorities in both parties want the government to solve national

27. The crabbed reading given the commerce clause and the necessary and proper clause by a majority of the justices in *National Federation of Independent Business v. Sebelius*, 567 U.S. 579 (2012) is the opening salvo of a judicial counterrevolution aimed at ensuring that the federal government lacks the power to solve national problems.

28. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

problems such as health care.²⁹ The response to COVID-19 has helped unite citizens in America's peer democracies, but not in the United States, where 77 percent of her citizens believe that the pandemic has deepened polarization.³⁰ The extraordinary Black Lives Matter protests in America's cities demonstrate our failure to effectuate the promise of equality. It is not just Black Americans who feel estranged from their country's Constitution. In 2016, a clear and substantial majority of citizens voted for dramatic change by voting for either Donald Trump in the general election or Bernie Sanders in the Democratic primaries. In 2020, a recent Pew poll shows that 90 percent of Trump's voters think that if Biden were to win, lasting harm would occur. The same is true of Biden's voters, 90 percent of whom think lasting harm would occur were Trump to win.³¹ Americans are learning what many citizens around the world know, which is that elections can be deeply unsettling affairs.

Madison, however, was right to seek to gauge the happiness of the citizens of a polity by examining their propensity to burn down institutional structures even if the answers he gave to that question have turned out to be empirically dubious. Citizen attachment to and disenchantment with institutions matter in assessing constitutions. The most durable cause of faction, Madison observed, is the unequal distribution of property. He feared that democratic majorities might enact legislation that would undermine the interests of wealthy elites. One of the key steps in democratic emergence around the globe occurs when wealthy and powerful elites cede power to institutions that provide security for their interests (Starr 2019, 109; Winters 2011). The United States Constitution blazed this trail around the globe.

It is becoming increasingly clear that democratic endurance in the twenty-first century turns on whether constitutional orders can provide security for ordinary citizens as well. If Americans are to muddle through the crisis of populism, they will need to deal with the economic insecurity that is one of its root causes. Franklin Delano Roosevelt, looking back on the Great Depression and the causes of World War II, argued in his 1944 State of the Union that the antidote for

29. See "Americans' Views of Government: Low Trust, but Some Positive Performance Ratings," Pew Research Center, September 14, 2020, <https://www.pewresearch.org/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/>.

30. See "Most Approve of COVID-19 Response in 14 Advanced Economies," Pew Research Center, August 27, 2020, <https://www.pewresearch.org/global/2020/08/27/most-approve-of-national-response-to-covid-19-in-14-advanced-economies/>.

31. See "Amid Campaign Turmoil, Biden Holds Wide Leads on Coronavirus, Unifying the Country," Pew Research Center, October 9, 2020, <https://www.pewresearch.org/politics/2020/10/09/amid-campaign-turmoil-biden-holds-wide-leads-on-coronavirus-unifying-the-country/>.

demagogues was a second Bill of Rights that would provide citizens with protection from many of the vicissitudes of life. Those rights are still lacking in the United States, as demonstrated by the struggle over realizing health care. It is as if the North Atlantic world were running a natural experiment on the virtues of inefficient versus efficient forms of government. The democracies of Western Europe have parliamentary governments that enable them to “take forceful, coherent policy actions” and, consequently, have “more comprehensive welfare states than the United States and are better able to buffer their citizens from the economic harms that populists feed on” (Howell and Moe 2020, 41). Populism is a problem in Western Europe as well as in the United States, but the United States is exceptional in turning toward a demagogue like Donald Trump as a means of fixing its ineffective government.

The framers imperfectly understood the promise and the danger of democracy. They understood that a demagogue might one day destroy the republic. *The Federalist* begins and ends by raising the specter of populism. The framers were mistaken, however, in their belief that the cure for republican ills was to weaken popular accountability by fashioning an overly complex machinery of government. Popular pressure is a two-edged sword. Popular anger can undermine democracy when charismatic leaders harness that energy to sweep away checks on their power. It can also cleanse representative government when citizen pressure turns into government reforms and outputs. A system of government that relies on formal structures rather than voting to deal with democratic erosion is dangerously unbalanced. The deep question Americans face as they address the exogenous shocks flowing from technological, economic, and climatic change is whether they will turn to demagogues or whether they will reclaim their authority to change their political-constitutional order when the government proves itself incapable of solving national problems.

V. CONCLUSIONS

Joe Biden defeated Trump in the 2020 presidential elections to become the forty-sixth president of the United States. The structural problems exposed by Trump’s presidency, however, will not be swept away by one election. Leo Tolstoy’s *Anna Karenina* famously begins with the observation that while all “happy families are alike; each unhappy family is unhappy in its own way.” Populism, a form of democratic politics that stokes polarization and eschews institutions in favor of personalist rule, is a potential problem even for America’s peer democracies, but it undoubtedly found a congenial home in Trump’s America.

America’s exceptional constitution played a role in constructing that home. Long-standing, wealthy democracies are highly resistant to democratic collapse

and erosion, but they are threatened if there are multiple sources of constitutional unhappiness. Such democracies are not destroyed in one fell swoop, but the cumulative weight of political changes can erode constitutional orders even in superman democracies. The Trump presidency demonstrates that America's constitutional order is peculiarly susceptible to democratic erosion.

America's constitution is showing its age. Elements of its constitutional order that worked tolerably well in the past are playing a role in undermining democracy in the twenty-first century. No constitution can dam up democratic politics forever, but some constitutional orders evolve formally or informally to deal with changed circumstances. Constitutional orders that do not evolve become increasingly divorced from political reality and a constant source of friction. They become sham documents that mask how power operates.

New speech technologies are a potential threat to all democracies. By dramatically lowering the cost of speech and removing the guardrails that once impeded the spread of false information, these technologies have transformed speech into a potent source of democratic instability. The problem is likely to be worse in the United States than in its peer democracies because the absolutist position taken by the Supreme Court makes it impossible for the government to regulate disinformation.

Presidentialism is peculiarly susceptible to demagogues, but the literature has failed to properly appreciate the sources of its weaknesses. The deep lesson of the Trump presidency is that the long-term success of a constitutional project rests on political actors internalizing democracy sustaining norms. The peril of presidentialism in a long-standing wealthy democracy is not that presidents become dictators, but that separation of powers can facilitate the destruction of the complex system of informal norms needed to sustain democracy for the long haul. Parliamentarism, on balance, does a better job of preserving these norms than presidentialism.

Constitutionalism is an ideology that bolts together two disparate ideas: written documents limiting power and democracy. Judicial review has become the near universal solution to the fear of democratic excess. Some constitutional orders, however, craft tutelary democracies that place guardrails around the power of the people to govern themselves. The American constitutional order is uniquely anti-democratic and it is consequently increasingly incapable of dealing with pressing, complex issues. When a polity relies on an exceptional number of veto points to place training wheels on democracy, however, the ability of ordinary citizens to vote for the outputs they need is stymied and demagogues such as Donald Trump may prove an appealing solution to large-scale exogenous shocks, some real and others imagined.

TABLE 1. America’s Peer Democracies

The first column lists the twenty-two nations that have been democratic since 1950 (Dahl 2001, 164). The second column provides the IMF estimate of nominal GDP per capita.³² The third provides the Gini index.³³ The fourth provides the form of government.

Polity	GDP per capita	Gini Index	Form of Government
Austria	13	30.5	Parliamentary
Australia	10	30.3	Parliamentary
Belgium	18	25.9	Parliamentary
Canada	17	32.1	Parliamentary
Costa Rica	58	48.5	Presidential
Denmark	9	29.0	Parliamentary
Finland	14	27.2	Parliamentary
France	20	29.3	Semi-presidential
Germany	16	27.0	Parliamentary
Iceland	6	28.0	Parliamentary
Ireland	4	31.3	Parliamentary
Israel	19	42.8	Parliamentary
Italy	26	31.9	Parliamentary
Japan	22	37.9	Parliamentary
Luxembourg	1	30.4	Parliamentary
Netherlands	11	30.3	Parliamentary
New Zealand	23	36.2	Parliamentary
Norway	3	26.8	Parliamentary
Sweden	12	24.9	Parliamentary
Switzerland	2	29.5	<i>Sui generis</i>
United Kingdom	21	32.4	Parliamentary
United States	7	45.0	Presidential

32. [https://en.wikipedia.org/wiki/List_of_countries_by_GDP_\(nominal\)_per_capita](https://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal)_per_capita)

33. <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html>.

REFERENCES

- Ahmed, Farrah, Richard Albert, and Adam Perry. 2019. "Judging Constitutional Conventions." *International Journal of Constitutional Law* 17:787–806.
- Bagehot, Walter. 1865/1986. *The English Constitution*. Repr. Ithaca, NY: Cornell University Press.
- Balkin, Jack. 2020. *The Cycles of Constitutional Time*. New York: Oxford University Press.
- Bazon, Emily. 2020a. "The Pandemic Election." *New York Times*, Nov. 8.
- . 2020b. "The Problem of Free Speech in an Age of Disinformation." *New York Times*, Oct. 13.
- Bermeo, Nancy. 2003. *Ordinary People in Extraordinary Times: The Citizenry and the Breakdown of Democracy*. Princeton, NJ: Princeton University Press.
- . 2016. "On Democratic Backsliding." *Journal of Democracy* 27: 5–19.
- Binder, Sarah A. 2003. *Stalemate: Causes and Consequences of Legislative Gridlock*. Washington, DC: Brookings Institution Press.
- Booth, John A. 1998. *Costa Rica: Quest for Democracy*. Boulder, CO: Westview Press.
- Browning, Kellen. 2020. "'Tsunamis of Misinformation' Overwhelm Local Election Officials." *New York Times*, October 29, 2020.
- Buckley, F. H. 2015. *The Once and Future King: the Rise of Crown Government in America*. New York: Encounter Books.
- Bump, Philip. "How Much Government Money Does Trump Plan to Spend on His Reelection?" *Washington Post*, October 8, 2020.
- Carreras, Miguel. 2014. "Outsiders and Executive-Legislative Conflict in Latin America." *Latin American Politics and Society* 56:70–92.
- Casper, Gerhard. 1997. *Separating Power: Essays on the Founding Period*. Boston: Harvard University Press.
- Ceaser, James W. 2011. *Designing a Polity: America's Constitution in Theory and Practice*. Lanham, MD: Rowman & Littlefield.
- Dahl, Robert A. 2001. *How Democratic Is the American Constitution?* New Haven, CT: Yale University Press.
- Delaney, Erin S. 2018. "Brexit Optimism and British Constitutional Renewal." In *Constitutional Democracy in Crisis?*, ed. Mark Graber, Sanford Levinson, and Mark Tushnet, 191–214. New York: Oxford University Press.
- Drutman, Lee. 2020. *Breaking the Two-Party Doom Loop: the Case for Multiparty Democracy in America*. New York: Oxford University Press.
- Elkins, Zachary, Tom Ginsburg, and Tom Melton. 2009. *The Endurance of National Constitutions*. New York: Cambridge University Press.
- European Commission. 2021. "Tackling Online Misinformation." Updated July 1, 2021. <https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation>.

- Fritz, Christian G. 2008. *American Sovereigns: The People and America's Constitutional Tradition before the Civil War*. New York: Cambridge University Press.
- Fukuyama, Francis. 1989. "The End of History." *The National Interest*. 16:3–18.
- Gardbaum, Stephen. 2013. *The New Commonwealth Model of Constitutionalism: Theory and Practice*. New York: Cambridge University Press.
- Gardbaum, Stephen, and Richard H. Pildes. 2018. "Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive." *New York University Law Review* 93:647–708.
- Gardner, James A. 2020. *Illiberalism and Authoritarianism in the American States*. Draft paper, July 18, 2020.
- Ginsburg, Tom, and Aziz Huq. 2018. *How to Save a Constitutional Democracy*. Chicago: University of Chicago Press.
- Graber, Mark. 2018. "Race and American Constitutional Exceptionalism." In *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor, 456–75. Northampton, MA: Edward Elgar Press.
- Graber, Mark, Sanford Levinson, and Mark Tushnet, eds. 2018. *Constitutional Democracy in Crisis*. New York: Oxford University Press.
- Hofstadter, Richard. 1970. *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840*. Berkeley: University of California Press.
- Howell, William G., and Terry M. Moe. 2020. *Presidents, Populism, and the Crisis of Democracy*. Chicago: University of Chicago Press.
- Huntington, Samuel P. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press.
- Issacharoff, Samuel. 2015. *Fragile Democracies: Contested Power in the Era of Constitutional Courts*. New York: Cambridge University Press.
- Kamarck, Elaine C. 2018. "Returning Peer Review to the American Presidential Nomination Process." *New York University Law Review* 93:709–27.
- Karol, David. 2015. "American Political Parties: Exceptional No More." In *Solutions to Political Polarization in America*, ed. Nathaniel Persily, 208–17. New York: Cambridge University Press.
- Kessler, Glen, et al. 2020. "Trump Is Averaging More than 50 False or Misleading Claims a Day." *Washington Post*, October 22, 2020.
- King, Anthony. 2017. *The British Constitution*. New York: Oxford University Press.
- Klarman, Michael J. 2016. *The Framers' Coup: The Making of the United States Constitution*. New York: Oxford University Press.
- Klein, Ezra. 2020. "Can Anything Change Americans' Minds about Donald Trump?" *Vox*, Sept. 2.
- Kommers, Donald P. 1991. "German Constitutionalism: A Prolegomenon." *Emory Law Journal* 40:837–73.
- Kramer, Larry D. 2004. *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press.

- Krotoszynski, Ronald J., Jr. 2015. "Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment." *Ohio State Law Journal* 76:660–90.
- Landau, David. 2013. "Abusive Constitutionalism." *University of California, Davis Law School* 47:189–260.
- Leonnig, Carol and Philip Rucker. 2021. *I Alone Can Fix It: Donald J. Trump's Catastrophic Final Year*. New York: Penguin Press.
- Lepore, Jill. 2018. *These Truths: A History of the United States*. New York: W. W. Norton & Co.
- Levinson, Daryl J., and Richard H. Pildes. 2006. "Separation of Parties, Not Powers." *Harvard Law Review* 119:2311–86.
- Levinson, Sanford. 2008. *Our Undemocratic Constitution*. New York: Oxford University Press.
- Levitsky, Steven, and Daniel Ziblatt. 2018. *How Democracies Die*. New York: Crown Books.
- Lewis, Michael. 2018. *The Fifth Risk*. New York: W. W. Norton & Co.
- Linz, Juan. 1990. "The Perils of Presidentialism." *Journal of Democracy* 1 (1): 51–69.
- Mann, Thomas E., and Norman J. Ornstein. 2012. *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*. New York: Basic Books.
- Marshall, Geoffrey. 1984. *Constitutional Conventions: The Rules and Forms of Political Accountability*. New York: Oxford University Press.
- Mason, Lilliana. 2018. *Uncivil Agreement: How Politics Became Our Identity*. Chicago: University of Chicago Press.
- Mayer, Jane. 2017. *Dark Money: The Hidden History of the Billionaires behind the Rise of the Radical Right*. New York: Anchor Books.
- McIlwain, Charles H. 1947. *Constitutionalism: Ancient and Modern*. Ithaca, NY: Cornell University Press.
- McLean, Janet. 2018. "The Unwritten constitution." In *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor, 395–414. Northampton, MA: Edward Elgar Press.
- Mettler, Suzanne, and Robert C. Lieberman. 2020. *The Recurring Crises of American Democracy: Four Threats*. New York: St. Martin's Press.
- Mounk, Yascha. 2018. *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It*. Boston: Harvard University Press.
- Mudde, Cas, and Cristobal Rovira Kaltwasser. 2017. *Populism: A Very Short Introduction*. New York: Oxford University Press.
- Müller, Jan Werner. 2012. "Militant Democracy." In *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, 1253–64. New York: Oxford University Press.
- . 2016. *What Is Populism?* Philadelphia: University of Pennsylvania Press.
- Norris, Pippa. 2008. *Driving Democracy: Do Power Sharing Institutions Work?* New York: Cambridge University Press.

- . 2017. *Why American Elections Are Flawed (and How to Fix Them)*. Ithaca, NY: Cornell University Press.
- Norris, Pippa, and Ronald Inglehart. 2019. *Cultural Backlash: Trump, Brexit, and Authoritarian Populism*. New York: Cambridge University Press.
- O'Donnell, Guillermo. 1994. "Delegative Democracy." *Journal of Democracy* 5 (1): 55–69.
- Olson, Mancur. 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge: Harvard University Press.
- Posner, Eric A. 2020. *The Demagogue's Playbook: The Battle for American Democracy from the Founders to Trump*. New York: St. Martin's Publishing Group.
- Posner, Eric A., and Adrian Vermeule. 2010. *The Executive Unbound: After the Madisonian Republic*. New York: Oxford University Press.
- Pozen, David E., ed. 2020. *The Perilous Public Square: Structural Threats to Free Expression Today*. New York: Columbia University Press.
- Pozen, David E., and Kim Lane Scheppele. 2020. "Executive Underreach, in Pandemics and Otherwise." *American Journal of International Law* 114 (4): 608–18.
- Przeworski, Adam. 2018. *Why Bother with Elections?* Medford: Polity Press.
- . 2019. *Crises of Democracy*. New York: Cambridge University Press.
- Roche, John P. 1961. "The Founding Fathers: A Reform Caucus in Action." *American Political Science Review* 55:799–816.
- Rosenfield, Sophia. 2018. *Democracy and Truth: a Short History*. Philadelphia: University of Pennsylvania Press.
- Runciman, David. 2013. *The Confidence Trap: A History of Democracy in Crisis from World War I to the Present*. Princeton, NJ: Princeton University Press.
- . 2018. *How Democracy Ends*. New York: Basic Books.
- Sartori, Giovanni. 1962. "Constitutionalism: A Preliminary Discussion." *American Political Science Review* 56 (4): 853–64.
- Scalia, Antonin. 2011. "Opening Statement on American Exceptionalism to Senate Judiciary Committee." Delivered October 5, 2011, Washington, DC. <https://www.americanrhetoric.com/speeches/antonin Scalia american exceptionalism.htm>.
- Scheppele, Kim Lane. 2018. "Autocratic Legalism." *University of Chicago Law Review* 85:545–83.
- Schor, Miguel. 2008. "Judicial Review and American Constitutional Exceptionalism." *Osgoode Hall Law Journal* 46:535–63.
- . 2018. "Constitutional Dialogue and Judicial Supremacy." In *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor, 86–101. Northampton, MA: Edward Elgar.
- . 2020a. *The British Constitution in the American Constitutional Imagination*, Draft article.
- . 2020b. *Constitutional Democracy and Scholarly Fashions*. *Drake Law Rev* 68:359–70.

- Selinger, William. 2020. *Parliamentarism: From Burke to Weber*. New York: Cambridge University Press.
- Setty, Sudha. 2008. "The President's Question Time: Power, Information, and the Executive Credibility Gap." *Cornell Journal of Law and Public Policy* 17:247–94.
- Skach, Cindy. 2005. *Borrowing Constitutional Law: Constitutional Law in Weimar Germany and the French Fifth Republic*. Princeton: Princeton University Press.
- Sloan, Herbert. 2004. "George Washington." In *The American Presidency*, ed. Alan Brinkley and Davis Dyer, 1–19. New York: Houghton Mifflin.
- Soto, Hernando de. 1992. *El otro sendero*. Buenos Aires: Editorial Sudamericana.
- Starr, Paul. 2009. "Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)." *The New Republic*, March 3, 2009.
- . 2019. *Entrenchment: Wealth, Powers, and the Constitution of Democratic Societies*. New Haven, CT: Yale University Press.
- Stille, Alexander. 2007. *The Sack of Rome. Media + Money + Celebrity = Power = Silvio Berlusconi*. New York: Penguin Books.
- Sullivan, Margaret. 2020. *Ghosting the News: Local Journalism and the Crisis of American Democracy*. New York: Columbia Global Reports.
- Sunstein, Cass R. 2017. *#Republic: Divided Democracy in the Age of Social Media*. Princeton, NJ: Princeton University Press.
- XX———, ed. 2018. *Can It Happen Here? Authoritarianism in America*. New York: HarperCollins.
- Tamura, Kimiko de Freytas. 2017. "George Orwell's 1984 Is Suddenly a Best-Seller," *New York Times*, January 25, 2017.
- Tulis, Jeffrey K. 2016. *The Rhetorical Presidency*. Princeton, NJ: Princeton University Press.
- Vosoughi, Soroush, Deb Roy, and Sinan Aral. 2018. "The Spread of True and False News Online." *Science* 359:1146–51.
- Weyland, Kurt, and Raúl Madrid, eds. 2019. *When Democracy Trumps Populism: European and Latin American Lessons for the United States*. New York: Cambridge University Press.
- Wheeler, Russell. 2018. "Senate Obstructionism Handed a Raft of Judicial Appointments to Trump: What Has He Done with Them?" *FLXGOV* (blog). *Brookings*, June 4, 2018. <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/>.
- Winters, Jeffrey A. 2011. *Oligarchy*. New York: Cambridge University Press.
- Wood, Gordon S. 1998. *The Creation of the American Republic, 1776–1787*. Chapel Hill: University of North Carolina Press.
- Wright, Benjamin F., ed. 1788/1996. *The Federalist*. Repr. New York: Barnes and Nobles.
- Wu, Tim. 2020. "Is the First Amendment Obsolete?" In *The Perilous Public Square: Structural Threats to Free Expression Today*, ed. David Pozen, 15–43. New York: Columbia University Press.

CASES CITED

Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020)

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)

Clinton v. City of New York, 524 U.S. (1998)

Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983)

National Federation of Independent Business v. Sebelius, 567 U.S. 579 (2012)

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)

Rucho v. Common Cause, 139 S. Ct. 2484 (2019)

United States v. Alvarez, 132 S. Ct. 2537 (2012)

United States v. Carolene Products, 304 U.S. 144, 152 fn. 4 (1938)