



A crisis of governability is on the horizon.
The century ahead will bring political extremism,
demagogic populism, and increased lawlessness.

So warns Yale Law School Professor Bruce Ackerman '67 in
his latest book, *The Decline and Fall of the American Republic*.

In the following excerpt from that book,
Ackerman lays out the threat facing the nation.



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Constitutional thought is in a triumphalist phase.

The American mind is dominated by heroic tales of the Founding Fathers, who built an Enlightenment machine that can tick-tock its way into the twenty-first century, with a little fine-tuning by the Supreme Court. The basic machinery has stood the test of time for two centuries—so why not three?

This premise is broadly shared by America's leading constitutionalists. While many criticize the extreme ancestor worship of Justices Scalia and Thomas, almost everybody is trying to fill the gap with other heroes. Judicial activists celebrate the genius of the Warren Court; judicial minimalists, the prudence of crafty judges; popular constitutionalists, the creativity of mass movements. These are different themes, but they add up to a triumphalist chorus: we must be doing something right; the only question is what?

Law follows life. The participants in the contemporary debate have all lived through the rise and rise of the American state at home and abroad. We have had defeats along the way, but there is no mistaking the general arc of ascendancy: America's victory over the Axis powers and the Communists, its civil rights revolution, and the success of its free market system have propelled the country to the center of the world historical stage—economically, militarily, morally. Little wonder that its lawyers merely disagree about the magic constitutional formula that accounts for this remarkable record of achievement.

It has not always been this way. Over most of our history, constitutional thought exhibited a healthy skepticism about the Philadelphia achievement. ...

Triumphalism is a Johnny-come-lately to the legal scene. It is the product of the New Deal's success in adapting classical constitutional forms to express a new activist vision of American government; reinforced by the Warren Court's triumph during the civil rights revolution; and consolidated by the new originalism of the Reagan years.

But nothing lasts forever, not even the American Century. And looking forward, I don't think we can afford another generation of triumphalism. The pathologies of the existing system are too dangerous to ignore. We can't limit our critique to details. We must ask whether something is seriously wrong—very seriously wrong—with the tradition of government that we have inherited.

This is an awkward moment for me. Like almost everybody else, I've been a triumphalist ever since I've been writing about the Constitution. My own account has featured a distinctive hero: not the Founding Fathers, not the Warren Court, but the ordinary Americans who have shaped and reshaped the country's fundamental commitments over the centuries—from the Founding to Reconstruction, from the New Deal to the civil rights revolution, and beyond.

My claims have proved controversial—surprise, surprise—but the cloud of debate should not disguise the triumphalist character of my enterprise. While most scholars look upon the very idea of “popular sovereignty” as a political myth, I have tried to establish that We the People have indeed given their government new marching orders at crucial turning points of American history. To make my case, I have provided blow-by-blow accounts of the constitutional moments at which Americans redefined their constitutional identity during the Founding and Reconstruction, the New Deal and the civil rights revolution.

One recurring theme has been the presidency. My revisionist history emphasizes its central role in expressing and consoli-

dating popular demands for fundamental change. The precise roles played by the presidency have differed during different historical eras. But without the creative interventions by great presidents of the past, popular sovereignty would not have remained a living force in the American tradition over the past two centuries.

Which leads to my current embarrassment. My argument will be taking a tragic turn. The triumphs of the presidency in the past have prepared the way for a grim future. The office that has sustained a living tradition of popular sovereignty threatens to become its principal agent of destruction. Just because we call him the “president,” we should not suppose that President Obama is occupying essentially the same office as George Washington, or even Richard Nixon. ...

... My discussion takes the form of classic tragedy: it's not as if there is one aspect of the presidency that is a force for good, and another a force for evil. *The very same features* that have made the presidency into the platform for credible tribunes of the People, like Abraham Lincoln or Franklin Roosevelt, are also conspiring, under different conditions, to make it into a vehicle for demagogic populism and lawlessness in the century ahead.

Haven't we heard all this before? Arthur Schlesinger sounded the alarm in his *Imperial Presidency* a generation ago—and yet the Republic has managed to stumble along despite the warnings of countless Cassandras ever since. We have had our share of crises, to be sure, but that's true of any other country at any other time. The presidency has been the site of three serious outbreaks of illegality over the past half-century—Watergate, Iran-Contra, and the War on Terror—as well as a host of lesser ones. But we have managed to recover from them all, to one degree or another. And that's better than lots of other countries have done. Let's not blow our problems out of proportion with idle chatter about our impending decline and fall.

What is more, if we look to the present, President Obama's performance in office has been anything but imperial. He has had a tough time pushing high-priority initiatives through Congress ... [and he will experience even greater difficulties in the future]. ...As a skeptical Congress buries one major presidential initiative after another, a very different diagnosis will come to the fore: surely it is congressional obstructionism that is our number one problem?

At least the president has an incentive to rise above congressional parochialism and speak for the Nation as it confronts the pressing problems of the twenty-first century. The real dangers come from Capitol Hill: its pandering to special-interest groups, its endless ideological posturing, will destroy our collective problem-solving capacity in the decades ahead. If there is any serious prospect of decline and fall, its source is this “crisis of governability”—a crisis generated by self-indulgent congressional barons, not presidential demagogues.

As president and Congress collide, each particular impasse will generate its own point-counterpoint: the president's talk of crisis will, to his critics, seem a petulant overreaction to Congress's prudent refusal to endorse his extravagant demands. Depending on the politics of the moment, each of us will find ourselves changing sides in the debate—sometimes cheering for the president, sometimes for the Congress. But as White House initiatives are repeatedly blocked on Capitol Hill, the escalating talk of a “crisis of governability” will deepen the suspicion that super-strong presidential leadership provides the only realistic path to decisive action. Crisis talk, in short, prepares the ground for a grudging acceptance of presidential unilateralism as the unfortunate, but necessary, price to pay if the nation is to confront and resolve the challenges of the twenty-first century.

In emphasizing the danger of a runaway presidency, I don't mean to give Congress a free pass. Most obviously, the Senate filibuster is a scandal, and requires reform...But the presidency represents the graver threat: while Schlesinger was prophetic in sounding the alarm, it has become a far more dangerous institution during the forty years since he wrote *The Imperial Presidency*—and these threatening trends promise to accelerate over the decades ahead. This is, at any rate, my thesis. ...

My institutional approach has four distinctive features. It is

systematic, historicist, dynamic, and interactive. Let me devote a few words to each.

Systematic: The modern presidency is an institution, not only a person. To understand its operation, we must dissect the institution into a series of functional elements. For starters, (1) there is the mechanism for selecting presidential nominees. Once the winning candidate gets to the White House, he will (2) continue to communicate to the larger public, and (3) use his very large White House staff to steer an enormous bureaucracy, containing thousands more of his political appointees. As commander in chief, he is also dealing (4) with the Joint Chiefs of Staff and other leading generals, as well as the civilian leadership at the Pentagon. As he is engaging with all these systems, the president is also trying (5) to legitimate his ongoing uses of power through the law and other forms of rhetorical appeal.

The presidency

has been the site of three serious outbreaks of illegality over the past half-century—Watergate, Iran-Contra, and the War on Terror—as well as a host of lesser ones.

Historicist: When we look at each of these functional systems, they pose greater dangers to constitutional fundamentals than they did a mere forty years ago, when Richard Nixon was in the White House. To put my thesis in deeper perspective, I will begin with the Founding and consider how the presidency has evolved through the centuries. This will allow a better appreciation of the remarkable character of the institutional transformations of the last generation.

Dynamic: I am not interested in the past for its own sake. By gaining perspective on recent institutional dynamics, we can appreciate how they may accelerate, if left unchecked, and generate even more serious presidential pathologies in the future. Reasonable people will disagree about the likelihood of my darker scenarios—and they will doubtless come up with counter-scenarios that I haven't considered.

So much the better. This forward-looking dialogue is absolutely necessary if we are to take control of our constitutional destiny and create new checks and balances responsive to the most likely forms of presidentialist abuse.

Interactive: Nevertheless, future projections are particularly difficult because of a final feature of the problem. It isn't enough to focus on a particular functional system to glimpse the future



Ackerman has proposed a series of reforms in hopes of minimizing the risks going forward. Among those proposals: the creation of a “Supreme Executive Tribunal” and a “Grand Bargain” (see page 43) for Senate confirmation of presidential appointments.

THE SUPREME EXECUTIVE TRIBUNAL

It would be best if the Supreme Court recognized the danger and radically expanded its understanding of the meaning of “case [or] controversy.” But there is zero chance of this happening any time soon. ...

...the only remaining option is to create a new institutional mechanism that will put a brake on the presidential dynamic before it can gather steam.

Call it the Supreme Executive Tribunal, and its nine members will think of themselves as judges for the executive branch, not lawyers for the sitting president. Members of the tribunal will serve (staggered) twelve-year terms, giving each president the chance to nominate three judges during his four years in office. Nominees must gain Senate confirma-

tion—encouraging the president to put forward candidates with established reputations as fair-minded jurists, not political operatives. ...

The president will continue to have a full staff of advocates at his command. They will have plenty to do dealing with Congress and framing legal opinions for executive departments and the White House. But these opinions will have only provisional authority, subject to full-dress adjudication by the Executive Tribunal. ...

At the same time, the tribunal's ongoing interchange with the executive branch will put a damper on unilateral assertions of power. At present, the president's lawyers develop aggressive constitutional doctrines without much fear of

correction by the Supreme Court, especially in the area of war, national security, emergency powers, and the like. ...

The new tribunal will change all this ... Instead of priding themselves on cutting-edge reinterpretations of traditional doctrines, the White House Counsel and Office of Legal Counsel will be preparing for the next case before the tribunal—and they will rightly fear that extreme positions will only serve to alienate the judges. ...

An obvious place for the tribunal to begin is with presidential signing statements—which I suppose will be a fixture of our constitutional arrangements for the foreseeable future. These slapdash documents should no longer serve as the final word from the executive branch. If a significant number of congressional representatives file an objection, the tribunal should resolve the constitutional questions after hearing advocates for both Congress and the president make their case.

contours of presidential abuse. We must consider how the systems interact with each other to assess the overall threat posed to the constitutional order. ...

The real dangers come from Capitol Hill: its pandering to special-interest groups, its endless ideological posturing, will destroy our collective problem-solving capacity in the decades ahead.

I predict that: (1) the evolving system of presidential nominations will lead to the election of an increasing number of charismatic outsider types who gain office by mobilizing activist support for extremist programs of the left or the right; (2) all presidents, whether extremist or mainstream, will rely on media consultants to design streams of sound bites aimed at narrowly segmented micropublics, generating a politics of unreason that will often dominate public debate; (3) they will increasingly govern through their White House staff of superloyalists, issuing executive orders that their staffers will impose on the federal bureaucracy even when they conflict with congressional mandates; (4) they will engage with an increasingly politicized military in ways that may greatly expand their effective power to put their executive orders into force throughout the nation; (5) they will legitimate their unilateral actions through an expansive use of emergency powers, and (6) assert “mandates from the People” to evade or ignore congressional statutes when public opinion polls support decisive action; (7) they will rely on elite lawyers in the executive branch to write up learned opinions that vindicate the constitutionality of their most blatant power grabs. These opinions will publicly rubber-stamp presidential actions months or years before the Supreme Court gets into the act—and they will generate heated debate amongst the broader legal community. With the profession divided, and the president’s media machine generating a groundswell of support for his power grab, the Supreme Court may find it prudent to stage a strategic retreat, allowing the president to displace Congress and use his bureaucracy and military authority to establish a new regime of law and order.

These are the dynamics of decline and fall for the American *Republic*—a term best clarified through a few orienting contrasts. For starters, the fall of the Republic is compatible with the continuation of American *empire*—by which I mean the country’s standing as world hegemon. While America may well be declin-

ing in relative economic and military power, this is not my subject. I am dealing with the future of the Republic, not the Republic’s future as a superpower.

Similarly, my subject is the decline of our political institutions, not the state of our morality. This is no Jeremiad prophesying America’s final fall into a godless condition of selfishness, sensuality, sloth. To the contrary, I take a positive view of the great moral movements of the twentieth century. We have managed to transform a white man’s country into a more inclusive place. Americans are much less bigoted and much more educated—eager to transform the techno-breakthroughs of the twenty-first century into new frontiers for the enhancement of human freedom. All in all, I don’t count myself amongst the doom-and-gloomers: for all our selfishness and self-righteousness, America *has* made moral progress in the twentieth century, and we *can* move forward once again.

But only if we manage to keep our institutions under control. This does not require a great leap forward into a higher morality, but some constitutional reality testing. We must rid ourselves of the comforting notion that our heroic ancestors have done the heavy lifting for us. We must confront the real-world Constitution and its potential for catastrophic decline—and act before it is too late.

Finally, the death of the Republic does not necessarily mean the end of *democracy*. Even if our constitutional tradition is overwhelmed by presidential power, the presidency may well remain an elective office—though, under some of the scenarios we shall be canvassing, the military will operate as a power behind the throne. My concern is with the preservation of our tradition of *republican* values—most notably, the threat posed by the transformation of the White House into a platform for charismatic extremism and bureaucratic lawlessness.

The republic can decline and fall in many different ways. My broad account points to seven different factors, whose dynamic interaction can generate a host of concrete scenarios that may destroy the system of checks and balances. Each is worth discussing in its own right. But I will be focusing on a few that seem to me most likely. Some critics will find my choices misguided—they will discount some scenarios I emphasize and develop others I have ignored. These critiques will usefully clarify the stakes involved, but they shouldn’t divert us from the key issue: is the overall likelihood of all the scenarios, when put together, big enough to warrant a serious reform effort to preempt the looming threat?

I think reform is imperative, but it can’t happen without sustained discussion. I hope to kick off the debate by proposing a broad-ranging reform program ... Given the multifaceted dynamics of the problem, we shouldn’t be searching for a single miracle cure to deal with all our presidential dis-eases at once.

It would be even sillier to respond with radical surgery—hacking away at presidential power indiscriminately in a desperate effort to reduce the danger. While the White House has become



A “GRAND BARGAIN” ON SENATE CONFIRMATION OF PRESIDENTIAL APPOINTMENTS

We are in a curious situation. The Senate takes the trouble to vote on the nomination of each new ambassador to Luxembourg, but it remains on the sidelines when the president appoints his national security advisor. ...

When describing British government in the nineteenth century, Walter Bagehot emphasized the importance of distinguishing the “efficient” from the “dignified” aspects of the constitution. During his day, Britain’s dignified constitution continued to center around the queen and her court; but its efficient power centers were the cabinet and the House of Commons. A similar, but opposite, transformation is happening in America today—away from the legisla-

ture, and toward presidential government. This means that our dignified Constitution emphasizes Senate confirmation of cabinet officers while effective government is increasingly run out of the White House by presidential staffers. ...

Here is where another pathological aspect of the modern system may come to the rescue. Individual senators can now block the confirmation of hundreds of key officials in the cabinet departments for lengthy periods, gravely undermining the administration’s effectiveness. By offering to eliminate this second abuse, the Senate might manage to interest the president in a grand bargain: In exchange for gaining the power to confirm top White House officials, the

a serious threat to the republic, the president also remains an indispensable tribune of the American people, expressing its deepest hopes for their collective future. We will have to keep on living with our tragic hero for a very long time to come. I do not aim to cripple the presidency, but to devise a series of damage control devices that check its worst tendencies.

... Some suggested reforms respond to the threat of a politics of unreason; others confront outbreaks of executive illegality led by superloyalists on the White House staff; others encourage a new professional code of military ethics that will check the ongoing politicization of the officer corps; and still others try to correct the perverse institutional incentives that can transform White House lawyers into apologists for presidential power grabs.

These proposals come in different sizes—some are small, some are not—but even when taken together, they won’t operate as a cure-all. The pathological tendencies of the modern presidency are far too deep for anything resembling a panacea.

Nevertheless, a series of partial fixes may make a real difference in the decades ahead.

... [But] before we can even think about serious reform, we must recognize that we have a serious problem on our hands.

Do we? ▼

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