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Yasmin Dawood

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THE FRAGILITY OF CONSTITUTIONAL DEMOCRACY

YASMIN DAWOOD*

ABSTRACT

Is the survival of constitutional democracy in America at serious risk? Given the actions of the Trump administration, and given the decline of democracy and concomitant rise of authoritarianism the world over, there is genuine cause for alarm. In light of these fears, it is worth remembering that the authors of The Federalist Papers were notably pessimistic about the survival chances of republican government. To what extent have their constitutional design innovations contributed to present woes, and conversely, to what extent will the Constitution ensure the survival of democracy? This Essay argues that while the design of the Constitution is both helpful and harmful, much will ultimately turn on the political dimension. In particular, this Essay claims that the republic will survive only if the ongoing practices of democracy re-affirm its central values. But there are significant challenges to maintaining constitutional democracy. In addition to President Trump in the White House, current challenges include the decline in the democratic norms of civility and compromise, the rise of ideological warfare and hyperpartisanship, and the ever-deepening polarization between opposing camps—not only in government but also in the public at large. In the coming years, the continued vigilance and resistance of individuals and institutions will be crucially important to ensure the survival of constitutional democracy in America.

It is hard to keep up with the Trump presidency; every hour seems to bring a fresh assault on the norms of democratic governance. At his first extended press conference, President Trump berated the media for leaking “fake” news by reporting the findings of intelligence agencies on the pre-

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* Canada Research Chair in Democracy, Constitutionalism, and Electoral Law, and Associate Professor of Law and Political Science, Faculty of Law, University of Toronto. I am grateful to all the participants in the Maryland Law School Constitutional Law Discussion Group for illuminating discussions, and in particular, to Mark Graber for bringing together and sustaining such a vibrant scholarly community. My thanks as well to the editors of the *Maryland Law Review*, in particular Catherine Gamper and Matt Schofield, for very helpful comments.

election communications between Trump's campaign staff and Russian officials.¹ He later fired James Comey, the Director of the FBI, who had been running an investigation into Russia's meddling with the U.S. election.² Trump also undermined the authority of the judicial branch by questioning the legitimacy of the "so-called judge" who rendered a decision on his Muslim travel ban.³ He has repeatedly stated that millions of ineligible people voted when, in fact, there is scant evidence of voter fraud.⁴ He has described the media as "the enemy of the people."⁵ More recently, President Trump was charged by a Republican Senator with issuing reckless threats that could place the United States "on the path to World War III."⁶

There are many more examples to draw upon that raise genuine worries about the future of democratic governance in America.⁷ While there does not yet appear to be a democracy-ending crisis, Trump's repeated attacks on the media, the judiciary, the intelligence agencies, Congress, the Republican and Democratic parties, and the bureaucracy, have given rise to a profound anxiety that a crisis will erupt during his presidential term.⁸ Even in the absence of a constitutional crisis, such attacks are eroding democratic norms, processes, and institutions.

The future of constitutional democracy is also under significant threat the world over. In a number of countries—including most notably Hungary,

1. Ben Jacobs, *This Press Conference Is Proof Donald Trump Will Never Be Presidential*, GUARDIAN (Feb. 17, 2017, 3:34 PM), <https://www.theguardian.com/us-news/2017/feb/16/donald-trump-press-conference-administration-defense-media>.

2. Dustin Volz & Susan Cornwell, *Comey Had Pushed for More Resources for Russia Probe Before Being Fired by Trump: Source*, REUTERS (May 10, 2017, 7:40 AM), <http://www.reuters.com/article/us-usa-trump-comey-replacement-idUSKBN1861HK>.

3. Michael C. Bender, *Trump Criticizes 'So-Called Judge' Who Lifted Travel Ban*, WALL ST. J. (Feb. 5, 2017, 12:03 PM), <https://www.wsj.com/articles/trump-attacks-judge-who-lifted-travel-ban-1486228352>.

4. Julie Hirschfeld Davis, *Trump to Order Inquiry into Voter Fraud and Suppression*, BOS. GLOBE (May 12, 2017), <https://www.bostonglobe.com/news/nation/2017/05/11/trump-order-inquiry-into-voter-fraud-and-suppression/eCe2YXaVfLn4UpjhDh2NTN/story.html>.

5. David Jackson, *Trump Again Calls Media 'Enemy of the People'*, USA TODAY (Feb. 24, 2017), <https://www.usatoday.com/story/news/politics/2017/02/24/donald-trump-cpac-media-enemy-of-the-people/98347970/>.

6. Jonathan Martin & Mark Landler, *Bob Corker Says Trump's Recklessness Threatens 'World War III'*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/us/politics/trump-corker.html>

7. For a compilation, see The Editorial Board, *The Republican's Guide to Presidential Etiquette*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/interactive/2017/10/08/opinion/editorials/republican-etiquette-guide.html> (cataloguing instances of President Trump's norm-violating conduct so that Republican leaders "never forget what they now condone in a president").

8. As Jack Balkin argues, however, the prospect of "constitutional rot" presents distinct concerns from, and can exist in, the absence of, a constitutional crisis. Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 151 (2017). Balkin defines constitutional rot as "a process of decay in the features of our system of government that maintain it as a healthy democratic republic." *Id.*

Poland, and Turkey—we have witnessed democratic backsliding via constitutional and legal means, which leave a facade of democratic institutions while hollowing out democracy’s substance.⁹ Empirical data suggest that newer democracies have become increasingly authoritarian.¹⁰ In 2010, nearly 53 of 128 countries were assessed as “defective democracies.”¹¹ One worldwide index of democracy, which measures the electoral process, pluralism, participation, government functioning, and civil liberties, found that “democracy was in retreat across nearly the entire globe.”¹²

These global trends prompt the following questions: Is the survival of constitutional democracy in America at serious risk? To what extent has the Constitution contributed to present woes? Conversely, to what extent will constitutional structures ensure the survival of democracy? I claim in this Essay that while the structural deficiencies of the Constitution are significant, the outcome will ultimately turn on the political dimension. I am cautiously optimistic that the republic will survive the Trump administration, but my optimism is based on the continued resistance of individuals and institutions. Constitutional democracy will avoid a crisis only if the ongoing practices of democracy reaffirm its central values. This Essay identifies some of these practices of constitutional democracy, and shows how they have eroded key democratic values such as representation and equality. Before considering these democratic practices, this Essay addresses the role of the Constitution in undermining or protecting the structures of democratic government.

Given our current fears, it is worth remembering that the Framers, or at least the authors of *The Federalist Papers*, were notably pessimistic about the survival chances of republican government. In *Federalist No. 9*, Alexander Hamilton observed:

It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a

9. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. (forthcoming 2018); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007); Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559 (2013); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015); Kim Lane Scheppele, Worst Practices and the Transnational Legal Order (or How to Build a Constitutional “Democratorship” in Plain Sight) (Nov. 2, 2016), https://www.law.utoronto.ca/utfl_file/count/documents/events/wright-scheppele2016.pdf.

10. JOSHUA KURLANTZICK, DEMOCRACY IN RETREAT: THE REVOLT OF THE MIDDLE CLASS AND THE WORLDWIDE DECLINE OF REPRESENTATIVE GOVERNMENT 7 (2013).

11. *Id.* at 9.

12. *Id.* at 10.

state of perpetual vibration between the extremes of tyranny and anarchy.¹³

James Madison sounded a similar note of doom with his assessment that republican governments have been “spectacles of turbulence and contention,” which “have in general been as short in their lives as they have been violent in their deaths.”¹⁴ He observed that the “instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have everywhere perished.”¹⁵ The lessons of history were clear: republican governments inevitably succumbed to revolution, anarchy, or tyranny.

It is an open question as to whether the authors of *The Federalist Papers* believed that the combination of their institutional innovations—the extended sphere, federalism, bicameralism, the separation of powers, checks and balances, the Electoral College, and assorted veto points—would stave off the fatal instabilities to which republican governments were historically prone. Certainly, it was in their strategic interest to claim that a large republic would not be susceptible to the vulnerabilities that plagued the small democracies of the ancient world.

But now, with President Trump in the White House, and with genuine concerns being raised about whether the United States is heading toward tyranny or anarchy or some combination of the two, it is important to enquire whether the Constitution is helpful or harmful to the survival of democracy.

On the negative side of the ledger, there is the depressing irony that the very institution the Framers believed would prevent an unsuitable president is the very institution that has installed Trump in the White House. Setting aside the deficiencies of the Electoral College, there are, as Sanford Levinson argues, a number of non-optimal features of the hard-wired or structural Constitution.¹⁶ One major problem is that presidents wield too much power, particularly in the context of emergencies.¹⁷ Another problem is that the Constitution’s multiple veto points create serious obstacles to policy formation and implementation.¹⁸

Those same veto points, however, may prove to work as the Framers had intended them to, namely by providing a check against Trump’s agenda.

13. THE FEDERALIST NO. 9, at 39 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

14. THE FEDERALIST NO. 10, at 49 (James Madison) (Clinton Rossiter ed., 1999).

15. *Id.* at 45.

16. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 23–24 (2006).

17. *Id.* at 107; see also BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 266 (2005) (arguing “[t]he Framers’ misunderstanding of the presidency was the biggest of their mistakes”).

18. LEVINSON, *supra* note 16, at 38. The veto points include federalism, bicameralism, and the presidential veto—all of which serve to check and diffuse the power of the federal government.

For example, the Republicans in Congress have shown some resistance to his agenda.¹⁹ Two additional constitutional features may also serve as checks against presidential power: federalism and an independent judiciary. Although, currently the Republican Party holds a majority of the states on the federal level, there is at least the possibility of some check to presidential power by state and local governments.²⁰ More crucially, the judicial branch will have to play a central role in protecting the rule of law and constitutional rights, as the recent controversy over Trump's travel ban demonstrates.

Ultimately, though, much will turn on developments in the political arena. Or to be more precise, the structural deficiencies of the Constitution will be rendered more or less problematic by the political environment. To put it another way, it is the interaction between constitutional and political factors that will be determinative of the outcome rather than the strengths and deficiencies of the Constitution on its own. To be sure, the divide between constitutional and political factors is perhaps impossible to discern in practice since the Constitution provides the structures and incentives through which political forces are developed and expressed. Even so, the structural deficiencies of the Constitution have remained constant over time, but what makes them particularly acute is the political environment. For this reason, I claim that constitutional democracy will avoid decay only if the ongoing practices of democracy re-affirm its central values. These practices of constitutional democracy include the choices of political actors, the evolution of the political culture, and the interaction of democratic norms and institutions. The health of constitutional democracy depends on whether these political practices affirm or erode the central democratic values of representation, fairness, equality, and accountability.

There are several political practices that, to my mind, present significant challenges to constitutional democracy. The first is that political parties are highly ideological and more divided than they were twenty years ago.²¹

19. For example, President Trump did not receive sufficient support from Republican members of the House for his health care legislation, which was pulled before the vote was to take place. A revised version of the legislation was approved by the House, and has undergone multiple rounds of revision in the Senate without, as of this writing, being adopted. See Julie Hirschfeld Davis, *Trump Laces into McCain over His Opposition to Health Care Bill*, N.Y. TIMES (Sept. 23, 2017), <https://www.nytimes.com/2017/09/23/us/politics/trump-mccain-graham-cassidy-health-care-obamacare.html>; Thomas Karlan & Robert Pear, *House Passes Measure to Repeal and Replace the Affordable Care Act*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/2017/05/04/us/politics/health-care-bill-vote.html>; *Trump Defiant After Health Care Bill Pulled Before Vote*, BBC NEWS (Mar. 25, 2017), <http://www.bbc.com/news/world-us-canada-39388815>.

20. Liz Robbins, *'Sanctuary City' Mayors Vow to Defy Trump's Immigration Order*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/nyregion/outraged-mayors-vow-to-defy-trumps-immigration-order.html>.

21. 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 44 (2012).

There is no longer any ideological overlap between the most conservative Democrats and the most liberal Republicans.²² As Daryl Levinson and Richard Pildes have argued, the Madisonian “separation of powers” has been replaced by a “separation of parties.”²³

Extreme partisan polarization is now the “defining attribute” of the U.S. political system.²⁴ The current political climate is marked by the contempt that each side shows for the other. Amy Gutmann and Dennis Thompson argue that compromise is necessary for democratic governance.²⁵ The intensely partisan and ideological nature of political competition, however, means that politicians will block the passage of legislation that is in the public interest in order to prevent the other party from enjoying an electoral advantage.²⁶ This toxic partisan dynamic in Washington, and the demands of the permanent campaign, have apparently contributed to the acquiescence of Republican party leaders to the dubious priorities of President Trump. The erosion of democratic norms, such as cooperation and compromise across party lines, has been accompanied by a corresponding decline in the functioning of democratic institutions.

Partisanship is now not only the driving determinant of governance but also of the underlying rules of the democratic process. In the wake of the Supreme Court’s decision in *Shelby County v. Holder*,²⁷ many states have passed voter identification rules that will suppress minority votes.²⁸ The Court, under Chief Justice Roberts, has also continued to dismantle campaign finance regulation.²⁹ Congress has become increasingly dependent on a tiny minority of the population, namely funders and lobbyists.³⁰ Studies have shown that the positions adopted by elected representatives are more responsive to the preferences of the affluent as compared to the preferences of the vast majority of citizens.³¹ The pathologies of the electoral infrastructure

22. *Id.* at 45.

23. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313, 2329 (2006).

24. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275 (2011).

25. AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* 1 (2012).

26. *Id.* at 207–10.

27. 570 U.S. 2 (2013).

28. *Election 2016: Restrictive Voting Laws by the Numbers*, BRENNAN CTR. FOR JUST. (Sept. 28, 2016), <https://www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers>.

29. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014).

30. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 110 (2011).

31. LARRY BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012).

have contributed to the creation of an arguably unrepresentative and unaccountable central government which, in turn, has opened the door to a demagogue who could whip up the grievances of a population that felt abandoned by the political system.

The decline in civility and compromise, the rise of ideological warfare and hyperpartisanship, and the ever-deepening polarization between opposing camps are not only the key features of the political landscape at the elite level, they are also characteristic of the public at large.³² America is a nation divided, each with its own set of facts (or alternative facts) and its own sense of the truth. Although Trump received one of the lowest percentages of the popular vote, he still received 46.1%—almost half of those Americans who voted.³³ After his first month in office, he had the lowest approval rating in history at that stage of the presidency, but he still had the approval of 44% of Americans despite (or because of) the positions he had taken in his first month.³⁴ These statistics suggest that almost half of Americans are in agreement with Trump's actions so far, including (arguably) his disdain and hostility towards religious and other minorities. Far from seeing Trump as an existential threat to the republic, there are literally millions of people who believe that he is saving America. This profound divide in the political culture, and the rapidly evaporating areas of common ground among citizens, will be a significant challenge to American democracy.

Given democracy's demonstrable fragility, there is certainly cause for alarm in the present circumstances. Constitutional democracy in America will avoid a crisis only if the ongoing practices of democracy re-affirm its central values and institutions. In the coming years, the continued vigilance and resistance of individuals and institutions will be crucially important. In a recent interview, Justice Ruth Bader Ginsburg said that "the true symbol of

32. STEPHEN M. GRIFFIN, *BROKEN TRUST: DYSFUNCTIONAL GOVERNMENT AND CONSTITUTIONAL REFORM* (2015); Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913 (2014); Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281 (2017).

33. Nick Wing, *Final Popular Vote Total Shows Hillary Clinton Won Almost 3 Million More Ballots than Donald Trump*, HUFF. POST (Dec. 20, 2016), http://www.huffingtonpost.com/entry/hillary-clinton-popular-vote_us_58599647e4b0eb58648446c6.

34. Bradford Richardson, *NBC/Wall Street Journal Poll: President Trump Approval Rating at 44 Percent*, WASH. TIMES (Feb. 26, 2017), <http://www.washington-times.com/news/2017/feb/26/nbcwall-street-journal-poll-president-trump-approv/>. By May 2017, his approval had sunk to thirty-six percent according to a Quinnipiac poll. See Adam Edelman, *President Trump's Approval Numbers Fall to Near-Record Lows in New Poll*, N.Y. DAILY NEWS (May 11, 2017), <http://www.nydailynews.com/news/politics/poll-trump-approval-numbers-fall-near-record-article-1.3156464>.

the United States is not the bald eagle; it is the pendulum, and when the pendulum swings too far in one direction, it will go back.”³⁵ To my mind, the pendulum will swing back only if there is sufficient support among political elites and the public for maintaining democratic norms and institutions.

35. Kristine Guerra, *Ruth Bader Ginsburg on Trump's Presidency: "We Are Not Experiencing the Best of Times,"* TAMPA BAY TIMES (Feb. 25, 2017), <http://www.tampabay.com/news/politics/national/ruth-bader-ginsburg-on-trumps-presidency-we-are-not-experiencing-the-best/2314499>.