

# THE REPUBLIC IN LONG-TERM PERSPECTIVE

*Richard Primus*<sup>\*</sup>

## INTRODUCTION

Every system of government eventually passes away. That's a feature of the human condition. The United States has been an unusually stable polity by the standards of world civilizations, and for that stability Americans should be deeply grateful. But no nation is exempt from the basic forces of history. It is not reasonable to think that the constitutional republic we know will last *forever*. The question is *when* it will meet its end—in our lifetimes, or in our grandchildren's, or centuries later. Given the stable conditions that living Americans were socialized to expect, the dominant intuition is probably something like "A very long time from now, long enough that we can't imagine what life will be like then." That was my own confident view until recently, and it may still turn out to be right. But the recognition that no system of government lasts forever should make us realize that this one, too, will one day run its course. Once we face that reality, we can perhaps think with open minds about the possibility that the end will come sooner than we expected.

Since President Trump was elected, some serious observers have concluded that the American Republic is in serious peril.<sup>1</sup> Others have thought that warnings about the possible fall of the Republic are exaggerated rhetoric.<sup>2</sup> The difference between those perspectives is partly a matter of people's having different understandings of the Trump Administration. But it is also partly a function of different views, usually unarticulated, about

---

<sup>\*</sup> Theodore J. St. Antoine Collegiate Professor, The University of Michigan Law School. Thanks to Gary Bass, Joey Fishkin, Jamal Greene, Emily Hantverk, Don Herzog, and Orin Kerr.

1. See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); YASCHA MOUNK, *THE PEOPLE V. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (2018).

2. See Eric Liu, *How Donald Trump Is Reviving American Democracy*, ATLANTIC (Mar. 8, 2017), <https://www.theatlantic.com/politics/archive/2017/03/how-donald-trump-is-reviving-our-democracy/518928/> [<https://perma.cc/84BA-7C4P>].

what it would mean for the Republic to fall. So one important step toward thinking clearly about the challenge before us is to specify more carefully than is usually done what it means for the Republic to be at risk.

One possibility—call it a Type One threat—is that the fall of the Republic means the formal end of government under the United States Constitution. Perhaps the country might devolve into an actual dictatorship with a long-term strongman dictator, a politicized military, and the official abrogation of basic and long-recognized rights like the freedom of speech. If that is the going conception, then talk of the fall of the Republic is probably hyperbolic. Whatever Trump threatens, he probably doesn't threaten *that*. But there is another way to understand the fall of the Republic, and perhaps a more helpful way. The Type Two threat is the prospect that although the Constitution will not be officially repudiated, the Republic will become corrupted, impoverished, and damaged to the point where it is a lot less worth having than it used to be. To analogize, a disease that might kill the patient is a threat to the patient. But so is a disease that will leave the patient alive and in a debilitated condition.

The Republic is now at risk in the Type Two sense. The threat arose from internal pathologies, including the mismatch between a politics of ideologically antagonistic parties and a Constitution designed without political parties in mind. If worse comes to worst, historians will one day say that the system carried within itself the seeds of its own destruction. To be sure, the worst-case scenario might not materialize. The Republic has faced challenges before, both homegrown and external. But the present threat is unusually potent. To put the risk in perspective, I'd say that the Republic now faces a greater risk of self-destruction than at any time since the 1870s. To explain why, I will first lay out a conception of what the Republic is and what makes the Republic valuable. Then, beginning with a broad historical lens and narrowing to the present, I'll describe the threat that the Republic now faces.

Crucially, the analysis also looks at the question of what happens *next*, after President Trump. If a broad American consensus reacts to the Trump Administration by repudiating what Trump represents, we could be launched in a better direction. Think of the good-government reforms that followed Watergate. But it would be a mistake to assume that what comes next will be better. Indeed, a continued downward path is perfectly plausible. The Trump Presidency is not just a disaster while it lasts, though it is surely that. It is also the product of unhealthy background conditions that did not exist at the time of Watergate and that are likely to keep making trouble even

after Trump is gone. More acutely, the Trump Administration is proof of a concept: a self-interested, unprincipled, out-of-control bully can run for President of the United States and win. Once everyone knows that, it seems plausible that other self-interested bullies will want in on the action. So after Trump is gone, what will the next guy look like? What if his values are just as bad as Trump's, but he has more talent for getting things done? What if the future President to whom Trump has shown the way is an *effective* would-be strongman, rather than a bumbling one?<sup>3</sup>

I do not come as a prophet of doom. Nor even as a pessimist. The Republic faces a grave challenge, but we probably have a better-than-even chance of coming through in good shape. We may even find our way, on the other side of this danger, to improvements that will make the Republic better than it was before. That's certainly a more likely outcome than the restoration of the particular ways in which the Republic operated in the decades preceding the Trump Administration: the conditions that made the twentieth-century system possible are gone, and they aren't coming back. The future will be different from the past, and people who would like to avert disaster need to get busy actively imagining and working for what will come next.<sup>4</sup> There are no guarantees. And even if we do come through well, there will probably be significant damage en route. What I've written in this paragraph might also have been a reasonable thing to write in 1860.<sup>5</sup>

#### I. SPECIFYING THE PROBLEM

The idea that the Republic now faces a greater threat of self-destruction than at any time since the 1870s does not claim that there is now more evil or more suffering in the United States than at any previous time within that span. Such a claim would be untenable, and mentioning Jim Crow is one sufficient way to explain why. Nor does the claim that the Republic is under

---

3. I thought about using less gendered language in these last three sentences, but in the end I decided to write the text as it appears above. I do not mean to preclude the possibility that the next constitutionally dangerous President will be a woman. Which isn't to say that I think the odds are fifty-fifty.

4. For a good statement of this point, as well as some particular ideas about what should be done, see Jedediah Purdy, *Normcore*, *DISSENT* (2018), <https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy> [<https://perma.cc/T42T-FRA2>].

5. That's not to say, of course, that the conditions of 1860 are comprehensively analogous to those of 2018. From a political-economy standpoint, the Gilded Age might be more analogous; if one situates the Trump Administration in a global perspective that notices comparable illiberal developments elsewhere, the 1930s comes to mind. None of these eras is comprehensively analogous to the present, which should not be surprising, because civilization is too complex for history to repeat itself comprehensively.

threat mean that there is a serious chance that the United States will soon cease to exist as a country. The threat is a threat to the *Republic*, not to the nation-state. History furnishes any number of examples of Republics that ended, in happy and unhappy ways, without the relevant polity's ceasing to exist as a sovereign entity. France didn't end when the Fourth Republic ended, and Rome didn't end with the transition to the Empire. What ended in those scenarios was a way of doing things, replaced by a different way.

The Republic, as I here understand it, is the reified state-and-society entity that sets the terms for American political behavior. It comprises the system of constitutional government and the parts of our culture establishing norms for the relationship between government and society. Like France's Fourth Republic, it could be displaced by formal political change installing a differently constituted republic. It could also come to an end through some formal political change that would usher in something that is not a republic at all.

But as more relevant here, republics can end without that sort of formal change. Sometimes the substance of governance changes without accompanying formal acknowledgment, and sometimes written constitutions that formally establish republics coexist with systems of government that, in practice, do not operate like republics.<sup>6</sup> So just as my concern is not that the United States will cease to be an independent country, my concern is not that the existing Constitution of the United States will be officially abrogated and replaced with some dystopian alternative. My concern—as labeled above, my Type Two concern—is that the United States will remain independent, and the Constitution will officially remain law, but the substance of governance “under” that Constitution will change in fundamental and seriously undesirable ways. One might call that development the end of the Republic, or one might say that the Republic persists but is much less worth having than it used to be.

The contention that substantive change of the kind here contemplated would make the Republic less worth having is not based on the premise that the existing Republic is perfect. It isn't. On the contrary, there are important ways in which the current (or recent) polity could and should be improved.<sup>7</sup> But something can be imperfect and in need of improvement and also, as

---

6. See, e.g., 1972 DPRK CONST. [CONSTITUTION] (Dec. 27, 1972) (N. Kor.); KONSTITUTSIIA RSFSR (1918) [KONST. RSFSR] [RSFSR CONSTITUTION].

7. And as important as they are, this Essay has enough to do without going deeply into them. So deeper discussion of that aspect of the problem will require different forums.

measured by the relevant standard, excellent. The country will never have a perfect form of government, so the question to ask about any particular government is how it compares to other governments that might realistically exist in its place. In other words, systems of government should be graded on a curve. By comparison with other forms of government that have existed around the globe and across human history, the American Republic as it has recently existed looks pretty good. Perhaps more to the point, the American Republic as it has recently existed is manifestly preferable to any changed form of government for the United States that the Trump Administration might portend—except, of course, if the change comes about as a reaction *against* Trump. Given the impossibility of going back to the past, what the Republic really faces is a choice between those two paths of change.

A precise definition of what makes a system a republic is elusive, as political theorists and constitutional lawyers have understood for a long time.<sup>8</sup> The specific features of *this* Republic are also subject to varying characterizations. But it is possible in a general way to specify important features of the American Republic—which is not to say that actual practice never deviates from those features. So, to speak in general terms, and without claiming that American government always succeeds in behaving in accordance with these terms, the American Republic has at least the following features:

**Electoral Democracy.** Most governmental authority is held by officials chosen for fixed terms in free and fair elections. There is a high degree of public confidence, and deservedly so, in the integrity of electoral outcomes.

**Legitimate Political Competition.** Officeholders have political opponents who are recognized as legitimate alternative exercisers of public power. Officeholders do not use the power of the state to jail, exile, impoverish, or otherwise persecute those political opponents. Political dissenters are—and feel—free to engage in oppositional politics without fear of state-power reprisal.

**The Rule of Law.** Public officials understand themselves to be limited by law, constitutional and otherwise, in the ways that they conduct themselves in office. Authority is vested in offices, not in persons. Law enforcement is not treated as a tool for the political or personal agendas of officeholders, and officials in general can be held to account for illegal

---

8. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (despairing of articulating in principled fashion the requirements for a republican form of government).

actions. There is a high degree of voluntary compliance with law by ordinary persons. (Most people pay most of their taxes most of the time.)

**Separation of Powers / Checks and Balances.** Governmental power is dispersed among different institutions so as to minimize the risks inherent in placing too much unchecked power in any single place. These arrangements of dispersal include not just the federal-state division and the division of federal power into three branches but also, say, the existence of a professionalized military under civilian control, with norms limiting the participation of military personnel in civilian government.

**Government in the Public Interest.** Public officials are expected to pursue the public good as they understand it, not to treat their offices as licenses to use power for their personal benefit.

**Other Substantive Values.** The system is committed to a set of basic values including free expression, equality, private property, religious liberty, and the impartial administration of justice (the last of which is to occur within a system where individuals accused of crimes are afforded things like legal representation and a presumption of innocence). The content of these values is contested, as are the best ways of adjudicating conflicts among those values and the question of what other values might be on the list. Nevertheless, there is broad agreement that these values (and not, say, the glory of an aristocratic house, or the purity of an ethnicity's gene pool) are important features of the system.

This list of features does not describe the American Republic precisely, much less exhaustively. Different well-informed people would offer somewhat varying accounts. But those accounts should also have a fair amount of overlap, and I hope to have captured much of what matters in the overlapping zone. Similarly, the features of the Republic at which I gesture above are not always scrupulously observed. Sometimes officeholders use their powers to line their pockets or to persecute their personal enemies, and sometimes dissent is squelched and justice corrupted, and so on. But the degree to which those practices are normal, or tolerated, is meaningfully different from that in countries where government is repressive, or arbitrary, or thoroughly corrupt, or in the hands of a particular family or tribe.<sup>9</sup>

---

9. "No doubt having a rule of law isn't enough for a society to qualify as a good one. But those inclined to denigrate it should contemplate societies without it." DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 133 (1989). See also Suzy Hansen, *Inside*

Once a substantive understanding of the Republic is in view, it's possible to wonder whether the Republic we had in 2015 is the same one we had in 1789, or 1860, or 1963. After all, the content of the values I described has changed dramatically over time, and so have many of the practices of ordinary government. It would be contrary to the modern Republic's sense of equality for voting to be restricted again to propertied white men; the degree to which financial corruption has been tolerated in government has varied by time and place; millions of African-Americans through most of American history would not have recognized the impartial administration of justice as part of their experience of government. (Many still do not, even if the present conditions differ meaningfully from those of the Jim Crow South.) What's more, many Americans of prior generations would agree that the Republic we now inhabit is not the same Republic that began in 1788. Beginning in 1860, many white Southerners held that the original Republic had been destroyed by President Lincoln's party.<sup>10</sup> Indeed, reported deaths of the Republic began pretty early: Madison and Jefferson argued in 1791 that the new government's essence would be destroyed if President Washington signed the bill incorporating the Bank of the United States.<sup>11</sup> Washington did sign that bill, of course, so if Madison and Jefferson were right, the Republic of 1788 lasted only three years. Maybe Madison and Jefferson were exaggerating their views for political purposes, but maybe not, and in any event the white Southerners who called themselves Redeemers were surely earnest in their version of the point. And there's an important strain in the constitutional law literature asking how many Republics we have had.<sup>12</sup>

---

*Turkey's Purge*, N.Y. TIMES MAG. (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/magazine/inside-turkeys-purge.html> (on file with the *Michigan Law Review*); Ivana Kottasová, *How Rich is Vladimir Putin?*, CNN MONEY (Mar. 14, 2018), <https://money.cnn.com/2018/03/14/news/putin-wealth-russia-election/index.html> [<https://perma.cc/U4T5-9FY8>].

10. See, e.g., CONG. GLOBE, 36th Cong., 2nd Sess. 212–17 (1860) (statement of Sen. Judah P. Benjamin) (defending secession on the ground that the newly empowered Republican Party had violated the constitutional compact and rendered it null).

11. See Representative James Madison, *The Bank Bill* (Feb. 2, 1791), available at *The Bank Bill*, [2 February] 1791, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-13-02-0282> [<https://perma.cc/G8Q8-89G3>] (describing the Bank bill as a threat to the “essential characteristic” of the new Constitution); Secretary Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, available at *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, 15 February 1791, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-19-02-0051> [<https://perma.cc/J992-QFD5>].

12. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 1 (1991).

The present analysis does not require establishing One Right Answer to the question of how old the current Republic is. Maybe we have had several Republics since 1788, and maybe we have had a single continuous Republic with an important series of reforms. Which framing makes more sense depends on why one is asking the question.

But during the first two centuries after 1788, the changes to the constitutional order that might or might not count as demarcations between one Republic and another were all—from my own normative perspective—*improvements*. If the Civil War and Reconstruction ended a prior Republic, they did not do so in a way that sacrificed what made the prior Republic worth having. Obviously, that's a contestable judgment. Hundreds of thousands of white Southerners died in the name of a contrary position. But I do not hesitate to make the normative judgment that what came after that transition was better than what came before. In contrast, the Republic in 2018 is at risk of undesirable change. The Type Two threat is a *threat*—it holds out of the prospect of serious damage. Maybe that threat is best construed as a threat to the Republic itself, as the Republic now stands, and maybe it is best construed as a threat to what makes the Republic as it now stands worth having. Regardless of the chosen description, the damage threatened is enormous.

A lot of the current threat of the Republic has to do with President Trump. He isn't responsible for all of it; the problem is more complex than that. But Trump is not a trivial feature of the problem, either. Part of the threat is about the conditions that made Trump possible, and part of the threat is about dynamics that he is setting in motion or accelerating. And part of the threat is what he's actually doing, right now. So in what follows, I will first sketch a deep historical background, one in which an important theme is the relationship within American government—often uneasy, and changing over time—between political conflict and constitutional conflict. Then I will bring the focus to 2018.

## II. THE DEEP DYNAMIC: PARTIES AND THE CONSTITUTION

The Framers of the Constitution largely imagined that they were designing a system without organized and long-lasting political parties. That vision didn't last long. And when leading American politicians first split into two parties in the 1790s, the contending groups regarded each other less as legitimate alternatives within a common constitutional system than as threats to the Republic, in the Type Two sense. The Democratic-Republicans didn't just want to beat the Federalists in elections more often than not. They



wanted to save the country by putting the Federalists out of business.<sup>13</sup> Within a generation, they succeeded. After that, political competition wobbled for a few decades between a legitimate-alternatives model and a threat-to-the Republic model. When the Civil War came, the sectional division largely mapped a partisan divide. As with the Federalists and the Democratic-Republicans, each side in 1860 saw the other as a threat to the Republic, and this time the two sides were willing to take up arms accordingly.<sup>14</sup>

Sometime after Reconstruction—I'd put the date in the 1890s, but one could reasonably argue for dates a little earlier or later—a different dynamic took shape. Two political parties understood each other as legitimate rivals within the system, not as threats to the system itself. For a hundred years thereafter, Democrats and Republicans sought to win elections, but the parties did not seek each other's destruction on the theory that the other party was a cabal to subvert the Constitution. The greatest constitutional conflicts of the twentieth century were not straight partisan conflicts. In the 1930s, lots of Republicans in Congress voted for President Franklin Roosevelt's New Deal legislation, and a nontrivial number of Democrats voted against.<sup>15</sup> Two of the Four Horsemen against whom Roosevelt faced

13. See GERALD LEONARD, *THE INVENTION OF PARTY POLITICS* 14–17 (2002).

14. In case it's not clear: Sometimes it's true that one side is a threat to the Republic. In principle, it could also be true that both sides are.

15. To be sure, Democrats in Congress were more likely than Republicans to vote in favor of all of these laws. But the constitutional conflict between the Supreme Court and the New Deal was very far from mapping a clean difference of opinion between the two political parties. The National Industrial Recovery Act of 1933, whose constitutionality was challenged in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), passed the House of Representatives with 54 Republicans in favor and only 50 Republicans opposed. *TO PASS H.R. 5755*, GOVTRACK, <https://www.govtrack.us/congress/votes/73-1/h44> [<https://perma.cc/XLF7-9PXU>]. In the Senate, ten of the thirty Republicans voting supported the Act. *TO PASS H.R. 5755*, GOVTRACK, <https://www.govtrack.us/congress/votes/73-1/s91> [<https://perma.cc/V7ME-W6SQ>]. The Agricultural Adjustment Act of 1933, at issue in *United States v. Butler*, 297 U.S. 1 (1936), passed the Senate with an equally divided Republican caucus, fifteen Republican Senators in favor and fifteen opposed. *TO PASS H.R. 3835*, GOVTRACK, <https://www.govtrack.us/congress/votes/73-1/s43> [<https://perma.cc/H864-RD4Q>]. Most Republicans in the House opposed the Bill, but more than one-third of the House Republicans—39 out of 112—voted in favor. *TO PASS H.R. 3835 (P.L. 10)*, GOVTRACK, <https://www.govtrack.us/congress/votes/73-1/h7> [<https://perma.cc/UE3H-HGDL>]. The National Labor Relations Act of 1935, which was at issue in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), passed the Senate with 13 Republicans in favor and only eight opposed. *TO PASS S. 1958, A Bill to Provide for Settlement of Labor Disputes*, GOVTRACK, <https://www.govtrack.us/congress/votes/74-1/s66> [<https://perma.cc/XGY5-GFKG>]. And the Fair Labor Standards Act of 1938, at issue in *United States v. Darby*, 312 U.S. 100 (1941), was opposed by most Republicans in the Senate (13-3), *TO PASS S. 2475*, GOVTRACK, <https://www.govtrack.us/congress/votes/75-1/s60> [<https://perma.cc/YJ9K-U89F>], but supported by a majority of Republicans in the House: 46 voted in favor and 41 voted against,

off in his great confrontation with the Supreme Court—Justices Pierce Butler and James McReynolds—were Democrats, and four of the five Justices who broke the logjam in his favor were Republicans. In the 1950s and 60s, the dismantling of Jim Crow was much more a matter of internal division within the Democratic Party than it was an issue dividing the two parties from each other.<sup>16</sup> And in 1973, *Roe v. Wade* saw Democratic- and Republican-appointed Justices in both the majority and the dissent, and public opinion polling around the time showed a roughly similar division on the merits of legal abortion within each party's self-identified voters.<sup>17</sup>

Partly because constitutional worldviews did not reliably map partisan affiliations during the century after 1890, the two political parties managed to compete in an iterated game that neither side understood as a constitutional death struggle. Partisan opponents were opponents, but within a common framework. In its first stages, this relatively amicable arrangement was purchased in part by an understanding among white politicians of both parties that no fundamental reform of the racial caste system would be attempted.<sup>18</sup> And from the 1930s on, it probably helped that American political leaders confronted enemies greater and more dangerous than one another. When you have Nazi Germany and the Soviet Union to worry about, it's easier to remember that Americans whose policy intuitions are different from yours might not be your mortal enemies.<sup>19</sup>

---

TO PASS S. 2475, (P. A. 728), *The Wage and Hour Bill*, GOVTRACK, <https://www.govtrack.us/congress/votes/75-3/h145> [<https://perma.cc/5TJ7-GXSG>].

16. See James C. Cobb, *The Voting Rights Act at 50: How It Changed the World*, TIME (Aug. 6, 2015), <http://time.com/3985479/voting-rights-act-1965-results/> [<https://perma.cc/WQG5-4F65>]; Alicia W. Stewart & Tricia Escobedo, *What You Might Not Know About the 1964 Civil Rights Act*, CNN (Apr. 10, 2014), <https://www.cnn.com/2014/04/10/politics/civil-rights-act-interesting-facts/index.html> [<https://perma.cc/A8NL-4NPQ>]; *The Southern Manifesto of 1956*, U.S. HOUSE REPRESENTATIVES, HISTORY, ART & ARCHIVES, <http://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/> [<https://perma.cc/UGQ2-CZLG>].

17. Gallup found that 59% of Democrats and 68% of Republicans agreed with the statement that the decision of whether to have an abortion should be made exclusively by the pregnant woman and her physician. Richard Pomeroy & Lynn C. Landman, *Public Opinion Trends: Elective Abortion and Birth Control Services to Teenagers*, 4 FAMILY PLANNING PERSPECTIVES 45 tbl.1 (1972).

18. See, e.g., DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2001); C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913* (1967).

19. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2nd ed., 2011); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* (1999); see also EVAN THOMAS & WALTER ISAACSON, *THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE* (1986). This is not to obscure the fact that many American politicians in the twentieth century also went the other way, trying to use international conflict as a political wedge at home. See, e.g., H.H. RANSOM, *CAN AMERICAN DEMOCRACY SURVIVE*

Nothing lasts forever. The end of Jim Crow triggered a partisan realignment of white Southerners that greatly increased the ideological homogeneity of the Democratic Party and permitted deep cultural cleavages to better map partisan divides.<sup>20</sup> The first federal elections conducted wholly within the paradigm of that realignment occurred in 1994, three years after the Soviet Union collapsed.<sup>21</sup> Those elections produced a divided federal government in 1995, with Republican majorities in Congress and a Democrat in the White House. Within a year, partisan conflict across that divide produced an acrimonious federal-government shutdown,<sup>22</sup> followed by a bitterly partisan presidential impeachment three years after that. Both of those events reflected a significant shift away from seeing the other party as a legitimate alternative to be negotiated and compromised with and toward a model of interparty conflict as unlimited warfare.<sup>23</sup>

For a variety of reasons, including my wish not to alienate readers whose political priors are different from mine, I'd like to be able to say that the dynamics of change from a legitimate-rivals model of politics to a constitutional-Armageddon model were symmetrical between the two parties. But they weren't. As Joseph Fishkin and David Pozen richly document in their new essay *Asymmetric Constitutional Hardball*, it has mostly been the Republican Party that, since the Gingrich Congress, has taken increasingly aggressive and destabilizing measures reflecting the view that the other major party is a threat to the Constitution rather than a

---

THE COLD WAR? (1964); SAM TANENHAUS, *THE DEATH OF CONSERVATISM: THE MOVEMENT AND ITS CONSEQUENCES* (2010) (describing the politicization of foreign affairs in the early Cold War).

20. See, e.g., Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804 (2014).

21. In each House of every Congress from the Civil War through 1994, the majority of Members from the former Confederate States was Democratic. In each House of every Congress since 1995, the majority of Members from those states has been Republican.

22. See Dylan Matthews, *Government Shutdown 2018: All 18 Previous Government Shutdowns, Explained*, VOX (Jan. 19, 2018, (9:00 AM)), <https://www.vox.com/policy-and-politics/2018/1/19/16905584/government-shutdown-history-clinton-obama-explained> [https://perma.cc/6J2Z-KWU6].

23. For related but different takes on this dynamic, see, for example, STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012); Jack Balkin, *Constitutional Rot, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA* 19 (Cass R. Sunstein, ed., 2018); 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/UJ66-HPZK].

legitimate alternative within it.<sup>24</sup> To be sure, neither party has acted irreproachably.<sup>25</sup> And nothing in this story means that the average Democrat is more tolerant or broad-minded than the average Republican. But speaking clearly about the current state of American government requires one to be able to observe that for the most part the Republican Party has led the way in projecting the view that it alone is the party of the Constitution, and its rival is beyond the constitutional pale.

Politics being what it is, some readers may think that this characterization is itself partisan and unfair. But the statement that the Republican Party sees itself as the only party loyal to the Constitution should not be controversial, because that view is the official position of the Republican Party. The 2016 Republican Platform states the point directly, announcing that “We are the party of the Declaration of Independence and the Constitution.”<sup>26</sup> The 2012 version simply said, “We are the party of the Constitution[.]”<sup>27</sup> Plainly, “We are the party of the Constitution” means “. . . and they are not.” That’s what it means to be the *party* of something.

The idea that only Republicans are faithful to the Constitution is not simply a matter of official posturing by an unrepresentative Platform Committee. On the contrary, the idea that the Republican Party is the sole party of the Constitution has found resonance within the Republican Party at both its most elite and its most populist. At the elite end, the Party has a favored theory of constitutional interpretation, is committed to the view that judicial review based on any other approach is illegitimate, and describes judges appointed by Democratic Presidents as lawless.<sup>28</sup> At the populist end,

24. Joseph Fishkin & David Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018). See also MANN & ORNSTEIN, *supra* note 23, at 51–58 (describing the related phenomenon of asymmetrical polarization).

25. For one account of Democratic as well as Republican escalations, see Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017).

26. REPUBLICAN NAT’L COMM., REPUBLICAN PARTY PLATFORM 2016 (2016), <https://prod-cdn-static.gop.com/static/home/data/platform.pdf> [<https://perma.cc/QS2N-FJ5F>].

27. *We Believe in America: 2012 Republican Platform*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=101961> [<https://perma.cc/Y39G-B4VW>]. The Democratic Party’s Platform has nothing comparable.

28. Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 17, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/34WS-NBMF>]; STEVEN G. CALABRESI & SHAMS HIRJI, PROPOSED JUDGESHIP BILL (2017), <https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf> [<https://perma.cc/79NL-8PAE>].

President Trump rose to political prominence partly on the idea that the incumbent President, a Democrat, was not just a bad President but constitutionally unfit to hold office.<sup>29</sup> Birtherism was an unhinged idea, and more than a little bit racist. Responsible Republicans didn't endorse it.<sup>30</sup> But it's not an accident that an idea like birtherism found a ready audience in one party rather than the other. And before long, the Birther-in-Chief was that party's presidential nominee.

Even if the Republican Party has mostly led the way, though, the tendency to see the other side as a threat to the Republic is by now a thoroughly bipartisan phenomenon.<sup>31</sup> Many Democrats today perceive the sitting President, who is a Republican, as a threat to the Republic. (I perceive him that way, for example.) Moreover, it's not just President Trump who now strikes many Democrats that way. Republicans in Congress who give Trump cover, and Republicans in the commentariat who do the same, are all helping to persuade Democrats that partisan conflict is indeed now tantamount to constitutional death struggle, such that the fate of the Republic depends on the outcome of the midterm elections.

I think, of course, that my assessment of the threat posed by the Republican Party under President Trump is more reasonable than the Republican claim to being the sole party of the Constitution. The fact that a noteworthy slice of leading Republicans outside of Congress and deep-red media shares my view of the President suggests that my view is not merely partisan. (These prominent Republicans include retired<sup>32</sup> and retiring<sup>33</sup>

(proposing to pack the lower federal courts for the express purpose of nullifying the influence of judges appointed by President Barack Obama).

29. Gregory Krieg, *14 of Trump's Most Outrageous 'Birther' Claims—Half From After 2011*, CNN (Sept. 16, 2016), <https://www.cnn.com/2016/09/09/politics/donald-trump-birther/index.html> [https://perma.cc/P77L-P4NM].

30. Alan Rappeport, *Jeb Bush Says President Obama Is 'an American' and 'a Christian'*, N.Y. TIMES: FIRSTDRAFT (Sept. 18, 2015), <https://www.nytimes.com/politics/first-draft/2015/09/18/jeb-bush-says-president-obama-is-an-american-and-a-christian/> [https://perma.cc/325P-Z9VV].

31. A Pew Research Center study published in 2016 found that 45% of Republicans and 41% of Democrats saw the opposing party as a threat to the nation's well-being. *Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/> [https://perma.cc/6G55-QHYY].

32. See, e.g., *Full Transcript: Mitt Romney's Remarks on Donald Trump and the 2016 Race*, POLITICO (Mar. 3, 2016, 11:59 AM), <https://www.politico.com/story/2016/03/full-transcript-mitt-romneys-remarks-on-donald-trump-and-the-2016-race-220176> [https://perma.cc/ZYS6-4BA2].

33. See, e.g., *Full Text: Jeff Flake on Trump Speech Transcript*, POLITICO (Jan. 17, 2018, 10:50 AM), <https://www.politico.com/story/2018/01/17/full-text-jeff-flake-on-trump-speech-transcript-343246> [https://perma.cc/4H33-SS4P].

politicians, policy-oriented intellectuals,<sup>34</sup> academics,<sup>35</sup> and commentators with bipartisan audiences<sup>36</sup>—that is, people not beholden to the Party's electoral base, which is strongly pro-Trump.) But regardless of one's sense of the differentiated behavior of the two political parties, it should be clear that we now inhabit a politics in which many people affiliated with each party see the other party as a threat to the constitutional republic.

That environment is a lot less healthy than one in which the two parties see each other as legitimate alternatives. The threat-to-the-Constitution orientation creates a sense that there must be no compromises in politics, because concessions are betrayals of the Constitution. Hence the rise of federal-government shutdowns as a signal feature of the new dynamic, beginning with the shutdown of 1995.<sup>37</sup> In the quarter century since then, the cause of defending the Constitution against its enemies has persuaded many people to turn away from twentieth-century norms of cooperation and self-limitation. If letting the other side legislate when it has majorities in Congress means permitting legislation that will destroy the Constitution, then every sort of legislative obstructionism is justified. If judges appointed by the other side do not believe in the Constitution, then one is justified in stonewalling any judicial nominee the other side puts forward. Indeed, such stonewalling isn't merely justified; it's the only responsible course of action. More generally, if letting the other side notch victories means exposing the Constitution to peril, then it will seem necessary to block the other side's victories at all costs.

That sort of maximalism takes its toll. Constitutional government is like playground basketball: if you care more about winning each round than you

---

34. See, e.g., Max Boot, Opinion, *I Left the Republican Party. Now I Want Democrats to Take Over*, WASH. POST (July 4, 2018), [https://www.washingtonpost.com/opinions/i-left-the-republican-party-now-i-want-democrats-to-take-over/2018/07/03/54a4007a-7e38-11e8-b0ef-fffcabeff946\\_story.html?noredirect=on&utm\\_term=.7ce671980f7e](https://www.washingtonpost.com/opinions/i-left-the-republican-party-now-i-want-democrats-to-take-over/2018/07/03/54a4007a-7e38-11e8-b0ef-fffcabeff946_story.html?noredirect=on&utm_term=.7ce671980f7e) [https://perma.cc/EDL7-XAJN].

35. See, e.g., Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> [https://perma.cc/A3UW-J58W].

36. See, e.g., Bret Stephens, Opinion, *To the Go-Along Republicans*, WALL STREET J. (Aug. 1, 2016), <https://www.wsj.com/articles/to-the-go-along-republicans-1470091421> (on file with the *Michigan Law Review*); George F. Will, Opinion, *Trump Has a Dangerous Disability*, WASH. POST (May 3, 2017), [https://www.washingtonpost.com/opinions/trump-has-a-dangerous-disability/2017/05/03/56ca6118-2f6b-11e7-9534-00e4656c22aa\\_story.html](https://www.washingtonpost.com/opinions/trump-has-a-dangerous-disability/2017/05/03/56ca6118-2f6b-11e7-9534-00e4656c22aa_story.html) [https://perma.cc/NLH6-MUPY].

37. See Matthews, *supra* note 22.

do about respecting your opponent in the spirit of the game, pretty soon the game will break down completely.

### III. PRESIDENT TRUMP

Into this already-damaged environment stepped Donald Trump, whose signature characteristic (other than shallow machismo) is the complete disregard for norms of self-limitation.<sup>38</sup> Needless to say, that makes him a powerful accelerant for the process of norm-decay that was already in progress. Early on, the leadership of the Republican Party saw Trump for what he was: a bigot, a con man, a spoiled bully whose utter lack of other-mindedness and incapacity for continent decisionmaking would make it irresponsible to vest him with the powers of a grade-school hall monitor. Honorable patriots like John McCain, Mitt Romney, and the Presidents Bush refused even to attend the party's 2016 nominating convention. But Trump filled the hall without them. And over time, the vast majority of Republicans came to conclude that supporting Trump was the lesser evil. (After all, supporting the other party's nominee would betray the Constitution.) Now Trump is the President, and the potential for further damage is downright frightening.

Human beings are adaptive. It has been eighteen months since Trump took office, and many of us have ceased to be shocked and horrified day by day. But take stock. We have a President with no regard for any number of the core norms that make constitutional government and the rule of law possible.<sup>39</sup> He resists the idea that the power of the executive branch is not a tool that he can use at will—that the federal government's investigatory and law-enforcement apparatuses have a duty to something impersonal (the law) rather than just to him.<sup>40</sup> He has no regard for the idea that his statements should be constrained by truth or reality,<sup>41</sup> nor for the institutions whose mission is to bring as much truth and reality as possible to public discourse

---

38. Actually, maybe that's not separate from shallow machismo. Maybe the two are deeply connected. But that's a question for someone with a different sort of training from mine.

39. Many analysts have written on this theme. To choose only from writers who don't share my political leanings, two good examples are DAVID FRUM, *TRUMPOCRACY: THE CORRUPTION OF THE AMERICAN REPUBLIC* (2018), and Jack Goldsmith, *supra* note 35.

40. See, e.g., Benjamin Wittes, *Big Lies, Law Enforcement, and the Defense of Rod Rosenstein*, *LAWFARE* (Jan. 29, 2018, 4:51 PM), <https://lawfareblog.com/big-lies-law-enforcement> [<https://perma.cc/8YQ3-AS9U>].

41. See, e.g., *In 497 days, President Trump Has Made 3,251 False or Misleading Claims*, in WASH. POST: FACT CHECKER (updated May 31, 2018), <https://www.washingtonpost.com/graphics/politics/trump-claims-database/> [<https://perma.cc/UX3T-9AT2>].

and government decisionmaking. He seeks to delegitimize the electoral process, and he seems not to care about the considerable risks that hostile foreign powers may pose for American elections in the future.<sup>42</sup> He is heedless of anti-corruption norms. And along all of these dimensions, he (and the people around him) exhibit no sense of shame, no requirement even to be duplicitous. In the corruption category, for example, perhaps the most astounding thing is not that the President ignores conflict-of-interest norms but that his administration *defends* his right to do so.<sup>43</sup> In the lies-and-disinformation category, what's distinctive about the Trump Administration isn't that it is willing to lie. All administrations sometimes lie. But all previous administrations have behaved as if being caught lying is a thing to be avoided. President Trump and the people around him exhibit no sense that lying is a disfavored behavior. And society is adjusting.

Note the ways in which President Trump's distinctive conduct map onto the things I earlier identified as central components of what makes the American Republic a desirable form of government. The list I offered included electoral democracy, legitimate political competition, the rule of law, government in the public interest, and a certain set of substantive values.

So, to begin at the beginning: the electoral democracy component requires a high degree of deserved public confidence in the integrity of elections. President Trump repeatedly and with no factual foundation tells his supporters that the nation is beset by widespread voter fraud, thus undermining confidence in the electoral system, and he shows no inclination to take action against the all-too-real cyberthreats to American elections that others in the government are openly warning him about.<sup>44</sup> In both respects,

---

42. See, e.g., Gardiner Harris, *State Dept. Was Granted \$120 Million to Fight Russian Meddling. It Has Spent \$0.*, N.Y. TIMES (Mar. 4, 2018), <https://www.nytimes.com/2018/03/04/world/16ichae/state-department-russia-global-engagement-center.html> (on file with the *Michigan Law Review*).

43. See, e.g., Memorandum in Support of Defendant's Motion to Dismiss, District of Columbia v. Trump, No. 8-17-cv-1596-PJM (D. Md. Sept. 29, 2017), 2017 WL 5557942 (arguing for the dismissal of a complaint alleging that President Trump is in violation of the Constitution's Emoluments Clauses); see also District of Columbia v. Trump, 2018 WL 3559027 (D. Md. July 25, 2018) (denying Defendants' motion to dismiss).

44. Matthew Rosenberg, *White House Has Given No Orders to Counter Russian Meddling. N.S.A. Chief Says*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/us/politics/16ichael-rogers-nsa-cyber-command-russia-election-meddling.html> (on file with the *Michigan Law Review*); Eli Watkins, *Trump Repeats Debunked Voter Fraud Claim*, CNN (Apr. 5, 2018), <https://www.cnn.com/2018/04/05/politics/trump-voter-fraud-california/index.html> [<https://perma.cc/8HYU-UYKH>].



he facilitates a decline of confidence in the integrity of elections. A loss of public confidence on that score would be incalculably damaging.

Next on the list is the recognition of one's political rivals as legitimate alternative exercisers of political power, one part of which is the settled understanding that—unlike in many other countries—officeholders in America do not use the power of the state to jail, exile, impoverish or otherwise persecute their political opponents. The decline of the idea that the opposition is a legitimate alternative was significant already before Trump, of course, but Trump's birtherism took the phenomenon to new levels. And during his campaign for the presidency, Trump expressly called the other party's nominee a criminal and pledged to prosecute her if elected. (The "lock her up" chant was not the sound of republicanism.)

With respect to the rule of law, Trump's infamous demand of loyalty from then-FBI Director James Comey is just one of many symptoms of his disregard for the ideas that authority resides in offices rather than persons and that law enforcement is not to be treated as a tool for personal or political agendas. The idea that President Trump uses his power only in the public interest and not to pursue his own personal benefit is a non-starter: he uses his office to drive business to his hotels and resorts, and his family negotiates special trade concessions for its business holdings from foreign governments,<sup>45</sup> and that's just the beginning. And as for substantive values like free expression, equality, religious liberty, and the impartial administration of justice: Trump attacks independent journalism,<sup>46</sup> gives comfort to White Supremacists,<sup>47</sup> actively denigrates Muslims,<sup>48</sup> and declares that the (exonerated) Central Park Five should be in prison<sup>49</sup> but pardons

45. See, e.g., Lynn Walsh, *This Week in Conflicts: Trump's Financial Disclosures and Odd Support for ZTE—Followed by a Chinese-Backed Theme Park*, SUNLIGHT FOUND. (May 17, 2018, 12:15 PM), <https://sunlightfoundation.com/tracking-trumps-conflicts-of-interest/recent-reporting/> [https://perma.cc/9N9X-R6KF].

46. See, e.g., Editorial, *Trump's War on Journalism*, L.A. TIMES (Apr. 5, 2017), <http://www.latimes.com/projects/la-ed-trumps-war-on-journalism/> [https://perma.cc/E6YG-QCYQ].

47. Michael D. Shear & Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames 'Both Sides'*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html> (on file with the *Michigan Law Review*).

48. Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST: POST POLITICS (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims> [https://perma.cc/N5ST-3SRN].

49. Benjy Sarlin, *Donald Trump Says Central Park Five Are Guilty, Despite DNA Evidence*, NBC NEWS (Oct. 7, 2016), <https://www.nbcnews.com/card/17onald-trump-says-central-park-five-are-guilty-despite-dna-n661871> [https://perma.cc/MU6U-D5ZM].

political allies Joe Arpaio<sup>50</sup> and Dinesh D'Souza,<sup>51</sup> convicted respectively of using the power of law enforcement to violate the constitutional rights of racial minorities and breaking the laws of the electoral system. And so on. Along virtually every dimension, President Trump is denying, rejecting, ignoring, or just plain trashing the norms and values that have made the Republic valuable.

If Congress were resolutely standing up for better ways of doing things, the current level of presidential pathology would still be alarming. As it happens, the Congress we have is less than heroic. Congress does not punish the President for his corruption, or his bigotry, or his attempts to politicize law enforcement, or his assaults on the freedom of the press, or his lying and lying and lying. On the contrary, too much of Congress seems intent on giving the President cover. To be sure, Congress hasn't given the President free rein: there was a Russia investigation in the House, and there is still one in the Senate. But they're paltry. (Compare the staffing of the Russia investigations in Congress with those of, say, the Benghazi affair, and consider how the House terminated its investigation of the subject.)<sup>52</sup> We can hope that Congress would rally if the President crossed some red line, like the firing of Special Counsel Robert Mueller. But to judge from a year and a half of experience, it is not clear what the grounds for thinking that hope realistic would be.

The mention of the fact that we are now a year and a half into the Trump Administration might prompt optimists to think that the situation, though unfortunate, is not really so dire. We seem to be surviving. It's not a pretty picture, but we haven't fallen completely apart, either. That's true. The system is pretty robust. Many people, inside and outside of government, have been making efforts to prevent or mitigate damage.<sup>53</sup> Some of these

---

50. Julie Hirschfield Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html> (on file with the *Michigan Law Review*).

51. Philip Rucker et al., *Trump Pardons Conservative Pundit Dinesh D'Souza, Suggests Others Also Could Receive Clemency*, WASH. POST (May 31, 2018), [https://www.washingtonpost.com/politics/trump-offers-pardon-to-conservative-pundit-dinesh-dsouza-for-campaign-finance-violations/2018/05/31/b4939a08-64d5-11e8-a768-ed043e33f1dc\\_story.html](https://www.washingtonpost.com/politics/trump-offers-pardon-to-conservative-pundit-dinesh-dsouza-for-campaign-finance-violations/2018/05/31/b4939a08-64d5-11e8-a768-ed043e33f1dc_story.html) [<https://perma.cc/K8QC-PUA8>].

52. Dustin Volz, *Senate Gives Limited Resources to Russia Election-Meddling Probe*, REUTERS (Apr. 24, 2017, 9:49 PM), <https://www.reuters.com/article/us-usa-trump-russia-congress-idUSKBN17R05E> [<https://perma.cc/8TEN-Z7CW>].

53. Examples from inside the government include Sally Yates, who refused to implement the first version of the Trump Administration's order banning entry into the

people have become famous, and many others are less well-known. We owe them our thanks.

But let's not kid ourselves. The President has significant resources for kneecapping or overwhelming the people who oppose him. And unlike previous Presidents, President Trump feels no need to exercise self-restraint in the ways that he deploys his power. President Trump calumniates his critics in ways that neither Barack Obama nor George W. Bush would have dreamed of, both because they would have been more constrained by the sense that demonstrable lies are to be avoided and because they thought that their role as Presidents was not consistent with speaking vituperatively about particular American citizens. And yes, Trump's lack of self-restraint along these dimensions has effects, including the effect of sometimes frightening into silence, or inaction, people who felt perfectly free to engage critically with prior administrations. One sort of example from my own experience: I have been involved in some litigation against the current administration, and more than once law firms with whom I sought working relationships have told me that they cannot take the risk of retaliation, against them or their clients, by the executive branch. That calculation shouldn't be necessary in America.

And crucially, we are nowhere near the end of Trump's presidency. Many more instances of norm-shattering behavior still await us. And that behavior will not be limited to the President.

Norm shattering is contagious. The more the President does it, visibly, the more other actors in the system will do it, too. The President is indifferent to facts and doesn't care that everyone knows it; Congress will legislate without facts, even altering the legislative process so as officially to cut out bits that are supposed to introduce real information. The President is heedless of conflict-of-interest norms intended to prevent the use of political power for personal enrichment; the heads of HHS, HUD, CDC, EPA<sup>54</sup> and

---

United States by nationals of various majority-Muslim countries, and various less well-known civil-service attorneys at the Justice Department who have declined to make especially irresponsible legal arguments in support of the Administration. A good example outside the government is the organization United to Protect Democracy, a non-profit, bipartisan organization dedicated to using legal measures to combat the threat that the Trump Administration poses: <https://protectdemocracy.org> [<https://perma.cc/UP9R-4FCR>].

54. See, e.g., Jayne O'Donnell, *HHS Nominee Tom Price Bought Stock, Then Authored Bill Benefiting Company*, USA TODAY (Feb. 2, 2017, 12:15 PM), [https://www.usatoday.com/story/news/politics/2017/02/02/hhs-nominee-tom-price-bought-stock-then-authored-bill-benefiting-company/97337838/?fb\\_comment\\_id=1394891637229337\\_1394921867226314](https://www.usatoday.com/story/news/politics/2017/02/02/hhs-nominee-tom-price-bought-stock-then-authored-bill-benefiting-company/97337838/?fb_comment_id=1394891637229337_1394921867226314) (on file with the Michigan Law Review); Lisa Friedman & Hiroko Tabuchi, *New Emails Suggest Scott Pruitt Discussed Hiring a Friend of Lobbyist Landlord*, N.Y. TIMES (Jun. 24, 2018), <https://www.nytimes.com/2018/06/24/climate/pruitt-epa-lobbyist-landlord-emails.html>

who knows what else all use their offices for personal gain in ways that would each have made headlines for weeks in a less turbulent time. The President engages in a disinformation campaign portraying the FBI as a partisan cabal against him,<sup>55</sup> despite the fact that the current and relevant former leadership of the FBI is entirely composed of members of his own party;<sup>56</sup> the House Intelligence Committee engages in disinformation to back him up.<sup>57</sup> The President rose to political prominence on the lie that his predecessor in office was constitutionally unfit to be President; the Chairman of the Board of Directors of the civil-society organization that exercises practical jurisdiction over the judicial appointment process openly asks Congress to authorize hundreds of new judgeships for the express purpose of preventing the judges that previous President nominated from exercising influence on future legal decisionmaking.<sup>58</sup>

In a similar norm-contagion vein, consider the crucial question of what the next elections might bring. At present, Democrats are winning special elections in state-level legislative races, and the conventional wisdom is that November will be bad for Republicans in Congress. Maybe things will turn out that way, and maybe not. But even if the Democrats pick up many seats in swing districts, the direction could be sharply different in the many states

---

[<https://perma.cc/XRB4-92MM>]; Sarah Karlin-Smith & Brianna Ehley, *Trump's Top Health Official Traded Tobacco Stock While Leading Anti-Smoking Efforts*, POLITICO (Jan. 30, 2018), <https://www.politico.com/story/2018/01/30/cdc-director-tobacco-stocks-after-appointment-316245> [<https://perma.cc/Q35N-QGDA>]; Juliet Eilperin & Jack Gillum, 'Using His Position For Private Gain': Ben Carson Was Warned He Might Run Afoul of Ethics Rules by Enlisting His Son, WASH. POST (Jan. 31, 2018), [https://www.washingtonpost.com/politics/using-his-position-for-private-gain-hud-lawyers-warned-ben-carson-risked-running-afoul-of-ethics-rules-by-enlisting-son/2018/01/31/bb20c48e-0532-11e8-8777-2a059f168dd2\\_story.html?utm\\_term=.76b86211c98b](https://www.washingtonpost.com/politics/using-his-position-for-private-gain-hud-lawyers-warned-ben-carson-risked-running-afoul-of-ethics-rules-by-enlisting-son/2018/01/31/bb20c48e-0532-11e8-8777-2a059f168dd2_story.html?utm_term=.76b86211c98b) [<https://perma.cc/52ME-PHGL>].

55. Brett Samuels, *FBI Director: I Don't Think Mueller Investigation Is a Witch Hunt*, HILL (July 18, 2018), <http://thehill.com/policy/national-security/fbi/397779-fbi-director-i-dont-think-mueller-investigation-is-a-witch-hunt> [<https://perma.cc/RZ2T-BBXG>].

56. Ryan J. Reilly & Jessica Schulberg, *The Key Players in Trump's 'Deep State' Conspiracy Theory Are All Republicans*, HUFFPOST (Feb. 1, 2018), [https://www.huffingtonpost.com/entry/trump-russia-probe-republicans-deep-state\\_us\\_5a737d6ee4b06ee97af0d4dd](https://www.huffingtonpost.com/entry/trump-russia-probe-republicans-deep-state_us_5a737d6ee4b06ee97af0d4dd) [<https://perma.cc/VUP3-ND69>].

57. Phillip Bump, *With the Release of New Documents, Devin Nunes's Memo on Carter Page Has Gotten Even Less Credible*, WASH. POST (July 22, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/07/22/with-the-release-of-new-documents-devin-nunes-memo-on-carter-page-has-gotten-even-less-credible/> [<https://perma.cc/S5SB-FVZK>].

58. See CALABRESI & HIRJI, *supra* note 28. This proposal was subsequently withdrawn in the face of strong criticism, including criticism from prominent Republicans. See, e.g., Ilya Somin, *The Case Against Court-Packing*, WASH. POST. (Nov. 27, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/> [<https://perma.cc/WAN3-Z5TL>].

and districts that will vote Republican. Overwhelmingly, self-identified Republicans *like* President Trump. So in heavily Republican constituencies, President Trump is likely to inspire the candidacies of people who, like Trump himself, would have been considered toxic a short time ago. (Seventy percent of white voters in Alabama supported Roy Moore for the U.S. Senate despite significant evidence that Moore was a serial child molester.<sup>59</sup> Without that particular flaw, he'd have won the election in a walk.) If a bunch of those candidates win office, they will be positioned to have their attitudes influence government more and more, and indefinitely.

The President's conduct exists in an ecosystem that made him possible and that he is now reinforcing. His indifference to truth is connected to the larger phenomenon, now many years old, by which powerful Americans actively help tear down institutions that were once relied upon to provide reliable information and expertise, like universities and leading media organizations and the nonpartisan government agencies responsible for supplying data on public policy questions.<sup>60</sup> Absent the shared, reality-based discourse that institutions like those make possible, government becomes merely a test of power, and citizens who would genuinely like to think about what might be in the public interest have little reason to think that anything good can come from the state apparatus, except to the extent that they can be the ones to pull its levers and deliver the spoils to themselves. That isn't a pretty prospect for a republic.

I'll finish this (incomplete) sketch with two worries. First is the worry that we have been lucky so far and that our luck will eventually run out. For all the crazy stuff that has happened since President Trump took office, the country hasn't faced much in the way of acute crisis. (Except for Hurricane Maria. But completely failing a nonwhite population that does not elect representatives to Congress has had little impact on the national political climate.) What will happen, though, if larger and more salient crises come, as they sometimes do? Suppose that the March for Our Lives movement provokes an in-the-streets countermovement by radicalized owners of assault rifles, and things get out of hand. Suppose that a YouTube video of white police officers killing an unarmed black person provokes anti-police demonstrations, and the demonstrations get violent, and post-Charlottesville white supremacists intervene with vigilante violence of their own. Suppose there is a significant terrorist attack, or two or three such attacks, and the

---

59. *Exit Poll Results: How Different Groups Voted in Alabama*, WASH. POST (Dec. 13, 2017), <https://www.washingtonpost.com/graphics/2017/politics/alabama-exit-polls/> [<https://perma.cc/GLU6-WAJB>].

60. Fishkin & Pozen, *supra* note 24, at 951–56.

government proposes an invasive set of limits on civil liberties in the name of necessary security. Suppose that this November there are credible indications that the midterm elections' electronic voting systems were hacked by Russian operatives, and there is real disagreement about the rightful winners of three dozen congressional elections. What damage will the governmental apparatus show when it has to operate under stress?

The second worry is about who comes *after* Trump. The current President is a serious problem, and some of the ways in which he is a problem result from his profound ignorance—of policy, of the norms of governance, and of other things as well. But there are also ways in which his ignorance, and the limited competence that goes along with it, are mitigating the threat he poses. So far, Trump is a weak President. With the exception of his big tax bill, which was a high priority not just for him but for his party's most important financial backers, President Trump has not been able to get much done. He seems to have limited capacity to call the shots even within the White House.

What would it look like to have a President as self-interested as Trump, with Trump's disregard for truth and fairness and the rule of law, who was also *effective*? Someone who was smart and savvy, who knew how Washington works, who surrounded himself with capable lieutenants hungry to get things done? President Trump is proof of concept for unscrupulous people who will want to be President after him. He demonstrates that a complete outsider to public service can be corrupt, and a shameless liar, and do it all entirely out in the open, and *win*. Now that we know that—now that every power-hungry billionaire in America knows it—what might come next? The Trump Administration is damaging enough. But what if it is only the dress rehearsal? Or the farce that precedes the tragedy?

Maybe this line of thinking is far-fetched. I hope that ten years from now I look back and think of it that way. But today, I remember how unlikely a Trump Presidency seemed three years ago. And the long-term direction of our political culture, as measured over the last twenty-five years, is not encouraging. There's no reason to think it can be easily turned around.

#### CONCLUSION

The contention that the Republic now faces its greatest risk of self-destruction since the 1870s does not rely on a rose-colored understanding of the past. The Republic has faced serious challenges before. The twentieth century saw Palmer Raids and the Great Depression and McCarthyism and J.

Edgar Hoover and urban rioting and Watergate, and readers will have valid suggestions for other things to include on that list. For what it is worth, I do not think that any of those threats presented the level and breadth of danger to the Republic that the current circumstances do. For what it's worth, I don't think it's even a close question.

The reasons why prior challenges did not present the same level of danger that our current circumstances do sound partly in the content of the challenges themselves and partly in the environments within which those problems arose. All of the twentieth-century challenges named above occurred at times when the political culture had better tools for containing and repairing damage than are currently available. During the Depression and during McCarthy's time, there were steady (if imperfect) hands on the Presidential tiller. Capable Presidents can help. And even when the country did not have particularly helpful Presidents, as during Watergate, the challenges the Republic faced were presented in environments where the two major political parties were better able to work cooperatively than they presently are—and, not unrelatedly, when information about politics was delivered to Americans through a set of institutions more broadly trusted, and less partisan identified, than is now the case. When people can agree on the facts, and when cooperation between the political parties is normal, crises are more likely to be managed rather than to spin out of control. There is much less of a safety net below us today.

\* \* \*

No system of government lasts forever. The danger to the Republic is real. And yet, for all the danger, I think it more likely than not that the Republic will come through its present troubles in recognizable form. More precisely, I think it more likely than not that we will emerge with a Republic that is better and stronger than the one we had when the twenty-first century began. There is, after all, no restoring the status quo 1950, or 1990: what comes next will be different from what happened earlier. A system held together by Jim Crow and the Cold War is not in our future. So the solutions we seek will need to be a bit unfamiliar, adapted as they must be to the conditions of the twenty-first century rather than the twentieth. And as bad as things are today, such solutions can surely be found, if we do the work. There is, after all, ample precedent for a great crisis's contributing to important progress. We were a better country after the Civil War than before.

But even when progress results, great crises can exact great costs. A lot of people died in the Civil War, and we still live with social pathologies that

reflect failures to heal after that crisis receded.<sup>61</sup> We can hope that the current threat will exact a far lighter cost than that one did, and probably it will. But in this crisis, as in that one, coming through to safety, and with luck to progress, will require enormous effort, and sacrifice, and discipline, and creativity from large numbers of Americans who dedicate themselves to meeting the challenge. Nobody is coming to save us.

---

61. Including some that animate our current predicament.