

A TYPOLOGY OF CONSTITUTIONAL CRISES

Keith E. Whittington*

The presidency of Donald Trump has heightened the fears of constitutional crisis, but in truth we have been talking this way for years. Everyone seems to agree that there is always a constitutional crisis just around the corner, even if no one can agree on what the constitutional crisis is and who is responsible for it. It is an oddity of our modern politics that we keep talking about constitutional crisis and yet it is not at all clear what we mean when we say so. Apparently, like obscenity, we think we know a constitutional crisis when we see one even though we cannot define it. Strangely, despite the constant claims that we are in the midst of a constitutional crisis, our constitutional system has mostly continued to operate fairly normally.

This paper draws on a book manuscript that brings some historical perspective to bear on the notion of a constitutional crisis. It tries to determine whether there is any gold hidden amidst the dross. If there is any content to the charge that we might be approaching a constitutional crisis, what might it be? How would we know whether the claimed constitutional crisis is real or the figment of an overheated political imagination? What would it mean to find ourselves in a midst of a constitutional crisis? For purposes of this paper, I focus on different ways in which a constitution might break down.

I. INTRODUCTION.....	1
II. A TYPOLOGY OF CONSTITUTIONAL CRISES.....	4
III. A CRISIS OF OPERATION	6
IV. A CRISIS OF FIDELITY	12
V. A CRISIS OF BAD FAITH	24
VI. CONCLUSION	26

I. INTRODUCTION

“This is a genuine constitutional crisis,” John Kerry intoned.¹ John Kerry is a serious man who has moved at the highest reaches of the American government. A longtime U.S. senator from the state of Massachusetts, the 2004 Democratic presidential nominee, and the U.S. secretary of state in the second term of Barack Obama’s presidency, Kerry understands how politics works. And his remarks were not made casually or off-handedly. They came in the midst of an on-air interview with Anderson Cooper, one of the most prominent anchors of the premier American cable news network. Kerry’s words were repeated scores of times, from the myriad video packages of CNN to Sputnik News, Russia’s international purveyor of “alternative news.”

* William Nelson Cromwell Professor of Politics, Princeton University; Visiting Fellow, Hoover Institution.

¹ Anderson Cooper 360 Degrees, CNN (September 5, 2018).

A few months later, it would be difficult to remember that Kerry had ever uttered the words, let alone what exactly occasioned his remarks. To be sure, it could be hard to keep up with the frenetic pace of the news cycle during the presidency of Donald Trump. Scandals, exposes, and shocking revelations came fast and furious, and as often as not were forgotten as quickly as they appeared as politicians and journalists moved on to the latest gaffe, blunder or outrage.

One might have thought that if Kerry believed the United States was trapped in a constitutional crisis he would have used the massive platform that he enjoys to have focused the nation's attention on the problem and to have exerted himself to develop an appropriate response. In fact, Kerry was not entirely silent, but he did not linger on the apparent crisis that he thought he saw when speaking with Anderson Cooper. A few months later, Kerry did add his name to a remarkable public letter jointly authored by 44 former U.S. senators addressed to their colleagues currently serving in the Senate. The group boasted of its bipartisan quality, though it could marshal fewer than a dozen Republicans to stand with the Democrats and left most sitting on the sidelines. Though filled with ominous sounding warnings about the United States standing "at an inflection point," a "critical juncture," and a "critical moment," the letter oddly shied away from any specifics. The former senators refrained from saying what exactly the constitutional crisis was that required the Senate to stand once again "in defense of our democracy" and what actions the senators needed to take to show themselves to be "zealous guardians of our democracy."² The constitutional crisis, such as it was, would be left undefined.

This would be easy to ignore if Kerry were alone in reaching for the rhetoric of constitutional crisis, but he was not. It might be of passing interest if such rhetoric was limited to tumult of the Trump presidency, but it is not. Americans have been bombarded with the rhetoric of constitutional crisis. The Trump presidency is just the latest occasion for politicians and pundits to worry that the American constitutional order is coming to an end. They have been expressing such worries for decades.

The constitution cannot always contain politics. Sometimes political forces put the constitution itself in play. If there are ready outlets to channel such pressures, like a formal constitutional amendment process, then the existing constitutional order might more readily accommodate such stresses. If such outlets are unavailable or unavailing, the constitutional system itself might threaten to crack under the pressure. Parts of the constitution or the constitution in its entirety might be jettisoned in order make room for something new.

It is the fundamental challenge of constitutions to make themselves relevant. The constitutional theorist Will Harris once characterized this as the problem of bonding word and polity.³ It is easy for the two to come apart. Constitutional framers imagine a political order. They write that imagined political order down, embodying it in a text. They tell a story about how that imagined political order would work and why it would be good. Perhaps they win support for that vision of governance and the constitution is adopted. Now comes the hard part: making that imagined political order real.

It would be nice if the job was done at the moment of founding, when a constitution is written and ratified and a government is constituted under its terms. Certainly a lot of

² "The Senate Must Defend Democracy," *Washington Post* (December 11, 2018), A21.

³ William F. Harris II, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993), 2.

work has to be put in to get the constitutional enterprise even that far, and there are no guarantees of success. It is a substantial achievement to draft a well-designed constitution and to win the necessary political support to get it off the ground.

But writing a constitution and adopting it are not enough. A constitution must be made part of the lived reality of a nation. It must actually describe political reality as well as prescribe one. The imagined political world embodied in the constitutional text must passably resemble how the government actually works and not just paint a picture of how the government should work. A constitution is a work of imagination, but it should not be a work of fiction.

The political scientist Giovanni Sartori once pointed out that there are now many constitutions in the world that have no bearing on how their societies operate.⁴ He called these “façade constitutions” because they were fundamentally untrue, or worse yet misleading. It had become fashionable for countries to have constitutions and to make certain declarations about their values and commitments. As a result, autocratic regimes across the globe had written out constitutions filled with high-minded promises about the liberties that their citizens would enjoy and the political institutions that would exercise power, and yet those promises were empty, serving little more than propaganda purposes. A dictator might dress up his regime with a constitution, but that constitution is a fraud and the dictator is still a dictator.

The problem of constitutions, and constitutional provisions, that are not true is not unique to autocratic regimes that never meant for their constitutions to be taken seriously in the first place. The bond between the constitutional word and the political reality can become undone in liberal, democratic societies as well. It is an ongoing struggle to preserve that bond, to make a constitution a meaningful part of the lived political experience, to make the language of the constitution an important part of the grammar of our political discourse and our political world.

Generally speaking, constitutional crises are best understood to refer to realistic threats of a breakdown in the constitutional order. The term was once largely unknown in American political rhetoric, and when it was deployed it was mostly to account for political events abroad. We could readily see that President Slobodan Milosevic’s refusal to concede defeat in the 2000 Yugoslavian election was a constitutional crisis. (Milosevic eventually stepped down a few weeks later after the army and constitutional court recognized the opposition leader as the electoral victor, a general strike paralyzed the country, and a large mob rampaged through the parliament building.) Similarly, President Alberto Fujimori’s successful *autogolpe* in 1992 in Peru presented a clear constitutional crisis. (Facing mounting political opposition, Fujimori dissolved Congress, reorganized the judiciary, suspended the constitution, and arrested opposition leaders.) Cries of constitutional crisis have become commonplace in the United States over the course of recent decades. The result has mostly been a debasement of the term as its use multiplied and became a partisan weapon. Despite its overuse, however, there is a real phenomenon that the idea of a constitutional crisis can helpfully characterize. A constitutional system can sometimes cease to function, and we need the language to talk about such a possibility.

⁴ Giovanni Sartori, “Constitutionalism: A Preliminary Discussion,” *American Political Science Review* 56 (1962): 853.

It is a constitutional crisis when our constitution and our politics come apart. If our politics diverges from the constitutional path and blazes a trail of its own, then the constitution is left behind and becomes increasingly irrelevant – or is abandoned and replaced with something new that can actually guide our progress forward. Our shared constitutional project is concerned with avoiding that point of crisis, of finding ways to make the constitution work, of keeping faith with the constitution and working to make the constitution true.

II. A TYPOLOGY OF CONSTITUTIONAL CRISES

A constitutional crisis arises when the constitution comes unglued from daily politics. A constitutional republic is an imagined political order. We envision how we want politics to work and make commitments about how power should be exercised and by whom. The deepest threat to such an imagined constitutional order is that our political reality might depart sharply from our constitutional map, and the prescriptive constitution that tells us how politics should work loses its connection with the descriptive reality of how our politics actually does work. The Soviet Union was no stranger to written constitutions filled with glittering promises, but those promises were empty because the constitution was nothing but a façade, and had never been intended to be anything other than a façade, obscuring the brutal reality of how the Soviet empire was actually ruled.⁵ For a genuine constitutional republic, a constitutional crisis arises when the constitution that had governed and that was intended to govern risks becoming a mere façade, disguising rather than guiding political practice.

Constitutional crises are, in the first instance, crises for and of the constitution itself. Given the importance of constitutions, a constitutional crisis is likely to be both a symptom and a cause of political crisis, but it is worth recognizing that the two are distinct. Political crises need not implicate the constitution, and constitutional crises need not have dramatic consequences for the political system or for society broadly. It is possible for the incumbent presidential administration to be wracked by scandal and be hemorrhaging political support without the constitutional system itself being called into question. It is possible for some constitutional provisions to be quietly ignored without necessarily jolting the ordinary workings of government. Some failures of the constitutional machinery may have little or no significance for the daily lives of most Americans, or even for the routine business of most government officials. Constitutional crises, for example, need not become regime crises, threatening the conversion from a democratic form of government to an authoritarian form of government. The constitutional crisis faced by the British in the early twentieth century had potentially significant consequences for how British politics operated, but none of the various plausible ways in which that crisis was going to be resolved was going to call into question the future of the United Kingdom as a constitutional republic. England might have emerged out of the early twentieth century without an upper legislative chamber composed of unelected noblemen or even without a hereditary monarch, but it was not going to lose its elected legislative assembly or its broader commitment to limited government

⁵ Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," *American Political Science Review* 56 (1962): 853.

Likewise, a constitutional crisis need not necessarily be regarded as a bad thing. In some cases, we might even regard a constitutional crisis as a positive good, if the constitution in question leads to outcomes that are deeply unjust. This is, after all, the Madisonian defense of the Federalist subversion of the Articles of Confederation in favor of the Constitution of 1787 drafted in Philadelphia. The Confederation was inadequate to securing justice and domestic tranquility. A new federal constitution promised to create a more perfect union. The Articles of Confederation specified that it could only be amended or changed by the consent of the legislature of each and every state, which had proven to be an impossible hurdle to get over. If it was not possible to mend it, the Federalists contended it was time to end it. They did not propose ending the republican experiment or the federal union, but they did propose ignoring the federal constitution that was then governing the country and putting in place a different set of constitutional institutions, practices and rules. The delegates who met in the Philadelphia convention in the summer of 1787 had been commissioned to devise some constitutional amendments that would make the Articles of Confederation work better. As soon as they met in convention, however, the delegates resolved that the Articles could not be salvaged and that they would have to start over with a new document rather than try to revise the old one. On behalf of such bold constitutional framers, Madison appealed to the citizens of the United States to not let form get in the way of substance. If the convention delegates “had exceeded their powers, they were not only warranted, but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assume.” “If they had violated both their powers and their obligations, in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America.”⁶ If the Philadelphia convention had thrown the Confederation into a constitutional crisis, the people should nonetheless welcome that crisis and seize it as an opportunity to make their government work better.

The constitutional blueprint is often imperfect. A constitution might give us the outlines of what we should do in any given situation, but much remains open to interpretation. Political choices will have to be made about how best to execute the constitutional plan. Judgment will have to be exercised about how best to resolve ambiguities about what the constitutional plan requires. Such decisions are unavoidable features of operating within a constitutional system.

The crisis for the constitution comes not when questions arise about how best to follow the blueprint but when we decide to depart from its terms. When we are no longer operating within the confines of the constitutional order but are instead forging ahead without regard to the constitutional guideposts we have left behind. If the inherited constitution can no longer contain our politics, then the force of politics will carve out its own channels.

Constitutional crises may fall into three types, reflecting ways in which the constitutional order might break down and politics might go off course. The types of crises arise from different causes and are likely to follow different paths, but difficulties of one sort may lead to difficulties of the other. The most severe crises might well involve more than one type. In all types of crisis, we find ourselves not merely with disagreements about

⁶ James Madison, “No. 40,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), 251.

what we ought to do or disagreements about what the constitution means. More fundamentally, we find ourselves unwilling to remain bound by the constitutional order with which we began.

One type of constitutional crisis we might characterize as a *crisis of operation*, or primarily a crisis of political procedure. Constitutions should provide processes for determining how to govern. A constitution establishes a political order, describing how we identify our political leaders, and how we resolve our political disagreements. A constitution risks procedural failure when it can no longer perform those functions. If following the constitutional rules merely leads us to an unresolvable impasse or a set of unsolvable contradictions, then it cannot perform that function. If we follow the constitutional path and it leads us to a dead end, then we may face a crisis of operation. If we feel an irrepressible need to move forward but a constitution provides no means to get there, then it may prove procedurally incapable of guiding our politics.

A second type of constitutional crisis might be characterized as a *crisis of fidelity*, or primarily a crisis of political substance. Constitutions might provide reasonably clear guideposts indicating what we should do in a political moment, and yet we might find ourselves unwilling to work within those guideposts. The crisis of fidelity comes when the substantive commitments of the constitution can no longer command our allegiance. We are not forced to adhere to a constitution. A constitution is a lived political reality only to the extent that we want it to be so and behave accordingly. If our potential leaders or our people are no longer willing to live within the constitutional order, then they can make the constitution a dead letter by simply ignoring it. A constitution that is nothing but a piece of parchment is no longer politically relevant, and the crisis of fidelity arises when the constitution risks becoming nothing but parchment barriers incapable of restraining the forces of politics.

A third type of constitutional crisis might be characterized as a crisis of bad faith.

III. A CRISIS OF OPERATION

Operational crises arise when important political disputes cannot be resolved within the existing constitutional framework. An essential element of establishing a well-functioning government is the identification of procedures for making political decisions and resolving political disputes. A political system must assume the existence of disagreement about what substantive actions society must take; otherwise, there would be no need for politics at all. Politicians and activists sometimes like to suggest that there are no real disagreements to be resolved, that the path forward is clear but for some reason the government is unwilling to take it. In the 1990s, the Texas businessman Ross Perot ran an independent populist presidential campaign that attracted more votes than any third-party candidate in decades. Among his favorite themes was the idea that the politicians in Washington were simply refusing to address the nation's problems but that if he were elected president he would act like a good mechanic, "get down under the hood," diagnosis our problems, and implement the correct fix. It is seductive to imagine that there are apolitical technocratic solutions to our collective problems if only we could quit our bickering, but there are rarely easy fixes available. Politics is difficult because we collectively do not agree about the right solutions. We do not even agree about the nature

and importance of the problems. There is no magic wand that will make our political disagreements go away or become irrelevant. We have to live together with our disagreements. Political action must be taken in the presence of disagreement, and constitutions specify the procedures by which persistent disagreements are overcome and political decisions are made. As a result of unforeseen circumstances or a simple design flaw, a constitution may fail to establish an authoritative mechanism for ending a political conflict.

Operational crises may themselves be of two sorts, either formal or practical. A formal operational crisis arises when following all of the correct constitutional procedures leads to multiple conflicting endpoints rather than to a single determinate outcome. At least in that circumstance, the Constitution produces disorder rather than order. If there is an election, it should be possible to determine who won and for a government to be formed. If there is a claim that an activity has been legally regulated, it should be possible to determine what is the law. If there is a claim that the government has authority over some place or persons, it should be possible to determine who is in charge and whose orders have to be obeyed. Constitutional crises occur when constitutions fail to provide adequate procedures for making such determinations.

A practical operational crisis occurs when the constitutional government is incapable of rendering the political decisions or taking the effective political actions that are widely regarded as necessary at a given moment. Constitutions are intended to create effective, though limited, governments. Certainly no constitution is intended to be a suicide pact. More generally, to sustain themselves governments must be capable of responding to the intense desires of important constituencies. Political crises will extend to a constitution itself if apparent constitutional imperfections in structure or law are thought to be responsible for the government's inability to respond adequately to a situation that seems to demand a response.

A bad constitutional design might contribute to the breakdown of the constitutional order, but a constitutional crisis is never simply the result of a bad constitutional design. Even a badly designed constitution might work tolerably well for a long period of time. The constitution interacts with its environment, and it is the political circumstances that put pressure on the constitutional framework and perhaps pushes that framework past its breaking point.

The role of political conditions for putting pressure on the constitution also suggests that there are always options for avoiding an operational constitutional crisis. The constitutional framework might lead political actors to an impasse, but it is the political actors themselves who decide that the impasse is intolerable and cannot be resolved by any other means than departing from the constitutional order. Politicians might choose to compromise, as Prime Minister Gladstone did in England in 1894, rather than push a political struggle to the constitutional brink. If politicians find themselves in a standoff and are unwilling or unable to retreat, then they might force a constitutional crisis in a situation in which other politicians might have chosen to leave the constitutional order intact and resolved their disagreements without resort to extreme measures. The fact of the impasse might be unquestionable, but it is a political judgment as to whether that impasse is intolerable and how to get past it. The constitutional framework might set the stage for the crisis, but contingent political decisions spark the crisis.

We can imagine trying to design a constitution that would avoid the possibility of such gridlock, but we would likely have to sacrifice some of what we wanted a constitution to accomplish in the first place. The very checks and balances that are intended to prevent political majorities from running roughshod over the rights and interests of political minorities also tend to produce stalemates. The Americans who cheered on the Liberals in their confrontation with the House of Lords in 1894 emphasized the anachronism of an upper legislative chamber that could not be held accountable by elections and that represented a landed aristocratic elite. Abolishing the House of Lords seemed like the obvious democratizing reform, and the conservatives' resistance to giving more power and autonomy to Ireland was hardly the kind of cause that won much American sympathy. The Americans who reacted more skeptically to the Liberal attack on the House of Lords in 1909 no doubt found themselves more attuned to the upper chamber's tax-fighting stance. As a consequence they found themselves less excited by the prospect of a unicameral Parliament capable of making radical policy changes on the basis of narrow electoral majorities with no real institutional restraints to slow them down. As the English constitutional crisis seemed to be careening toward an abolition of the House of Lords, American commentators were reminded of the virtues of checks and balances that might sometimes frustrate the democratic impulse. The same people who wailed when President Barack Obama's policies were being obstructed by lawsuits or whose personnel were being harassed by congressional investigators were wildly cheering when those same constitutional weapons were turned against President Donald Trump. Whether gridlock is a constitutional virtue or a constitutional defect is often in the eye of the beholder. It depends on whose policies are being stalled. All constitutions are pregnant with the possibility of constitutional crisis.

We build up a set of norms, practices and expectations around our formal constitutional institutions that are designed, in part, to discourage politicians from converting ordinary political disputes into constitutional crises. They counsel politicians to embrace tolerance and forbearance rather than radicalism.⁷ They nudge politicians to exercise moderation and restraint rather than exert themselves to the limits of their formal authority. They preach the virtues of negotiation and compromise rather than obstinance and intransigence. They encourage politicians to think that in the long run they are better off accepting some momentary defeats than they would be if they tore up the constitutional rulebook for the sake of some short-term gains. The extremists will always argue that this is simply defeatism and that it is more important to vanquish the enemy today and let the future take care of itself. One of the difficulties of constitutional politics is that the extremists are sometimes right. There are times in which extremism is no vice and moderation is no virtue. There are times in which the rulebook should be thrown out. The hard part is knowing when those times are at hand given that there will always be voices from the wings saying the time is now.

The Senate filibuster is one of those small-c constitutional practices that serves a constitutional function in the American political system. The filibuster is not part of the formal Constitution. The U.S. Constitution simply gives each chamber of Congress the power to set its own rules, and it did so against a backdrop in which legislatures were

⁷ On the importance of tolerance and forbearance to democratic stability, see Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).

assumed to operate by majority rule. The U.S. Senate backed in to a filibuster rule by allowing for the possibility of endless debate on legislative motions. In time, the Senate adopted, by majority vote, rules that put limits on how long debates could be conducted and created the possibility of bringing debate to a close and bringing a vote to the floor if a supermajority of senators agreed to do so (by voting on a “cloture” motion). The size of the majority needed to support a cloture motion has itself been adjusted over time, as has the range of topics that are subject to such procedures. In theory, the possibility of a filibuster allowed a legislative minority to extend a debate and try to persuade the majority of the worthiness of its point. In practice, the possibility of a filibuster gave a legislative minority a qualified veto that could be used to bottle up policies that threatened the minority’s most fundamental interests. A filibuster rule provides a political check on narrow majorities. Like bicameralism, a presidential veto, or judicial review, a filibuster rule can create stalemates that a political majority might eventually find intolerable.⁸

In recent years, the Senate filibuster rule has been pared back, and in time it might even be eliminated entirely. The consequence will be to make it easier for narrow majorities to get their way in the Senate and to take away one of the tools that political minorities had long used to defend their interests against democratic majorities. It removes some of the incentive for building political consensus and relying on large majorities to get things done. One could imagine tearing up the filibuster rule because the stakes on some particular issue just seemed too high and the majority was no longer willing to pay the price of obstruction. As it happens, the filibuster fell victim not to a titanic struggle over a single issue but to partisan polarization. As the Senate became busier, it became less necessary to actually take to the Senate floor for a talkathon in the style of *Mr. Smith Goes to Washington*. The mere threat of a filibuster was sufficient to block a bill unless there was a sufficient supermajority to invoke cloture. As partisan polarization intensified, it became harder to cobble together those supermajorities and easier to exercise a filibuster threat. The number of threatened filibusters grew exponentially until Senate majorities began to whittle away at the filibuster rule in order to get anything done. The kind of gridlock that filibusters could produce was once regarded as acceptable, even desirable, when filibusters were relatively rare and the issues involved were particularly contentious. As filibusters became commonplace, minority obstructionism became intolerable. The filibuster rule cracked under the pressure of partisan polarization, and the Senate has become a more majoritarian institution.

In the case of the filibuster obstructionism reached a breaking point because it became too pervasive. In other cases obstructionism reached a breaking point because the stakes in particular conflicts were too large. The filibuster was always highly dependent on the majority’s forbearance. It was a relatively easy matter to “go nuclear” and reform or eliminate the filibuster on the basis of a simple majority vote on the Senate floor. Other vehicles for minority obstruction of majority rule are more entrenched, and as a consequence the battle for altering them can shake the constitutional pillars to their foundations.

⁸ On the Senate filibuster, see Gregory J. Wawro and Eric Schickler, *Filibuster* (Princeton: Princeton University Press, 2006); Gregory Koger, *Filibustering* (Chicago: University of Chicago Press, 2010); Sarah A. Binder, *Minority Rights, Majority Rule* (New York: Cambridge University Press, 1997); Steven S. Smith, *The Senate Syndrome* (Norman: University of Oklahoma Press, 2014).

The design of the Articles of Confederation facilitated obstructionist tactics by the states, and it ultimately could not survive the extent to which some state chose to exploit that vulnerability. Drafted in large part by Delaware's John Dickinson in 1777, the Articles of Confederation were not officially ratified by all the state legislatures until 1781, though Congress unofficially operated under its terms while it awaited ratification. The Articles pledged the states to a "perpetual union," but it created a weak Congress that was subordinate to the states. The members of the federal Congress were selected by the state legislatures. Important congressional decisions could only be made with the assent of the delegations of nine of the thirteen states. It specified an amendment procedure to alter the terms of the federal constitution that required the unanimous agreement of the state legislatures.

The high bar to constitutional amendments proved to be fatal to the Articles of Confederation. When it became evident that the states were disinclined to send funds to the federal government, it was obvious that Congress needed the power to raise tax revenue on its own, and the only realistic option was to allow Congress to impose import duties on international trade. But under the Articles, the states were already imposing their own international tariffs, and the states with the busiest ports were unwilling to share their lucrative tax base with the federal government. First Rhode Island and then New York vetoed proposals to amend the federal constitution to give Congress a taxing power in the early 1780s. By 1787, the inability of the majority of the states to amend the Articles of Confederation had built to a point of constitutional crisis. The convention that met in Philadelphia in the summer of 1787 was a desperate effort to get around the impasse. It was able to make progress in part because Rhode Island and New York mostly sat out and in part because the convention delegates simply agreed to change the rules and make it possible to change the constitution without the consent of the two recalcitrant states. When the gridlock created by the rules of the federal constitution proved both insurmountable and intolerable, the resulting constitutional crisis led to the abandonment of the entire constitution.

The constitutional amendment procedure built into the Articles of Confederation proved to be too inflexible, but its level of difficulty was not out of line with that of many of the state constitutions drafted during the American Revolution. The Virginia, North Carolina, and New Jersey state constitutions of 1776, for example, included no provision at all for their own alteration or amendment. The 1777 state constitution of Georgia allowed constitutional amendments only if the majority of voters in a majority of counties petitioned for a change and only then if a new constitutional convention could agree to the amendment. The Delaware state constitution of 1776 required nearly three-quarters of the legislators to agree to any constitutional amendment. Such constitutions were built to resist pressures for change, and in particular to disable politicians from altering the constitutional commitments that had been solemnly entered into by the people. As those states soon discovered, the likelihood of constitutional crisis was baked in to such a constitutional design. It was too easy to bottle up reform movements. The pressure for change could only be alleviated by calling the constitution itself into question. Political

impasses were resolved by going around the established constitution, either by simply ignoring its terms or by calling new conventions to rewrite the fundamental law.⁹

The fiscal constitution established by the Constitution of 1787 is obviously more flexible than the one established by the Articles of Confederation. The modern Congress has ample authority to raise its own tax revenue and set its own budget. Nonetheless, it is possible for the modern federal government to reach a constitutional impasse that debilitates it from funding essential government programs. Although the current constitutional rules make setting a budget no more difficult than passing any other piece of legislation, our contemporary politicians still find it difficult to navigate the process and avoid deadlock. As a consequence recent years have seen repeated partial government shutdowns, a very visible display of the federal government's failure to perform its most basic function. Of course, the key here is that these have been *partial* government shutdowns. By putting the most essential parts of the government on automatic pilot, it becomes easier because it is less painful to allow the less essential parts of the government to temporarily shut down. Elected officials, of course, have a strong incentive to eventually compromise, agree to a budget pact, and get the government running again.

Such episodes have provided a little taste of what an operational crisis can look like. Without a willingness to compromise, the constitutional procedures allow for the possibility of the government to grind to a halt as legislators and the president fail to reach a budget deal. If pushed to extremes, such an impasse regarding the basic functioning of the government would call into question the viability of the constitutional arrangement itself. Electoral pressure and some sense of political self-preservation combine to lead politicians out of such deadlocks before things get out of hand. Even reasonable constitutional procedures need reasonable behavior by political actors if they are going to work. Even a reasonably designed constitution can become dysfunctional if political actors throw caution to the wind and let short-term calculations overwhelm long-term goals.

Rather differently, the changing technology of war might have exposed a flaw in the constitutional design that could leave the federal government incapable of performing its most basic functions. The specter of the terrorist attacks on September 11, 2001 briefly renewed concerns about the possibility of the government being decapitated by a single strike by an enemy. Democratic Representative Brian Baird pointed to the constitutional scheme for the succession of office as the "unlocked cockpit door in the cabin of the Constitution."¹⁰ The need for a clear path of succession in the case of the disability of the president has long been obvious. The possibility of a large-scale disaster in the nation's capital could be nearly as damaging to the rest of the government. The Constitution anticipated the need to replace individual legislators during the course of a congressional session, but the possible use of a weapon of mass destruction in Washington, D.C. could decimate the entire Congress. The constitutional mechanism of directing state governors to organize special elections to fill vacant congressional seats could leave the country without a functioning national legislature for months. In the nineteenth century, it was perfectly normal for Congress to be out of session for months at a time, but in the modern era and in the midst of a political crisis the impossibility of calling Congress into session to address

⁹ On early state constitution amendment practices, see John Wilford Garner, "Amendment of State Constitutions," *American Political Science Review* 1 (1907): 213.

¹⁰ Ben Pershing, "Rep. Baird: Fix Constitutional 'Weakness,'" *Roll Call* (October 11, 2001).

the nation's business raises real concerns. Baird proposed a constitutional amendment to allow the appointment of temporary legislators until elections could be held to fill the vacant seats on a more permanent basis. Baird's amendment went nowhere, but as he noted the lack of a sufficiently robust constitutional mechanism to insure the continuity of the government in "catastrophic circumstances" would "virtually require the violation of fundamental principles of our Constitution."¹¹ Faced with a crisis of operation as the existing constitutional rules left the legislative branch debilitated, political leaders would soon be forced to ignore the constitutional rules and improvise in order to reconstitute a functional government. Unable to agree on a plan to secure the continuity of the government in such circumstances, Congress has left it to screenwriters and novelists to game plan what might happen in the event of such a constitutional crisis. Political actors often have control over decisions to exploit constitutional forms to drive the system into crisis. The constitutional system assumes that those actors will instead generally choose to resolve their disputes within the existing constitutional forms rather than instigate crises and contemplate extraconstitutional steps to overcome operational failures. But there are at least some circumstances in which politicians could find themselves with few options other than to abandon the Constitution.

IV. A CRISIS OF FIDELITY

Crises of constitutional fidelity arise when important political actors threaten to become no longer willing to abide by existing constitutional arrangements or willing to systematically contradict constitutional proscriptions. Constitutional efficacy depends on the willingness of political actors to adhere to constitutional principles and procedures even when they are inconvenient. Normal legislation seeks to regulate social actors and is undergirded by enforcement mechanisms located in the government and external to the social context being regulated. The sanctioning force of the government underwrites the law. If private citizens or organizations find the requirements of the law burdensome or inconvenient or nonsensical, the government does not have to rely on their sense of good citizenship to nonetheless comply with those legal edicts. Private citizens who violate the law run the risk of being punished by the agencies of the state. By contrast, constitutions attempt to regulate the government itself and cannot rely on any external enforcement mechanism.

Sanctions for violations of constitutional requirements must ultimately come from within the political system. If a private individual believes that a government official has violated the constitutional rules, the best that private citizen can do is complain to another government official who works down the hall, though one who adorns him or herself in black robes to emphasize the difference. Given that the government itself is the repository of effective sanctioning power, the primary sanction available for a constitutional violation is simply publicity of the violation. A judge who thinks the Constitution has been violated can mostly just issue an opinion proclaiming that point of view and hope that other government officials pay attention. The effectiveness of publicity as a sanctioning

¹¹ Rep. Brian Baird, *Continuity of Congress in the Wake of a Catastrophic Attack: Hearing before the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties*, 111th Cong., 1st Sess. (July 23, 2009), 7.

mechanism is centrally dependent for its effectiveness on the continued general commitment to the constitutional provisions that are being violated. The judge who tells the governor that he is violating the constitution can only hope that the governor's response is not "so what?"

There are a variety of means of making such constitutional commitments credible, so that citizens might think that government officials will actually comply with the constitution most of the time. Creating a judicial system that is independent from the rest of the government and giving it a responsibility for enforcing the terms of a constitution is one common strategy for making the promises contained in a constitutional text more believable. The citizen can at least complain to a government official down the hall, or in a different building, rather than complain to the government official who is suspected of violating the constitution in the first place. The judge down the hall might be insulated in some ways, such as having a secure tenure in her office so that she cannot easily be fired or demoted or financially penalized if she does not do what other government officials want. That might help make citizens more confident that the judge will be fair and act independently even when a complaint is brought against the government itself.¹² But the central dilemma of the self-executing nature of constitutions is inescapable. There is a perpetual danger that political actors, including potentially judges or even the citizenry, will not remain faithful to the putative constitution.

Creating an independent judiciary tasked with interpreting constitutional provisions and calling out constitutional violations has both advantages and risks. Because courts are insulated from many political enticements and have a specialized mission, they may be particularly likely to maintain a constitutional faith and seek to uphold constitutional verities even when many others are tempted to abandon them. Where others might be inclined to sacrifice constitutional commitments for the sake of other political priorities, judges might be more reluctant to court constitutional crisis by departing from constitutional pathways and pursuing extraconstitutional alternatives.

Such a strong reliance on courts as constitutional guardians can work, but it requires a layering of fidelity. We might task judges to be faithful to the constitution, but then we need other political actors to be faithful to the judiciary. If judges are to be our chosen lifeline to constitutional surety, then subverting the judiciary severs our most reliable connection to the constitution. If we allow elected officials to be lackadaisical about their constitutional responsibilities and put our reliance on judges to clean up the messes that they might make, then it becomes imperative that we treat the judiciary with due care.

For much of our history, this heavy reliance on judges to perform the thankless task of holding faith with the constitution when no one else would have seemed perverse. Legislators and presidents and candidates for public office understood that they had constitutional responsibilities of their own. Throughout the nineteenth century, presidents

¹² The literature on the political challenges of creating and maintaining an independent judiciary is voluminous. See, e.g., Georg Vanberg, "Establishing and Maintaining Judicial Independence," in *The Oxford Handbook of Law and Politics*, eds. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (New York: Oxford University Press, 2008); Rebecca Bill Chavez, "The Rule of Law and Courts in Democratizing Regimes," in *Oxford Handbook of Law and Politics*; James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence," *Journal of Law and Courts* 2 (2014): 187; John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," *Southern California Law Review* 72 (1999): 353.

regularly vetoed bills that they thought violated constitutional requirements. In the twentieth century, presidents have largely abandoned using the veto power for this purpose. Instead, they have increasingly contented themselves with writing signing statements outlining their constitutional concerns as they usher a problematic bill into law. Presidents have come to count on courts to carefully review laws after they have been passed and excise the unconstitutional bits rather than take the political heat themselves by vetoing bills that included constitutionally dubious provisions. Elected officials have learned that there is a political cost to be paid for killing off bills with popular provisions in them, but that there is no political cost to adopting bills containing unconstitutional provisions. Unsurprisingly, politicians have increasingly decided that it is not worth it to set themselves up as guardians of the Constitution. They will be rewarded by neither their constituents nor their colleagues for such efforts.¹³

In the very first Congress that met under the newly ratified U.S. Constitution, the legislators found themselves struggling with constitutional questions. Among the earliest and most consequential was the question of how executive officers could be removed from office if their performance was found to be unsatisfactory. The text of the Constitution did not say, specifying only that there was an impeachment power that could be used to remove officers who had committed high crimes or misdemeanors. When it was creating the first cabinet positions, the House of Representatives found itself bogged down in an extended debate over whether it could specify by statute how those department heads could be fired from their jobs. Elbridge Gerry of Massachusetts, who had served as a delegate in the constitutional convention and would later serve as James Madison's vice president, was in the minority in thinking that presidents should not be able to remove members of the cabinet without the consent of the Senate. Perhaps because he seemed to be on the losing end of that argument, he fell back to a secondary position – the House should take no position on the question one way or another. Whether the president could fire the secretary of foreign affairs (as the secretary of state position was then known) on his own or only with the agreement of the Senate, the “House of Representatives have nothing to do with it.” The president and the Senate “know their respective duties” and could figure it out for themselves. Or, “if the fact is, as we seem to suspect, that they do not understand the constitution, let it go before the proper tribunal; the judges are the constitutional umpires on such questions.”¹⁴ Figuring out what the Constitution requires is hard; let's leave it to the specialists.

James Madison objected. Madison thought the president had the constitutional power to fire department heads on his own, but more importantly for our purposes he also objected to the suggestion that the House should be indifferent to how the question was resolved. “It is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty, so far as it depends upon us, to take care that the powers of the constitution be preserved entire to every department of Government; the breach of the constitution in one point, will facilitate the breach in another.” Moreover, he thought it would be a grave mistake for the legislature to leave the Constitution entirely in the hands of the judges. The judiciary would

¹³ Keith E. Whittington, *Political Foundations of Judicial Supremacy* (Princeton: Princeton University Press, 2007), 187-188.

¹⁴ *Annals of Congress*, 1st Cong., 1st Sess. (June 16, 1789), 491, 492.

undoubtedly “in the ordinary course of Government” expound on the meaning of the Constitution, but the “constitution is the charter of the people to the Government” and each branch of government had both the responsibility and the right to make a decision in the case of constitutional uncertainties and to act to maintain the Constitution as they understand it.¹⁵ When Madison concluded, Gerry quickly jumped to his feet to emphasize that he did not mean to disagree on that point. “I shall be as ready to oppose every innovation or encroachment on the rights of the Executive as upon those of the Legislature. I conceive myself bound to do this, not only by oath, but by an obligation equally strong – I mean, the obligation of honor.”¹⁶ Constitutional fidelity was a responsibility borne by all government officials.

Elbridge Gerry might have been embarrassed by the suggestion that he was not taking the Constitution seriously enough, but later legislators would not be so easily flustered. Eventually they took it in stride. Worrying about what the Constitution might mean was not part of the job description of a member of Congress. When Congress took up a bill to grant statehood to the territory of Alaska, the bill included, at the insistence of the president, a provision authorizing the president to “withdraw” from the control of the state land that the president deemed necessary for national defense. A number of senators objected that such a measure that claimed to treat Alaska differently than any other state in the union was unconstitutional. (It was no accident that many of the senators raising the constitutional objection were Southern Democrats who had their own reasons in the 1950s to worry that the internal affairs of states might be singled out for differential treatment by the federal government.) Mississippi Senator John Stennis warned his colleagues, “in my opinion, a Senator should not vote for a bill he thinks contains unconstitutional provisions.”¹⁷ Virginia Senator Absalom Robertson admitted that “times may arise when it not too clear in our minds what the Constitution means,” but no one seemed to be arguing that such was the case with the Alaska bill. The fear was simply that the bill would be vetoed if it did not include the provision the defense establishment wanted, and the worst that was likely to happen if the provision was left in is that the courts would eventually strike it out but uphold Alaska as a validly admitted state. The senators could either rush constitutionally flawed legislation through the chamber or they could “honor the oath they took to support and uphold the Constitution and not deliberately vote for unconstitutional provisions.”¹⁸ Influential Washington Senator Scoop Jackson offered what turned out to be the winning argument. Jackson did not bother to contest his colleagues’ points about the “plain, old-fashioned, rockbottom commonsense” view of the Constitution and the equal rights of the states.¹⁹ He took what he thought to be a more practical position. The dissenting senators might well be right about what the Constitution requires, but who could tell. After all,

it is an inescapable fact that 50 percent of the lawyers are wrong in every lawsuit.

¹⁵ *Annals of Congress*, 1st Cong., 1st Sess. (June 17, 1798), 520.

¹⁶ *Annals of Congress*, 1st Cong., 1st Sess. (June 17, 1798), 521.

¹⁷ *Congressional Record*, 85th Cong., 2nd Sess., vol. 104, pt. 10 (June 27, 1958), 12466.

¹⁸ *Congressional Record*, 85th Cong., 2nd Sess., vol. 104, pt. 10 (June 27, 1958), 12467.

¹⁹ *Ibid.*, 12466.

We could spend the rest of this session and all of the next arguing the legal authorities on both sides of this question. But that is not the function of this body. Our function is to make a legislative decision: Do we want statehood for Alaska, or do we not?

Nothing we do here can change the Constitution, nor is it intended to do so. Nothing is more certain in our law than the fact that State laws and the laws of Congress must conform to the Constitution as interpreted by the Supreme Court of the United States. To the extent that they violate the Constitution, all such laws will be inoperative.²⁰

Rather than “argue this point interminably,” senators should simply resolve any doubts they might have “in favor of constitutionality” and let the courts sort it out later.²¹

Senator Jackson was here echoing advice that President Franklin D. Roosevelt had offered to wavering legislators as he was trying to push through a controversial New Deal measure.

Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests, for the simple fact that you can get not 10 but 1000 different legal opinions on the subject. But the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality. . . . I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.²²

The letter caused an uproar in Washington, as it was quickly leaked to the press and passed around the capital. Legislators who were skeptical of the bill were quick to pounce. Massachusetts Republican Allen Treadway thought it plain that the president understood that the bill was, in fact, unconstitutional. What he was really asking was for legislators to ignore the Constitution, but “if your oath of office means anything it means first of all support of this Constitution.” “To throw upon the Supreme Court the entire responsibility for considering the constitutional features of this measure is to shirk our responsibilities as Members of Congress.”²³ Iowa Republican L.J. Dickinson returned to Roosevelt’s letter when debating an entirely different New Deal proposal. The Democrats knew the constitutional problems with this bill as well, he charged, but had decided the politically expedient course of action was to give the president what he wanted and “then ‘passed the buck,’ placing upon the judiciary the burden of disapproval.”²⁴ From the Republican perspective at least, urging Congress to adopt legislation regardless of constitutional concerns “is tantamount to saying that it doesn’t matter whether a bill is plainly unconstitutional, it should be passed anyhow. If this philosophy were followed there would

²⁰ *Ibid.*, 12468.

²¹ *Ibid.*

²² *Congressional Record*, 74th Cong., 1st Sess., vol. 79, pt. 12 (August 16, 1935), 13449.

²³ *Ibid.*, 14435.

²⁴ *Congressional Record*, 74th Cong., 1st Sess., vol. 79, pt. 10 (July 11, 1935), 11023.

be an end to the Constitution altogether.”²⁵ Such an attitude “not only exhibits an amazing disregard for his own oath of office and the processes of constitutional government, but what is far worse, he encourages public contempt for the actions of the highest law in the land.”²⁶ But, as one of the president’s supporters framed the question in an earlier debate well before Roosevelt wrote his infamous letter, the “real issue before this Congress and before this administration . . . is not these fine-spun technical and constitutional questions that able lawyers discuss.” The real question was simply how “we can rescue this country from this terrible condition and establish a new deal.” A “genuine American answer” to that question would be to do what it takes to get the country moving again; the alternative “would be like fighting the World War and not winning it.”²⁷

If all the weight for keeping faith with the constitution is put on the courts, then preserving the courts is tantamount to preserving the constitution itself. It does not have to be this way. Elected officials can argue over the meaning of the Constitution themselves and dedicate themselves to doing what they think is necessary to adhere to constitutional commitments.²⁸ But if they instead choose to pass the buck the courts, to do what they think is politically expedient in the moment and let the courts worry about the fine-spun technical questions of what the Constitution requires, if they rely upon a division of labor between the judges and the politicians with only the former charged with the responsibility of maintaining fidelity to the constitution, then the courts themselves must be as sacrosanct as the Constitution is supposed to be.

Constitutional fidelity does not require constitutional perfection. Constitutions are, to some degree, idealized representations of the political community. Whether through mishap or willfulness, there are bound to be some violations of any moderately constraining constitution. The mere fact of constitutional violations does not indicate a crisis of fidelity. At the same time, constitutional violations cannot be routine in a true constitutional system. Regular constitutional violations suggest the inefficacy of a constitution. Occasional constitutional violations, subject to recognition and correction, simply suggest human fallibility. As Madison pointed out, if men were angels there would be no need for either governments or constitutions.²⁹ But if men were wholly corrupt, or uncommitted to constitutional values, then mere paper barriers would be insufficient to prevent political abuses in any case. Constitutions assume a genuine commitment to constitutionalism and a large measure of voluntary compliance.

Crises of fidelity undermine a constitution’s ability to achieve its substantive goals of specifying and advancing a specific set of political values. Those political values may refer to either the means or the ends of government power, and a constitution will be equally concerned with identifying the appropriate means by which political ends will be pursued

²⁵ *Ibid.*, 11024 (quoting conservative newspaper columnist David Lawrence).

²⁶ *Congressional Record*, 74th Cong., 1st Sess., vol. 79, pt. 13 (August 20, 1935), 13899 (Rep. Bertrand Snell).

²⁷ *Congressional Record*, 73rd Cong., 1st Sess., vol. 77, pt. 3 (May 2, 1933), 2750 (Rep. John Martin).

²⁸ For explorations of congressional engagement with the Constitution, see Donald G. Morgan, *Congress and the Constitution* (Cambridge, MA: Harvard University Press, 1966); Louis Fisher, *The Constitution Between Friends* (New York: St. Martin’s Press, 1978); Keith E. Whittington, *Constitutional Construction* (Cambridge, MA: Harvard University Press, 1999); J. Mitchell Pickerill, *Constitutional Deliberation in Congress* (Durham, NC: Duke University Press, 2004); David P. Currie, *The Constitution in Congress* (Chicago: University of Chicago Press, 1996).

²⁹ Madison, “No. 51,” in *Federalist Papers*, 322.

and with identifying and prioritizing the ends themselves. A constitution may prohibit the government from doing some things, or tell the government that other things can be done but only by following certain restrictive procedures, but government officials may decide that such prohibitions or procedures are no longer necessary or no longer desirable or no longer as important as some immediate political objective. An effective constitution commands government officials to remain faithful to its terms even when they are no longer inclined to do so.

Whereas an operational crisis calls into question a constitution's ability to establish political order, a crisis of fidelity calls into question a constitution's ability to establish a particular political order. Political actors may well challenge the authority only of specific constitutional provisions, or they might challenge the authority of the constitution as a whole. Important political actors may continue to accept the authority of, and express their fidelity to, a constitution as a whole, while still asserting that particular constitutional constraints, provisions, or rules are unjust, outdated, or otherwise unworthy of continued respect and without the authority to demand fidelity. The result might not be political chaos, but the constitution is further removed from lived political reality and its authoritativeness becomes more a matter of discretion than compulsion.

A crisis of fidelity may begin as an operational crisis. The existence of an operational crisis may call into question the substantive value and legitimacy of a constitution, resulting in a crisis of fidelity. In a sense, this is what happened to the Articles of Confederation. Because the Articles provided no mechanism to force state compliance with national policy and required unanimous consent of the states to adopt any amendments, the persistent obstruction of individual states to any proposed reform eventually led nationalists to circumvent and replace the entire constitutional system with a new one. The inability of a constitution to overcome a political disagreement and authorize action when action is evidently needed may lead political actors to lose faith in the constitution itself, or at least aspects of it, and seek elsewhere the authority to act.

Likewise, an operational crisis may itself arise from a crisis of fidelity. If some important social or political actors are effectively operating outside the existing constitutional order, they may disrupt the normal workings of the system and eventually force others to abandon the established constitutional order as well. Constitutional crises can cascade, with failure building on failure and political actors feeling increasing pressure to defect from the constitutional order rather than be left behind as others shed their constitutional fetters.

Crises of fidelity may arise from a variety of other sources as well. Despite the nominal acceptance of a given constitution, a nation's commitment to that constitution may not be very deep or wide. When the base of support for a constitution is not very strong in the first place, the constitution may well be abandoned when it becomes inconvenient or when its strongest proponents lose political influence. The political scientist Bruce Rutherford, for example, has argued that the Egyptian support for liberal constitutionalism was always limited to the legal and judicial class, and liberal constitutionalism in Egypt has faced crises of fidelity whenever the power of that constituency has waned. A set of Western-educated lawyers might well believe in liberal constitutional values and even be able to persuade an authoritarian political regime to adopt a constitutional document expressing those values. International investors may be placated by building some liberal commitments into a constitutional document for an otherwise authoritarian regime. But

making those values influential in political life is difficult when powerful political interests never really accept them as important.³⁰

Even if a constitution was fully embraced initially, subsequent political developments may lead to a crisis of fidelity. New political sensibilities may regard long-accepted constitutional provisions as substantively unjust, or a relatively stable constitutional structure may come to be regarded as outmoded in a new social or political environment. Some opponents of slavery in the antebellum United States, for example, simply became unwilling to continue to recognize the authority of a “convent with death.”³¹ The actions of the state governments during the Confederation period increasingly led James Madison and others to lose faith in the justice and continuing authority of the Articles. Somewhat differently, the Colombian constitution came under pressure as a result of rapid urbanization in the mid-twentieth century. The established constitution allocated legislative seats by territorial district, which were not significantly adjusted as the population left the rural districts and moved into a small number of urban centers. Constitutional amendments, however, could only be made by the legislature, which had no interest in altering the electoral scheme that kept the incumbent legislators in office. Presidents, who were elected by a national constituency that gave greater representation to the urban population, repeatedly found their policy proposals stymied in the legislative assembly. In the midst of an escalating armed rebellion, the president declared a state of siege and called a constitutional assembly by executive decree. A century-old Colombian constitution was abandoned in favor of a new constitution adopted by extraconstitutional means. An ossified electoral system incapable of internal reform eventually undermined fidelity to the constitutional system itself.³² If a constitution cannot readily be modified within the bounds of its own procedures to reflect the new political consensus, it may instead suffer a crisis of fidelity as political actors challenge its legitimacy and authority.

A constitution built to endure must be built to be responsive to the many challenges that a nation must face and overcome across its history. The pragmatic justice Robert H. Jackson once famously concluded a dissenting opinion with the words, “There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”³³ Jackson had served as Franklin Roosevelt’s attorney general during the run-up to American entry into World War II and as the chief American prosecutor during the postwar Nuremberg trials before this particular case arrived in the U.S. Supreme Court. His dissent came in the context of an appeal of a disorderly conduct charge that Father Arthur Terminiello had received in the winter of 1946. Terminiello was a notorious right-wing racial agitator, and his speech railing against “Communistic Zionistic Jews” in a packed auditorium in a Jewish suburb in

³⁰ Bruce K. Rutherford, *Egypt after Mubarak*, rev. ed. (Princeton: Princeton University Press, 2013); Tamir Moustafa, *The Struggle for Constitutional Power* (New York: Cambridge University Press, 2007).

³¹ William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca, NY: Cornell University Press, 1977), 228-248.

³² Daniel L. Nelson and Matthew Soberg Shugart, “Constitutional Change in Colombia: Policy Adjustment Through Institutional Reform,” *Comparative Political Studies* 32 (1999): 321-328; Ronald P. Archer and Matthew Soberg Shugart, “The Unrealized Potential of Presidential Dominance in Colombia,” in *Presidentialism and Democracy in Latin America*, eds. Scott Mainwaring and Matthew Soberg Shugart (New York: Cambridge University Press, 1997).

³³ *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949).

Chicago was greeted by a violent mob of protestors both inside and outside the lecture hall. In a landmark decision, a narrow majority of the Supreme Court held that Terminiello had a constitutional right to give his speech and that the police had an obligation to keep the peace by controlling the angry crowd in the street not by arresting the speaker for riling them up. Justice William O. Douglas, well on his way to becoming a fervent defender of broad First Amendment protections in the mid-twentieth century, wrote for the majority that it was the “right to speak freely and to promote diversity of ideas and programs” that was “one of the chief distinctions that sets us apart from totalitarian regimes.” Even speech that “stirs people to anger” had to be tolerated and protected from both the government and from “dominant political or community groups.”³⁴

Justice Jackson wrote a lengthy dissent accusing Douglas of indulging abstract theory while ignoring the riot that had broken out on the streets of an American city. Jackson saw in the majority opinion a belief that that “we must forego order to achieve liberty,” but Jackson thought the Constitution was made for “a people who value both liberty and order.” He thought that his brethren were missing the ominous implications of what the police in Chicago were facing. Terminiello was aping “the pattern of European fascist leaders.” The “street mob” was “communist-organized and communist-led.” Chicago was not dealing with “an isolated, spontaneous and unintended collision of political, racial or ideological adversaries.” This particular riot “was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind as devastated Europe.” This was not a political debate. This was an example of the “terror tactics” used by extremist groups to “confuse, bully and discredit . . . freely chosen governments” and to drive average citizens to “lose faith in the democratic process.” A “dogma of absolute freedom” would cripple the ability of governments “to keep their streets from becoming the battleground for these hostile ideologies to the destruction and detriment of public order.” “Free democratic communities” must be able “to maintain peace with liberty.”³⁵

Jackson thought that the Court’s majority was misinterpreting what the Constitution actually required. He thought the framers of American constitutional liberty knew how to balance order and liberty and did not themselves make the mistake of substituting “doctrinaire logic” for “practical wisdom.”³⁶ His deeper point was not merely that the majority was misreading this Constitution but that the majority was misunderstanding the essential nature of a constitution. A constitution could never properly be understood to be a “suicide pact,” because such a constitution would necessarily have to be broken. The Court’s majority was creating a false choice. If the choice was between suicide and survival, liberty and order, then the nation would always choose survival, regardless of what a piece of ancient parchment said. A constitution that could not bend when faced with such an existential threat would face a constitutional crisis and would ultimately break as the people lost faith in a document that made it impossible for them to prevent anarchy and violence.

³⁴ Terminiello, 4, 5.

³⁵ Terminiello, 14, 22, 23, 24, 28, 34, 37.

³⁶ Terminiello, 37.

James Madison would have understood Jackson's fears. Madison's immediate worry was not Jackson's dogma of absolute liberty that might cripple a government. Madison's worry was of a government that was not given the tools it needed to accomplish its essential goals. When anti-Federalists like Patrick Henry complained that the newly drafted Constitution gave Congress too great of a taxing power, a power not only to collect duties on imported goods but also a power to impose burdensome "direct taxes" on American citizens, Madison asked what else he would have them do. "It is necessary to establish funds for extraordinary exigencies" because nations could not win wars without the ability to raise money, and it was useless to design a constitution that would not allow a nation "to defend itself." "No government can exist unless its powers extend to make provisions for every contingency." In ordinary circumstances, elected officials would have no desire to impose unnecessary taxes "in a manner oppressive to the people." But if the government had to face "great emergencies, such as the maintenance of a war, without an uncontrolled power of raising money," it would face a constitutional crisis.³⁷ The circumstances would drive the government to look for extraconstitutional means to do what the constitution had failed to do. Madison was a realist about the limits of constitutional faith.

Madison knew that a constitutional designer hoping to create something durable for the future would have to make some hard choices. The opponents of the Philadelphia Constitution had chosen "to dwell on the inconveniences which must be unavoidably blended with all political advantages, and with the possible abuses which must be incident to every power or trust, of which a beneficial use can be made." He hoped the American people would see through that kind of rhetorical ploy. A good constitution could not withhold from the government powers that are "necessary to the public good"; it could only work "to guard them as effectually as possible against a perversion of the power to the public detriment." "It is vain to oppose constitutional barriers to the impulse of self-preservation."³⁸ Self-preservation will always come out on top in that battle. Privately, Madison explained to Thomas Jefferson why this might be a problem for a constitutional bill of rights as well. Absolute restrictions on government power "however strongly marked on paper will never be regarded when opposed to the decided sense of the public." Madison was clear-eyed about the dangers that war posed to liberty, but he thought there were limits to what a constitution could do about it. "No written prohibitions on earth would prevent" the people or the government from doing whatever they thought necessary to put down a rebellion or throw back an invasion.³⁹ Constitutional faith would not survive if it were put to such a test. If constitutional crisis were to be avoided, the Constitution would have to be written in a way that avoided such futile confrontations.

Unfortunately, the existence of a crisis of fidelity can be even more difficult to establish than operational failure. Political actors are prone to accuse their opponents not simply of being mistaken or guilty of constitutional violations, but also of being illegitimate and unfaithful to a constitution. Especially when the accepted range of reasonable constitutional interpretation is wide, the distinction between reinterpretation and actual

³⁷ Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, rev. ed., vol. 3 (Philadelphia: J.B. Lippincott Company, 1907), 96.

³⁸ Madison, "No. 41," in *Federalist Papers*, 251, 252.

³⁹ James Madison, "Letter to Thomas Jefferson, October 17, 1788," in *The Writings of James Madison*, ed. Gaillard Hunt, vol. 5 (New York: G.P. Putnam's Sons, 1904), 274.

infidelity can be difficult to pin down, at least within a political system such as that of the United States where the symbolic authority of the Constitution is largely unquestioned. Charges of infidelity are likely to be common, but admissions of infidelity are likely to be few.

This can be a blessing, at least if the goal is to maintain constitutional stability and avoid constitutional crisis. A stable constitutional order tries to draw dissenters in, to persuade them to work within the system rather than work to tear it down. It tries to nurture constitutional faith by encouraging a wide range of political actors to see how they can advance their particular political projects by working within the terms of the constitution.

The political culture can foster constitutional faith, or undermine it. Ever the rationalist with an ideological commitment to democratic sensibilities, Thomas Jefferson thought that constitutions should be periodically revisited. No constitution was perfect, and all constitutions were likely to have trouble keeping up with the political times. New generations would need the freedom to make their own, and Jefferson thought frequent constitutional conventions would be a good vehicle for renewing constitutional faith through controlled revolution. When there are disagreements about what the constitutional rules should be, or even what they are, we should go back to the source and appeal directly to the people for a new mandate.⁴⁰

Madison's instincts were more cautious and more Burkean. Having gone through the experience of drafting a constitution and sweating out the process of getting it ratified, he was not eager to see the experiment repeated. The constitutional document that emerged out of the Philadelphia convention was hardly perfect in his eyes. In fact, Madison left the convention quite morose about the proposals of his that had been rejected by his fellow delegates and how inadequate he thought the final product was given the challenges facing the nation. Nonetheless, he became convinced that it could have been worse, much worse, and he did everything he could to insure that the Constitution would be adopted and that a new government would be properly launched.

As for Jefferson's suggestion that there should be periodic constitutional conventions to reassess, revise and rewrite the American constitutions, Madison respectfully disagreed with his friend and neighbor. "Every appeal to the people," he worried, "would carry an implication of some defect in the government," and so would be corrosive of "that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." "All governments rest on opinion," and the "strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion." If each citizen thought that she alone harbored doubts about the constitution and the government, she would swallow her doubts and defer to others. The government could benefit from the fact that man is "timid and cautious when left alone." Men could come to revere a constitution that had stood the test of time and that seemingly enjoyed the support of the bulk of the populace. But the "constitutional equilibrium of the government" would be thrown off if "public passions" were too often stirred up and the "spirit of party" were to become tied up with constitutional disputes. A

⁴⁰ Thomas Jefferson, "Proposed Constitution for Virginia" in *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 3 (New York: G.P. Putnam's Sons, 1894), 332.

“nation of philosophers” might be able to regularly sit down and reasonably hash out their differences, but in the real world “disturbing the public tranquility” with repeated calls to reconsider the constitutional rules would just sink the nation into turmoil and chaos. We should not wish to test our fidelity to the constitutional order too often.⁴¹

It was always possible to appeal to what the revolutionary generation called the “people out of doors.” Jefferson hoped to appeal to the more disciplined people “indoors,” the people assembled in a constituent assembly capable of deliberating and voting and following rules of parliamentary procedure. The people out of doors were the people who assembled in the streets. At their best, those people might dump tea in a harbor or burn an effigy of a high government official. At their worst, they might tar and feather a hapless government officer or take up arms against the duly constituted authority.⁴²

The founders of the various American constitutions in the late eighteenth century were all committed to the ultimate authority of the people. James Wilson opened his remarks to the state constitutional ratification convention in his home state of Pennsylvania with a justification for what they were doing there, engaging in a process that was entirely outside the bounds of the existing federal constitution and debating whether to dump that government in favor of a new one. “In all governments whatever is their form, however they may be constituted, there must be a power established from which there is no appeal, and which is therefore called absolute, supreme and uncontrollable. The only question is, where that power is lodged?” In the England of the late eighteenth century, it was claimed that the British Parliament was that absolute and supreme political power. In other countries, that supreme and uncontrollable power might be a king. “Where does this supreme power reside in the United States? . . . in truth, it remains and flourishes with the people; and under the influence of that truth we, at this moment, sit, deliberate, and speak.” For in the people alone was there “a power paramount to every constitution.”⁴³ They had the power, as the Declaration of Independence had put it, to “alter or abolish” existing governments and “institute [a] new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” A constitutional crisis risks just such an appeal to the supreme and absolute authority, potentially unbounded by constitutional forms and with no way to forecast where things will land.

Americans of the founding generation knew that it was hard to get a constitution to stick. Their first federal constitution lasted barely more than a decade. Many of the first state constitutions fared no better, and states were forced to go back to the drawing board and try again. The constitutional framers who met in Philadelphia hoped that the constitution they were drafting would actually be adopted and would prove enduring, but the American experience thus far should not have given them much hope for such a happy outcome. Constitutional crisis, and constitutional failure, followed American independence, and some pessimists were beginning to doubt that the American political experiment was going to succeed. It was still an article of faith in America that, as James Wilson told the

⁴¹ Madison, “No. 49,” *Federalist Papers*, 311, 312.

⁴² Benjamin H. Irvin, *Clothed in Robes of Sovereignty* (New York: Oxford University Press, 2011); Alfred F. Young, *Liberty Tree* (New York: NYU Press, 2006); Georgina Green, *The Majesty of the People* (New York: Oxford University Press, 2014).

⁴³ James Wilson, *The Substance of a Speech Delivered by James Wilson, Esq.* (Philadelphia, PA: Thomas Bradford, 1787), 9.

Pennsylvania ratifying convention, vesting the “supreme power . . . in the people” is “the great panacea of human politics.” The people had the unquestioned right to totally change their form of government and the constitution that organized politics, and it was still hoped that they had “a superior knowledge of the nature of government” and so could settle on a constitutional system for organizing government that would both command popular support and advance the public good.⁴⁴ That article of faith was eventually rewarded. Constitutional crises became quite rare, and popular government became more secure. We have mostly managed to keep our constitutional ideals and our political reality from tearing apart.

V. A CRISIS OF BAD FAITH

I have long found it useful for understanding American constitutional history to conceptualize constitutional crises as coming in two varieties.⁴⁵ A crisis of constitutional operation arises when important political disputes cannot be resolved within the existing constitutional framework. Whether through a change in circumstances or through a flaw in constitutional design, political actors may find themselves unable to resolve political disagreements within the confines of established constitutional procedures. A crisis of constitutional fidelity arises when important political actors are no longer willing to abide by existing constitutional arrangements or systematically contradict constitutional proscriptions. Part or all of the constitution may simply be ignored as political actors seek to resolve their political disagreements and advance their goals in ways that are at odds with the putative constitutional arrangement. And, of course, a crisis of operation may well lead to a crisis of fidelity.

I have reluctantly come to the conclusion that a third category might be needed to encompass the range of constitutional crises that have emerged. A crisis of constitutional bad faith may occur when political actors refrain from repudiating the inherited constitutional system but nonetheless subvert it by only giving lip service to constitutional requirements.

I have come around to this possibility only reluctantly, not because bad faith does not exist but because it is too hard to recognize. My initial concern with this topic was to try to wrest the concept of a constitutional crisis from common political parlance and recover an analytical tool that could help us make sense of constitutional systems and how they operate. A central goal was to separate out the small kernel of what can be usefully understood to be genuine constitutional crises from the large set of ordinary constitutional politics that partisans might have interest in characterizing as crises. The tool would not be very useful if we cannot recognize constitutional crises, even in hindsight, or we cannot reach any agreement on when they occur. As a piece of political rhetoric it had already degenerated into a particularly emphatic way of attacking political enemies. Like judicial activism, constitutional crisis might become inherently subjective and exist only in the eye of the beholder, a way of describing political actions that one’s opponents engage in.

⁴⁴ *Ibid.*, 10.

⁴⁵ Keith E. Whittington, “Yet Another Constitutional Crisis?” *William and Mary Law Review* 43 (2002): 2093; Keith E. Whittington, “The Coming Constitutional Crisis?” *Lawfare* (July 21, 2017).

Of course, accusations of bad faith generally have also become quite common. At least in the political context this is perhaps unsurprising given increasing polarization and political separation. As political and social groups become more homogeneous and the distance between the political camps grows, it becomes all the harder to understand, let alone empathize with, those with whom we disagree. Political actions by the other side seem less explicable as simple good faith disagreements about political ends and means. It becomes easier to imagine that our political foes act in bad faith than that they just have reasonable disagreements with us.

The challenge of distinguishing bad faith behavior from good faith disagreement is at least as serious in the constitutional context. When our shared understandings are extensive and our disagreements are small, it is straightforward to imagine that we are all playing the same game under the same rules. Our disagreements might be important and meaningful, but they are understandable and at least theoretically possible to overcome. As our common bonds fray, however, those disagreements begin to seem more sinister. One starts to suspect that one's antagonist is not even trying to play the same game anymore. It is hard to credit their constitutional arguments as sincere and worth taking seriously. The disagreements are so deep that it is hard to believe that the other side is even being sincere in saying that they too are just trying to understand, live within, and elaborate on our common constitutional inheritance. From the perspective of conservative jurists, the New Dealers and their scholarly allies were not just mistaken but no longer even trying. Their success meant the Constitution was "gone"; it has been "swept away." From the perspective of conservative jurists, the Warren Court and its scholarly apologists were not just wrong but were lawless, unbound by and unfaithful to constitutional strictures. Of course the reformers did not take such complaints seriously. After all they saw themselves as acting in good faith (I think). They were perhaps creative, they would say, but they were still playing the same old game. They were still using the familiar constitutional grammar even if they were using it to reach new conclusions. Accusations of bad faith were just the whining of the political losers and could be dismissed as such. Trying to create a conceptual category of bad faith constitutionalism risks degenerating into endless partisan bickering that neither clarifies nor helps.

Despite such concerns, the possibility of a crisis of bad faith constitutionalism seems all too real and so perhaps cannot be ignored if we want to adequately understand the workings of constitutional politics. Functionally it does similar work to constitutional infidelity. It effectively excises components of the constitutional system and renders them inoperative, and does so without any legitimate or recognizable process of constitutional amendment or change. Crises of constitutional infidelity have been exceedingly rare in American history, or least so I have argued. Part of what makes infidelity rare is that the United States has traditionally had a robust culture of constitutional veneration. No matter how dysfunctional the constitutional system might seem, the political costs of simply stepping outside of that system have been high. Elites and citizens alike have demanded that any viable political movement and would-be political leader declare their loyalty to the constitutional faith. In a political culture of constitutional veneration, the constitution cannot simply be suspended. There is no substantial constituency willing to back the play of a leader tempted to announce an explicit departure from the inherited constitutional order, and so successful political leaders refrain from making such announcements.

But what one cannot openly announce one might still be able deceitfully to do. Bad faith constitutionalism might be a viable alternative to faithless constitutionalism. One can comply with the constitutional forms while emptying them of their substance. One can claim adherence to the constitutional letter while subverting the constitutional spirit. The constitutional order has still broken down. Politics is no longer confined within and structured by the ostensible constitution. Political actors can still pledge allegiance to the old constitutional order without having to concede to the inconveniences of constitutionalism. Political will triumphs over constitutional judgment without acknowledging the achievement.

Perhaps bad faith constitutionalism is just how constitutional infidelity works in a culture of constitutional veneration. All the pressures that lead to constitutional infidelity still exist, but the infidelity dare not speak its name. But even if bad faith constitutionalism is theoretically a meaningful phenomenon, we might still not have much luck in identifying it. We might be able to see the speck in our brother's eye but neglect the beam in our own. We might be able to recognize such a crisis if we observe it happening in other countries. We might even be able to recognize it in our own history, at least if those controversies are sufficiently detached from our own. Unfortunately, when the alleged bad faith crisis is entangled with our own contemporary controversies, we are unlikely to be able to achieve the kind of objectivity necessary to separate out the bad faith actions from the good faith, if intense, disagreements.

Despite such concerns, however, it might be necessary to recognize that the wolf of constitutional crisis sometimes comes dressed as a sheep. Descriptively and analytically, we would want to know what political actions initiate a departure from an established constitutional order. Normatively, we would want to know what political actions threaten a constitutional order that we want to sustain – or are necessary to leave behind a constitutional order that can no longer be justified.

VI. CONCLUSION

Constitutional crises have been rare in American history, but fears of a constitutional crisis are becoming more common. Long after Donald Trump has left the White House and presidential behavior has returned to something more closely resembling normal, there will still be occasions in which politicians, pundits and activists declare that the nation is careening toward a constitutional crisis. Those declarations might be made in good faith, but they will tend to serve a strategic purpose. They will heighten our sense of the fragility of the constitutional system while trying to enhance their own position as potential saviors of the constitutional order. When politicians tells us that we are careening toward a constitutional crisis, they will almost always be wrong.

Identifying the varieties of constitutional crises may help us identify the ways in which constitutional crises are avoided. This is not to say that a constitutional crisis is necessarily a bad thing, to be avoided at all costs. Constitutions are only instrumental goods, a mere "picture of silver" for the "apple of gold," as Abraham Lincoln put it on the

eve of the Civil War.⁴⁶ A constitution exists to preserve and effectuate the core values of the nation, to secure liberty and advance the commonweal. It may be perfectly appropriate to put an unjust or inadequate constitution into crisis in order to force reform or revolution. At various times in American history, dissenters from the established political order have seen the virtue in constitutional crisis. The Federalists thought radical constitutional reform was inevitable if the American experiment in democracy and independence was to be sustained. Both abolitionists and Southern fire-eaters questioned the value of continued constitutional union when there increasingly seemed to be no common values and little trust that the other side would live up to its constitutional commitments. The radical left at the turn of the twentieth century doubted that the Constitution was fit for an industrialized democracy. Nonetheless, constitutional crises create their own problems, and it certainly seems preferable that they at least be avoidable.

Constitutional crises may be more likely if there are fundamental flaws in the constitutional design or the constitution is larded with transitory values. The U.S. Constitution has survived as a viable document that can guide the lived practice of American politics because it has proven sufficiently adaptable to the changing needs of the nation and sufficiently flexible to accommodate new political movements. It has been possible to conduct our politics within the constitutional framework rather than outside of it. We have been able to argue over what the Constitution means rather than decide that such arguments are pointless and choose to ignore the Constitution. The American constitutional order has endured not by constantly trumping and constraining politics, but by engaging politics. The U.S. Constitution contains some timeless principles that have continued to command allegiance across generations, but the American constitutional system is also dependent on the political construction and reconstruction of constitutional meaning, values, and practices over time. Constitutional faith is sustained and rejuvenated through politics.

Just as political engagement with the Constitution is essential to avoiding crises of fidelity, so the informal operation of the constitutional system is crucial to avoiding and defusing potential operational crises. The Constitution sometimes provides a formal, final authority for resolving political disputes. In some instances, such a final authority has been inferred from the constitutional text to settle disputes over constitutional meaning, as in the case of judicial review. Operational conflicts are often worked out informally, however, without turning to such final, formal devices. Of course, informal practices and norms are often backed by the formal powers that structure the relationship among political actors. Nonetheless, these informal practices importantly supplement the formal constitution.

The obvious presence of operational conflicts that are embedded in the basic features of a formal constitution can obscure the informal practices that provide solutions to those conflicts. Political parties have historically helped structure the relationship between Congress and the president and provide politicians with a larger set of interests and commitments to temper their own immediate self-interest. Political norms of deference and cooperation help prevent conflicts from escalating into deadlocks.

The backdrop of such shared political understandings can expand the tolerance of the constitutional system for ordinary political conflicts. Political actors can exploit

⁴⁶ Abraham Lincoln, "Fragment: The Constitution and the Union (1860 est.)," in Abraham Lincoln, ed. Roy P. Basler (Cleveland, OH: World Publishing Co., 1946), 513.

constitutional and political institutions for advantage, relatively secure in the understanding that the system as a whole is resilient and that conflicts will ultimately be resolved. The difference between extended political conflict and actual constitutional crisis turns crucially on the intentions, expectations, and commitments of the individuals who exercise the formal powers established by the Constitution.

The very expectation on the part of political actors that a constitution will survive into the future helps ensure that a constitution does survive. The expectation that others will adhere to the constitutional rules dissuades politicians mired in political disagreement from quickly turning to extraconstitutional solutions to their problems. A long history without military intervention in political disputes encourages all sides to continue discussion and maintain constitutional forms rather than make a preemptive strike of turning to coercion. The expectation that there will be future elections encourages political losers to abide by the results of the current election. The belief that incoming government officials will respect the constitutional limits on their power makes the peaceful transfer of power more likely. As the political theorist Russell Hardin noted, a constitutional order survives by persuading political participants that they have “more to gain from continuing to live with the . . . constitutional order than by attempting to upset it.”⁴⁷

The American constitutional system has benefited from a relatively good constitutional design. The Constitution is far from perfect, and some flaws became obvious almost immediately. The Constitution failed to provide for an explicit means of removing executive officials, for example, or for adding territories. The unexpected and undesired formation of political parties created unforeseen complications for the constitutional design. Nonetheless, despite these and other miscalculations, the constitutional text has proven to be fairly resilient. Such basic features as the distribution of powers within the national government and between levels of government have proven to be generally effective but flexible enough to accommodate political development. By the standards of both the American state constitutions and foreign constitutions, the U.S. Constitution is relatively difficult to amend. Such difficulty in changing the text of the Constitution could have tempted those unhappy with the existing text to look for extraconstitutional ways to advance their political goals. Compared to both American state constitutions and foreign constitutions, however, the terms of the U.S. Constitution are also fairly imprecise, allowing for reconsideration, adjustment, and growth without threatening the integrity of the basic document. The framers of the U.S. Constitution managed to avoid some of the deficiencies that have proven fatal to other, similar constitutional texts. In some instances, the founders were simply lucky. The timing of congressional and presidential elections in the American system increases the likelihood that the president will be supported by a large fraction of the elected legislatures, if not an actual majority. Although divided government has become more common in recent decades, presidents often at least begin their terms of office with some substantial support in Congress. The presidential system would likely be more brittle if presidents were more routinely confronted by a legislature in their own partisan supporters held only a small share of the seats. In other instances, the founders made wise decisions. Given their distrust of executive power, for example, the founders created a relatively weak presidency with limited legislative powers. An expansive executive decree

⁴⁷ Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (New York: Oxford University Press, 1999), 137.

authority has been an important source of conflict, stalemate, and even democratic collapse in presidential systems elsewhere.⁴⁸

The American constitutional system has traditionally benefited from a common and relatively strong constitutional culture. To a striking degree, political actors in the American system accept the importance of constitutionalism. Disagreements emerge over the meaning and requirements of constitutionalism, not over the appropriateness of constitutionalism itself. Moreover, even the historical disagreements over constitutionalism in the United States have occurred within a relatively narrow range. Constitutional failures are more likely to occur precisely when the constitutional culture is no longer robust or shared. Mark Brandon has compellingly argued that the gradual development of two distinct constitutional cultures in the antebellum United States contributed to the eventual Civil War.⁴⁹ Though the constitutional cultures in both the North and the South were derivative of the original U.S. Constitution and liberal democratic foundations, they were nonetheless increasingly distinct and in tension with one another. When Abraham Lincoln warned that a house divided against itself cannot stand, he was capturing not only two social and economic systems that were on a collision course with one another but also two constitutional cultures that increasingly saw the other as alien and illegitimate. Many countries across the world have had to deal with a persistent strand of authoritarian populism within their political cultures that is fundamentally at odds with a commitment to liberal democratic values. Attempting to bridge the divide between those two political philosophies to maintain a single set of constitutional commitments is intrinsically difficult for any nation to manage. A shared constitutional culture helps keep political disagreements from expanding into foundational, constitutional disagreements and helps provide the common ground upon which political disagreements can be resolved. Once that common ground has been eroded, then taking extraconstitutional steps becomes more fathomable and fear that the other side might take extraconstitutional steps becomes more pervasive.

The United States has also benefited from relatively limited polarization in politics. Constitutions can only do so much. If a political system is under too much stress, then it is bound to give way to crisis, regardless of the constitutional arrangements. It helps that the United States has enjoyed fortunate socioeconomic circumstances. Economic wealth both dampens the demand for radical political change and increases the societal investment in existing institutional arrangements. Resources can help contain the intensity of political conflict and lessen the willingness of important political actors to simply abandon established commitments and take the risk of leaving the constitutional guideposts behind.

Keeping political disagreements within constitutional bounds depends on the willingness of political actors to regard the maintenance of the constitutional bounds as ultimately more important than the immediate political disagreement. Just as important political actors must be willing to accept the possibility of electoral defeat if democracy is

⁴⁸ See Scott Mainwaring, "Presidentialism, Multipartyism, and Democracy: The Difficult Combination," *Comparative Political Studies* 26 (1993): 198; Matthew Soberg Shugart, "The Electoral Cycle and Institutional Sources of Divided Presidential Government," *American Political Science Review* 89 (1995): 327; Scott Mainwaring and Matthew S. Shugart, "Juan Linz, Presidentialism, and Democracy: A Critical Appraisal," *Comparative Political Studies* 29 (1997): 449; Alfred Stepan and Cindy Skach, "Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism," *World Politics* 46 (1993): 1.

⁴⁹ Mark Brandon, *

to prevail, they also must be willing to accept that some political outcomes are out of bounds if constitutionalism is to prevail. If the political cleavages are too great or economic conditions too bleak, however, this basic precondition for constitutional maintenance is unlikely to be met. For some at both end of the slavery debate, it was better to dissolve the Union and break the constitutional bounds than tolerate the other side of the debate. For leader in many nations, it is more important to vindicate national power, advance ethnic or class interests, address economic difficulties, or the like than to be hampered by constitutional requirements. The existence of the Constitution to some degree contributes to the relatively lack of fundamental political conflict in the United States, but importantly the continued existence of the Constitution depends on that lack of fundamental political conflict. If politics is divisive enough, the continued willingness to adhere to the constitutional rules becomes expendable.

It is valuable for political actors to be reminded that constitutions must in fact be maintained, and that constitutional stability cannot simply be assumed. To the extent that appropriate constitutional cultures and informal constitutional practices help sustain constitutionalism and particular constitutions and help prevent constitutional crises, then political actors must take care that such cultures and practices are maintained and strive in their own actions to adhere to and reproduce them.

At the same time, however, it can be damaging to the constitutional system to panic too easily about the possibility of crisis. If minor and even not-so-minor political conflicts are labeled as constitutional crises, then we lose the ability to adequately distinguish real constitutional crises. The full range of constitutional experience is flattened out and misidentified. The political struggles that are to be expected within any constitutional system, and that in fact may be essential aspects of political life under a written constitution, may be lost from our constitutional learning. The normal give-and-take of politics in a fragmented political system can be rendered unbearable. There are times when presidents must reasonably be subjected to an impeachment inquiry. There are times when congressional investigations into the workings of the executive branch should be resisted. Conflict and tension are normal features of American politics, and do not necessarily suggest a constitutional system in crisis.

Crying wolf too often may lead us to fail to recognize and respond appropriately when true constitutional crises threaten. If constitutional crisis simply becomes a rallying cry in partisan political campaigns, then it will lose its force. It becomes too easy to dismiss shouts of constitutional crisis as the complaints of political losers if they are in fact used too often to simply try to mobilize the base in ordinary political disputes. If every election is the most important election in our lifetime, then it is hard to ratchet up the rhetoric much more or send a meaningful signal to friends or foes alike when the situation really is worrisome and when it really is time to set aside smaller differences and come together for a common cause. It is important to maintain some distinctions so that it is still possible to tell which lines really should not be crossed.

Talk of constitutional crisis can also lead us to overreact to the normal complexities and struggles of political life. As a consequence, the overuse of the rhetoric of constitutional crisis can itself feed political and constitutional irregularities. Constitutional crises, and the threat of constitutional crises, require extraordinary response. If the constitutional order is breaking down, then the barriers to any given political actor stepping out of the constitutional order are diminished. Indeed, political actors may think it necessary to claim

new powers and go outside their usual constitutional authority in order to respond adequately to the extraordinary events that occur when the constitutional mechanisms are not properly functioning. Crisis rhetoric is meant to shorten the patience for deliberation and tolerance for dissent and uncertainty. If we face a crisis, there is no time to waste in going through the laborious work of persuasion and contemplation. If the constitutional order itself is in crisis, then we can brook no dissent as we take the steps we think necessary to save it.

A constitutional crisis justifies extraconstitutional, and perhaps even unconstitutional, actions, and a rhetoric of constitutional crisis can itself lead us into a constitutional crisis. To the extent that constitutional stability is grounded in a web of expectations about how other political actors and government officials will behave, the widespread belief in impending constitutional crisis and instability can become a self-fulfilling prophecy. If political actors become convinced that others are bent on “stealing” an election, then they have every incentive to take extraordinary steps themselves toward securing victory. If you anticipate that others will not adhere to preexisting rules and norms, then would feel like a fool for continuing to adhere to those rules and norms yourself. Constitutional stability requires a constant effort at reassuring our political adversaries that despite our disagreements we will continue to play by the rules. When those assurances are no longer given, or no longer believed, then constitutional crisis becomes much more likely. A lack of faith in the capacity of political actors to struggle over and maintain the constitutional inheritance may well make the Constitution more fragile, not less.

Jack Balkin has referred to “constitutional rot” as “a process of decay in the features of our system of government that maintain it as a healthy democratic republic.”⁵⁰ Constitutional rot eats away at the support structures of the constitutional system and makes constitutional crises more likely. A healthy constitutional system nurtures what the political scientists Steven Levitsky and Daniel Ziblatt call norms of mutual tolerance and forbearance.⁵¹ In a healthy constitutional system, politicians need to refrain from doing all that they can to aggrandize political power and to disempower their opponents. They recognize and accept a pluralistic political system and civil society in which there are multiple centers of influence and power and people disagree about values and the best path forward.

Intense partisan polarization can contribute that kind of constitutional rot. If your political opponents are “literally Hitler,” then procedural values take second place to achieving victory at all costs. The pro-Trump battle cry that 2016 was a “Flight 93 election” posited that “death is certain” if conservatives allowed Hillary Clinton to win the presidency. There was no choice but to “charge the cockpit” and “take your chances” with Trump. If we are genuinely “headed off a cliff” if the other side takes power, then all our normal restraints have to be suspended for the duration.⁵² That might mean taking a gamble on a would-be president like Trump who we would not normally support, but such

⁵⁰ Jack M. Balkin, “Constitutional Crisis and Constitutional Rot,” in *Constitutional Democracy in Crisis?*, eds. Mark A. Graber, Sanford Levinson, and Mark Tushnet (New York: Oxford University Press, 2018), *.

⁵¹ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishing, 2018).

⁵² Publius Decius Mus [Michael Anton], “The Flight 93 Election,” *Claremont Review of Books* (September 5, 2016).

rhetoric encourages us to wonder why we should stop there. If the stakes are high enough, then anything goes. Intense partisan polarization makes it more likely that we will come to believe that the stakes really are high enough, that the other side cannot be allowed to prevail, that the gloves have to come off. Although there is plenty of apocalyptic rhetoric on the political right, such fears about the other side are hardly limited to the political right. Both sides of the political divide hear voices pleading that the opposition is too evil to be tolerated, that the other side is not just wrong but illegitimate, that the other side will show no restraint, that the next election could be the last.

Although the Trump presidency does not itself present the country with a constitutional crisis, it does not bode well for the health of the republic. The tendencies in the American political system that predated Trump's election and that have continued during his administration will continue to put stress on constitutional rules and strain the ability of constitutional institutions to contain and channel political disagreement. Partisan polarization has reached a point where short-term political gains seem to justify subverting longstanding constitutional norms. Popular distrust of American political and social institutions undercuts the ability of political actors to stabilize the system and fans the flames of those who would like to burn the established order down. The electoral process as it has developed rewards celebrity and extremism at the expense of experience and pragmatism.

The personality and disposition of Donald Trump certainly tilts the country toward constitutional crisis. More established politicians would veer away from the actions that Trump is willing to take seriously. He revels in intensifying divisions and heightening conflict that subvert traditional expectations that the president can act as a head of state that represents the country as a whole. It is all too easy to imagine President Trump being willing to engage in actions that would instigate a constitutional crisis, and that evident attitude of constitutional disregard left everyone else on edge as they anticipated the worst.

If Trump was a stress test of the American constitutional system, the results of the test are not entirely reassuring. While Trump himself might not have much regard for the value of constitutional rules and norms, he also did not have the patience, vision or knowledge to match that willingness to break the rules and pursue a concerted effort to undermine the constitutional order. His rhetoric was often radical, but his actions were much more muted. Trump's inattentiveness allowed a great deal of passive resistance to his more damaging instincts. Trump might float extreme ideas, but his administration demonstrated less capacity to follow through on them. Trump might wish to put a permanent end to the Russia investigation, but those around him were willing and able to allow such desires to lie fallow. A president with a greater willingness to follow through on his pronouncements would have posed a much more challenging problem. The good news is that no matter the personal proclivities of Donald Trump, he could be effectively managed and those around him were generally inclined to try to do.

The bad news is that Trump demonstrated how easy it would be for a more sophisticated political figure to exploit the weaknesses of the current party system. The political parties as organizations have little capacity to resist hostile takeovers by popular outsiders. Trump swept onto the political scene in a way that left established politicians stunned but wary. His sudden rise to power and lack of a coherent ideology meant that few in Washington shared the president's particular policy goals and were not mobilized to try to advance them. Trump's continued popularity with Republican voters largely neutered

his potential critics and rivals within the Republican Party and limited the extent to which they were willing to oppose his actions, denounce his rhetoric, or uncover his administration's misconduct. While President Trump was not able to push forward much of a positive policy agenda of his own, there is no indication of a congressional appetite to draw power away from the White House. After Johnson and Nixon presidencies, congressional reformers recognized that they could no longer rely on the president to always be a sympathetic ally, and they looked for ways to build legislative institution that might counterbalance executive power. Those reforms were not always very successful, but the White House had rivals for power in the legislative branch. Even when there was congressional disagreement with the policy decisions emerging from the White House, there was little legislative effort to restrict presidential discretion. From the ability to declare a national emergency to move appropriated funds around to the ability to adjust tariff rates to constantly evolving military action abroad, legislators demonstrated no appetite to reassess the network of statutory provisions that vest substantial discretionary authority in the president.

As a result, it is hard to know how confident to be that senior political leaders would publicly break from a president who was willing to instigate a constitutional crisis. When President Franklin Roosevelt proposed his Court-packing plan, it was a coalition of senators in his own party who led the opposition to it and forcefully tried to shut the door to any president attempting such a thing again. When President Richard Nixon contemplated ignoring a Supreme Court order and refusing to hand over the Watergate tapes, it was a group of senators in his own party who informed the president that he would not survive an impeachment trial. Although President Trump might welcome the chaos that would follow from presidential subversion of the courts, it seems unlikely that other political elites would share that enthusiasm. They might not always approve of the decisions issued by the courts, but they are unlikely to approve of open defiance of a judicial order. But could current political leaders be relied upon to look to the longer-term horizon, or would they focus only on their short-term electoral and policy interests? Would presidential misbehavior go unchecked because other elected officials were cowed by a president's popular support? Would the sullen silence of senators become vocal opposition if a president were to act on an intention to disregard the rules and norms of the constitutional order? Would there even be sullen silence if that disregard of constitutional rules and norms came in the name of a political cause that the senators themselves shared?

The Trump experience might have encouraged politicians, activists and citizens to redouble their own commitments to constitutional maintenance. There is little evidence that it has done so. To the extent that partisan calculation and constitutional preservation coincide, then constitutionalism is reinforced. To the extent that they diverge, however, constitutionalism might be seen as expendable.