How Constitutional Democracy is Lost (and Saved)

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Introduction

How would you know your democracy is in peril? The question wracked Americans—including us—both before and after the November 2016 presidential election. The campaign and assumption of presidential office by Donald J. Trump, a New York real-estate magnate who had never before held political office, marked a significant rejection of the political establishment, which he characterized as corrupt and out of touch. Among liberals, the question was not whether the Trump campaign was exceptional, but rather when he had breached a norm of democratic governance in a way that disqualified him as a democratic leader: Was it when he attacked a federal judge on the basis of his ethnicity? When he threatened to “lock up” his election opponent? When he declined to say whether he would recognize the result of a loss at the polls? Among conservatives—including some of our friends and colleagues—the question was why we were even asking such questions at all. Even as they demurred to his more openly sexist, racist, and cruel remarks, they queried how exceptional Trump really was in a country where heated political debate, spilling sometimes over into ad hominem attacks and lies have been a repeated feature of our history.

The same debates replayed after the election. What, liberals were asking themselves was the decisive turning point? What kind of democratically elected president falsely brags about his inauguration crowd size, and then falsely alleges massive voter fraud to explain his (equally false) claim to have won the popular vote? What kind of president calls the news media the “enemy of the American people”? What kind of president fires the head of the Federal Bureau of Investigation, and then explains on national television that he did this to end an investigation into his own campaign and family? What kind of president discerns a moral equivalence between violent neo-Nazi protesters in paramilitary formation wielding torches, assault rifles and clubs, and residents of a college town defending the racial and ethnic diversity of their homes? In
response, some conservative voters wondered, when would the liberal media and elites allow the president to catch a break? Weren’t liberals the real threat, with their efforts to suppress conservative speakers on campuses, their tolerance of social disorder, and their reckless embrace of unchecked immigration?

This is a book provoked by the election of Donald Trump—but it is not a book about Trump in any direct way. Although we share the grave concern held by many about some of President Trump’s words and deeds, we also think it is important, and even necessary, to step back from the current moment to consider more structural forces at work. Perceptions of impending crisis are hardly new. Using words that could be transposed forward two hundred-odd years with only minor alternations, the great British politician and novelist Benjamin Disraeli worried about the “disintegration of society into ‘two nations; between whom there is no intercourse and no sympathy ….’” An irresponsible, self-aggrandizing aristocracy confronted by an exploited people led by agitators with ‘wild ambitions and sinister and selfish ends.’”¹ A wider lens is needed to place today’s concerns in proper perspective. As students of law and political institutions, we think it is especially important to think hard about how networks of laws, regulations, and especially constitutional rules in place now can either facilitate democracy’s derogation, or prevent it. Because we are trained and work as scholars of what is called ‘comparative constitutional design,’ we think it is especially important to ask general questions about how our basic legal institutions—the ones familiar from a perusal of a nation’s constitution and associated traditions—will respond to the risk of democratic decline. The problem is hardly parochial in scope. Rather, it is striking that many of the institutional and political dynamics legible in the United States today in the wake of Trump’s victory are also apparent in other liberal democracies. The interaction of political strategy and legal frameworks may vary with local circumstances, but patterns can also be observed across countries and continents. The forces at work in the United States are not so much idiosyncratic local tempests as they are durable weather systems that determine the possibilities for political action. They are the conditions of our near political future, and so cry out for more general investigation.

By looking across the globe today, as well as plunging back into time, this book can pursue that more general investigation. We hence ask whether there is indeed a threat to constitutional democracies that are committed to liberal ideals today. Further, we consider whether law, and in particular the constitutional law that structures the basic institutions of government, can mitigate such risks—or whether it might even embolden the enemies of democratic perseverance. Our answers to these questions will be heartening to some and disheartening to others. In brief, we argue that liberal democracies are indeed at some risk today—although the character of the risk is rather different from how it is commonly imagined. We also show that law can and should (although often does not) play a role in parrying that risk, and imagine how constitutional design might respond. That does not mean, however, either that law will play a facilitative role in democracy’s defense, or that law alone will be enough.

Our account begins by setting out some basic terms in Chapter One. Our central construct is something we call “constitutional liberal democracy,” which highlights the role of law in constructing and underpinning democratic competition. Our approach is
fairly minimalist, though not excessively so. Some scholars have tried to reduce democracy to the mere fact of elections, and while this approach is fine for some purposes, we argue that the quality of elections depends on legal underpinnings. Chapter Two then deploys our concept to ask whether there is such a thing as a global democratic recession today. While the numbers of democracies may be declining, our major concern is the set of countries that have had relatively durable periods of democratic governance. Many of these countries have seen the rise of populism, but even some that have not elected populist leaders have experienced some degradation of parts of the democratic structures. In Chapter Three, we distinguish two distinct pathways away from constitutional liberal democracy. These are, to put it simply, the fast route and the slow route. While much of our political and constitutional imagination is focused on the speedy and complete collapse of democratic institutions, we argue that the greater risk in our moment is of the slow route: the gradual degradation of democracy. While this path might lead to total democratic collapse, the more likely endpoint is a hybrid regime, where democratic institutions are compromised to some degree and political competition restricted. For us this is a disturbing enough prospect as to motivate its own thinking about remedies.

Chapters Four and Five, respectively, trace the mechanisms at work in the fast and slow paths using examples from both the twentieth century and from our own contemporary moment. By looking at different risks to democracy in this fashion, we can start to assess the probabilities for constitutional democracies in general.

We then turn to the heart of our analysis. Chapter Six asks the key question for the United States: if forces arise that wish to take the United States down one or the other of these paths, could our Constitution save us? It is conventional wisdom that the checks and balances of the federal government, a robust civil society and media, as well as individual rights, such as those included within the First Amendment, will work as bulwarks against democratic backsliding. This book takes on this claim and finds it seriously wanting.

Chapter Seven then asks, for the United States and for other countries, how laws and constitutional design play a role, whether positive or negative, in the risk of democratic decline. Drawing on both political science and comparative law expertise, we explore the practical steps that can be taken to minimize its prospects. Our focus here is upon law and constitutional design—by which we mean how the basic institutions and rights of a polity are specified in a constitution or similar norms. In concluding, we confront the question of how we can “save” constitutional democracy, by which we mean minimizing the possibility that it decays beyond recognition within our lifetimes, leaving a set of governing arrangements for the next generation that is morally bankrupt.

By applying the same framework both to the United States and other countries, our method implicitly rejects claims of American exceptionalism, or at least subjects them to rigorous scrutiny. Since the Puritan preacher John Winthrop declared in 1630 that the new nation would be “a city upon a hill” that would serve as a light to the world, Americans have liked to think that they have a special position in the world. There is an implicit but powerful belief that America is immune from challenges that face other countries. Indeed, the phrase “American exceptionalism” emerged in communist circles
in the 1930s to explain the apparent immunity of the United States to proletarian revolution. American democracy, celebrated around the world at least since Alexis de Tocqueville, should be uniquely robust.

Of course, it is a truism that each country is unique in some way. But we also know that some challenges do not distinguish among nations. Pandemics, wars, and macroeconomic shocks often simultaneously affect multiple countries at once, sometimes even the entire globe. Since the invention of the electric telegram in 1846, political ideas, idioms and tactics have spread almost instantaneously across borders. Starting with the revolutions of 1848, ours has been in some sense a single (if not singular) and enmeshed ideological universe. In the study of democratic rise and fall, it is therefore a mistake to think that trends observed in the United States lack a parallel in other democracies. It is also a mistake to think that America is exceptional in the sense of standing aside the current riptide of democratic backsliding.

Nevertheless, there is at least one way in which the United States is indeed exceptional. Our Constitution has been in in continuous force since 1787. This is in some sense a remarkable achievement with no parallel. (The roughly contemporaneous French and Polish constitutions died quickly). Although the adoption of our founding document in 1787 launched a global era of national constitution-making, and is venerated by many Americans as the key to our success as a nation, its very longevity also poses a problem. Being old, the U.S. Constitution does not necessarily reflect the learning of subsequent years and decades. It calcifies the mistaken assumptions and prejudices of the long-dead, while ignoring the learning of new generations. Although there is a natural inclination to hope that the United States Constitution, which has underpinned two centuries of material growth and yielded global hegemony (for now) will insulate us from the global forces that are now buffeting democracies elsewhere, this may have things backward: It is the absence of new learning from the Constitution’s text that makes that threat all the more potent, and all the more urgent to address.
Chapter 7: The Circumstances of Democratic Endurance

“I cannot help fearing that men may reach a point where they look on every new theory as a danger, every innovation as a toilsome trouble, every social advance as a first step toward revolution, and that they may absolutely refuse to move at all.”

--Alexis de Tocqueville

In retrospect, the portents of democracy’s impending collapse had been there from the day he came to power in 2005. The scion of an important family of politicians from Sri Lanka’s achingly beautiful south, Mahinda Rajapaksa became prime minister off the back of a populist campaign that appealed to the country’s Sinhala Buddhist majority, inveighed against its Tamil and Muslim minorities, and promised a hard line against the Tamil Tigers, who had run a exceptionally brutal two-decade insurgency in the north of the country. Once in office, Rajapaksa appointed family members to key positions, and invoked the same populist playbook that had been passed from Venezuela to Poland to Turkey to India. Opening a cancer hospital in the seaside town of Galle in 2007, for example, he memorably warned that a “virus has entered the body politic today that to resolve local problems to invite foreign powers for the greed of power.” Two years later, he promised that Sri Lanka would have “no more minorities.”

In due course, the virus was addressed with the full treatment familiar from other cases of retrogression. Rajapaksa rescinded the cease fire with the Tigers that had been in effect when he came to office, and instead began a savage war to retake the north of the island. Press censorship was justified by wartime exigency. During the war, journalists grappled with formal censorship, but also harassment or worse. In January 2009, a prominent local editor and Rajapaksa critic, Lasantha Wickrematunge, was shot dead as he left his home for work. Another editor, J.S. Tissainayagam, was arrested and sentenced to twenty years for his critical war coverage. Civil society was not spared. In 2014, in the culmination of a long campaign against human-rights organizations in particular, the Rajapaksa administration announced that non-governmental organizations would have to register with a new military-affiliated administrator, desist from press conferences or public statements, and refrain from training journalists.

Rajapaksa used his 2009 decisive military victory over the Tigers as a pivot to eliminate interbranch checks, especially from the courts. Under the Seventeenth Amendment to Sri Lanka’s constitution, which had been enacted in October 2001, a depoliticized ‘constitutional council’ was tasked with selecting judges and authorizing their elevation onto higher courts. With the connivance of an allied chief justice, Rajapaksa refused to convene this council, selected allies as judges, and deployed the administrative powers of the chief justice’s position to punish judges who strayed from the government’s positions. On the ground, legal remedies for those detained, particularly those of Tamil extraction, withered, while the violent behavior of both police and the military went unchecked. As internal checks on his power fell away, Rajapaksa successfully pushed for the adoption of a suite of constitutional amendments with the support of a two-thirds parliamentary supermajority. The ensuing Eighteenth Amendment abolished the constitutional council, replacing it with a mechanism that allowed direct political control over judicial staffing. It eliminated a two-term limit on the presidency,
opening the door to Rajapaksa staying in office until his son was well positioned to take
over. And it defanged other institutions of horizontal accountability created by earlier
constitutional amendments, including independent commissions to oversee the judiciary,
the police, the public service, the electoral administration, and bribery and corruption.4
Meanwhile he jailed former allies, notably General Sarath Fonseka who had led the
military campaign against the Tamil Tigers.

The drama of democratic retrogression that we have seen in earlier chapters
seemed to be moving along into the final act, when in January 2015, the story went off
script. Seeking the third term that the amended constitutional allowed, Rajapaksa lost an
election. The defeat was a thin one—his former ally Maithripala Sirisena obtained 51.3
percent of the vote—but decisive, with turnout high. Sirisena had crucially won over a
large share of Sinhala Buddhists as well as Tamil and Muslim votes. During the election,
Rajapaksa’s image was “ubiquitous” in billboards around the country, with a campaign
rallies filling stadiums, while Sirisena barely filled parking lots. A few months later,
when Rajapaksa attempted a comeback in parliamentary polls, Sirisena informed him in
no uncertain terms that he would never be made prime minister given his “blatant racism”
against Tamils and Muslims.5

In many ways, Sri Lanka is a quite unpromising showcase to identify the tools for
undoing a slide away from democratic practice: It was led by a charismatic populist who
encouraged partisan degradation by appealing to a sharp ethnic schism that had
previously led to violent civil war. In the run-up to the 2015 election, most state
institutions remained captured, and electoral playing field was far from level. And yet, in
a remarkable moment, it was not the People—that mythic, abstract, entity—but a more
motley people who spoke up on behalf of the messy, fractured, inconclusive, and
necessarily imperfect processes of democracy. An intraparty split, not a sustained
opposition movement, led to Rajapaksa’s fall.

But Sri Lanka is not alone in staving off slides from democracy. During the
interwar collapse of European democracies, not all efforts at imposing fascist rule
prevailed. The Popular Front coalition in France, which came to power in 1936, banned
the sort of paramilitary groups that had aided the Nazi rise to power in Germany. French
conservatives declined to ally with fascist groups such as the Croix de Feu. “The
importance of the republican tradition” to the French people’s sense of themselves did
important work.6 A half century later, the string of military dictatorships that had gripped
Latin America like a vice started to give way, first in Brazil and Argentina, and then in
Chile in the face of popular protest.7

These cases differ in important ways. Some are near scrapes with authoritarianism
(and a short dalliances with competitive authoritarianism). Others are examples are
effective prophylaxis against retrogression, while yet others are proper transitions from
authoritarian rule to democracy. We have argued that the principal threat to democratic
quality today is retrogression of already established democracies, rather than reversion to
full-on dictatorships. If retrogression is indeed the dominant threat today, it seems useful
to attend closely to two related questions: First, how should the designer of a new
constitution think about her institutional design choices given the newly crystallized
threat of retrogression? Second, what can a country like the United States, which is
constitutionally vulnerable to retrogression, and that may be experiencing symptoms of charismatic populism or partisan degradation, do about it? Taking these two vantage points presses us toward two distinct kinds of prescriptions. On the one hand is the question of what an optimal constitutional design to insulate against retrogression might look like. On the other hand is the question whether existing weaknesses in a constitutional system can be cured. In the U.S. context, the currently enactable range of legal and constitutional responses to the risk of retrogression is relatively small, if only because we think it is unlikely that the current Supreme Court and the current Congress, given its institutional and ideological dispositions, would support significant institutional overhauls. We therefore loosen the constraints on our analysis, and ask not only what a feasible change is now, but also what might be desirable constitutional reforms to consider once the window of institutional reform has opened a crack more.

Challenging the wisdom of the Constitution is something of a heretical question in the United States. The Framers—a quasi-religious term that itself is telling—are revered on both left and right. Their canonization is something both Lin-Manuel Miranda and Bill O’Reilly can agree upon. But this unblinking reverence is a bit paradoxical. The Framers had a deep empirical bent. Their constitutional design reflected not only the lessons from past constitutional experiences—James Madison famously asked Jefferson for books on the subject when the latter was in Europe—but a willingness to challenge received wisdom. Indeed, the Constitution represented a defiant rejection of the conventional wisdom that democracy was possible only in small republics, and could not survive in an expansive American empire. We are therefore skeptical that they would have endorsed future generations’ blind and unquestioning retention of old institutions without verification of their fit for current conditions. Jefferson’s famous words about constitutional change reflects the progressive and empirical spirit of the founding era:

[S]ome men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment...But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

In a Jeffersonian spirit, some recent scholars have challenged the continued relevance of the Framers’ design. Constitutional law professor Sandy Levinson calls for rewriting “Our Undemocratic Constitution.” Political scientist Larry Sabato has proposed twenty-three amendments for “A More Perfect Constitution.” And retired Justice John Paul Stevens has proposed six amendments to restore American democracy. This spate of elite criticism suggests that the founders’ imperfections are more than a theoretical possibility, and that there is some public space for considering reforms.

These questions are worth asking again now because of the new risks we have charted, and because of the new stock of knowledge available for answering them. One of the clear themes of recent scholarship on comparative constitutional design is that the
choice set of institutions on offer has evolved since 1789. Early constitutions borrowed heavily from the American model, but subsequent constitutions, even within a particular country, have tended to drift away from it, as new institutions are incorporated into sequentially adopted texts. The figure below provides an indicator of this phenomenon. The dots show how constitutions adopted over time look in terms of their formal similarity to the U.S. Constitution. The panel on the left demonstrates that countries in Latin America, a region with a set of old nation states and thus a rich constitutional history, have moved away from the American model over time. The panel on the right indicates the same for the broader set of all countries. In each case, the US model seems to have declining power. New countries are making new choices and not simply following old patterns.

Figure 7.1: Is the U.S. Constitution a Model for Others?¹⁰

Constitutional designers around the world, then have heeded Jefferson’s advice that the design of “laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.”¹¹ Consistent with this Founding Era wisdom, our aim is to show first what a brand new United States might do if it was just emerging today, in addition to what kind of more radical changes a more mature polity (such as the United States today) might adopt to reduce the risk of retrogression.

Oddly, the question of insulation against retrogression has not been investigated deeply before. Perhaps because of the post-Cold War confidence in the inevitability of democracy’s global hegemony, few scholars have devoted much time to thinking about how to harden new or established democracies against retrogression. Tellingly, one must go back to the inter-war period to find the closest precursor. The German political
scientist Karl Loewenstein fled Germany in December 1933, and penned a pair of important articles on “militant democracy” in the *American Political Science Review*. Loewenstein pointed to the emotional, and non-intellectual, appeal of fascism, to argue that democracies have to take repressive measures—including party bans, restrictions on free assembly and free speech, prohibitions on public office, and even citizenship stripping in order to safeguard democracy against its internal enemies. It was an idea with a remarkable after-life. The German Constitutional Court drew on Loewenstein’s principle of militant democracy to ban the quasi-Nazi Socialist Reich Party in 1952 and the German Communist Party in 1956. At least 21 other democracies have experimented with various forms of party bans, with a range of results.12

Loewenstein was correct, we think, to worry about the capacity of democracies to protect themselves from the corrosive effects of internal antidemocratic forces. But, for a number of reasons, we think that his militant democratic framework, which focuses on the proscription of democracy’s internal enemies, is inadequate and dangerous. It is inadequate, in the first instance, because it does not speak to the situation in Poland or Turkey, which is already slipping into competitive authoritarianism. Nor does it have much to say to polities such as the United States, where a charismatic populist is in charge at this writing, or perhaps even Israel and Japan, where potentially hegemonic party coalitions are parlaying electoral gains into institutional reforms to consolidate power. Even in its core applications, moreover, we think that Loewenstein’s advice is too dependent on the model of the Nazi ascent to power to capture the range of ways in which more mainstream parties turn to retrogression as a means of remaining in power. The range of design decisions that can mitigate the risk of retrogression is wider than Loewenstein’s concept of militant democracy—or so we hope to show.

Moreover, we think militant democracy a very risky strategy. In Europe today, associational bans, bans on public office, and a range of other forms of coercion are used in putative defense of democracy—even though Loewenstein’s justifications are not present in respect to the targeted groups. In this fashion, the repression he licensed in the name of democracy has easily slipped its moorings in the defense of democracy. European Muslims are members of a numerical minority who have no chance at seizing political power to overturn democracy (outside, at least, the impassioned fantasies of Michel Houellebecq). Muslims face considerable discrimination in job markets and social interactions, as well as an ample share of violent and hateful treatment in public. Under European law, the choice to don Muslim garb justifies exclusion from certain public and private workplaces, even though the choice to display Christian symbols in the classroom is tolerated. Antiterrorism measures, in particular France’s extensive use of emergency powers after a series of attacks in Paris, have led to the closure or close surveillance of many mosques and Islamic associations.13 The use of militant democracy’s methods against a discrete minority that presents no plausible political risk, but that is already subject to high levels of social and economic discrimination, showcases the danger of Loewenstein’s concept: It is amenable to use against not those who present an actual threat, but those who are perceived as alien and therefore unworthy of inclusion in the body politic. Paradoxically, the use of militant democratic methods in Europe feeds the narrative of charismatic populists who paint the continent as under siege, and who use
migration and security issues as wedge issues to attack existing political elites. In this way, the tools of militant democracy stoke the very fires they were designed to assuage.

If militant democracy cannot prevent retrogression, what can? Are some constitutional designs more susceptible to backsliding risk than others? And could any of these usefully be considered for our own system? These are the questions the remainder of this chapter sets out to answer.

A caveat before we proceed: the example of Sri Lanka with which we opened this chapter provide clues that attention to formal institutional design will not be sufficient: The success or failure of a democratic enterprise ultimately depends on the extent to which people—including those within the ruling alliance—are willing to reject the allure of charismatic populism or partisan degradation. This is, as we shall explore in the conclusion, a matter of political strategy and sometimes of the contingent preferences of those who are in a special position to stop retrogression. In this regard, we diverge most sharply from Loewenstein’s account of militant democracy: We think that constitutional design and political strategy are necessary, but we do not think they are ever sufficient. Democracy demands from its participants a political morality. In the absence of that political morality, nothing in the toolkit of constitutional designers will save constitutional democracy. Cunning, that is, can go only so far without decency.

A. Constitutional Amendment Rules

1. Amendment rules in new constitutions

Constitutional change is necessary for constitutional survival. As a result, rules to facilitate such change are a common and core feature of national constitutions. Amendments can keep a constitutional system up to date with changing times, and allow for the correction of unintended errors in the original design. From this Jeffersonian point of view, amendments ought to relatively easy to accomplish. Indeed, one of us has argued elsewhere that most constitutions are too difficult to change from the point of view of facilitating constitutional endurance.

At the same time, an amendment rule that enables too much change can threaten the very purpose of constitutions, which is to entrench certain elements of the constitutional design beyond manipulation by the government of the day. Many of the cases of constitutional retrogression that we have discussed, including those of Poland, Hungary, and Sri Lanka, have used constitutional amendments to help entrench a particular party or leader into power. They have ended term limits, packed the courts, and changed the electoral system through constitutional amendment. Often these entrenchment strategies have been justified by an appeal to the people’s will, a rhetorical trope that resonates with the choice of constitutional amendment as a pathway of legal change. Accounting for this history may suggest that the best strategy for a constitutional designer concerned about retrogression would be to have a relatively rigid amendment rule. Yet on the other hand, this might be too quick and glib a lesson to draw. For a constitution that it is too rigid invites its own replacement because it cannot cope with exogenous shocks. By producing deadlock, it might invite the tragedy it seeks to forestall.
One solution to this puzzle, offered by advocates of militant democracy, is to have certain provisions in the constitution be immune from change. The Indonesian Constitution states that the unitary status of the state is unamendable. Conversely, the German Constitution has a so-called “eternity clause” that provides that no constitutional amendment can change the federal character of the constitutional order or overturn the “basic principles” contained in the first twenty articles. Indeed, some two-thirds of the constitutions now in force contain some such clause. In addition, a judicially created doctrine of unconstitutional constitutional amendments has emerged in other countries.

While superficially attractive, this variable entrenchment strategy provides no failsafe against retrogression. Because these doctrines are not self-enforcing, much of the work in guarding against “unconstitutional” constitutional amendments must be done by the courts. Indeed, judges in a remarkably wide range of contexts, including both weak and strong democracies, have stepped up to block majorities from enacting rules that violate core principles of the constitutional order. But the central role played by the courts, which is part of the broader phenomenon in global constitutional known as judicialization, perversely raises the stakes in political battles over who controls the courts. Of course, in the first instance, judges can be insulated from immediate political inference. But constitutional provisions on judicial appointments, removal and salaries are rarely immunized from constitutional amendment. Hence, it is typically straightforward for a would-be autocrat to first gain control of the judicial apparatus before turning to amending other features of the constitution. This is the strategy that has been used in Poland in recent months.

But variable entrenchment is only one option in designing an amendment rule. Other possibilities involve the use of higher vote thresholds, an increase in the number of discrete steps involved in amendment, or alternatively the addition of a larger number of institutional actors to approve an amendment. An especially promising institutional design option, used in Scandinavian countries, is to extend the amendment process across time. Here’s how it works: A legislative majority proposes an amendment, which then must be reconsidered after a new election. Then, a new majority (or two-third supermajority in the case of Finland) must pass the same amendment again. This may be followed by a referendum (for example in Denmark). In short, passing a constitutional amendment requires not just a certain majority, but the ability to sustain that majority over time through an intervening election, which presumably changes the composition of the relevant legislative bodies.

This multiple-stage design seems to us well-suited for preventing retrogression through constitutional amendment. First, it reduces the risk of a Hungary-type retrogression in which a single election with an anomalous outcome leads to the near-complete capture of political power by one party. Even if such an election occurs, a multiple-stage amendment process will require voters to have another say before the constitution can be transformed in partisan ways. Yet the Scandinavian approach also need not lead toward over-entrenchment, because the thresholds for passage are relatively low. Amendments tend to be fairly technical but on occasion they can be substantial, and generate significant public debate.
Yet another constitutional design choice that may help immunize against retrogression would be to involve multiple institutions. In many countries, constitutional amendments are scrutinized for constitutionality by courts before promulgation for consistency with basic constitutional commitments. This might serve to prevent, for example, a constitutional amendment firing all opposition judges, or undermining judicial independence. Similarly, in many countries a figurehead president has the last word on constitutional change. Where this figurehead is not von Hindenburg-like, that step might also work to slow down backsliding.

2. Amendment Rules in the U.S. Constitution

Let us turn from this discussion to the United States, and consider what (if anything) might be done about Article V. In the previous chapter, we saw how Article V, although reviled by liberal constitutional scholars in particular for its regressive, status-quo preserving effects, precludes a common strategy of retrogression—the use of amendments to eliminate accountability mechanisms or entrench a charismatic populist or single party. But Article V’s rigidity is a double-edged sword: It has also means that prophylactic institutional reforms that might retard retrogression will also languish. Moreover, it is not possible to fix ambiguities in the current text. For example, when President Trump suggested in July 2017, based on an aggressive, if plausible, reading of Article II of the Constitution, that a president has power to pardon himself, it was not feasible to change the text to eliminate the possibility of a self-pardon. Nor is it possible to establish a better mechanism for investigating serious crimes by senior federal officials than the ad hoc constitutionally fraught system that we currently have. Rather, Article V puts almost all textual amendment off the table for both good and for ill.

Despite, of perhaps because of, the difficulty of mobilizing 2/3 of both houses and ¾ of the state legislatures, a popular movement has developed to call a constitutional convention under the never-used “second” mechanism of Article V. Under this provision, 2/3 of the state legislatures can call on Congress to create a new Constitutional Convention, akin to that it Philadelphia in 1787. When Michigan’s legislature voted in 2014 to ask for a Constitutional Convention to adopt a balanced budget amendment, it became the 34th state to have issued a call of some kind. Because several others had withdrawn their requests, and because uncertainty still exists on whether a convention, if approved by Congress, would be limited in scope or general, we think that it is unlikely that a convention will actually materialize. But the mere possibility raises the interesting question as whether for those concerned about the possibility of retrogression ought to pursue a convention.

We think that a constitutional convention is a risky strategy for an established democracy such as the United States, especially if it is facing a clear and present risk of retrogression. There would, most, importantly, be no way to insulate against the risk that a convention would be captured by anti-democratic forces. Experience in Ecuador, Bolivia and Venezuela, in particular, suggests that we should be skeptical of the efficacy of formal, legal limits on the power of a constitutional convention—to say nothing of the softer norms that might be all that restricts a new constitutional convention in the U.S. Constitution-making can go off the rails. Further, the risk of harm is far greater than the risk of gain. We have explained in Chapter 5 the myriad flaws in the design of the 1787
Constitution, which have created a historical legacy of partial, uneven, and racially hierarchal democracy, and do too little to minimize the risk of retrogression. That list, moreover, is not complete. As early as the 1800 election, for example, it became plain that core mechanisms of presidential selection in Article II of the Constitution could produce destabilizing electoral deadlocks, throwing the polity into chaos. 22 Yet Americans have muddled through, and made democracy a going concern despite the institutional limitations of the Constitution. Its problems, such as declining responsiveness to all but elite opinion, institutional gridlock and increasing partisan polarization, do not follow from the Constitution’s design, but rather opposed from more contingent and recent policy choices and shifts in political economy. 23 Subconstitutional fixes for the problems of political inequality and polarization are imaginable, but require political will. If we do not have the necessary determination to attack these problems in a time of ordinary politics, there is no reason to expect that it would spontaneously appear in a moment of extraordinary, constitutional politics. We think that a constitutional convention would be far more likely to damage the quality of democracy at this moment than it would be to improve it.

A competing possibility related to amendment rules would be to make the U.S. Constitution even more inflexible by importing the “basic structure” doctrine employed in other jurisdictions as a basis for holding that some amendments to a constitution are invalid. Faced with a charismatic populist intent on partisan degradation, should the Supreme Court discern a “basic structure” in the U.S. Constitution of a democratic character similar to the German Constitution’s core, as a way to stave off retrogression? For a number of reasons, we are skeptical. Attractive as this idea sounds, it is nonetheless implausible to think that the Court would have the motivation or the stamina to resist retrogression wholesale in this fashion. Perhaps most importantly, there is precious little in the text, history, or current precedent of the Court that supports the idea of unconstitutional constitutional amendments. The closest analogy (although we doubt the Court would embrace it) is the Justices’ treatment of the so-called Reconstruction Amendments. The Thirteenth, Fourteenth, and Fifteenth Amendments, all passed after the Civil War to reign in the states’ abusive treatment of African-Americans, were initially interpreted in ways that preserve the antebellum balance of federal-state power, rather than honor the dramatic nature of the post-Civil War change. Most crucially, the postbellum Court rejected Congress’s assertion of power to target private discrimination under the Fourteenth Amendment—even though that provision had ratified as a response to private violence against Africa-Americans in the South. 24

But even if the Court did have the legal materials on hand to take the unprecedented step of repudiating a constitutional amendment, we think it would not be likely to do so. Its various opinions gutting Congress’s Reconstruction powers have been lawyerly exercises rather than overt confrontations. As we saw in Chapter 6, the courts are generally aligned in a lagged way with political majorities. We think it unlikely that the Justices would uniformly stand against a slate of entrenching amendments given those partisan allegiances. Moreover, the Court’s institutional interests tend to prioritize self-protection over than protection of the polity. Relying on the Court to protect democracy in such a wholesale fashion—as opposed to altering some of its doctrines to reduce more subtly the risk of retrogression—is not compatible with the Court’s current incentives.
B. The choice between parliamentary and semi-presidential forms of government

We turn next to the possibility of designing government—or, in the case of the United States, adjusting the design of government—to reduce the risk of retrogression. We consider first the decision—long the subject of contention among constitutional scholars—about how to structure executive-legislative relations, before turning in the next section to the design of courts. If we wanted to choose a constitution solely to minimize the risk of backsliding, is there a particular system we should prefer? While there may be no version of liberal democratic constitutional design that is completely immune from backsliding risk, there are nevertheless meaningful differences among alternative variants that might affect their vulnerability. Moreover, there are ways in which the American constitutional design can be tweaked to lower retrogression risk.

1. Government design in new constitutions

In early 2017, many analysts feared a wave of charismatic populist candidates would sweep West European elections, setting them up to undermine liberal democratic institutions in the same way that Poland and Hungarian populists have done. The Netherlands and France, it was feared, would follow Britain’s Brexit vote and the United States’ presidential election, in veering to a populist right. From one point of view, these fears proved justified. Geert Wilders in the Netherlands did increase his seat share in parliamentary elections, making him the second largest party. Marine Le Pen in France found her way to the run-off in the presidential election against a virtual unknown, Emmanuel Macron. Yet neither Wilders nor Le Pen “won” in the sense taking control of government, or even coming close to that goal. In contrast, the far-right populist candidate in the Austrian presidential election of 2016, Norbert Hofer, lost by a meager 30,863 votes, and secured a recount, only to lose a rerun decisively. Given how close these countries came to seeing political power captured by openly open-liberal populists, it seems worth asking whether the design of their electoral systems either increased or decreased their vulnerability. Do the alternative constitutional designs of these political systems—parliamentarism in the case of the Netherlands, semi-presidentialism in the case of France and Austria—deserve any credit or blame for limiting the success of populist, “anti-system” candidates?

The range of choices for how to organize government has changed over time. When the American founders drafted the Constitution, they invented a novel way of selecting the head of state, who was labeled the President. The related Electoral College, which employs a complex system to intermediate between popular preferences and the choice of chief executive, is frequently decried as undemocratic. Indeed, it has on five occasions led to the election of a president lacking a majority of the popular vote. In Europe, by contrast, kings or queens selected through hereditary means had traditionally been heads of state until well into the nineteenth and early twentieth century. As a result, European constitutions devoted a lot of space to monarchic succession, but not selection. But once the position of head of state was to be selected rather than inherited, constitutional designers had to figure out how to pick the person.
The United Kingdom had evolved a parliamentary system over several centuries of gradual negotiation between elite nobles with the King. Later, in the nineteenth century, in country after country in Europe, rising social forces won election to parliaments that battled with kings over power and resources. Eventually, in every European country, they triumphed. Where monarchs yielded, they survived as neutered constitutional monarchs, exercising only a ceremonial role. In these cases, executive power effectively shifted to a Prime Minister who was accountable to the parliament. The centrality of parliament leads to the label ‘parliamentary’ for such systems. And lest one think that the parliamentary model fits only small polities, it is used for a continent-sized federalism in Australia, which modeled many other aspects of its Constitution on that of the United States.

Where monarchs resisted the advance of parliaments, as in France, they were deposed and replaced with republican forms of government, which led to the need for a formal head of state—i.e., a president. In some countries, this led to another alternative constitutional design known as semi-presidentialism, developed in Weimar Germany and then stabilizing in Fifth Republic France. In semi-presidential systems, a directly elected president serves as the head of state, sharing executive power with a prime minister that has some accountability to parliament. This model has become increasingly popular around the world in recent years, such that there are now more semi-presidential systems than pure presidential systems in operation today (although there is also much variation within each type).

Figure 7.2 illustrates the trend lines in choices of governmental form around the world.

*Figure 7.2: Forms of Government: Parliamentary, Presidential, and Semi-Presidential*
A large literature in comparative politics compares the merits of these different systems. A central divide separated advocates of presidentialism and parliamentarism. Opponents of presidential systems have noted their tendency to lead to breakdown. In contrast, they observe, no established parliamentary democracy had ever suffered authoritarian reversion. They argue that presidentialism, by its nature, contains a single office at the center of the political system, which raises the stakes of electoral politics and creates a zero-sum, winner-take-all competition. It also incentivizes rewarding one’s supporters once in office while denying one’s opponents political benefits. If the winner really does take ‘all,’ as seems to have happened in Hungary, Venezuela, and Poland, elections might be accompanied by political violence and followed by disaffection of large portions of the population, leading to democratic breakdown. Because parliamentary systems allow for greater distributions of political benefits, it is suggested, they create a lower risk of systemic instability. One recent study finds that presidential democracies are ten times more likely than other democracies to suffer an authoritarian reversion through incumbent takeover.

Another line of criticism concerns performance. While presidentialism can produce strong leadership, it can also lead to gridlock when the opposition party controls the parliament. As Americans observed first hand since the mid-1990s, divided government means little new law can be passed. This might in turn seed disappointment with democracy as a whole, because the system cannot deliver effective and responsive politics. Parliamentary systems, in contrast, are less prone to gridlock, since the government by definition enjoys the support of the legislature. Depending on the nature of the electoral system, they may require coalitions of different parties to govern. This can moderate positions though hamper strong leadership. It is perhaps telling that countries picking their first constitution in recent years have avoided presidentialism.

The most recent statement in the presidentialism-parliamentarism debate, however, suggests we should not attribute too much to statistical associations between presidentialism and democratic breakdown. The political scientist Jose Cheibub has shown that it may not be that presidential systems lead to breakdown, but rather that unstable countries tend to choose presidentialism. Countries emerging from military dictatorship, he suggests, might adopt a presidential system so the leading general can run for office. Alternatively, civilians afraid of military takeover might wish to consolidate power. For example, Turkey’s recent constitutional reform, which was designed to consolidate the power of a single man, led to a much stronger presidency, but occurred after, and indeed responded to, the failed coup attempt of 2016.

What of the relative performance of different systems as checks on retrogression? While remaining cognizant of Cheibub’s cautionary point, we think there are several reasons to think that parliamentary democracies might be less vulnerable to retrogression than presidential ones, ceteris paribus. First, parliamentary government allows more voices to participate in policy-making, and so deals with anti-system movements in different way. Few parliamentary systems are truly two-party, and so parliamentary
systems are considered to be better suited to ventilating minority perspectives. Small ethnic groups or linguistic minorities will usually do better in a system of proportional representation, which many though not all parliamentary systems have. This feature allows fringe, anti-system parties to obtain a national platform relatively quickly, but may also serve to keep them from ever taking power. In the recent Dutch election, for example, no party took more than 22% of the vote—but all political forces agreed that they would keep the charismatic populist Geert Wilders out of power. In contrast, in a presidential system such as the United States—where legislative competition tends to be binary because of the first-past-the-post system and closely tied to presidential competition—a charismatic populist cannot obtain power unless they win the presidency. Hence, a presidential system keeps populists out completely for longer—but when it fails to do, the consequences are far more wide-ranging and risky.

There are, to be sure, counterarguments: A parliamentary system such as the Dutch or Belgian system, allows populist parties to gain an official platform quicker. Parties that accept the democratic system may be uncertain about how to respond, and may allow anti-system forces to seize a role as king-maker. It was the breakdown of coalition government in the late 1920s and early 1930s in Weimar Germany that opened the way for the National Socialists to assume a pivotal role through an alliance with conservatives. And there is the possibility that mainstream parties will adopt the rhetoric and policies of the anti-system populists, so that in policy terms there is little difference. Mark Rutte, the Prime Minister of the Netherlands, was criticized by some for shifting political rhetoric in an anti-immigrant direction to contain Wilders. Despite these points, we think there is still more to be said for the parliamentary method of containing destabilizing forces, and lowering the stakes of both presidential elections and the process of selecting major-party candidates. Unless one takes the militant democratic position, the inclusion of populist forces within a parliament is not necessarily to be deplored, as it can provide mechanisms of accountability. A critical question is whether those parties have associated paramilitary wings, of the kind seen in 1930s Germany (and again in Charlottesville in August 2017). Private violence when aligned with a populist candidate or slate, we think, raises quite different questions and risks of a wholly different order or magnitude. The key is that parties dedicated to the democratic system’s survival remain sufficiently robust. In other words, when one focuses on the risk of retrogression from liberal constitutional democracy, it is the institutional politics rather than policies that matter.

Second, because parliamentarism does not have a fixed-term executive, it can be more responsive, and avoid some destabilizing showdowns. In a parliamentary system, leaders serve as long—or as briefly—as they retain the confidence of the parliament. A system can jettison bad leaders but also retain good ones, making them not only more immediately responsive. Hence, when a charismatic populist comes to power, they must in fact continue to maintain majority support within the legislature, and as a result sometimes even court other parties and factions. These features of parliamentary systems temper might temper autocratic tendencies, even if they do not assure democratic rotation or the exit of charismatic populists from office. For example, Recep Tayyib Erdogan has to some extent continued to court minority parties, and tempered his deployment of libel as a weapon against political opponents, even after the attempted coup of 2016, perhaps
as a means of maintaining broad majority support. In this fashion, parliamentarism might not prevent charismatic populism, but it may be able to blunt some of its most damaging effects. Moreover, a parliamentary system does not need to resort to term limits to ward off the possibility of a ‘president for life.’ It is hence less vulnerable to reach a crisis point when a would-be autocrat hits a term limit and reaches for the post hoc constitutional reengineering of term limits that is observed in several backsliding democracies.

Consider how this would affect the United States (setting aside the question of whether these leaders could have even been elected in a different constitutional system). As the country approached its fateful election of November 2016, Barack Obama continued to enjoy a strong approval rating of over 50 per cent. Barred by the Constitution from running again, he joined Bill Clinton and Ronald Reagan as recent presidents able to go out on a high note. Should the U.S. have been a parliamentary system, Obama, Clinton and Reagan would have been able to serve for more than eight years. On the other hand, other leaders would not have made it to a full term. Jimmy Carter took office in early 1977, but by mid-1978 his approval ratings had dipped below 50%. George W. Bush found himself in a similar position in his second term, and his ratings did not touch 50% after mid-2005. In a parliamentary system, Carter and Bush might well have been discarded mid-term, whereas both Reagan and Clinton might have stayed beyond their actual departure from office. A direct dependence on continued popular support for survival in office would have obviated the need for term limits. This would have aligned political leadership with popular sentiment more closely, perhaps mitigating disillusionment with democracy, and perhaps leading to unpopular leaders being ousted before they can resort to institutional tinkering as a way of entrenching their power.

Third, presidential systems appear to be more responsive to public demand than parliamentary ones in part because the position of chief executive is more conducive to claims to uniquely represent the people. But in practice, parliamentary government may well be more responsive to popular demands even though it might appear less transparent and responsive to the public. In a parliamentary system, the coalition that forms the government perforce has power to enact new laws. Political victory therefore conduces to change in the law. Meanwhile, presidential systems that separate the legislative from the executive court gridlock, especially when the policy is closely divided. When a parliamentary system deadlocks, by contrast, mechanisms such as the vote of no-confidence allow for rapid changes to dissolve barriers to action. Hence, where the parliamentary system leads to instability in government the presidential system can lead to instability in the institutional regime as a whole. An intuition along these lines motivated the great theorist of the English Constitution Walter Bagehot to advocate the fusion of legislative and executive power and to criticize the American presidential system. In a similar vein, some decades later and on the other side of the Atlantic, Woodrow Wilson suggested that the Industrial Revolution necessitated a more centralized, parliamentarian federal government in which an executive-driven cabinet would replace parliamentary committees as drafters of legislation. More recently, distinguished political scientists Thomas Mann and Norman Ornstein, in their searing indictment of American politics, conclude that a “Westminster-style parliamentary
system provides a much cleaner form of democratic accountability than the American system.”

Fourth, parliamentary systems seem to have more effective routine instruments for maintaining accountability and checking efforts at partisan degradation. For example, the regular appearance of the government in parliament in the form of an organized question time provides a form of routine accountability. By signifying the dependence of political leadership on broad support, and its necessary openness to questions from all sides, institutions such as a parliamentary question time refute the direct and unmediated claims of charismatic authority made by populists. (Of course, one can quickly see how question time might, given a weak opposition, devolve into simply another platform for a charismatic leader. But our point here is that the institution makes that sort of degradation less likely in the first instance). In addition, we have already mentioned the fact that some parliamentary and semi-presidential system formalize the idea of a loyal opposition, recognizing the centrality of continued legislative opposition to the effectual opposition of democracy. In Germany, for example, committee chairmanships in the two legislative houses, the Bundestag and the Bundesrat, are apportioned according to the percentage of seats each party has in each chamber. Moreover, both the dominant and the opposition party have a role in selecting members of the apex court, the Federal Constitutional Court. Half of that body is selected by the Bundestag, which decides based on a two-thirds vote of its Judicial Selection Committee, and half by the Bundesrat acting by two-thirds vote too. In practice this means that a party that loses an election still influences judicial picks. In contrast, in a presidential system such as the United States, legislative oversight is done primarily by Congressional committees, but this means that in periods of unified government, there may be no regular mechanism of holding government accountable at all. As we shall see below, there is no reason these measures cannot be replicated in presidential systems such as the United States. But it seems clear that they flow more immediately from the organizing logic of parliamentary system.

We do not want, however, to be too optimistic. Rapid legislative change can lead to rash and foolish decisions. As Ivor Crew and Anthony King have recently documented in delicious detail, parliamentary systems can be “blunder prone.” Parliamentary systems can also become unstable as a result of interaction with the underlying electoral system and the incentives created for party structures. Interparty competition in a new democracy can lead to instability, and even open the door to military coups. Finally, the Polish and Hungarian cases suggest that if an anti-system party does seize power in a parliamentary system, it would immediately be able to use the legislative power to lock in its electoral hegemony. Without sufficient instruments of horizontal accountability, this can lead (as in Poland and Hungary) to rapid democratic retrogression. Since the same rapid degradation can also happen in presidential systems, this simply means that choosing a parliamentary over a presidential system is no panacea. Perhaps the best way to summarize the matter is as one of competing risks: if the threat to democracy is a charismatic populist, parliamentary systems may be better; if the threat is from partisan degradation, presidentialism might be a preferable option.

We should also say a word about semi-presidentialism, which as noted earlier combines some of these features of parliamentarism with the enhanced accountability of
a directly elected president. Whether for reasons of function or fashion, this model has surged in popularity through widespread adoption in Africa and Eastern Europe, and now rivals “pure” presidentialism and parliamentarism in terms of global popularity. Semi-presidentialism has the advantage of fashioning a unifying national figure who stands above the fray of day-to-day politics, while still being directly accountable, while maintaining a more mutable prime minister’s office that responds quicker to changes in popular preferences. It is often criticized because of the gridlock that arises during periods of divided government, as France has experienced.

In terms of retrogression risk, we see both pros and cons to semi-presidentialism. On the one hand, in both Turkey and Russia, the notionally ceremonial president’s position has provided charismatic populists with a convenient waiting area when term limits kick in. Moreover, a semi-presidential system might suit, for example, a populist president such as Donald Trump, whose command of policy detail is weak in comparison to his communication skills. Another common point against semi-presidential systems is that they can become complicated during periods of divided government—obscuring accountability and promoting deadlock. On the other hand, semi-presidential systems have one more protection against tyranny if the president must cooperate with an accountable prime minister to get anything done. Polish President Andrzej Duda’s decision to veto proposals to entrench partisan control of the Polish judiciary in July 2017 is a useful example of how semi-presidentialism can work a useful check despite partisan alignment within government. Moreover, many semi-presidential systems employ a two-stage presidential election system. Even though this is conceptually and empirically distinct from semi-presidentialism, and indeed began in the parliamentary French Third Republic, it is worth highlighting for its anti-retrogression benefits. The two-stage system involves an initial round in which many candidates compete. If none gets a majority of the vote, there is a second round that is held between the top two vote getters in the first round. This allows people to vote their “true” preferences in the first round, whereas the second round forces many voters to choose their “least-bad” option. Such a system can eliminate the possibility of a president coming to power after having been recognized by many, but not all, as a hazard to democratic stability.

2. Improving interbranch checks under the U.S. Constitution

The United States does not have a plausible pathway to a parliamentary system for reasons we have already canvassed. Those hoping that a constitutional convention will set right the ship of state are whistling in the wind. But this does not mean that there is not way of shoring up democracy against retrogression by altering legislative-executive relations in the United States. To the contrary, we think there is a substantial reform agenda in terms of altering relations between Congress and the executive with both short-term and long-term fixes. In one regard, however, our analysis is modest. There is some evidence that the larger phenomenon of partisan polarization among legislative elites drives congressional deadlock. Polarization, however, is a complex problem, reflecting (among other things) a nationwide geography of residential sorting, a growing rural/urban divide, and changes in election law on primaries and redistricting. We approach the problem of retrogression risk in the United States with polarization in mind as a background fact rather than a direct target of reform proposals (although we hope that
some of our solutions might mitigate the extent of elite polarization, and we think it important to analyze polarization as a distinct, and important, problem of political design.)\textsuperscript{53}

Moreover, it is important to concede that this does not seem a propitious moment in American history for good-government-type reforms. Indeed, should the risks already inherent in our constitutional design materialize, attempts at institutional recalibration will likely come too late. We thus readily concede that the following proposals are unlikely to be incentive-compatible with the interests of national leaders already lodged in place. Any significant reform today is further impeded by the socioeconomic and cultural forces that have contaminated and soured American politics. Nevertheless, the risk of retrogression today presents an opportunity for rethinking first principles. We should not exclude the experience of alternative political systems, and hence think expansively in what follows in the same spirit of optimistic experimentation as the Constitution’s original designers.

The first of our ideas harks back to our notion of opposition power. We think that the United States should benefit from other countries’ experiments with the creation of legal powers for the legislative opposition. As we have noted, in other countries, the democratic opposition represented in the legislature is vested with legal authority by being given committee chairmanships, positions that carry with them investigative tools and jurisdiction over new legislation. Such arrangements need not be memorialized in a constitution, and indeed in many cases result from laws or even unwritten conventions. Minority powers to demand information, either in documentary or testimonial form, provide a way to challenge the factual justifications for decisions and claims made by an administration. Hearings, although not quite analogous to prime ministerial question time, can supply a focus point for opposition to an administration policy to emerge. They also work as a platform for legislators to draw public attention to elements of retrogression that might otherwise escape public notice. Moreover, there is no reason to think that such minority powers would exacerbate gridlock, since the latter are not necessarily part of the process of crafting new legislation. Indeed, they provide the minority party with a way to ventilate issues of concerns without gumming up potentially important legislation.

Congress already has at hand a mechanism for fashioning instruments for loyal opposition: each House’s Article I power to establish “rules of Procedure” for itself.\textsuperscript{54} Imagine that the minority party in each house during a period of unified government demanded a new set of minority rights to committee chairs and related investigative powers to convene hearings, demand testimony, and subpoena documents. Currently, these broad investigative powers are controlled by committee chairs, who are members of the majority party. A party in power often struggles to secure major legislation because of internal divisions. There may be instances in which it is willing to trade the immediate gain of a policy win for the uncertain loss of granting opposition procedural rights. Indeed, to the extent the latter impinge on no specific near-term policy agenda of the dominant party—and may even benefit the dominant party if it were to return to the minority—the quid pro quo would be relatively costless. If the minority party is worried that the majority will renege by altering each House’s rules, there is also historical
precedent for Congress enacting legislation that imposes certain rules by law—hence rendering them harder to change.\textsuperscript{55} Ideally, such a law would provide a right to challenge executive-branch denials of court and a requirement that subpoenaed executive-branch officials offer live testimony at the behest of minority committee chairs.

An important function of these legislative opposition rights is epistemic: They enable the opposition to extract information from the executive that might compromise or contradict public justifications for policies. We think this is generally a healthy feature of democracy even in the absence of retrogression risk. But the efficacy of these mechanisms’ does not rest on legislators’ motivations alone, and there is a powerful case for strengthening the capacity of Congress to obtain and use information about the executive branch even apart from the empowerment of legislative minorities. In particular, Congress influences the efficacy of its oversight when it organizes its committees to have either greater or lesser degrees of overlap, and assigns either more or less professional, nonpartisan support to such bodies. As a historical matter, it has demonstrated a willingness to expend scarce political resources on measures such as the 1946 Legislative Reorganization Act, which streamlined and strengthened oversight committees in response to the growth of executive power during World War II.\textsuperscript{56} The last eighty years have seen no new effort to recalibrate legislative authorities in light of the still-evolving state of the executive branch. There has been no effort, for example, to strengthen Congress’s ability to assert its legal and constitutional interests—say, by creating an in-house counsel that maintains an institutional memory of legal positions adopted in service of Article I, and able to bring suit to defend those institutional prerogatives.

Courts have a role to play too. The White House and executive agencies have often stonewalled or slow-walked congressional requests for information. When legislators have turned to the federal courts for injunctions requiring disclosure, federal judges have been unwilling to act, absent evidence that the whole of one or the other house concurs in a measure.\textsuperscript{57} Moreover, judges have often been reluctant to grant relief, preferring to allow the elected branches to reach a negotiated solution. In the ensuing negotiations, however, the executive has tended to have the upper hand since it has the advantage of favoring the status quo, and can generally wait out whatever political pressure exists and (if necessary) string out litigation until the next election cycle—when a new set of potentially more sympathetic or less experienced legislators may be installed. An important part of the institutional design, therefore, should be an explicit right to an order of disclosure—although one stronger than the slow and incomplete remedies now available under the Freedom of Information Act—and a mandate for rapid judicial relief, including expedited appeals in case a district court denies legislators relief. We think this is more seemly and credible than the traditional form of parliamentary relief—which was achieved by sending a parliamentary sergeant at arms to arrest the errant executive official.\textsuperscript{58}

Our second idea starts from the observation that the Constitution contains a paucity of devices for disciplining presidents who overtly violate the law, or violate what we have called the administrative rule of law by suborning prosecutorial and bureaucratic resources for personal or partisan ends (or a convergence of the two). We will have
At present, the requirement of a “high crime” or “misdemeanor” as a predicate for impeachment is generally viewed as imposing a relatively high bar. Impeachment, therefore, is treated as a nuclear option, “the most powerful weapon in the political armory, short of civil war.” But constitutional history does not command this reading. “High crimes and misdemeanors” was a vague phrase of uncertain meaning even at the time of the Constitutional Convention. The original proposal was to limit impeachment only to cases of treason or bribery, but George Mason of Virginia worried that those bases would not cover a president who was inclined toward tyranny, and proposed adding “maladministration” as a basis. When Madison objected that maladministration was a vague term, Mason added the term “high crimes and misdemeanors”, which had a long history in English law. In England, impeachment had long been used to remove the King’s Ministers, and provided a central power of parliamentary accountability, but was hardly limited to serious crimes. As a Congressional report issued during the Nixon impeachment recounts, the phrase “High Crimes and Misdemeanors” had been first used in 1386 during a procedure to remove the Earl of Suffolk for failing to follow parliamentary instructions about improving the Kings estate, and for failing to deliver a ransom for the town of Ghent. These seem less like and more akin to dereliction of duty. In addition, even as the debates about the Constitution were roiling the United States, in the former motherland Edward Burke was spearheading an effort to impeach Warren Hastings, the first Governor-General of India, for high crimes and misdemeanors in the form of gross maladministration. Viewed in historical context, therefore, the impeachment power is plausibly understood as not contiguous with the criminal process. As the 1970s Congressional report concludes in assessing the perspective of the framers, “it is apparent that the scope of impeachment was not viewed narrowly.”

Moreover, the phrase “high crimes and misdemeanors” is akin to “cruel and unusual punishment” (in the Eighth Amendment) or “right to bear arms” (in the Second Amendment) in its essential ambiguity when viewed out of context. Just as the Eighth Amendment is not limited to drawing and quartering, and the Second Amendment is not limited to flintlocks, so too “high crimes and misdemeanors” should not be limited to the specific enumeration of such offenses in 1787. Rather, the phrase should (like the Second and Eighth Amendments) be understood in terms of its function within the larger constitutional scheme. That function is simple: Impeachment is the sole pathway for punishing high-level officials aligned with the president because the latter has a broad-ranging and unreviewable power to pardon. Especially given the evidence that voters do not always evaluate incumbents on the basis of their policy performance, but on the basis of extrinsic considerations, the wise use of impeachment to police the democratic bargain is of great importance. Impeachments might thus be more common, and should focus on disloyalty not just to the nation (“treason”), improper pecuniary motives (“bribery”),
but also improper self-dealing that undermines principles of democratic rotation and choice.

We should add that changing the scope of impeachment does not mean it will be used more often. Whereas Article I requires a majority of the House to impeach, conviction requires a two-third supermajority of the Senate. The latter in particular will often be difficult to obtain. We nevertheless think that congressional and public affirmation that the Impeachment Power does extend beyond crimes, and that it focuses on presidential efforts to subvert the democratic elements of the Constitution, would have salutary effects on official behavior.

While we think impeachment ought to be used to prevent retrogression, we are skeptical, absent (unlikely) alterations in the constitutional text, that impeachment should function akin to the vote of no confidence in a parliamentary system, as a means of relieving chief executives who lack legislative support. Given the different electoral bases of the president and the Congress, as well the frequency of divided government, we do not think transposition of that element of parliamentary government would work well in the U.S. system. (In addition, there is the problem that impeachment presently leaves the vice-president in charge; one can survey recent presidential teams and decide whether this seems an appetizing prospect).

Our fourth suggestion is perhaps counterintuitive, and involves increasing the extent of coordination between executive and legislative branches. Some commentators have argued for a repeal of Article I, section 6, paragraph 2, of the Constitution in order to allow members of Congress to serve in the President’s cabinet. 63 That clause prohibits members of either house from being appointed to a “civil Office under the Authority of the United States” and hence disallows officers from also serving as members of Congress. We think that a targeted repeal of this provision does not present the risks of a constitutional convention (although we concede that, like all constitutional amendments, it would be exceedingly difficult to do). Rather, it might be understood as a relatively technical and minor amendment that would not trigger a new round of the Culture Wars—particularly if cross-branch appointments were subject to a ‘partisan balancing’ rule to the effect that each copartisan appointment had to be matched with an appointment from the other party.

Licensing members of the cabinet serve in Congress would allow the President to align his or her administration more closely with Congress as a way to facilitate their legislative agenda. Increased coordination between the two political branches might ease the present difficult of passing new legislation, as information could be easily shared across institutional lines, and effectual coalitions more quickly formed. But in achieving this benefit, presidents would have to reach across the partisan divide in ways that at least have a possibility of mitigating some of the partisan polarization that characterizes our era. Doing so would introduce real diversity into the cabinet: Administrative agencies with partisan balance requirements are these days staffed with truly diverse leaders as a result of the balance rule. 64 Although we recognize that there is a risk that a charismatic populist would seek to co-opt or bribe representatives of the other party, we think that this risk is outweighed by the benefit of giving a public platform to a member of the opposition party to act as a whistle-blower or internal dissenter. We also think that there
is considerable symbolic value in a constitutional repudiation of a charismatic populist’s claim that his (or her) vision of America is the only valid one: A partisan balance rule for the cabinet appointments from the legislative branch is doubly inconsistent with that sort of exclusionary vision.

This seemingly minor fix would not end the separation of powers. The two branches would still need to cooperate to enact laws and treaties, to spend money, and to accomplish other essential government functions. But these separated powers would be conjoined by one bridging institution that is barely mentioned in the Constitution despite its paramount contemporary importance—the Cabinet. This would strengthen the Executive in ways that enhance political responsiveness.

C. Rethinking Judicial Independence

We have seen that one of the first victims in an eroding democracy is the courts, which stand in the way of autocrat attempts to curtail liberal rights of speech and association, or prevent charismatic populists from dismantling other checks on their authority—including elections, legislatures, and internal instruments of horizontal accountability. The very attention lavished on courts suggests that they matter in democratic retrogression. Yet, as we argued in Chapter 5, previously successful democracies such as the United States do not have an institutional design likely to insulate the bench from partisan entanglements, or inclined to protect all three of the institutional predicates of democratic rule. Hence it is worth asking whether there are fixes, either in the context of a new constitution, or with an eye to the current American landscape to the problem of judicial independence.

1. The role of constitutional courts in new constitutions

The third wave of democratization which began in the late 1970s and crested some time earlier in this century was accompanied by a major development in democratic institutional history: the spread of specialized constitutional courts around their world, and the broader expansion in the powers of courts more generally. To illustrate, in 1910, less than a quarter of constitutions provided for any power of judicial review. A century later the figure was roughly 80%. More than half of the countries with judicial review centralize the function in a designated constitutional court.65

The paradigm function of constitutional review is usually seen as protecting democracy, by preventing legislative majorities from trampling on the rights of minorities. This democracy-protecting function has indeed served to help consolidate democracy in myriad environments, and deserves celebration.66 Less frequently observed is that it has also served to justify the expansion of powers granted to constitutional courts in many countries. Constitutional courts today are now granted a range of powers to protect democracy, including the powers to oversee and certify elections; to conduct impeachment proceedings; to regulate political parties in the name of militant democracy; and to approve declarations of states of emergency. Constitutional courts have become lynchpin institutions to prevent constitutional backsliding—the Swiss army knife of constitutional design.
An important example for our argument is found in Colombia, where the Constitutional Court has been widely celebrated for a series of decisions on rights. After its creation in the Constitution of 1991, the Court became quite a popular institution in a country with a tradition of state weakness. It faced a significant test when confronted by the desire of Alvaro Uribe, the popular president who had led a successful campaign against leftist guerilla groups like the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN), to stay in office beyond the single term contemplated in the 1991 Constitution. The entire logic of the constitutional scheme, in some sense, hinged on the single presidential term, as it meant that each president would only be able to make a minority of appointments to key institutions like the Central Bank, Judicial Council and Constitutional Court. In 2005, however, Uribe was riding high and through his allies in Congress, obtained a constitutional amendment to let him stay on. A case was brought before the Court challenging the constitutionality of the proposed amendment; the Court upheld it but suggested that there were certain procedural limits to constitutional amendments.

Uribe handily won re-election. At this point, his rule turned darker. He had the Supreme Court deliberations wiretapped, along with journalists. And he began to assert more control over the elections machinery and judicial appointments. This was a case of looming potential retrogression. In 2010, a still-popular Uribe attempted to pass another constitutional amendment to seek a third term, this time through a referendum. But now, the Constitutional Court held that the proposed referendum was unconstitutional on procedural grounds, and that the amendment itself was unconstitutional on substantive grounds. Importing the doctrine of unconstitutional constitutional amendments, the Court found that the amendment would be an unconstitutional “substitution” of the constitution. Professors Dixon and Landau, commenting on the case, observe that the Court “noted in detail how a president with twelve consecutive years in power would have tremendous power over various institutions of state, including those institutions charged with checking him.” The Court also expressed concern about clientalism and media dominance by a three-term president. In other words, the separation of powers would no longer remain secure. Uribe accepted the Court’s decision and withdrew his candidacy for the 2010 presidential race.

The Colombian case represents an example of a Constitutional Court almost single-handedly saving constitutional democracy. The challenge was not from partisan degradation, but from a successful leader who had delivered popular policies. Uribe’s style is more popular than populist, but he nevertheless represented a threat, and the only institution able to stop him was the Constitutional Court, itself containing four members out of nine appointed by Uribe. Colombia, like Sri Lanka, was a near miss.

There are many other examples of constitutional courts playing democracy-enhancing functions. Yet it is too much to rely exclusively on judges to be a safeguard, particularly when liberal and constitutional norms come under sustained attack. As we have seen in other contexts, the very power of constitutional courts makes them attractive targets for the forces of retrogression. The classic question of who guards the guardians, originally formulated by the Roman poet Juvenal, forces us to consider how judicial independence can be ensured even under adverse conditions.
The comparative literature on the topic has focused on the mutual construction of judicial independence and democratic competition.Both the formal and actual power of constitutional review, one of us has argued, tends to expand as political uncertainty increases. When political parties foresee that they might one day be out of power, they tend to prefer a greater role for courts as protectors of minorities. In contrast, when one party thinks it can dominate, it tends to prefer weaker or more subservient courts. Similar arguments have been made in the context of judicial independence in democracies more generally. The mutual reinforcement among judicial power, democracy, and the rule of law is an illustration, moreover of a more general point we made at the outset: Constitutional liberal democracy has a systemic quality, and is more than just the sum of particular institutions.

The argument that judicial power is dependent in important ways on democratic competition helps explains how judges secure effective political power in the first place. But it is now subject to a kind of retrogression caveat. If courts, once created, can become a kind of instrument of retrogression, political leaders may want to imbue them with extensive formal powers once they are captured. Constitutional review plays a very different role in an autocratic context, where it can serve to repress associational rights and provide a “rule of law” fig leaf over the manipulation of elections. But this does not mean that putative retrogressors always want subservient courts. Professor Brad Epperly has argued that in weak democratic environments that characterize constitutional retrogression, neither fully authoritarian nor democratic, independent judges can serve to guarantee the post-tenure safety of leaders, providing a kind of personal insurance policy. In short, judicial independence might in some circumstances be robust to mild retrogression.

How then does one ensure it? One institutional solution that has been quite popular in recent decades is the empowerment of a special institution to manage the judiciary, potentially including appointments, promotions, removal, and budget. These judicial councils, as they are called, are now found in more than two-thirds of constitutions in force. They have been argued to protect judicial independence by giving judges a role in their own management. The academic literature on these institutions, though, is not so sanguine. In many cases, judicial councils become instruments for political control of the judiciary, rather than means of ensuring its independence. Indeed, one recent study found that only the combination of constitutional protection against removal, and appointment processes insulated from political institutions, served to enhance judicial independence in fact. More generally, the lesson of comparative experience is that judicial independence from political control is a tricky matter that requires a combination of insulating devices that account for the possibility of a sustained attack on the courts that aims not to destroy but to suborn.

2. **A Note on International Courts and Regional Organizations**

No matter how careful the institutional design, domestic judges can be subjected to pressure and manipulation, unless they have built up a stock of public or elite reputational capital. It is therefore important to think about monitors of democratic performance who might be less subject to manipulation, namely international courts and institutions. For parts of Africa, and all of Latin America and Europe, regional trade and
human rights courts play an important role in protecting constitutional democracy by adjudicating complaints against governments. For example, when Hugo Chavez sought to fire judges that were not voting as he liked, the Inter-American Court of Human Rights ordered Venezuela to reinstate them. When in 2016 the Gambian President sought to remain in office after losing an election, the Economic Community of West African States (ECOWAS) threatened to sanction the country. And after a coup d’etat in Mali in 2012 (to remove a president who himself sought to overstay), the African Union suspended the country from membership, as it has done in other instances of retorgression. These examples show that for some countries, international and regional organizations can play a significant and important role in monitoring democracy and preventing backsliding.

For a country writing a new constitution to prevent backsliding, integrating regional and international law can be a fine design choice. Providing for the direct application of international human rights treaties for example, and making them justiciable in domestic courts, is one way to do this. Providing for the superior status of international law in the event of conflict with domestic law is another strategy, as is affirming membership in regional organizations.

This strategy, however, is not available for every country and not foolproof. Regional organizations have proved themselves much more successful in supporting democracy than have international ones like the United Nations. Major regions of the world, notably Asia and the Middle East, lack access to regional instruments. For the United States, such a strategy is available: the Senate could ratify the American Convention on Human Rights, which would give citizens access to the Interamerican Court of Human Rights. Ratification alone, however, does not guarantee enforcement. Indeed, several liberal democracies—including Chile and Mexico--have failed to implement decisions of the Interamerican Court when they touch core political interests.

In sum, domestic institutions can be supplemented by regional and international ones, and there is little cost from the perspective of constitutional liberal democracy to recognizing and leveraging this fact. But implementing international decisions is not automatic, and in some cases depends on the cooperation of the domestic judiciary itself.

3. What good are the federal courts?

Whatever might ultimately prove to be the optimal process for ensuring judicial independence in most countries, we can be fairly certain it won’t resemble the American model. The process for selecting federal judges is hard-wired to be thoroughly political in Article II of the Constitution. Nomination by the president, followed by approval after public confirmation hearings in the Senate, means that the formal process is dominated by active politicians. Room for institutional recalibration without a constitutional amendment, therefore, is quite small notwithstanding the scheme’s glaring weaknesses. Nevertheless, we think that improvements to both the selection and the performance of federal judges are possible to imagine.

First, the selection of federal judges has become increasingly partisan rather than bipartisan in character with the elimination of a supermajority rule in the form of the
Senate filibuster for first lower-court and the Supreme Court nominees. In addition, the nomination process has become increasingly an arena for interest-group activity. On the political right, highly ideological groups such as the Federalist Society playing a large, almost monopolistic, role. Creation of a politically aligned bench may be pursued immediately for ideological goals, but also corrodes the likelihood that the judiciary will resist retrogression measures. Judges committed to a specific ideology (say, or deregulation and smaller government) may well be inclined to indulge the anti-democratic initiatives of a president who otherwise pursues that ideological program.

Worse, the current federal judiciary is asymmetrically biased toward those least likely to carefully scrutinize exercises of state power. Former prosecutors outnumber former public defenders three to one. Whereas four members of the Supreme Court (as of 2017) formerly had prosecutorial experience, the last one to have defense side experience was Thurgood Marshall. A majority of the current Court also formerly worked in the executive branch; only one worked for Congress. As of 2016, fewer than four percent had worked in public interest organizations (a fact that is especially striking given the number of exceedingly gifted law student we have seen take that route out of a commitment to public service). Given the concentration of prosecutors and executive-branch officials on the federal bench, it should be no surprise that remedies for violations of the Constitution by prosecutors and executive-branch officials are in a state of general disrepair. And the absence of meaningful remedies for individuals whose constitutional rights are violated by the coercive arms of the state (for example, police, prosecutors, officers of the Department of Homeland Security, and the military) should dispel any claims that former prosecutors are more diligent in policing their former peers than others would be. To the contrary, the current federal judiciary is extraordinarily state-oriented.

What might be done to secure a less lopsided, partisan, and ideologically fueled system of federal courts? Although the Constitution speaks to the roles of the President and a Senate majority in nominating and confirming judges, it does not stipulate that these be exclusive. From the mid-1950s until the presidency of George W. Bush, the American Bar Association (ABA) would provide a recommendation about the suitability of all nominees. The use of Senate supermajorities was an important institutional guarantee of moderation in appointments, the loss of which is deeply regrettable. The filibuster should be restored for all federal judges. Moreover, the Senate Judiciary Committee should examine nominations, and in particular slates of nominations, for professional and ideological variance. By Senate rule, nominations that increase the judiciary’s professional uniformity should be returned to the president’s desk. We suspect that a charge to maintain professional diversity of this kind would have beneficial ramifications in regard to other forms of diversity. More ambitiously, we think that professional organizations such as the American Bar Association should again play a larger role in crafting pools of nominees, and in vetting not just the qualifications of particular nominees, but in evaluating the effect of their appointment on the bench as a whole. The ABA is well positioned to play this role. Finally, ideological organizations such as the Federalist Society should be excluded from the process.

Second, a Congress concerned with installing a check on retrogression could enact jurisdictional statutes that enlist the courts in that endeavor. While the current
judiciary is excessively disposed to interventions that maximize its authority and prestige rather than constitutional rights, judges might yet be nudged toward greater protection of democratic institutions. Hence, statutes might assign courts a larger role not only in congressional-executive disputes over information, but also in disputes that implicate the administrative rule of law. At present, court-made doctrine imposes disabling constraints on litigants’ ability to allege partisan (or other forms of) bias. Congress could direct federal judges to allow controlled discovery and careful exposition of allegations of bias, either in the operation of federal criminal law or regulation. Moreover, the courts could play a larger role in protecting the civil service. In the 1940s, the Court invoked the Bill of Attainder Clause to protect civil servants against ideologically motivated penalties. It could revive and expand that jurisprudence as a basis for a larger degree of civil service protection from congressional measures such as the Holman rule, the targeted exercise of which threaten the institutional quality of bureaucratic autonomy and professionalism.

When it comes to ideologically motivated job decisions within the executive branch, however, the Court has moved in the other direction. In a series of cases interpreting the Free Speech Clause of the First Amendment, the Court has expanded the authority of public sector institutions to punish employees for their speech. We disagree with these decisions. Rather than pressing for their reversal, though, we think it easier for Congress to step into the breach and supply remedies for ideologically motivated personnel decisions. Federal whistleblower statutes are a good start, but are hardly adequate today. They should be supplements with more robust protections of job tenure, and penalties for officials who misuse bureaucratic resources for partisan ends.

As federal coercive capacity expands in some areas (especially immigration), corresponding checks are becoming more important. But at present there is no federal statute that allows for a damages remedy when a federal official violates a person’s constitutional rights. (There is an analogous statute, enacted in 1871, that applies when a state official violates a constitutional right). The Supreme Court relies on this absence (incorrectly) to dismiss requests for relief from plaintiffs who have suffered gross and substantial physical harms by federal officers. There are many reasons to fill this shameful gap in federal law, but one of them is the role that a remedy for constitutional torts would play in restraining the kinds of coercion and censorship witnessed in other cases of democratic retrogression. Damages remedies are no panacea (especially for a class of noncitizens, who are not in a financial or a practical position to sue in many instances), but they do provide one mechanism for bringing to light objectionable government behavior and for obtaining legal rulings to the effect that such behavior is unlawful.

One specific area in which a new judicial remedy is warranted concerns government speech. Now, when an official acting in their formal capacity slanders a private citizen—say, by suggesting that they engaged in treasonous activities—there is no remedy. Such accusations, sometimes paired with libel suits against the victims, have been a part of retrogression in Turkey and elsewhere. By contrast, if the New York Times, Washington Post, CNN, Fox News, Breitbart, or even a private citizen campaigning for office, utters a slander, the courts stand open. Certainly, remedies are not unlimited. Worried about defamation’s chilling effects on press, the Supreme Court has rightly
erected high hurdles to defamation damages in landmark Free Speech cases such as *New York Times v. Sullivan* and *Gertz v. Robert Welch*. The Constitution itself does not extend any protection from reputational harms, and the relevant federal statutes that do allow some damages action have an exception for intentional torts, such as libel and slander. This omission, however, was never intended to be permanent. Testifying about government tort liability in 1940 before the House of Representatives, Attorney General Alexander Holtzoff accepted the need for such liability, but suggested that Congress should move by increments. Of course, seventy years later, it hasn’t taken the first step. A remedy against government defamation, in fact, would be relatively easy to install. Congress should enact a judicial remedy for any person defamed by an official of the federal government speaking or writing to the public. To foreclose the need for burdensome discovery or depositions, liability would turn on whether a reasonable person in the official’s position would have known the statement was false. This standard is similar to the “actual malice” used in *Sullivan*, but would not hinge on what the official in fact knew. Discovery would be allowed in only exceptional cases if defendants’ responses made it necessary.

Finally, Congress has established specialized courts tasked with overseeing different areas of law. For instance, the Federal Circuit has a prominent role in respect to patent law. Creating a specialized court is a way to nudge the incentives of jurists toward a specific substantive aim. For example, if judges are presently too cautious about vindicating constitutional rights, why not create a special bench expressly tasked with that responsibility, and staffed with judges who have prior career experience in the vindication of the constitutional rights? This might include not only public defenders, but advocates for specific issues (think of Thurgood Marshall and Ruth Bader Ginsburg), and also former officials within the Department of Justice’s Civil Rights division. This court would be empowered and oriented toward the vindication of constitutional rights and the protection of democracy. Although some measure of Supreme Court supervision is probably constitutionally required, we note that in other domains, Congress has narrowed Supreme Court supervision to what might be the constitutional minimum, and we think that the same might be done here. The key, though, is to have judges who are specifically tasked with enforcing rights, for example through the use of professional qualifications geared to a disposition to vindicate the interests of those harmed by the government.

**D. Decentralizing and Depoliticizing Executive Power**

One potent lesson of comparative constitutional studies for those interested in checking democratic retrogression is the new ecosystem of institutions promoting what Guillermo O’Donnell calls ‘horizontal accountability,’ which involves the questioning, and eventual punishment, of unlawful or self-dealing uses of official responsibilities. We turn now to the questions whether some of these can be arrayed in a new constitution as safeguards against retrogression, and also whether the U.S. Constitution can be supplemented with institutional checks. Our proposals for constitutional and institutional reform interact with the ideas of constitutional design laid out in the first part of this chapter. Because the functions of oversight and accountability can be separated from the primary government functions of making and executing laws, we need not rely on those
primary institutions to achieve accountability. Many constitutional democracies have parliamentary systems of government, and do not appear to suffer from greater levels of corruption, mismanagement or propensity to backslide. Indeed, there is significant evidence that parliamentary systems are less prone to these things, especially corruption.84

Before turning to specifics, we think it is worth airing and rejecting two intertwined objections. Some influential scholars have argued that restraints on executive power are doomed to fail. Drawing on Carl Schmitt’s theory of the exception, for example, Adrian Vermeule has advanced the claim that administrative law is “Schmittian” insofar as it is riddled with gaps and “openly lawless” domains.85 With his co-author Eric Posner, Vermeule has also characterized efforts to constrain executive discretion with respect to national security matters (and more generally) as futile.86 These and other commentators conceive of retrospective elections as the primary and indeed only effective constraint.87 There is much to be said in response to these rich celebrations of unbridled power.88 Neither theory nor practice, however, in our view supports the conclusion that a powerful executive branch will be constrained by prospective electoral pressures, or that checking institutions are exercises in futility. We perceive no general reason to think that executives will deploy their authorities solely for the public good. We do not think that it is impossible to establish a bureaucratic structure characterized by legality, regularity, and due regard for the administrative rule of law. It is, by contrast, a folly to think that retrospective voting will generate appropriate pressures to conform the uses of government power to the social good. For one thing, it requires heroic and unsustainable assumptions about what voters know, and how they use that knowledge.89 Our accumulation of case studies of retrogression and reversion is proof enough on that point. Finally, there is no logical or functional inconsistency between the delegation of broad administrative and security powers and the installation of internal and judicial mechanisms to superintend the proper use of those powers. To the contrary, those checks supply a means of verifying that executive power, when used, is in fact based on actual expertise and motivated by some version of the public good—as opposed to founded on errant fear or prejudice, or oriented toward partisan degradation and the erosion of future democratic checks.

1. **Horizontal accountability in new constitutions**

Modern constitutions are replete with examples of horizontal accountability. For example South Africa’s Chapter IX of the Constitution provides a set of “state institutions supporting constitutional democracy” including the Public Protector (a kind of ombudsman); a Human Rights Commission to promote and protect human rights; a Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities; a Commission for Gender Equality; an Auditor-General; and an Independent Electoral Commission. Many other constitutions have similar bodies, along with counter-corruption commissions, judicial councils, civil service commissions and other bodies. The typical constitution today has four such bodies and the number is increasing, as the following figure shows.
An important institution of horizontal accountability increasingly found in constitutional practice is the ombudsman. The latter originated in Sweden in the early nineteenth century, and thereafter spread to many other constitutional democracies. While they come in a range of different institutional forms, all designate an official to monitor the conduct of public administration for legality, and in some versions, its fairness. The particular form of the office varies. In some countries the ombudsman is a plural office while in others it is a single individual. The most powerful ombudsmen can investigate, report and even bring legal cases against any government agency. For example, in South Africa, the Public Protector can investigate ‘any conduct in state affairs, or in the conduct of public administration in any sphere of government’ that is alleged to have been ‘improper, or to result in any impropriety or prejudice.’ This office was critical in investigating the misuse of public funds to upgrade President Zuma’s family compound, finding that the President should pay back some of the expenses in a 2014 report. President Zuma complied by paying back roughly half a million dollars in 2016 (raising questions, in so doing, about how he earned that money!)

A modern day Madison would surely adopt such horizontal accountability institutions within the scheme of government. She would not rely on inter-branch competition, federalism, and retrospective voting as the only mechanisms to check government. As we have seen, both the horizontal and the vertical separation of powers
are incomplete responses to the problem of democratic retrogression (let alone to the problem of misused governmental power more generally). Civil service commissions, for example, help to insulate meritocratically elected bureaucracy from patronage based appointments. They do so by providing overall policies for and supervising the hiring, promotion and retirement of officials based on neutral criteria. More than a fifth of national constitutions have a provision for such an institution. At least seven U.S. states also have them. While their design varies, their basic intuition can be translated into many other national contexts.

Ombudsman are not unique. They are often supplemented by offices devoted to identifying and punishing high-level corruption, which is a blight on many new democracies. Various independent election bodies help draw district boundaries, maintain accurate voter rolls, and ensure fair polling and counting practices. There seem to be substantial potential benefits associated with each of the horizontal accountability institutions, which may or may not materialize in any particular context. But it is also worth noting that there is a potential benefit from having not just one, but a network of checking institutions. While more institutions by definition increases the complexity of government, along with its cost and inefficiency, such costs are offset by an important quality in the context of retrogression: A set of accountability institutions means that a putative autocrat must capture more of them in order to achieve total control over a political system. One can view institutional duplication as a kind of insurance policy against the failure of any particular institution, in which case multiple and overlapping accountability institutions is an advisable constitutional design.

2. Checking presidential administration and the bad faith use of Article II power

What of the U.S.? Written well before the advent of the modern administrative state, Article II of the Constitution is vague and unrevealing about the structure and functioning of the government today. It contains none of the institutional innovations discussed above, or in Chapter 6. This is a deficiency—evidence of the Constitution’s age and its concomitant inability to account for new learning. Ironically, the spare quality of Article II’s text has left space for a good deal of creative thinking by constitutional scholars about how the Constitution speaks to executive power. Much of this scholarship, which is explicitly ‘originalist’ in bent, ignores the revolutionary context in which the colonists repudiated royal rule, in favor of diligent attention to the first decades of the Republic—after the Constitution’s adoption— which marked a period of nation-building and correspondingly ambitious and extensive claims about executive power. Political actors, however, are likely to behave quite differently in the run-up to a constitution’s adoption, and the first period after that adoption. Given that variance, we think it is possible to cherry-pick the historical record for many different accounts of the presidency depending on the felt needs of the historical moment. Casuistic accounts of particular historically situated debates, moreover, do not advance our understanding of how best to respond to the contemporary problem of retrogression. History furnishes evidence. It doesn’t dictate solutions.

More recently, scholars on the left and right have praised what Elena Kagan calls “presidential administration,” in which the White House finds means to render the regulatory activity of the executive branch agencies as an extension of the President's
own policy and political agenda. According to Kagan’s foundational account, this explicit centralization and politicization of the bureaucracy was justified because it promoted both transparency by “enabling the public to comprehend more accurately the sources and nature of bureaucratic power,” and accountability because “presidential leadership establishes an electoral link between the public and the bureaucracy.” Kagan’s approach is consistent with a centralizing tendency in the Supreme Court’s approach to the law of executive-branch appointments and removals, as well as with political science literature that emphasizes public assignment of blame and credit to the president, regardless of the actual responsibility. Along with pro-executive readings of the eighteenth-century history, it provides the main intellectual support for judicial acquiescence and support for broad presidential control of the bureaucracy.

But no project of anti-retrogression immunization that aims at cultivating professionalism and independent horizontal accountability can prosper when presidential administration provides the dominant framework for viewing executive power. So unsurprisingly, we are skeptical of its merit. We are not convinced, to begin with, that the democratic legitimacy and transparency gains to be had from presidential administration fully offset the costs it creates through its centralizing and politicizing tendencies. Even if presidential administration might look attractive when a sympathetic president is in the White House, facing a hostile White House, it cannot be evaluated without thinking about the worst-case state of the world—in which a reckless and incautious president stands at the helm. Hence, we think the project can be abandoned without much harm to the values it seeks to promote.

To be more specific, it is not at all clear that public attributions of responsibility are influenced by the internal organization of the executive branch (and Kagan’s work identifies no evidence to suggest as much). We think it is more likely that the public attributes responsibility for new policies to a sitting president without regard to the extent of centralization within the executive. That is, we would predict that the public applies the same notion of accountability to an immigration-related executive order from the White House and a financial directive that emerges from notice-and-comment rule-making within an independent regulatory agency. Even if there was a difference in public perceptions of accountability, we are skeptical that this would make much practical difference. Presidents are responsible for many different policy domains. A small number are consequential, and will elicit attributions of presidential responsibility regardless of policy-making form. (Immigration is a good example of this during the Obama-Trump era). The overwhelming number of policy decisions, though, are simply inconsequential in determining public approval of the president.

On the other side of the ledger, we think that the maintenance of an independent, professional bureaucracy oriented toward advancing policy ends defined by statute is both intrinsically valuable and extrinsically important to checking retrogression. However beneficial it might be when a president is well-intentioned, presidential administration presents clear risks of partisan policy distortion and politicization of the bureaucracy in ways that are inconsistent with a robust administrative rule of law. This is not lost on the agencies themselves, which take precautions to insulate themselves where possible from presidential control.
Liberals and conservatives alike have been captivated by the prospect of a decisive president capable of slicing through the Gordian knot of American politics to achieve great things for the people. Although we agree that deadlock is undesirable—and indeed have already suggested some solutions—we do not think that giving up on bureaucratic autonomy is a worthwhile stratagem. The independence of the bureaucracy—as much as it is maligned in American political culture more generally—is a crucial component of the rule of law, and thereby an essential element of constitutional liberal democracy. Because it functions as the implementing arm of elected actors, the bureaucratic decision about whether to cooperate with a populist program of retrogression determines whether such a program can succeed. Increasing political controls over the bureaucracy hence creates considerable risks. A bureaucracy that is filled with members loyal to political factions—like the patronage-based systems of some developing countries and the early United States--undermining the power of the state to achieve democratically approved programs. It also means that bureaucrats may be tempted to support retrogression. Programs of retrogression can become self-fulfilling in this regard: where bureaucrats think they are likely to succeed, they may rush to support the putative autocrat. In contrast, where bureaucrats believe that power will continue to alternate, they are likely to resist efforts to politicize their activities.

We think a number of measures can be taken that can reduce retrogression risk without compromising other structural goals. First, the legal protections of bureaucratic autonomy can be increased. The United States already has statutory protections for the bureaucracy in terms of some merit-based appointment and statutory bodies such as the Office of Personnel Management and the Merit Systems Protection Board. In addition, the Hatch Act prevents officials from using their position to engage in political campaigns while in office. Empirical work by political scientist David Lewis finds that these protections already conduce to a bureaucracy that understands itself to be bound by “legal, moral, and professional norms” notwithstanding contrary presidential directives.

Ideally, these protections would be constitutionalized. We see little prospect for that now, to be sure. Nevertheless, they should, where possible, be strengthened, and not rolled back. Measures such as the deceptively captioned “Promote Accountability and Government Efficiency Act,” introduced by an Indiana Republican, which would eliminate tenure protections and allow the reproduction of the nineteenth century spoils system, would increase politicization, make fraud harder to detect and corrode the quality of government services. A better move would be to expand the number of nonpolitical, career positions; strengthen protections for whistle-blowing both internally inside the executive and externally to Congress and the media; and impose mandatory qualifications on political appointment related to the skills and knowledge necessary to the relevant agency’s mission. In addition to limiting White House control of personnel, the Holman rule should also be abandoned as inconsistent with sound government under the rule of law.

Second, federal statutes create several governmental offices that play an ombudsman-like role of identifying fraud, abuse, or criminality, and acting upon it. These include the Office of Government Ethics, the Government Accountability Office, and the
several Inspectors General who sit in many government departments and agencies pursuant to a 1978 statutory reform. Privacy offices in the Department of Homeland Security and the Department of State are supposed to monitor the intrusiveness of their home agency’s action. Under President Obama, moreover, new offices of civil rights and civil liberties were installed in national security agencies such as the National Security Agency and the Department of Homeland Security. These offices provide neutral assessments and investigations of corruption, mismanagement, rights violations, and ethical violations. While these systems have fallen short at times—in particular on national security matters, where congressional and ad hoc investigations have taken up some of the slack—they nonetheless provide the kernel of an effectual accountability system for all but the top echelons of the federal government.

Nevertheless, all of these institutional mechanisms of horizontal accountability could be considerably strengthened, including through increased powers, greater funding, and a measure of autonomy from political control. Because these institutions are diverse, we offer a series of illustrations, focused on the Office of Government Ethics and the Inspectors General System as starting points for reform. Hence, the former head of the Office of Government Ethics Walter Shaub has argued that the office requires additional authority to obtain information from the White House, and further authority to communicate directly with Congress on budgetary and legislative matters. Having grappled with the Trump White House’s tangle of ethical conflicts, Shaub persuasively contends that it is not only these new authorities that are needed now, but also additional laws imposing ethical rules on presidents respecting financial and familial conflicts of interest.

The Inspector General system also has important gaps that could be stanched by statute. At present, numerous departmental heads, including the Attorney General and the Treasury Secretary, have broad authority simply to shut down Inspector General investigations. Other departmental heads have broad authority to preclude investigations merely by citing a risk that national security-related information will be disclosed. These limitations are unwarranted. There is no reason, for example, why national security information cannot be appropriately handled by an internal investigation, and no general reasons Inspector General reports cannot be published in redacted form without compromising matters that genuinely require secrecy. More generally, Inspector General investigations should be backed by greater formal powers to elicit information, and if necessary force the declassification of such information, in addition to a more robust and predictable stream of funding than is presently the case. Finally, privacy and civil liberties offices within agencies and departments could be placed on a firmer statutory footing, given formal investigation powers, and even permitted to seek relief in court on behalf of aggrieved persons both inside and outside the government. Many of the objections lodged when the victims of misfired counterterrorism sue would lose their force of these victims could claim an institutional sponsor when seeking relief from a court.

Third, these reforms do not address malfeasance or law-breaking at higher levels of office, including the Presidency. These investigations are typically managed at the moment by the Department of Justice, which is headed by the Attorney General, who is a
direct appointee of the President. Where high-level malfeasance is suspected, federal regulations permit the Attorney General, or a person acting in his stead, to appoint a ‘special prosecutor’ or ‘special counsel’ to pursue a criminal investigations, and potentially issue indictments, when it is “warranted” and “in the public interest.” The special counsel can only be fired by the Attorney General, and can only pursue criminal investigations within a mandate defined, again, by the Attorney General. Once an investigation ends, the special counsel must file a confidential report with the Attorney General, although it is at least arguable that the special counsel would have authority to make public his or her findings through a formal “presentment” to the grand jury. For example, Deputy Attorney General Rod J. Rosenstein appointed former-FBI director Robert Mueller in May 2017 to oversee an investigation into the Trump campaign’s potential contacts with Russia.

Special counsels, however, have neither statutory nor constitutional protection from termination. The relevant regulations stipulate that the Attorney General needs “good cause” to fire a special counsel. But this is a very elastic standard. In practice, it is more realistic to think that only the anticipation of political costs checks a president from coaxing their Attorney General into getting rid of a special counsel. In this regard, they are quite unlike the “independent counsel” office created under Title VI of the 1978 Ethics in Government Act, which lapsed in 1999. The independent counsel had power to investigate and prosecute high-level misconduct, and was statutorily insulated from termination except for “good cause.” It did so in more than fifteen cases. Despite a record of successful investigations, the idea of an independent counsel was heavily criticized both on constitutional grounds, and also for enabling open-ended, and arguably politicized, investigations of sitting presidents, with Kenneth Starr’s sprawling Whitewater investigation being the leading example.

The former constitutional criticism is based on a theory of the “unitary executive” that we reject. The latter criticism, by contrast, conflates the pathological misuse of the Act (allegedly, the Whitewater investigation) with its modal deployment. It assumes the fault is with the Independent Counsel’s powers as opposed to the dubious choice of counsel made by the initial body of appointing judges in the Whitewater case. As an early and important piece of scholarship by Ken Gormley demonstrated, there are numerous ways of narrowing or tweaking the Ethics in Government Act to deal with the problem of truly runaway prosecutors. Indeed, as legal scholar David Strauss has pointed out, merely “insisting that executive officials operate within, not outside, a bureaucracy” might be sufficient to create horizontal checks on abusive investigations to assuage earlier concerns. Repudiating the whole enterprise of independent investigations of high-level misconduct without accounting for the possibility of reform is the proverbial tossing out of the baby with her bathwaters. Rather, it is past time that a more robust statute enabling investigations into high-level investigation be installed so that the next time it is needed, the relevant mechanisms are in place.

Fourth, and finally, there is the problem of political influence over prosecutions and related investigative activities. Consider the case of criminal prosecutions. Federal statutes currently provide that “the conduct of litigation in which the United States is a party is reserved to officers of the Department of Justice, under the direction of the
Attorney General,” but leave the operationalizing of this command to elected actors and their delegates. As a result, conventions and norms, not regulations or statutes, regulate the White House’s communication with prosecutors in the Justice Department, safeguarding against the risk that specific criminal investigations or civil matters might become politicized. Hence, under a 2007 memo issued by then-Attorney General Michael Mukasey, communications between the White House and the Justice Department concerning ongoing cases, investigations, or adjudicative matters could take place only when necessary for the discharge of the President’s constitutional duties and appropriate from a law enforcement perspective. But conventions and memos lack the force of law. As the first few months of the Trump Administration demonstrates, they could be flicked aside given sufficient disregard for the neutral administration of justice or the appearance thereof. The subsequent firing of FBI Director James Comey simply served as a graphic illustration of how presidential control over personnel—prized by both the unitary executive theorists and by presidential administration advocates—could be directly employed to attempt to stymie lawful and proper criminal investigations that touched on either the President or his close associates.

Although traditionally Justice Department lawyers have maintained a sense of fidelity to the law over political direction, there is no structural reason that this norm could not be undermined through the appointment of an aggressively partisan Attorney General with personal loyalty to the President. We therefore think statutory reform is needed to insulate the prosecutorial function from White House communications, except in the exceptional circumstances anticipated by the Mukasey memorandum. The Comey firing merely underscores the importance of an independent element of the Justice Department tasked with the investigation of high-level criminality without any possibility of White House interference or suasion.

All this makes for a daunting reform agenda. But it is worth emphasizing that our list of reforms here is not complete: We anticipate that future forms of misconduct will reveal the need for additional safeguards. Moreover, none of our suggestions will be foolproof. Most importantly, institutions of horizontal accountability can themselves become corrupted and politicized. Indonesia’s powerful counter-corruption commission, for example, developed an early reputation as a highly successful institution, prosecuting myriad cases in a context where corruption had seen endemic and unavoidable. In 2012, though, the commission’s standing was badly damaged when its own chairman was found to have been taking bribes. This sort of self-inflicted wound can happen in any system (indeed, some might view the Whitewater investigation as an example). Nevertheless, the lesson of recent constitutional design innovations is that dispersing power minimizes the probability of significant harm resulting, because other institutions can guard the guardians. There is no guarantee that any individual institution will be immune from capture—just the possibility that a plurality of such institutions will be harder to subdue than a single one.

E. Protecting the Public Sphere

We have to this point been mainly concerned with the manner in which government is structured. It is time to pivot to the question of how the Constitution and laws organize the private sphere. This is principally a matter of how the liberal rights of
speech and association are to be vindicated. But it spills over into questions of how associations are to be regulated. As before, we first begin by asking how a new constitution’s designer should account for the risk of retrogression, before turning to the related question of how retrogression risk might be mitigated in the United States.

1. **New constitutions and the public sphere**

Democracy, in its ideal form, is a system in which parties compete on policies, preferences and values. The possibility of a meaningful policy debate requires to some extent a common epistemic basis for these contests. You may prefer lower taxes to more equality, and I may prefer the reverse; but unless we can at least agree on most of the factual questions related to these different policies, our debate is likely to deadlock quickly. Democracy therefore depends to a degree not generally appreciated on neutral institutions to produce unbiased information and then evaluate and disseminate it. Facts are common property; it is their implications that ought to be contested. Neutrality in the production of primary data is therefore a bedrock of democracy, while pluralism in their assessments and interpretations enables and informs partisan competition. When both influential private actors and public figures trash both the value of factual accuracy, and also the public’s traditional sources of facts in favor of systematically misleading and erroneous sources, we think that the quality of democratic contestation necessarily deteriorates. Similarly, when the sources of information and analysis are constrained, the epistemic basis of democracy is threatened.

There are powerful forces working to undermine the public sphere in many countries. The economics of the media business have led toward ever-greater consolidation, even as journalism itself has been radically decentralized. There are fewer truly authoritative sources of news, and there have been systematic attacks on those that remain by the forces of retrogression, who know a soft target when they see one. Government officials have stepped up libel prosecutions in some countries. Civil society, too, is under significant and sustained attack in many countries, with core freedoms of association, expression and assembly violated in more than half the world’s countries in 2015. The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has described this wave as an “ideological pandemic.” A key mechanism is the use of legislation to hinder civil society’s ability to attract funding, to protect excluded groups, and to disseminate information. Libel law is a common tool as well. Retrogressors and dictators alike learn from each other, and understand that epistemic competition is the enemy of political consolidation.

The associational rights central to democratic life depend, like all rights, on politics and courts to protect them. These institutional features are hard to engineer, but careful and thorough articulation of the rights in constitutions may go some way, at least in certain contexts. While there is no foolproof way to articulate a bill of rights, anticipating the challenges to implementing rights is helpful. So, for example, defining exceptions narrowly and carefully, and making clear that criticism of the government is constitutionally allowed, can help to head off some attacks.
Many countries have media commissions to help ensure fair use of the media, as well as to assign rights to the broadcast spectrum. While these are obviously work as two-edged swords, in that they can be used to control information, they can play one particularly important role when it comes to preventing retrogression: ensuring adequate competition among media outlets and that no single source gains monopoly power over the news. Whether or not this will serve to enlighten the public in our post-truth era, it at least ensures that oligarchs who own media companies are in competition with each other.

2 The American public sphere

The ideal view of democracy does not describe the contemporary United States. Liberals and conservatives are increasingly divided in values and beliefs—with the exception of their shared fear and distrust of each other. The common ground of shared public facts is under threat across several fronts. One relates to the trustworthiness of news sources. As candidate and President. Trump has fiercely and consistently attacked the integrity and veracity of news sources such as the New York Times, Washington Post, and CNN that report critically on him, even as he has embraced websites such as Breitbart that have a consistent track record of false and hate-filled reporting. Trump’s view of “mainstream” news sources as full of “fake news” is shared by almost two-thirds of the public. It is easy to see how these beliefs can facilitate even the crudest forms of democratic retrogression. Imagine, for instance, that the government starts a program of investigating and prosecuting political enemies, or installs a policy restricting the movement within cities of people based on their religion, race, or ethnicity. Even if facts about such policy were known, would the truth or falsity of purported explanations for such policies be widely disseminated and credited? A world in which established media is distrusted is a world in which both coercive measures and subterfuges targeting democracy’s persistence are far easier to achieve.

To put our cards on the table, our view is that media such as the New York Times, the Wall Street Journal and CNN, while far from perfect, do try to follow a code of journalistic ethics that prioritizes factual accuracy and the suppression of bias. We think that Breitbart and its ilk do not. When President Trump attacks the Times or CNN in a fashion quite unlike any other president, he is trashing the possibility of shared epistemic premises for our democracy in service of partisan advantage, and possibly for his own psychological demands. Our willingness to credit established news sources, while viewing with suspicion those that lack a record of journalistic integrity, may be a minority position. But we believe it is the position best supported by the available factual record, and the most normative consistent with democratic participation.

While many retrogressing democracies have been stricken by the aggressive use of libel laws or NGO regulation, the United States has not to date seen either these forms of suppression, or more overt forms of censorship and suppression. The country still has a vigorous press and a lively associational life that generally seems inclined to stand up to direct attacks by the state. Nevertheless, we think that one of the most serious threats to constitutional democracy in the United States derives from a steady degradation of its public sphere, and in particular the acceptance of a shared universe of facts upon which debate about policy choices can be made. To be clear, this erosion of the shared epistemic
premises of democracy is partially due to the behavior of political figures such as President Trump, who find misrepresentation or outright lies quick to the tongue, and who find contempt and verbal violence against the news media just as convenient. Nevertheless, we think the fragility of democracy’s epistemic premises runs deeper, and relates to the larger trends of partisan polarization and sorting by ideological beliefs that the United States has been experiencing for some years now.

Another element of the factual foundation of the public sphere that has deteriorated the diminished public standing of science as a source of trustworthy knowledge. Consider two recent findings from polling (which, we hasten to add, is as much an art as it is a science!). In 2016, a majority of self-described conservative Republicans believed that climate scientists’ findings concerning global warming are motivated by their own political leanings, and a desire to advance their careers.117 These respondents therefore do not really believe that science is a neutral enterprise devoted to truth-finding (and yet are happy to take medicines that have been subject to scientific testing, and to listen to doctors who employ the same scientific method). Lest you think that this disregard of basic science is a partisan phenomenon, consider that almost twice the number of Democrats believe that the basic childhood vaccine for measles, mumps, and rubella is unsafe.118 Liberals, no less than conservatives have their convenient (and at times dumb) beliefs too.

To date, neither distrust of science nor reliance on junk science has seeped into the law—but even here there are worrying signs. For example, in upholding a controversial restriction on abortions, Justice Kennedy recently relied on a body of controversial (and, in our view, false) scientific studies about women’s regret after terminating a pregnancy.119 Proposals to allow administrative agencies to rely on political justifications rather than empirical data, by contrast, have yet to gain traction.120 But the fracturing of democracy’s epistemic ground presents a serious problem: Indeed, there is some evidence that once a false belief (say, in the connection between vaccines and autism) is assimilated, a person responds to falsifying evidence by switching from factual to normative grounds for their position.121

How might we start to go about responding to these deeply worrying trends? We concede up front that this is an enormous task of civic education, that implicates the structure and function of education from an early age.122 Our proposals focus on the top-line of constitutional and institutional design, since we cannot flesh out a more general program here.

To begin with, we should rethink the role of the First Amendment. In a recent set of Tanner Lectures criticizing the Supreme Court’s recent campaign finance decision *Citizens United v. Federal Elections Commission*, Robert Post develops the important point that the First Amendment speech and association cannot be understood outside the context of the government institutions—such as legislatures, elections, and courts—that those rights are supposed to enable. In the institutional context of elections, Post observes, government necessarily places a large managerial role in relation to private speech, including decisions about who gets to appeal to voters by appearing on the ballot. In other contexts in which the state assumes a managerial role to achieve democratic ends—the legislature, the courtroom, and the schoolhouse, for example—the First
Amendment allows speech to be regulated with the aim of furthering the democratic function of the institution. Elections, he posits, are no different, and speech regulations must be understood as functions of the underlying aim of election integrity and management. Although Post focuses on the regulation of campaign expenditures by corporate entities, his general analytic framework extends to the issues that interest us. Elections require vigorous and adversarial speech, but are distorted by the absence of shared epistemic premises, just as they are distorted by speech that implicitly or explicitly threatens violence or attempts to silence by invocation of hateful anti-Semitic or racist imagery, or worse, racist or anti-Semitic violence.

In a world without political constraints, and where the federal government was well-functioning, we would argue that an independent entity capable of promoting a shared epistemic basis for elections, and of maintaining the channels of political contestation free of explicit and implicit violence, would be of great value. Such an institution would restrict candidates’ and officials’ attacks on the press, while working to promote a culture of journalistic integrity. Such a body might also focus on appropriately tailored solutions to institutions that purposefully disseminate false news, perhaps in collaboration with a foreign government, knowing that the news is false and intending that it distort the electoral process. At present, we see no prospect that such an institution, sufficiently carefully designed, could be adopted, or, if adopted, would work well free of political capture. As a lesser ambition, we think that there may well a much greater role for informational intermediaries such as Facebook, Twitter, and Google to play in crafting platforms that limit, rather than enable, the dissemination of false news (although research into how they might do so remains in its infancy). We should learn from the efforts of other states, such as Germany, which are more actively grappling with the problem, but not assume solutions are either non-existent or straightforward. It may be that the lesson of these tentative measures is that the regulatory tools simply do not exist, or that private forms of regulation work better. Assuming an answer to that hard problem in advance of a careful learning process, however, would be a mistake.

Second, we think there are potential solutions to the erosion of scientific authority. Consider, for example, a high-level commission, not directed at specific policies such as climate change, rather focused on the idea of science and neutral and provisional methods of fact-finding as the basis of policymaking. (Call it “Make American Science Great,” if you really want to provoke). This body, comprised of experts and political leaders from both sides of the aisle, would be tasked at exploring the role that science already plays—in the technologies we adopt and the medicines we take—and in reaffirming the idea of both public-policy making and informed scientific progress on the basis of verifiable and transparent evidence and procedures, would have important consequences. This body would reaffirm what Karl Popper noted several decades ago—that the scientific method, based on provisional knowledge developed using open and transparent methodologies, has significant social and political implications.

An open mind to scientific progress is also one that is open to new political information. This attitude is liberal in its classical sense, and is still embodied in the First Amendment, which is radical in its epistemic openness and a genuine mark of American
exceptionalism. We recognize that such an effort would presently run up against powerful headwinds in the form of industrial interest groups that are specifically opposed to the dissemination of climate science. But we think that meeting this effort by embracing science and its self-correcting methods is far better than defeatism.

A related set of solutions emphasizes the defense of the values of civility and citizenship within the public sphere. The era of the 24-hour news cycle, continuous political campaigning, and endless background noise seem to be incompatible with idealized notions of civic engagement by a politically informed electorate. The demands of citizenship now are higher than ever, even as our attention to civics is declining. Incentivizing civic knowledge and civil debate is a task that can engage educational institutions, governments, foundations and churches—a worthy national project for a divided society. There are some heinous and hateful views that have no place in a decent democratic society—and as such are worthy of neither respect or consideration—but we think that both sides of the political aisle have far to go in their efforts to understand the concerns and priorities of those on the other side of the partisan divide.

None of this will be easy, or even sufficient, in the absence of broader cultural change. The difficulty is hardwired into American constitutional culture. The First Amendment provides a powerful hook for the idea of the open society, even as it may contribute to the undermining of the very openness. Americans’ support for the First Amendment remains strong (although though thirty-nine percent of Americans cannot name any of its freedoms). For those who understand it, however, the First Amendment embodies the open society. But it also stands for the idea that government cannot step in to prevent the development of a public culture in which the enemies of democracy and its epistemic predicates prevail. The institution-focused analysis offered by Post offers a way to reconcile these tensions. But it is not currently the law, and even if it was the law, it seems fair to say that the Trump White House does not have a great fondness for factual accuracy. As a result, the paradox of the First Amendment—which is also the paradox of liberal constitutional democracy rendered in miniature—will continue to bedevil us.

F. Cultivating Political Competition

The final mechanism of democratic retrogression involves attacks on electoral competition, either directly by assailing political foes with brute force or the coercive powers of the state, or indirectly by rigging the system to ensure one-party rule. Once again, we proceed by taking up the situation of new constitutions, and then turn our attention to the American scene. Once again, we caution that our analysis focuses on the top-line question of constitutional design. Since election maladministration takes many forms—not all of which can or should be regulated by constitutional law—our suggested reforms are necessarily only part of the project of building free and fair elections.

1. Seeding robust democratic competition in a new constitution

Many new constitutions have established a non-partisan electoral commission as a safeguard against partisan capture of the electoral machinery. We estimate that some 45% of constitutions currently in force have such a body. In some, it is the only administrative
entity to be elevated to formally entrenched status in the constitutional text; in others, it is one of several such entities. In either case, formally entrenching this body in the constitution sends an explicit and powerful signal that election administration should be free of partisan interference. The same effect can be achieved, albeit more weakly by statute, and democracies that lack a constitutionally mandated election commission generally create one by statute on par with other important administrative entities.128 The United States’ failure to do so makes it an outlier—and not one that deserves emulation. Although the U.S. Constitution assigns the design of electoral machinery to political actors, the possibility of non-partisan election administration has not entirely vanished in the domestic context. Instead, thirteen American states currently use such commissions for state districts. According to legal scholar Nicholas Stephanopoulos, the political systems of these states are more politically responsive than those in states where districts are drawn by the partisan legislatures.129

Independent election bodies that assume all aspects of election governance, including the resolution of election-related disputes, have been particularly important in Latin America. The modal approach there, initially adopted in Uruguay in 1924, and then diffused across the continent, has been to create a special branch of the judiciary with jurisdiction limited to election-related matters. These tribunals manage elections from the voter registration process to the certification of results, and have been crucial in resistance to retrogression. In Mexico, for example, the interventions of the Mexican Supreme Electoral Tribunal were “critical” in loosening the one-party rule of the Partido Revolucionario Institutional (PRI).130 Tellingly, an important element of this body’s success was its nationalization of disputes over gubernatorial elections that had previously been resolved on a provincial level.

2. Saving democracy, American style

As we saw in Chapter 5, the American system of managing elections is deeply flawed. There is no consistent professional management of elections. At the state level, secretaries of state elected in partisan races, and committed to partisan ends, are too often in charge of printing ballots, managing voter registration, and organizing polling. As the 2016 election demonstrated, the integrity of election administration in the face of a concerted web-based attack targeting either voter data, or even the enumeration of ballots casts, is far from certain. Seemingly because recognition of this vulnerability would compromise his own sense of electoral victory, President Trump has declined to recognize properly, let alone act upon the consensus view of the U.S. intelligence community, that Russian intelligence or its proxies attempted to hack election-related networks. In the short term, therefore, the prospects for administrative rule-of-law in respect to election management in the United States is dimming.

The Constitution, on the one hand, works as a significant barrier to meaningful professionalization of election administration at the national level. Article I, section 4, commits election administration to state legislatures (although the Court has wisely declined to disallow states from delegating certain election-related tasks to neutral, expert bodies). This federalization means that reform of election administration must to a large
extent proceed on a state-by-state basis. It is only the likelihood that foreign sovereigns will continue to attack election infrastructure, engaging in increasingly aggressive efforts at shaping American political outcomes (accelerated by the Trump Administration’s unwillingness to reckon with the threat) that in the medium-term might prompt a shift to greater national control, standardization, and professionalization. The deleterious effects of federalism on election administration might be mitigated were a judicial remedy available for excessive partisan gerrymanders. Litigation on that question, however, remains ongoing at the time that we write.

3 A Note on Reviving Democratic Participation

Many of the institutional solutions that we have surveyed are drawn from existing constitutions, addressed to a hypothetical designer of a new constitution. Yet, because the challenges to liberal constitutional democracy are occurring in many parts of the world, we would be naïve to suggest there is an ideal design that can immunize a polity completely from the threat of retrogression. Globally, we are suffering in part from what David Van Reybrouck calls “democratic fatigue syndrome”: the configuration of low voter turnout, declining support for political parties, chronic electoral campaigning, among other things, that exhausts public support for democracy as a system.131 His diagnosis relies on the reduction of democracy to its representative form, and the reduction of representation to elections. This technology of facilitating participation, the core of constitutional liberal democracy, is hopelessly outdated. How many inventions of the late eighteenth century, he pointedly asks, are still of much use in the present day in the same form? What have become of the stagecoach, the air balloon, the snuff box?

Van Reybrouck’s remedy is to reinvigorate direct and deliberative modes of political participation, including deliberative polling, citizen assemblies, and random selection of legislators. These new forms of political participation have been the subject of much experimentation around the world, particularly at the subnational level. Some well-known examples include participatory budgeting, developed in the Brazilian city of Porto Allegre, in which citizens come together to select projects for funding under limited budget constraints; British Columbia’s 2004 revision of its electoral law by a randomly selected set of 160 citizens; and the Icelandic process of drafting the citizens constitution in 2011 and 2012.

Iceland’s experiment in democratic constitution-making was, in many ways, the first serious attempt to design a constitution in the social media era, with its possibilities of round-the-clock transparency and engagement. While many countries have had Twitter revolutions, and the social media have been used to monitor and mobilize support for constitution-making, Iceland’s constitution-making process involved unprecedented mechanisms of ongoing direct public involvement. 1000 randomly selected citizens came together to generate ideas for the constitution; 25 citizens were elected to a drafting commission, with the only qualification requirement being that they not be existing politicians. The process included the release of several drafts, and online input from the public.

While the draft was not ultimately adopted (it required the formal vote of the existing parliament, which declined to pass it) it has inspired several other efforts to
incorporate participation in constitution-making. In 2016, Chile’s government facilitated small group discussions that involved 200,000 citizens in deliberation about the directions of constitutional reform. Mexico City drafted a new constitution in 2016 using 100 member assembly made up of randomly selected citizens and a minority of political actors and civil society representatives. Mongolia held a deliberative poll on constitutional design in 2017.

In the United States, California candidate for Governor John Cox has proposed a “neighborhood legislature” in which there would be many more legislative districts that would in turn select a smaller group of lawmakers. Other proposals are more theoretical, such as that developed by former Vermont legislator Terrill Bouricious of an elaborate system of interlocking bodies using sortition. Bouricious has a scheme in which different legislative tasks are assigned to different bodies, some selected for fixed terms and others temporary, with complex interactions.

All these experiments in constitutional design suggest that our existing institutional vocabulary may not exhaust the possibilities of constitutional liberal democracy. We are supportive of such experiments, and think they have some promise for reviving democratic participation through innovative institutional design. At the same time, we have no evidence that mechanisms of sortition, citizen deliberation and so on can work on the scale of a large country like the United States. In particular, we simply do not know what constitutional liberal democracy at the national level might look like without political parties. In the absence of comparative evidence to the contrary, we remain agnostic. In addition, our focus is not on improving constitutional democracy so much as maintaining it in the face of retrogressive challenges.

G. A Final Note on Emergencies

We conclude by drawing attention to one final area in which the U.S. Constitution has lagged in terms of constitutional design—emergency powers—where the relevant risk is one of reversion rather than retrogression. Although we think the risk that emergency powers will be directly misused to dismantle democracy, they are sufficiently worrisome in the context of new constitutions that they warrant a brief mention. In the teeth of that worry, there are relatively promising models of how an effective system of emergency powers might be designed to minimize the risk of democratic backsliding.

The first design lesson from other countries is that the key design decisions should be specifically identified and solved in the Constitution’s text. Consider, by way of a recent example, the newly fashioned Constitution of Nepal of 2015. Its text mentions “emergency” 57 times, and provides in detail for how an emergency is declared, under what conditions, and to what effect. In rough paraphrase, the nation’s President may declare a state of emergency under conditions of war, attack revolt, economic breakdown, natural calamity or epidemic outbreak. A declaration must be approved by a two-third majority of the legislature, a threshold designed to prevent abuse by a majority party acting in bad faith. Like the Roman model of dictatorship, new powers come with a fixed expiration date: Legislative approval is only for a three-month period. Regular meetings of the legislature are required as a way to preventing the displacement of elected government seen in Germany in the 1930s. Although the President is empowered to issue
orders to deal with emergencies, these lapse when the state of emergency ends and cannot impinge on rights of equality, access to fair trial, and freedom from torture among others. One especially innovative element of the Nepalese scheme is that salaries of judges and bureaucrats, generally protected from diminution, can be reduced in the event of an economic emergency.

Contrary to the dire predictions of executive power mavens, there is no evidence that such carefully calibrated powers will be self-defeating in practice. To the contrary, the best available evidence is that emergency declarations are now generally employed without leading to dissolutions of constitutional order. Fears of a Schmittian unraveling seem more hypothetical phantoms than real concerns given this comparative experience. In this light, proposals such as one by Bruce Ackerman to adopt a legislative “supermajoritarian escalator” provision for the authorization of emergency powers in the United States merit serious consideration, even if they are unlikely to be adopted in the short-term. Pursuant to Ackerman’s proposal, which was inspired by the South African Constitution, a presidentially declared state of emergency would be temporally limited, and could be extended only by legislative majorities that increased worth each successive vote. This design would minimize the chance of a permanent state of emergency, while formalizing and channeling the deployment of emergency powers into carefully defined periods.

* * *

Declines in the quality of constitutional liberal democracy are neither unidirectional nor permanent. The United States has suffered backsliding before. After the Civil War, a period of relative democratic openness in the South collapsed into a regional authoritarianism build upon explicit principles of racial hierarchy. This subnational regime lasted more than a half-century, but ultimately crumbled. Just as there is no reason to think that American cannot experience retrogression again, so too there is no reason to think that it lacks the tools to combat that erosion of democratic practice. We have canvassed some of the tools available at the constitutional and legal design level here. But instruments do not wield themselves. Political will and public mobilization behind democracy is also needed. The mobilization required to effectuate reversals in the direction of change is costly, however, and especially challenging in an era of epistemic fractionalization, as we shall see in our Conclusion. It is as easy today to imagine sustained retrogression as it is a more contested period of give and take.

INTRODUCTION


CHAPTER 7


Art 37, Ch. 16.


For an excellent analysis, see Daniel Hemel and Eric Posner, “Presidential Obstruction of Justice” (July 2017).

David Landau, *Constitution-making Gone Wrong*, Alabama Law Review {RA GET FULL CITE}


37 Cheibub, *Presidentialism, Parliamentarism and Democracy*.

38 On the ambivalent responses of conservative parties to presence of the far right in a national legislature, see William M. Downs, “Pariahs in their midst: Belgian and Norwegian parties react to extremist threats,” *West European Politics* 24, no. 3 (2001): 23-42.

39 On the strategic mistakes made by democratic parties, particularly the Social Democrats, in Weimar Germany, see Heinrich August Winkler, “Choosing the lesser evil: The German Social Democrats and the fall of the Weimar republic,” *Journal of Contemporary History* 25, no. 2 (1990): 205-227.


45 For a useful study of how parliamentary question time can aid opposition, but also devolve, see Rob Salmond, “Grabbing governments by the throat: Question time and leadership in New Zealand's parliamentary opposition,” *Political Science* 56, no. 2 (2004): 75-90.


54 U.S. Const. art. I, § 5, cl. 2.


The seminal source for this style of interpretation is, as luck would have it, by the leading commentator on impeachment. Charles Black, *Structure and relationship in constitutional law* (Baton Rouge: Louisiana State University Press, 1969).


Data from the Comparative Constitutions Project on file with authors.


RA: FIND AND CITE NEW BOOK BY Manuel Jose Cepeda Espinosa AND DAVID LANDAU


Brad Epperly, *Political Competition and Judicial Independence in Dictatorship and Democracy*, manuscript.


91 Sec. 182.

92 Illinois, Louisiana, Massachusetts, Michigan, New Jersey, New York and Pennsylvania all have bodies specifically designed a Civil Service Commission.

93 The relationship between constitutional design and corruption is more complex than a focus on anti-corruption bodies alone would suggest. Jana Kunicova and Susan Rose-Ackerman, “Electoral rules and constitutional structures as constraints on corruption,” *British Journal of Political Science* 35, no. 4 (2005): 573-606.


104 These are presently found at 28 C.F.R. § 600.1.


28 U.S.C § 516.


http://www.pewinternet.org/2016/10/04/the-politics-of-climate/ FULL CITE


Kathryn A. Watts, “Proposing a place for politics in arbitrary and capricious review,” *Yale Law Journal* 119, no. 1 (2009): 2-85. To be clear, we think that Watts is a serious scholar with nonpartisan reasons for her proposal.

For a recent study of civil education as it pertains to democracy maintenance, see Arthur Lupia, Uninformed: Why people know so little about politics and what we can do about it (New York: Oxford University Press, 2015).


Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (New Haven: Yale University Press, 2006).