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Trump as a Constitutional Failure

JAMAL GREENE*

*As democracy is perfected, the office [of the President] represents, more and more closely, the inner soul of the people. . . . On some great and glorious day, the plain folks of the land will reach their heart's desire at last and the White House will be adorned by a downright moron.*¹

INTRODUCTION

The election of Donald Trump as president represented a failure of American politics. Trump is a serial liar, a sexual predator, deeply conflicted financially, hostile to bedrock democratic institutions such as free press, and ignorant of even the broad brushstrokes of important policy matters. The best evidence suggests that he is a white nationalist, a plutocrat, and a professional con artist, dangerously attracted to corrupt and incompetent sycophants, self-obsessed and aggressive to the point of psychopathy, and otherwise temperamentally unfit to be in charge of the world's largest military and nuclear arsenal. There is some evidence that Trump or members of his campaign conspired with a hostile foreign power to help secure his election.² His electoral opponent (whom he promised to prosecute criminally if elected) received nearly three million more votes than he did,³ and he assumed office as the least popular elected president in recorded history.⁴ No credible account of a healthy electoral process can abide Trump's election as an acceptable outcome of that process.

But you want to know what I really think. Less clear than the status of the Trump presidency as a political failure is whether Trump's election also represented a failure of the U.S. Constitution. Do our constitutional arrangements predict just the kind of political failure that materialized in November 2016? If so, does that mean that the long-term remedy for that failure lies in constitutional reform? Does our constitutional fate, in other words, determine our political fate?

Before seeking to answer that question, it is important to note that its premise is not necessarily a politically partisan one. Trump ran as a Republican, but it is not just possible, but easy to imagine the American Left producing a corrupt and boorish demagogue who ascends to the apex of U.S. politics. Indeed, it would not be surprising if Trump himself appropriated some progressive rhetoric before all was

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1. H.L. MENCKEN, *Bayard vs. Lionheart*, in *ON POLITICS: A CARNIVAL OF BUNCOMBE* 21 (Malcom Moos, ed., 1956). Mencken wrote those words in 1920. *Id.* at 17.

2. See, e.g., Jo Becker, Adam Goldman & Matt Apuzzo, *Russian Dirt on Clinton? "I Love It," Donald Trump Jr. Said*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/us/politics/trump-russia-email-clinton.html> [<https://perma.cc/5MSG-ZZR9>].

3. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN: POLITICS (Dec. 22, 2016), <http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html> [<https://perma.cc/V4PR-3F3E>].

4. Madeline Farber, *Donald Trump's Approval Ratings Have Hit a Historic Low Before He Takes Office*, TIME (Jan. 17, 2017), <http://time.com/4636142/donald-trump-inauguration-polls-approval-ratings> [<https://perma.cc/YF5N-W534>].

said and done. Trump is today's preoccupation, but the question is whether he is a symptom of a chronic disease or merely a seasonal one.

Determining the causes of Trump's election will occupy political scientists, historians, sociologists, anthropologists, and economists for the rest of human history. Constitutional lawyers will have their own set of narratives. What follows is one contribution to that discussion. The basic claim is that there is a widening gap between the democratic order the U.S. Constitution presupposes and the one it governs. Unless that gap narrows, the at least occasional ascendancy of populist demagogues to the U.S. presidency is certain.

As Part I explains, the American constitutional system assumes a certain sort of democratic culture. That assumption is encapsulated in Chief Justice John Marshall's dictum, in *M'Culloch v. Maryland*, that the Constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."⁵ The U.S. Constitution indeed lacks "the prolixity of a legal code," but subsequent history confirms that its relative sparseness is not, as Marshall maintained, because it is "*a constitution* we are expounding."⁶ The U.S. Constitution is among the world's least prolix and most difficult to amend. These attributes contribute to its mystique, but also render the constitutional text a radical underspecification of the American constitutional system.

What stands in the place of the text is a set of norms and conventions that are the product of democratic culture. Thus, we refuse to wall off our borders, even as we regulate immigration. We have peaceful transitions of power, even where there may be electoral irregularities. We do not promise or threaten to jail our political opponents during the election, even when there may be evidence of crimes committed. We view nepotism as inherently suspicious. We reject the interference of hostile foreign states into our elections, even when they offer valuable information. We do not ban immigrants based on religion, or (openly) pillage the natural resources of defeated enemies. We act on the basis of our values and not simply our power.

These norms appear obvious to those trained in the law or experienced in politics but they are not codified. They are subject to accretion and erosion but—and this is critical—rarely do they change through avulsion. This pattern of growth and decay in governing norms reflects a culture of respect for tradition, for existing institutions, and for the wisdom of prior generations. The U.S. Constitution lives less in its sparse text than in the connective tissue its normative order forms and reinforces.

But maintaining an unwritten constitutional order requires a democratic culture that is, to put it plainly, prosocial rather than antisocial. Consider two ideal types of pluralistic democratic cultures. One operates on the basis of deliberation towards consensus, in the style envisioned by theorists such as John Rawls and Jürgen Habermas. The political community ruminates rationally and produces a dominant view. That view remains subject to contestation but its legitimacy is essentially accepted as the product of democratic deliberation in which citizens were able to participate on broadly equal footing. This democratic culture is prosocial; its participants recognize their status as essentially equal members of a society—a collective enterprise

5. 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted), *superseded by constitutional amendment*, U.S. Const. amend. XVI.

6. *Id.* at 407.

—that needs rules of decision in order to progress.

The other ideal type of pluralistic democratic culture operates on the basis of power, in the style described by Carl Schmitt.⁷ Ideas are thoroughly discussed, perhaps even debated, but not in the service of persuasion. The ideas that win out are not the products of deliberation, much less consensus. They are those whose promoters have access to institutions that enable them to dominate and suffocate the ideas of others. This democratic culture is antisocial; its participants adopt an antagonistic posture towards each other and seek constantly to undermine and marginalize those who hold opposing views.

This Essay argues that democratic culture in the United States is increasingly antisocial, and may become so to a degree that the American constitutional system cannot accommodate. President Trump's election is a harbinger of this constitutional failure. As Part II explains, Trump's hostility to the sustaining norms of the constitutional system reflects the ascendancy of a fundamentally antagonistic and hegemonic approach to democratic politics. The rise of this political culture is enabled by technological changes that have diminished the role of intermediaries in public life in ways that have contributed to political polarization and social balkanization.

We need not assume that a polity exhibiting these antisocial features is ungovernable, but it is safe to say that its constitutional arrangements require strong rules of recognition. Relying on soft, unwritten norms is an invitation to abuse by whoever happens to be in power, which we can then expect to invite retaliatory abuse when power shifts.⁸ The existing U.S. Constitution is of a type one would expect of a reasonably socialized culture, but its politics are approaching those of a post-conflict society.

Part III discusses what to do about the potential mismatch between American constitutional arrangements and American politics. Without assuming that any course of action will be successful—the forces arrayed against deliberative democracy are formidable—it is fair to say that the most promising strategies tend to channel the exercise of power and the promulgation of policy into processes of political negotiation.

Reform in at least three broad areas might assist toward that end. First, American electoral institutions could be better suited to negotiated action. We should seek to bolster supermajority requirements, such as the filibuster, while at the same time seeking means of eroding party discipline by creating greater and more varied electoral competition. Second, we must think creatively about restoring or creating institutions of trust that can act as intermediaries between the public and our political actors. New models of media financing, including through public processes, or establishing government bodies tasked with public integrity may be better suited to the present moment than previously believed. Third, the judiciary has a role to play in reorienting our rights discourse toward dialogue, both between judges and political actors and within the political branches themselves.

7. See generally CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. of Chi. Press expanded ed. 2007) (1932).

8. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 *YALE L.J.* 2 (2014); Mark Tushnet, *Constitutional Hardball*, 37 *J. MARSHALL L. REV.* 523 (2004).

I.

The U.S. Constitution is short, roughly 4500 words, and about 7500 words including amendments. But it is not short because it is a *constitution*, as Marshall would have it; nearly every constitution in the world is longer.⁹ The U.S. Constitution is short because it is a particular kind of constitution, what is sometimes called a “framework” constitution.¹⁰ Unlike, say, Mexico’s constitution, which runs more than 60,000 words,¹¹ the U.S. Constitution does little more than to describe, broadly, a political architecture.

For example, the key powers to which the first three articles are committed—the legislative, executive, and judicial—are nowhere defined in the Constitution. The document permits Congress to tax and spend for the general welfare and to regulate interstate commerce, but it neither further defines those ends nor discusses the role of states in addressing the same subjects. It does not tell us whether there is to be an administrative state and, if so, what its permissible contours are. It does not explicitly grant to Article III judges the power of judicial review and indeed does not even establish a federal court system. The rights the Constitution provides are sparse and are generally stated in abstract terms.

In addition to being sparse, the U.S. Constitution is difficult to amend. A formal amendment requires a two-thirds majority in Congress and the agreement of thirty-eight states, nearly all of which have bicameral legislatures.¹² More than 11,000 amendments to the U.S. Constitution have been proposed in Congress; only 27 have been ratified, including just 17 in the last 226 years and one in the last 46.¹³ The German Basic Law has been amended more than 60 times in 68 years;¹⁴ the South African Constitution, 17 times in 21 years;¹⁵ the Mexican Constitution, more than 500 times in just a century of life.¹⁶

A constitution that is short, abstract, and difficult to change relies on the political system to develop and maintain informal institutional norms. There was some sense in the American framers resting on this possibility. They were statesmen already, nearly all of the fifty-five Philadelphia Convention delegates having held political office within their own states. Most were lawyers, and all were elites.¹⁷ They were

9. See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 105 (2009).

10. *Id.* at 71, 84.

11. Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 15-09-2017.

12. The only state with a unicameral legislature is Nebraska. *History of the Nebraska Unicameral*, NEB. LEGISLATURE, http://nebraskalegislature.gov/about/history_unicameral.php [https://perma.cc/P7AF-CKFV].

13. See Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 ALTA. L. REV. 85, 86 (2015); see also Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692 (1996).

14. *Constitution of the Federal Republic of Germany*, FED. MINISTRY INTERIOR, <https://www.bmi.bund.de/EN/topics/constitution/constitutional-issues/constitutional-issues-node.html> [https://perma.cc/7C5W-KNL5].

15. See S. AFR. CONST., Seventeenth Amendment Act of 2012.

16. JORGE A. VARGAS, *MEXICO AND THE LAW OF THE SEA* 4 (2011).

17. See JAMES LINCOLN COLLIER & CHRISTOPHER COLLIER, *DECISION IN PHILADELPHIA*:

accustomed to deliberation and negotiation. Moreover, a written constitution was a relatively novel thing in 1787, and the menu of institutional choices was limited relative to today.

All three branches operate in substantial part according to subconstitutional political norms. No constitutional provision specifies the manner in which congressional election or congressional voting is to be conducted, either denies or allows for filibusters or blue slips or committees, gives Congress any oversight role or subpoena or contempt power, or grants or denies it the power to create independent agencies. Although the Constitution contemplates that there will be executive officers,¹⁸ it does not anticipate the rise of the administrative state or seek to accommodate either agency rulemaking or executive branch adjudication into its text. It says little of how, by whom, or under what circumstances executive officials may be removed. The Constitution does not grant the power of judicial review, establish lower federal courts, specify the term of the Supreme Court or the number of Justices on it, provide for confirmation hearings, require that the Senate consider a judicial nominee at all, or prevent Congress from stripping the Court of jurisdiction to hear controversial matters.

It is a mistake, however, to assume that the Constitution forms the sole or even the dominant basis for political continuity and solidarity within the United States. Thick political norms address and delimit all of the topics discussed above, as well as many others. Among those norms are obeying the pronouncements of the Supreme Court, sequestering the Department of Justice from specific presidential direction, maintaining conditionally open borders, cooperating in the staffing of the executive branch and the judiciary by a President of the opposing party, and permitting, indeed facilitating, media coverage of the President and other executive branch officials.

These kinds of norms may have constitutional dimensions, but they are not constitutionally specified and likely could be changed, at least over time, without any constitutional amendment. The reason they do not easily change rests in a shared sense among political and legal elites that these norms are constitutive of the constitutional system. Legal and political professionals have been socialized into a set of attitudes about what constitutes on- and off-the-wall political behavior. Whether out of a sense of tradition, solidarity, or reciprocity, public officials have generally adhered to the view that certain political practices are worth preserving even if doing so seems not to be those officials' immediate best interest.¹⁹

To train the mind on an alternative constitutional arrangement, consider the 1988 Constitution of Brazil. The constitution was ratified three years after the country's two-decade-long military dictatorship ended with Congress's selection of opposition leader Tancredo Neves as president.²⁰ As originally drafted, the Brazilian constitution contained 245 articles and an additional 70 transitory provisions, occupying 193

THE CONSTITUTIONAL CONVENTION OF 1787 (1986).

18. See, e.g., U.S. CONST. art. II, § 2, cl. 1.

19. Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSP. ON POL. 37, 37 (2012); cf. Emily Bazelon, *How Do We Contend with Trump's Defiance of "Norms"?*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/magazine/how-do-we-contend-with-trumps-defiance-of-norms.html> [https://perma.cc/8ZRC-78TT].

20. Neves succumbed to illness before assuming office. Marlise Simons, *Brazil's Leader*

pages in the official record.²¹ It has been amended nearly 100 times in just three decades since then. As Keith Rosenn notes, the Brazilian constitution, unlike its U.S. counterpart, contains “a great many detailed rules normally found in ordinary legislation or regulations,”²² the result in part of a “generalized concern about disrespect for law.”²³ Thus, the constitution defines “usury” as charging a real rate of interest in excess of twelve percent a year.²⁴ It contains extensive and detailed workers’ rights provisions, specifying an eight-hour work day and a forty-four-hour work week.²⁵ It has been amended to provide, for example, for the financing of the public lighting service and to provide a monthly pension to rubber tappers.²⁶

In light of Brazil’s civil law tradition and Portuguese influence, the level of detail in its constitution is likely overdetermined.²⁷ Still, it is not surprising that a highly fractured, postauthoritarian political order eschewed a framework constitution over what might be deemed a Frankenstein one.²⁸ Brazil’s political culture had a deep tradition of popular mobilization and political opposition, including during military rule. But it had no corresponding culture of deliberation and negotiation among rivals or of peaceful transitions of authority; rather, it had a shameful history of human rights abuses committed by its military leaders against political opponents. The Brazilian Constitution was designed for a society lacking a rich preexisting deliberative culture. Skepticism about the nation’s political norms shows through the text.

II.

As the Brazil example implies, not all democracies are able to satisfy the conditions necessary to maintain thick but informal political norms.

Consider two ideal types. In the first, conflicting interests accept a common set of basic and constitutive political values—the equality and dignity of persons, the impartiality of the law and the political independence of judges, the centrality of a nation-state that is nevertheless situated within a global economic order, and so forth. That acceptance is, following Cass Sunstein, incompletely theorized;²⁹ following John Rawls, it reflects an overlapping consensus.³⁰ Various individuals and groups within the society hold different worldviews, and so the conceptions that flesh out

Dies at Age 75; Never Sworn In, N.Y. TIMES (Apr. 22, 1985), <http://www.nytimes.com/1985/04/22/world/brazil-s-leader-dies-at-age-75-never-sworn-in.html> [<https://perma.cc/G96D-5G7R>].

21. Keith S. Rosenn, *Brazil’s New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 777 (1990).

22. *Id.* at 778.

23. *Id.*

24. *Id.* at 798; see CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 195, sec. VIII, ¶ 3 (Braz.).

25. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 7, sec. XIII (Braz.).

26. See Juliano Zaiden Benvindo, *The Brazilian Constitutional Amendment Rate: A Culture of Change*, I-CONNECT (Aug. 10, 2016), <http://www.iconnectblog.com/2016/08/the-brazilian-constitutional-amendment-rate-a-culture-of-change> [<https://perma.cc/S8E6-ZSQA>].

27. See Rosenn, *supra* note 21, at 778.

28. See *id.* at 777 n.15.

29. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

30. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

the agreed upon concepts are quite different. One side believes that the importance of political and economic sovereignty dictates a wary view of global trade and immigration. The other side believes that economic equality, the dignity of workers, or the well-being of political or economic migrants requires a different balance. One side believes that government is most effective at its core functions of national security and law enforcement when a nimble and politically accountable executive exercises control over the bureaucratic machinery without significant interference from courts or legislators. The other side believes that control of that sort unacceptably threatens individual liberty or the rule of law. Each side understands and accepts the basic liberal democratic project and accepts the legitimacy of the values the other side promotes, but they weigh those values differently. Their relationship is as between political competitors rather than adversaries or enemies.³¹ The policy outcomes that result from this kind of conflict are negotiable. Political theorists—Habermas and Rawls most prominently—have set about explicating the conditions of negotiation.³²

One of those conditions, for example, is a robust and open space for political conversation.³³ The constitutional commitment to freedom of speech has been read as protecting a marketplace of ideas whose currency is truth.³⁴ The metaphor assumes that deregulation will lead individual participants within the marketplace to have greater, not less, access to challenging ideas and that they will have the will and capacity to reflect upon those ideas. The relationship between market actors is deliberative in the service of reaching a set of political equilibria.

The marketplace of ideas metaphor has less purchase within a second ideal type of democratic order. Within this order, participants have competing world views that either are in fact or are believed to be irreconcilable. Such a society might be notionally democratic insofar as political leadership is assigned through an electoral mechanism. But the project of each side is not to negotiate towards a policy outcome everyone can live with; it is to dominate, marginalize, and kneecap the other side. The winners and losers of such conflicts exist in a hegemonic and antagonistic relationship as one seeks any means of extending its power that it can get away with and the other seeks unrelentingly to undermine that power. The free flow of ideas serves each project, not because it facilitates negotiation, but because it facilitates conspiracy and affiliation with like-minded others. Here, democracy and distrust are sympathetic ideas; they require no reconciliation.³⁵ Political theorists have explicated the conditions under which this kind of democratic order can (see, for example, Chantal Mouffe)³⁶ or cannot (see, most prominently, Carl Schmitt)³⁷ redeem liberal commitments.

Which of these democratic orders sounds closer to the one that elected President

31. See CHANTAL MOUFFE, *Introduction: Schmitt's Challenge*, in *THE CHALLENGE OF CARL SCHMITT* 1, 5 (Chantal Mouffe ed., 1999).

32. See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1996); JOHN RAWLS, *POLITICAL LIBERALISM* (3d ed. 2005).

33. See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

34. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

35. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

36. See CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* (1993).

37. See SCHMITT, *supra* note 7.

Trump? The question is neither hypothetical nor glib. It is difficult to dispute that Trump himself uncannily embodies Schmitt's conception of the political, as evidenced by his campaign's apparent unblinking willingness to collude with the Russian government to tarnish Hillary Clinton.³⁸ Still, it would be too quick to speak of the electorate as a whole in such terms. The United States has a robust and politically independent press, a respected and professional federal court system, and numerous temperamentally moderate political figures, including Clinton and every major party nominee for president since at least 1984 (save, of course, Trump). Polling has consistently shown voters to be less polarized than their leaders and to have a general preference for compromise over principled opposition.³⁹

The problem is that Americans too often understand compromise as meaning that the other side should cave. That is evidenced by consistently low approval ratings for Congress (twenty percent in a July 2017 Gallup poll⁴⁰ and under thirty percent for eight years running) and consistently high ratings for one's own member of Congress (a five percent net positive in a 2013 poll).⁴¹ Internalizing and accepting the wages of compromise requires a thick understanding not only of substantive policy issues but also of the shape of the political landscape. This kind of system knowledge is undersupplied in the current information environment.

John Hibbing and Elizabeth Theiss-Morse make the point effectively in their 2002 book, *Stealth Democracy*.⁴² Hibbing and Theiss-Morse argue based on extensive survey evidence that a substantial number of Americans are hostile to ordinary politics in part because they lack the capacity or the will to recognize the fact of reasonable policy disagreement. They write:

[P]eople are simply averse to political conflict and many others believe political conflict is unnecessary and an indication that something is wrong with governmental procedures. People believe that Americans all have the same basic goals, and they are consequently turned off by political debate and deal making that presuppose an absence of consensus. People believe these activities would be unnecessary if decision makers were in tune with the (consensual) public interest rather than with cacophonous special interests.⁴³

38. Becker et al., *supra* note 2.

39. See MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA* 16–17 (3d ed. 2011); Frank Newport, *Americans Continue To Want Political Leaders To Compromise*, GALLUP (Sept. 21, 2016), <http://www.gallup.com/poll/195707/americans-continue-political-leaders-compromise.aspx> [<https://perma.cc/9Q54-Z4CF>].

40. RJ Reinhart, *Americans' Approval of Congress Remains Low, Steady*, GALLUP (July 12, 2017), <http://www.gallup.com/poll/213944/americans-approval-congress-remains-low-steady.aspx> [<https://perma.cc/9GCC-7Y6D>].

41. *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/T5PX-NE3N>]; Elizabeth Mendes, *Americans Down on Congress, OK with Own Representative*, GALLUP (May 9, 2013), <http://www.gallup.com/poll/162362/americans-down-congress-own-representative.aspx> [<https://perma.cc/U6TZ-LBUA>].

42. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY* (2002).

43. *Id.* at 7.

Candidate Trump took advantage of this information gap by making confident but unrealistic promises—about health care, about entitlements, about ISIS, about foreign policy, about immigration, about economic growth—to especially low-information voters. His lack of any political track record meant that he had not yet shown himself to be unable to deliver on his agenda.

While the presence of people holding these views about politics is not new, it might be uniquely damaging in the present information, political, and economic environment. First, facts are in a bad way. Americans (and not just Americans) increasingly acquire factual information from diffuse and biased or otherwise unreliable sources. Technological change has enabled information to be shared more quickly and through networks customized to the interests and ideologies of the recipient. Our declining respect for truth is not a triumph of relativism but rather of its opposite: extremism. It is not that we perceive and reflect upon the ways in which perspective alters perception, but rather that we perfectly model those distortions. Our experiences are not communally shared, which in turn reinforces our mutual suspicion. The percentage of Americans with a high degree of trust in national news organizations sits at eleven percent of Republicans, thirty-four percent of Democrats, and fifteen percent of independents.⁴⁴ The number of institutions with the capacity to convey politically relevant facts appears to be in sharp decline.

Second, and relatedly, national politics are controlled by polarized interests thatglom onto a sclerotic two-party system. Although the parties themselves have changed in character, national politics in the United States has been dominated by two—and only two—parties for nearly all of the country’s history under the current Constitution. No third party candidate has ever won the U.S. presidency and no third party has even sniffed a majority in either congressional chamber. The two-party system is remarkably stable despite widespread disdain for both parties. What is less stable is *leadership* control of the composition and agenda of political officials within the parties.

Political primaries have come to be the chief means of selecting candidates as a result of progressive reform of occluded or opaque processes dominated by party bosses.⁴⁵ What was once controlled by insiders, often corrupt but attuned to the long-term survival of the party, is now controlled by extremists who enforce ideological purity. The prevalence of sophisticated gerrymanders combined with historic polarization levels has made the primary the only significant election for most members of Congress.⁴⁶ This means that the sole mechanism of political accountability for most members is *internal* to the parties. Moreover, the voters who turn out for primary elections are not a representative sample. Participation in the Republican and Democratic primaries was high in relative terms in 2016, but primary voters still

44. Michael Barthel & Amy Mitchell, *Americans’ Attitudes About the News Media Deeply Divided Along Partisan Lines*, PEW RES. CTR. (May 10, 2017), <http://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines> [<https://perma.cc/BJ4B-WJZ3>].

45. See Jonathan Rauch, *How American Politics Went Insane*, ATLANTIC (July/Aug. 2016), <https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570> [<https://perma.cc/S3MD-ARD9>].

46. See SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS 59 (2008).

represented only 28.5% of eligible voters.⁴⁷ Less than one in ten eligible voters cast votes in the 2014 midterm elections.⁴⁸ These kinds of turnout numbers make primary elections susceptible to ideological appeals and funding by narrow interest groups.

Third, the current level of socioeconomic inequality in the United States, and its special causes, is likely exacerbating existing political polarization. Trump won voters without a college degree by eight points, and won white voters without a college degree by thirty-nine points, the largest such margin since 1980.⁴⁹ The top one percent of American families holds roughly forty percent of the country's wealth, nearly double what it held at the dawn of Jimmy Carter's presidency.⁵⁰ Nearly one-half of income gains in the United States from 1979 to 2007 went to the top one percent of earners.⁵¹ When the economy collapsed in 2008, the federal government then bailed out banks rather than homeowners. Manufacturing jobs, once a reliable path to the middle class for Americans without a college degree, continue to be replaced by automation and, to a lesser degree, global trade.⁵² The returns to elite higher education are substantial.⁵³ Many newly marginalized Americans feel nostalgic for a time when the middle class was larger and less diverse.⁵⁴

Promising to "make America great again," Trump gave them hope. His hope was not grounded in the inclusive, optimistic, and *redemptive* politics of his predecessor. To the contrary, Trump offered comfort in the profane. For Trump, nothing was or is sacred, and so notionally, nothing stood in the way of his pursuit of his constituents'

47. See Drew DeSilver, *Turnout Was High in the 2016 Primary Season, but Just Short of 2008 Record*, PEW RES. CTR. (June 10, 2016), <http://www.pewresearch.org/fact-tank/2016/06/10/turnout-was-high-in-the-2016-primary-season-but-just-short-of-2008-record> [https://perma.cc/3TRN-S95M].

48. See Jay O'Callaghan, *Republican 2014 Primary Turnout Tops Democrats for the Second Time Since 1930*, HUM. EVENTS (Oct. 8, 2014), <http://humanevents.com/2014/10/08/republican-2014-primary-turnout-tops-democrats-for-the-second-time-since-1930> [https://perma.cc/H2JC-BUS4].

49. See Alec Tyson & Shiva Maniam, *Behind Trump's Victory: Divisions by Race, Gender, Education*, PEW RES. CTR. (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education> [https://perma.cc/E7WT-U763].

50. These data are based on World Wealth and Income Database, whose U.S. data are available at <http://wid.world/country/usa> [https://perma.cc/9ZGY-JPBK].

51. INT'L LABOR ORG., INT'L MONETARY FUND, ORG. FOR ECON. CO-OPERATION & DEV. & WORLD BANK GRP., *INCOME INEQUALITY AND LABOUR INCOME SHARE IN G20 COUNTRIES: TRENDS, IMPACTS AND CAUSES 7* (2015), <https://www.oecd.org/g20/topics/employment-and-social-policy/Income-inequality-labour-income-share.pdf>.

52. See MICHAEL J. HICKS & SRIKANT DEVARAJ, *THE MYTH AND REALITY OF MANUFACTURING IN AMERICA* (2015), <http://projects.cberdata.org/reports/MfgReality.pdf>.

53. See Dan A. Black & Jeffrey A. Smith, *How Robust Is the Evidence on the Effects of College Quality? Evidence From Matching*, 121 J. ECONOMETRICS 99 (2004); Mark Hoekstra, *The Effect of Attending the Flagship State University on Earnings: A Discontinuity-Based Approach*, 91 REV. ECON. STAT. 717 (2009).

54. See Daniel Cox, Rachel Lienesch & Robert P. Jones, *Beyond Economics: Fears of Cultural Displacement Pushed the White Working Class to Trump*, PRRI (May 9, 2017), <https://www.prii.org/research/white-working-class-attitudes-economy-trade-immigration-election-donald-trump> [https://perma.cc/6X3L-X58P].

interest.⁵⁵ Ronald Dworkin famously analogized constitutional interpretation to writing a new chapter in a chain novel.⁵⁶ Each new author had some discretion to forge the path ahead, but was constrained by “fit” with the previously authored material.⁵⁷ A president within a healthy, deliberative democratic culture faces the same opportunity and the same constraint. A president within an agonistic, Schmittian democratic culture is unconstrained by previous norms, indeed may even be hostile to those norms just for being previous. Trump is not adding a new chapter to a novel. He is writing—nay, tweeting—an entirely new text.

On Dworkin’s view, law as integrity helps to constitute us as a community. It places demands on each citizen to understand the law in light of a common scheme of justice that is integral to shared political life.⁵⁸ The argument in favor of law as integrity applies as well to the integrity of political institutions. In a practical sense, citizens and other government actors, foreign and domestic, rely on those norms to structure their behavior and to make investments. The longevity of certain practices bears upon their wisdom,⁵⁹ or should at least give us pause in revising them without forethought. But it is more than that. Subconstitutional institutions are the Jenga blocks of the constituted nation; their sudden avulsion can crash the system. Specific constitutions are designed, with varying degrees of success, to map out which blocks can be removed, and how. Framework constitutions like that of the United States do not identify the blocks but rather articulate a political structure designed to resist avulsion altogether. The Constitution might be our national sacrament,⁶⁰ but the norms it leaves unspecified are what sustain us.⁶¹

III.

There is no easy answer to the problem just described. When the constitutional order does not match the political culture, the solution is to change one of the two. As Part I discusses, changing the U.S. Constitution through formal means is famously difficult.⁶² Changing it informally requires just the prosocial attitude and

55. See Ryan Lizza, *How Trump Broke the Office of Government Ethics*, NEW YORKER (July 14, 2017), <http://www.newyorker.com/news/ryan-lizza/how-trump-broke-the-office-of-government-ethics> [<https://perma.cc/KP5R-5DLY>] (“One of the main stories of the Trump era is that President Trump is breaking norms, not laws.”).

56. RONALD DWORKIN, *LAW’S EMPIRE* 229 (1986).

57. *Id.* at 230.

58. *Id.* at 186–90.

59. See EDMUND BURKE, *Reflections on the Revolution in France*, in *THE PORTABLE EDMUND BURKE* 416, 451 (Isaac Kramnick ed., 1999).

60. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Edwin S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1072 (1936).

61. See Azari & Smith, *supra* note 19.

62. There is an active movement in the United States to convene a constitutional convention through state action, which requires the assent of two-thirds, or thirty-four, of the states. (Any proposed amendment would require the support of an additional four states.) As of this writing, twenty-nine states have concurred in a call for a convention for the purpose of a balanced budget amendment, and twelve states have formally called for a more general constitutional convention. But typical of a conflicted society, the convention movement is overwhelmingly supported by just one side of the political spectrum: in this case, conservatives who wish

orientation toward consensus that the political culture undersupplies. Moreover, designing a constitution for a deeply divided society typically requires difficult compromises and specifications that are achievable only when the cost of failure is transparent. The United States suffers from political rupture but it has suffered neither a recent civil war nor anything comparable that would put its citizens on notice as to its constitutional shortcomings. To the contrary, the current U.S. constitutional culture features a level of constitutional worship that at least borders on the cultish.⁶³

Efforts to change the political culture itself are not much easier, but at least they are not premised on the very possibility of consensus that we must restore. This Part proposes three areas of relative promise: electoral mechanics; the media and public trust; and rights review. These areas are not promising because change within them is likely or easy, but rather because such change would be meaningful and productive.

Electoral Mechanics

The first area is voting. By that term, I mean to encompass a range of fora through which political decision making occurs, both within legislatures and among the general public. Within legislatures, supermajority requirements and other vetogates can be used to force otherwise passive or hostile parties into negotiation.⁶⁴ In Congress, these mechanisms include the filibuster in the Senate, so-called blue slips that enable a single Senator to block a judicial appointment from his or her state, and markup rules that require committee action in order for bills to reach the floor of the chamber. Placing political economy to one side, such constraints could be extended, for example, by subjecting budget reconciliation to filibusters⁶⁵ or importing the filibuster in whole or in part to the House of Representatives.

Under certain conditions, supermajority requirements result not in consensus policy making but simply in inaction. The balance between the two is likely to depend on the political cost of inactivity in relation to compromise. In a deeply polarized environment in which party loyalists enjoy greater power through primaries (both as voters and as financiers) than moderate voters enjoy through the general election, the balance can easily tip toward stalemate.⁶⁶ To wit, legislative gridlock appears to be a fixed feature of our national life.⁶⁷ The modern filibuster itself, which over the last

to enact a balanced budget amendment or repeal the Sixteenth Amendment in order to rein in deficit spending and the welfare state. A convention held under those circumstances would exacerbate rather than ameliorate the polarization that characterizes the current political climate.

63. See Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CAL. L. REV. 335 (2015); Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765 (1992).

64. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 221 (1997).

65. Current budget legislation imposes time constraints that eliminate the possibility of a filibuster. *Id.* at 215.

66. See Frances E. Lee, *Senate Deliberation and the Future of Congressional Power*, 43 POL. SCI. & POL. 227, 227 (2010).

67. See SARAH BINDER, CTR. FOR EFFECTIVE PUB. MGMT. BROOKINGS, POLARIZED WE GOVERN? (2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRevTableRev.pdf.

three decades has come to be associated with party cohesion rather than independent senators,⁶⁸ reflects the current polarized climate. Accordingly, it is important to couple innovation in chamber voting rules with innovation in the electoral process writ large.

With respect to political decision making among the general public, then, a number of interventions could help to force political negotiation and deliberation. Party discipline within the United States is at historic highs.⁶⁹ American separation of powers was designed to operate based on diffusion of power across institutions with different bases of accountability: the House, the Senate, the President, the courts, and the states. With the rise of national political parties in the 1790s, the proliferation of political primaries after 1968, and the sophisticated use of gerrymandering to ensure that House members focus on primaries rather than the general election, the number of moderate officeholders—those open to hearing the arguments of members of the opposing party—has diminished substantially.

Party discipline can erode in any number of ways. The Supreme Court has the opportunity in its 2017 Term to develop a standard that newly subjects political gerrymandering to constitutional scrutiny.⁷⁰ Relaxing the existing federal statutory constraint on single member districts, and thereby permitting some at large voting, would create incentives for representatives to be responsive to a broader cross section of the population. First-past-the-post voting enables an electoral victory with less than a majority of the vote. Scrapping first past the post in favor of instant runoff or proportionality voting would eliminate the phenomenon of “wasted” votes and thereby enable third party candidates to be competitive in U.S. elections. More robust public financing of political campaigns might open the political process to actors who are not beholden to party machines.

Intermediation

Restoring shared intermediaries is not easy. The media environment is forever altered, in many respects for the better. Still, the lack of trust that has accompanied media diffusion hampers political negotiation. More substantial public financing of media could provide news organizations with the resources to provide coverage that is both deep and broad. The current vehicle for public media financing is the Corporation for Public Broadcasting (CPB), which was created in 1967 and is responsible for the advent of PBS and NPR. The CPB Board is politically balanced by statute,⁷¹ and PBS and NPR have both enjoyed relatively strong reputations for journalistic excellence and independence.⁷²

68. See Lee, *supra* note 66.

69. See KATHRYN PEARSON, PARTY DISCIPLINE IN THE U.S. HOUSE OF REPRESENTATIVES (2015).

70. See Gill v. Whitford, No. 16-1161 (U.S. argued Oct. 3, 2017).

71. See Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C. §§ 390–99 (2012)).

72. See Amy Mitchell, *Which News Organization Is the Most Trusted? The Answer Is Complicated*, PEW RES. CTR. (Oct. 30, 2014), <http://www.pewresearch.org/fact-tank/2014/10/30/which-news-organization-is-the-most-trusted-the-answer-is-complicated> [<https://perma.cc/H27E-U7QJ>]; Press Release, PBS, Nationwide Survey Confirms That PBS

It is telling that President Trump has proposed that the CPB be eliminated; its dramatic expansion could assist in restoring trust in American media. Additional public financing could take the form of increasing the budgets of public media organizations but could also be more experimentalist in nature.⁷³ For example, the Knight Foundation has seeded a fund to provide innovation grants to local media organizations.⁷⁴ The government could do the same through an independent but publicly financed board.

Information intermediaries need not comprise media as traditionally understood. Trusted institutions remain in the United States. Courts and the military, for example, enjoy broad levels of diffuse support that far outpace those of the political branches.⁷⁵ These institutions enjoy a reputation for professionalism and political independence. Likewise, certain administrative agencies such as the Congressional Budget Office and the Federal Reserve have, respectively, civil servants and political appointees whose decision making is widely viewed as nonpartisan.

We should think creatively about whether we might construct institutions focused on production or curation of information that can enjoy similar reputations. For example, South Africa's constitution provides for a Public Protector, an independent institution that serves "as a buffer between the state and ordinary people."⁷⁶ The Public Protector investigates complaints about provision of government services and the conduct of government officials and addresses broader issues of corruption and administrative malfeasance.⁷⁷ Imagine a similar institution, structured to be politically independent, that had privileged access to government information and was empowered not just to act as an inspector general to investigate political corruption but also, for example, to fact check statements issued by the White House Press Office. Such an office would raise serious separation of powers concerns, but that is precisely the point. The current separation of powers model in the United States might be inadequate to sustain the constitutional order in the present information environment.

and Member Stations Are America's Most Trusted Institution for the 14th Consecutive Year (Feb. 23, 2017), <http://www.pbs.org/about/blogs/news/nationwide-survey-confirms-that-pbs-and-member-stations-are-americas-most-trusted-institution-for-the-14th-consecutive-year>.

73. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

74. *INNnovation Fund*, INST. FOR NONPROFIT NEWS, <https://inn.org/project/innovation-fund> [https://perma.cc/V9RW-R2S5].

75. See James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201 (2014); Brian Kennedy, *Most Americans Trust the Military and Scientists To Act in the Public's Interest*, PEW RES. CTR. (Oct. 18, 2016), <http://www.pewresearch.org/fact-tank/2016/10/18/most-americans-trust-the-military-and-scientists-to-act-in-the-publics-interest> [https://perma.cc/ay57-SSR5].

76. Heinz Klug, *Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions*, 60 N.Y. L. SCH. L. REV. 153, 171 (2015).

77. See *id.* at 171–72.

Proportionality

Courts have a role to play in structuring the political environment to encourage deliberation. American courts can and should do better along this dimension. The notional frame for constitutional rights adjudication in U.S. courts is categorical rather than oriented toward balancing. Taking guidance from the Supreme Court, courts assess whether a rights claim may be placed in a delimited category of presumptive protection. If so, a form of strict or heightened scrutiny applies. There are many exceptions, to be sure.⁷⁸ But the exceptions are less in the nature of promoting balancing than in the nature of creating additional doctrinal categories: intermediate scrutiny for particular discrimination claims, special First Amendment doctrines for particular fora,⁷⁹ and so forth.⁸⁰

One consequence of this categorical frame is that the stakes of being declared a rights-holder are high. Thus, throughout the 1960s and through much of the 1970s, much women's rights advocacy sought to compare gender to race and thereby for women facing government discrimination to enjoy the benefit of strict scrutiny. Desegregation cases turned heavily on the question of whether segregation was *de jure*, in which case courts could order coercive remedies, or *de facto*, in which case courts were disempowered entirely. For decades, affirmative action cases featured extended argumentation over the standard of review to apply to the claims of particular groups.⁸¹ Constitutional disparate impact claims and claims based on social and economic rights have been rejected on the ground that courts lack the doctrinal resources to adjudicate them contextually.⁸² This posture towards rights encourages litigants to seek to persuade courts that they "count," that the Constitution recognizes the richness of their injuries, knowing that the alternative is being told that it does not.

Transnationally, the alternative to categorical adjudication of the American sort is proportionality.⁸³ Proportionality is a structured framework that tends to reorient constitutional adjudication away from the *ex ante* question of whether the claimant is a rights-bearer and toward the *ex post* question of whether the government's treatment of the claimant was justified.⁸⁴ Proportionality tests typically understand rights broadly but require courts to focus on whether the government was acting reasonably (was there adequate means-ends fit?), efficiently (was the government action no more burdensome than it needed to be?), and proportionally (was the government's

78. Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 417–31 (2008).

79. See *The Supreme Court, 1984 Term—Leading Cases*, 99 HARV. L. REV. 120, 202–12 (1985) (discussing public forum doctrine).

80. See MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* (2013); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

81. See *Adarand Constructors v. Peña*, 515 U.S. 200, 218–26 (1995).

82. See *Washington v. Davis*, 426 U.S. 229, 248 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973).

83. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015).

84. See COHEN-ELIYA & PORAT, *supra* note 80, at 126.

action excessive in relation to the benefit in policy terms and the injury in rights terms?).⁸⁵

Proportionality describes the dominant adjudicative framework among the world's constitutional courts, and there are benefits to adopting it in the United States. For the purposes of this Essay, its benefits are several. First, it lowers the stakes of political conflict because it tends to avoid requiring the court to declare that one or the other side of a constitutional rights dispute is beneath constitutional concern. Second, proportionality encourages the government to take into account the concerns of affected parties, since its attention and responsiveness to those concerns informs the doctrinal test. Third, proportionality tends to channel rights conflict into conflict over empirical facts. In a postfact environment, proportionality enables judges to avail themselves of their positions as relatively trusted arbiters of factual claims.⁸⁶

In addition to more explicitly adopting a form of proportionality analysis, courts can help spur deliberation by thinking more flexibly about remedies. One device used by courts around the world, but deployed rarely in the United States, is a suspension of invalidity, what the German Constitutional Court calls “unconstitutional but not void.”⁸⁷ Under this remedial posture, an unconstitutional law is not immediately invalidated; rather, the court retains jurisdiction and gives the legislature a fixed period of time in which to craft a remedy consistent with articulated constitutional guideposts. A suspension of invalidity is a dialogic approach to constitutional adjudication that situates the court as a mediator of political conflict rather than solely as a decision maker.

CONCLUSION

A framework constitution permits a people to be the author of its own constitutional fate. A pluralistic political community that is fit for mutual engagement, one whose members understand themselves as participants in the same collective enterprise, as negotiating the same set of basic values, as dealing with others who are the same but for the political conclusions they reach, can forge durable subconstitutional institutions. For a more antagonistic political community, one characterized by mutual suspicion and an adversarial posture toward ideological competitors, a framework constitution is an opportunity for great mischief.

Donald Trump is one of history's great opportunists. The American political culture is sufficiently in the grips of political antagonism that Candidate Trump's core promise—a profane posture towards American institutions—resonated with

85. See KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* 3 (2012); Jackson, *supra* note 83, at 3098–99.

86. See Dan M. Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, “Ideology” or “Situation Sense”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349 (2016) (finding based on experimental data that judges' legal training helps insulate them from motivated reasoning when resolving legal controversies).

87. DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 36 (3d ed. rev. 2012); see also Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 47 (2016).

substantial numbers of voters. The U.S. Constitution does not anticipate avulsive politics of this sort. It cannot help us.

This Essay has sketched preliminary suggestions for mitigating the effects of adversarial politics in the United States: restoring or installing supermajority requirements to encourage political negotiation; putting pressure on the two-party system through electoral reform; implementing more aggressive public funding of media organizations or creating institutions of public integrity to try to restore political intermediation; and adopting proportionality analysis in courts.

The constitutional challenge of the twenty-first century will be to reinvigorate the discursive life of the *res publica*. There is no going back from the technological environment that fractures and diffuses the political audience: Cronkite is dead. But we cannot forget that, for all his remarkable prescience, Mencken was wrong. The politics that produced President Trump represent not democracy's perfection but its perversion.