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### Recommended Citation

77 Md. L. Rev. 161 (2017)

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## TRUMP, TRUST, AND THE FUTURE OF THE CONSTITUTIONAL ORDER

STEPHEN M. GRIFFIN\*

Sometimes constitutions fail. The unprecedented election of Donald Trump, a populist insurgent<sup>1</sup> who lacks the prior political experience or military service of all presidents before him, is such a sharp break in American historical experience that it raises questions as to whether something is deeply amiss with the constitutional order.<sup>2</sup>

Constitutional failure is not uncommon.<sup>3</sup> A path-breaking global study of national constitutions shows that on average, they last only nineteen years.<sup>4</sup> The U.S. Constitution is an uncommon outlier and, as such, is accounted for by many a long-running success story.<sup>5</sup> But could a bell be tolling for American constitutionalism?

In this Essay, I assess the meaning of Trump's shocking rise for the future of our constitutional order.<sup>6</sup> The shock, of course, was not the election of a Republican president. There have been many Republican presidents since Lincoln, each making their own distinctive contribution to the American tradition. Yet, there are good reasons to think this time around is different.<sup>7</sup> The efficacy and, perhaps, stability of our constitutional order are in question, and we should try to understand why.

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1. On contemporary populism, see generally JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* (2016).

2. Many longstanding observers of American politics and history have had this reaction. See, e.g., Thomas B. Edsall, *When the President Is Ignorant of His Own Ignorance*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/opinion/when-the-president-is-ignorant-of-his-own-ignorance>; James Fallows, *Despair and Hope in the Age of Trump*, ATLANTIC (Jan.–Feb. 2017) <https://www.theatlantic.com/magazine/archive/2017/01/despair-and-hope-in-the-age-of-trump/508799/>.

3. See generally ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009). See *id.* at 1 (specifying the failure rate of constitutions worldwide over time).

4. *Id.* at 2.

5. *Id.* at 65.

6. For an insightful analysis by a political scientist of Trump's surprising win, see Gary C. Jacobson, *The Triumph of Polarized Partisanship in 2016: Donald Trump's Improbable Victory*, 132 POL. SCI. Q. 9 (2017).

7. See *infra* Part I.

In particular, we should consider the possibility that Trump's success is the product of longstanding trends that show the Constitution to be more crisis-prone than many would like to admit.<sup>8</sup> These crises are not akin to Bruce Ackerman's transformational moments and are not produced by social movements seeking to reform the Constitution from the outside.<sup>9</sup> Rather, they are internal to the constitutional order, created by the reality that an obdurate Constitution has long placed political elites in the difficult position of informally adapting it to the increased responsibilities placed on the national state. To understand this process of informal constitutional change,<sup>10</sup> we should keep in view several moving parts—the structure of state institutions, political parties trying to govern in a polarized environment, and the political trust required to keep the rickety train of government on track.<sup>11</sup>

Given this perspective, I provide three takes on Trump and the future of the constitutional order. Part I argues that Trump's victory was enabled by the long-term decline in political trust. The entire presidential selection process, from the beginning of Trump's candidacy to the November election was saturated by persistent distrust of all politicians, public officials, and government institutions.<sup>12</sup> This permissive context facilitated the rapid rise of candidate Trump, who presented himself as the savior who would "blow up" the system and solve the dysfunctional situation in Washington.<sup>13</sup> In considering the future of the constitutional order, it is important to understand that no matter whether President Trump is reelected or (possibly) impeached, the problems of distrust and dysfunctional government will remain front and center.<sup>14</sup>

Part II contends that the challenge Trump presents cannot be remedied by returning to the verities of the Constitution because the Constitution is the problem.<sup>15</sup> I critique the view that the Constitution's checks and balances

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8. This was an early concern of mine. See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 194–201 (1996).

9. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) (arguing the Constitution has been transformed in key historical episodes including Reconstruction, the New Deal, and the civil rights movement); JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011).

10. See, e.g., Stephen M. Griffin, *Understanding Informal Constitutional Change* 2 (Tulane Univ. Sch. of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 16-1, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2724580](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724580).

11. I took this approach in a previous work. See STEPHEN M. GRIFFIN, *BROKEN TRUST: DYSFUNCTIONAL GOVERNMENT AND CONSTITUTIONAL REFORM* 31–40 (2015).

12. See *infra* Part I.

13. Doug Sosnik, *Trump Is on Track to Win Reelection*, WASH. POST (Oct. 6, 2017), [https://www.washingtonpost.com/opinions/trump-is-on-track-to-win-reelection/2017/10/06/91cd2af0-aa15-11e7-850e-2bdd1236be5d\\_story.html?utm\\_term=.3e50afc43dd8](https://www.washingtonpost.com/opinions/trump-is-on-track-to-win-reelection/2017/10/06/91cd2af0-aa15-11e7-850e-2bdd1236be5d_story.html?utm_term=.3e50afc43dd8).

14. See GRIFFIN, *supra* note 11, at 76–77.

15. For works developing this theme in different ways, see generally GRIFFIN, *supra* note 11; WILLIAM G. HOWELL & TERRY M. MOE, *RELIC: HOW OUR CONSTITUTION UNDERMINES*

will be sufficient to steer the Trump Administration within safe boundaries. Instead, we should face the music and acknowledge that the dysfunctional operation of the contemporary constitutional order made Trump's rise possible in the first place. The reality is that our governing order, weakened by a systemic loss of trust, is increasingly unable to reproduce those conditions that contribute to its maintenance and success.<sup>16</sup> This means that however the United States eventually moves on from Trump's presidency, what has been called the "Trump Effect"<sup>17</sup> likely will persist.

In Part III, I discuss to what extent the Trump presidency is consistent with political regime theory, particularly the highly influential theory of "political time" put forward by Stephen Skowronek.<sup>18</sup> Skowronek's theory depends on the recurrence of "reconstructive" presidencies that create new possibilities for the national agenda.<sup>19</sup> I argue that the dysfunction at the heart of our constitutional order today has made those sorts of presidencies difficult, if not impossible. The last three presidencies of Bush, Obama, and now Trump, suggest strongly that it is this constitutional dysfunction that must be addressed before American politics and policy can move forward in a productive direction.

#### I. IN TRUMP WE TRUST?

There is nothing new in electing a Republican president. But Donald Trump is something new, different from not only previous Republican presidents, but from all prior presidents. Trump has no experience as a politician, public official, or in the formation of public policy. Trump is (and will remain throughout his presidency, absent a divestiture of his ownership of the Trump Organization)<sup>20</sup> a real estate developer and former reality show host who learned how to brand his name worldwide.<sup>21</sup> In order to run as a competitive candidate, he had to execute what was plausibly described as a hostile

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EFFECTIVE GOVERNMENT (2016); SANFORD LEVINSON, *FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

16. See GRIFFIN, *supra* note 11, at 31.

17. Dan Balz, *The Trump Effect Is in Full Flower, and No One Is Immune*, WASH. POST (Jan. 31, 2017), [https://www.washingtonpost.com/politics/the-trump-effect-is-in-full-flower-and-no-one-is-immune/2017/01/31/d0364318-e7d2-11e6-b82f-687d6e6a3e7c\\_story.html](https://www.washingtonpost.com/politics/the-trump-effect-is-in-full-flower-and-no-one-is-immune/2017/01/31/d0364318-e7d2-11e6-b82f-687d6e6a3e7c_story.html).

18. See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 30 (1993).

19. *Id.* at 36–39.

20. There is no effective separation between Trump and his business. See Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/us/politics/donald-trump-business.html>.

21. For a useful review of Trump's career in relation to his presidential management style, see Michael Kruse, *'He's a Performance Artist Pretending to be a Great Manager'*, POLITICO (Feb. 28, 2017), <http://www.politico.com/magazine/story/2017/02/hes-a-performance-artist-pretending-to-be-a-great-manager-214836>.

takeover of the Republican Party.<sup>22</sup> As the venerable British magazine *The Economist* described in the election's aftermath, "America has voted not for a change of party so much as a change of regime. Mr. Trump was carried to office on a tide of popular rage."<sup>23</sup>

How should we understand the "Trump Effect"<sup>24</sup> in relation to the Constitution? I suggest we first require a methodology that helps us understand the process of informal constitutional change; for that we need to introduce the concept of a constitutional order. It is commonplace among scholars that to understand how the Constitution operates today in a practical sense, we should take account of norms, practices, and institutions that go beyond its spare text.<sup>25</sup> The concept of a constitutional order is a useful way of summarizing the reality that to be effective as a supreme law, the Constitution must be implemented and enforced by institutions. Some of these institutions might be reasonably regarded as "formal" because they are created by the text, such as three branches of government. Others are informal such as political parties. But all of these institutions, formal or informal, have mediated constitutional meaning over the course of American history.

Talking about constitutional order is a useful heuristic tool that enables us to focus properly on how the Constitution changes informally in different historical eras. My version of this concept, which might be called "constitutional change as state building,"<sup>26</sup> features two particular claims. First, we should attend to how the structure of and resources available to these institutions influence how the Constitution is enforced over time.<sup>27</sup> Second, we should assess whether constitutional orders succeed at reproducing themselves across time.<sup>28</sup> These claims are related because the degree of support institutions can command from the public is critical to whether they can reproduce themselves successfully.<sup>29</sup> It is here that the empirical literature on political trust is especially relevant.<sup>30</sup>

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22. See, e.g., Dan Balz, *Donald Trump, America's First Independent President*, WASH. POST (Nov. 19, 2016), [https://www.washingtonpost.com/politics/donald-trump-americas-first-independent-president/2016/11/19/b09e1cc6-ade2-11e6-8b45-f8e493f06fcd\\_story.html?hpid=hp\\_hp-top-table-main\\_sundaytake523pm%3Ahomepage%2Fstory&utm\\_term=.07782c679fac](https://www.washingtonpost.com/politics/donald-trump-americas-first-independent-president/2016/11/19/b09e1cc6-ade2-11e6-8b45-f8e493f06fcd_story.html?hpid=hp_hp-top-table-main_sundaytake523pm%3Ahomepage%2Fstory&utm_term=.07782c679fac).

23. *America's New President: The Trump Era*, ECONOMIST (Nov. 12, 2016), <http://www.economist.com/news/leaders/21709951-his-victory-threatens-old-certainties-about-america-and-its-role-world-what-will-take>.

24. Balz, *supra* note 17.

25. See Griffin, *supra* note 10, at 1 n.3.

26. *Id.* at 18.

27. I advanced this idea for the case of war powers previously. See generally STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

28. GRIFFIN, *supra* note 11, at 31–40.

29. *Id.*

30. See generally MARC J. HETHERINGTON, *WHY TRUST MATTERS: DECLINING POLITICAL TRUST AND THE DEMISE OF AMERICAN LIBERALISM* (2005); MARC J. HETHERINGTON & THOMAS

Trump did not run a campaign based on reproducing an existing order. In fact, by frontally challenging so many assumptions about what constitutes regular order in politics, Trump was arguably putting in question the contemporary constitutional order itself. As well described by one commentator, “Trump is a transgressive personality,”<sup>31</sup> and it could be said as well that his campaign transgressed many fundamental political rules of the game. Without taking on for the moment the question of whether these are violations of constitutional norms, consider his statements (1) that the presidential election was rigged; (2) that he would not necessarily abide by the result; (3) that he would prosecute his opponent Hillary Clinton; (4) that he suggested all of his opponents were corrupt; (5) denying allegations of Russian hacking of the Democratic Party without evidence; and (6) claiming after the election that millions of illegal immigrants cast votes for Hillary Clinton.<sup>32</sup>

Trump’s transgressive behavior did not slacken after he arrived in Washington.<sup>33</sup> In fact, writing this Essay I found it impossible to keep up.<sup>34</sup> His inauguration speech contended that over the decades, the Washington elite stole the wealth of the country for its own personal benefit.<sup>35</sup> Following the inauguration, Trump again claimed that millions of illegal votes were cast in the presidential election,<sup>36</sup> attacked federal court judges who ruled against

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J. RUDOLPH, WHY WASHINGTON WON’T WORK: POLARIZATION, POLITICAL TRUST, AND THE GOVERNING CRISIS (2015).

31. Peter Wehner, *Why I Cannot Fall in Line Behind Trump*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/opinion/sunday/why-i-cannot-fall-in-line-behind-trump.html>.

32. For (1)–(3), see Steven Levitsky & Daniel Ziblatt, *Is Donald Trump a Threat to Democracy?*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html>. For (4), see *Lexington: The People v. the People*, ECONOMIST (Nov. 12, 2016), <http://www.economist.com/news/united-states/21709919-setting-americans-against-each-other-paved-president-elects-path-power-people-v>. For (5) see Eugene Kiely, *Trump Misleads on Russia Hacking*, FACTCHECK.ORG (July 7, 2017), <http://www.factcheck.org/2017/07/trump-misleads-russia-hacking>. For (6), see Edward Helmore, *Trump Claims ‘Millions Voted Illegally’ but Offers No Evidence*, GUARDIAN (Nov. 28, 2016), <https://www.theguardian.com/us-news/2016/nov/27/donald-trump-scam-recount-jill-stein-hillary-clinton>.

33. Perhaps his most disturbing tendency is to try to deliberately divide Americans by race. See, e.g., Michael Gerson, *America Has a Racial Demagogue for a President*, WASH. POST (Sept. 25, 2017), [https://www.washingtonpost.com/opinions/america-has-a-racial-demagogue-for-a-president/2017/09/25/07af83da-a223-11e7-b14f-f41773cd5a14\\_story.html?utm\\_term=.1bb3de013714](https://www.washingtonpost.com/opinions/america-has-a-racial-demagogue-for-a-president/2017/09/25/07af83da-a223-11e7-b14f-f41773cd5a14_story.html?utm_term=.1bb3de013714).

34. It has been a difficult time for many Americans. It is relevant here that the *Washington Post*’s fact checker found that in his first 232 days in office, President Trump made 1,145 false and misleading claims. *Fact Checker*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/trump-claims-database> (last updated Oct. 9, 2017).

35. *Inaugural Address: Trump’s Full Speech*, CNN, <http://www.cnn.com/2017/01/20/politics/trump-inaugural-address> (last updated Jan. 21, 2017).

36. Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/poli->

his travel ban,<sup>37</sup> and referred to the news media as “the enemy of the American people.”<sup>38</sup> He accused President Obama of having his phones at Trump Tower wiretapped during the election campaign,<sup>39</sup> and he accused Susan Rice, President Obama’s National Security Adviser, of committing a crime—both without any apparent evidence.<sup>40</sup> In May, Trump threw Washington into turmoil—and created a serious ongoing problem for himself in terms of an investigation by a special prosecutor—by suddenly dismissing FBI Director James Comey.<sup>41</sup> At the time, Comey was in the middle of supervising an investigation into how Russia attempted to influence the 2016 election.<sup>42</sup> These statements and actions raised hard questions about Trump’s basic competence to serve as president, and he admitted that the job was far more difficult than he had expected.<sup>43</sup>

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tics/donald-trump-congress-democrats.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news.

37. Brian Bennett, *Trump Attacks Federal Judges in Unusually Personal Terms*, L.A. TIMES (Feb. 8, 2017), <http://beta.latimes.com/politics/la-na-pol-trump-supreme-court-20170209-story.html>.

38. Kristine Phillips, ‘*Greatest Threat to Democracy*’: *Commander of Bin Laden Raid Slams Trump’s Anti-Media Sentiment*, WASH. POST: CHECKPOINT (Feb. 24, 2017), [https://www.washingtonpost.com/news/checkpoint/wp/2017/02/23/greatest-threat-to-democracy-commander-of-bin-laden-raid-slams-trumps-anti-media-sentiment/?utm\\_term=.389b487b4418](https://www.washingtonpost.com/news/checkpoint/wp/2017/02/23/greatest-threat-to-democracy-commander-of-bin-laden-raid-slams-trumps-anti-media-sentiment/?utm_term=.389b487b4418).

39. Michael D. Shear & Michael S. Schmidt, *Trump, Offering No Evidence, Says Obama Tapped His Phones*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/us/politics/trump-obama-tap-phones.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news>.

40. Maggie Haberman et al., *Trump, Citing No Evidence, Suggests Susan Rice Committed Crime*, N.Y. TIMES (Apr. 5, 2017), <https://www.nytimes.com/2017/04/05/us/politics/trump-interview-susan-rice.html>.

41. David A. Graham, *Only Mueller’s Team Knows What It’s Actually Doing*, ATLANTIC (Sept. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/09/mueller-investigation-black-box/538707>; Michael D. Shear, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>.

42. Maggie Haberman et al., ‘*Enough Was Enough*’: *How Festering Anger at Comey Ended in His Firing*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/us/politics/how-trump-decided-to-fire-james-comey.html>; Philip Rucker et al., *Inside Trump’s Anger and Impatience—and His Sudden Decision to Fire Comey*, WASH. POST (May 10, 2017), [https://www.washingtonpost.com/politics/how-trumps-anger-and-impatience-prompted-him-to-fire-the-fbi-director/2017/05/10/d9642334-359c-11e7-b373-418f6849a004\\_story.html](https://www.washingtonpost.com/politics/how-trumps-anger-and-impatience-prompted-him-to-fire-the-fbi-director/2017/05/10/d9642334-359c-11e7-b373-418f6849a004_story.html).

43. Philip Bump, *Trump Now Agrees with the Majority of Americans: He Wasn’t Ready to be President*, WASH. POST (Apr. 28, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/04/28/trump-now-agrees-with-the-majority-of-americans-he-wasnt-ready-to-be-president/>; E.J. Dionne Jr., *Admit It: Trump Is Unfit to Serve*, WASH. POST (Feb. 15, 2017), [https://www.washingtonpost.com/opinions/admit-it-trump-is-unfit-to-serve/2017/02/15/467d0bbe-f3be-11e6-8d72-263470bf0401\\_story.html?utm\\_term=.77e7134d61a6](https://www.washingtonpost.com/opinions/admit-it-trump-is-unfit-to-serve/2017/02/15/467d0bbe-f3be-11e6-8d72-263470bf0401_story.html?utm_term=.77e7134d61a6); Michael D. Shear, ‘*Unbelievable Turmoil*’: *Trump’s First Month Leaves Washington Reeling*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/trump-white-house.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news>; Karen Tumulty, *Trump’s Charge That He Was Wiretapped*

Many longtime political observers continue to express their dismay at Trump's election and his multiple transgressions of political norms, but it is perhaps more productive to analyze the environment that made these events possible in the first place. Although Trump may be bringing something new to the table, he may also be simply opportunistic. With that in mind, I suggest Trump's unconventional campaign was fueled from the start by the highly permissive environment created by the decline of trust in government. To be sure, Trump did all he could on his own to foment distrust. As *The Economist* commented, Trump "won office by systematically undermining trust in any figure or institution that seemed to stand in his way."<sup>44</sup> Yet ultimately, he was more the beneficiary of distrust than its progenitor. The ground was cleared well before Trump took the field, given that both President Obama and Hillary Clinton were widely distrusted, at least by Republicans.<sup>45</sup>

Trust in government has been declining in the United States since the mid-1960s and distrust reached significant levels during the 1970s.<sup>46</sup> Although trust in government recovered somewhat during Reagan's first term and as Bill Clinton was reelected in 1996, it never rebounded to the level attained before the recognition of race as a national issue, not to mention Vietnam and Watergate.<sup>47</sup> After the 1970s the noneconomic causes of persisting low levels of trust are unclear, although it is worth considering that some scholars believe that the high levels of trust enjoyed after World War II were anomalous.<sup>48</sup>

The extensive literature on the causes of low trust in government does not pay sufficient attention to its constitutional hazards.<sup>49</sup> I have called attention to these, arguing that low trust interferes with the ability of institutions to reproduce themselves and plausibly imposes a legitimacy drain on the normal operations of government.<sup>50</sup> This creates the potential for sudden,

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*Takes Presidency into New Territory*, WASH. POST (Mar. 5, 2017), [https://www.washingtonpost.com/politics/trumps-charge-that-he-was-wiretapped-takes-presidency-into-new-territory/2017/03/05/7ce64578-01bd-11e7-ad5b-d22680e18d10\\_story.html?hpid=hp\\_hp-top-table-main\\_trumpdebrief-530pm%3Ahomepage%2Fstory&utm\\_term=.534147df791d](https://www.washingtonpost.com/politics/trumps-charge-that-he-was-wiretapped-takes-presidency-into-new-territory/2017/03/05/7ce64578-01bd-11e7-ad5b-d22680e18d10_story.html?hpid=hp_hp-top-table-main_trumpdebrief-530pm%3Ahomepage%2Fstory&utm_term=.534147df791d).

44. *Donald Trump's Most Damaging Legacy May be a Lower-Trust America*, ECONOMIST (Dec. 20, 2016), <https://www.economist.com/news/united-states/21712157-fomenting-cynicism-and-partisan-divisions-his-best-chance-surviving-his-term-donald>.

45. Michael Barbaro, *Americans Don't Trust Her. But Why?*, N.Y. TIMES: THE RUN-UP (Aug. 16, 2016), <https://www.nytimes.com/2016/08/16/podcasts/hillary-clinton-trust.html>.

46. GRIFFIN, *supra* note 11, at 76–100.

47. *Id.*

48. *Id.* at 84.

49. For one recent useful review of the evidence, see Bill Bishop, *Americans Have Lost Faith in Institutions. That's Not Because of Trump or 'Fake News'*, WASH. POST (Mar. 3, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/03/03/americans-have-lost-faith-in-institutions-thats-not-because-of-trump-or-fake-news/?hpid=hp\\_no-name\\_opinion-card-e%3Ahomepage%2Fstory&utm\\_term=.320704ca9131](https://www.washingtonpost.com/posteverything/wp/2017/03/03/americans-have-lost-faith-in-institutions-thats-not-because-of-trump-or-fake-news/?hpid=hp_no-name_opinion-card-e%3Ahomepage%2Fstory&utm_term=.320704ca9131).

50. GRIFFIN, *supra* note 11, at 31–40.



sharp breaks from traditional constitutional norms. The early 1990s, for example, was a period of very low trust, and the subsequent increase in politicization was widely noticed.<sup>51</sup> We could ask why someone like Trump did not appear before, but in fact, populist outsider Ross Perot did make a good run at the presidency in 1992 (eventually winning nineteen percent of the popular vote) despite having no prior experience in politics and a personality unsuited for elective office.<sup>52</sup> John Judis argues that Perot represented a “radical middle” of Americans who did not describe themselves as liberal or conservative and believed they had not benefited from global free trade or the neoliberal agenda.<sup>53</sup> At least part of this diagnosis should have a familiar ring.<sup>54</sup>

Recent research on political trust contrasts the situation prevailing after 9/11 with the experience of the Obama Administration. Marc Hetherington and Thomas Rudolph argue that one reason trust continued to be high for a time after 9/11 was that “politics was consumed by foreign affairs and war.”<sup>55</sup> Although they may distrust government as a general matter, Americans respect, and indeed trust, particular government institutions such as the military.<sup>56</sup> Hetherington and Rudolph contend that when government focuses on a problem of foreign affairs Americans agree on and employs the military effectively, trust is maintained.<sup>57</sup> But the situation is different when domestic issues are in the foreground, such as after the 2008 financial crisis. With no political consensus on solutions, trust plummeted and “spawned a virulently antigovernment political movement”—the Tea Party.<sup>58</sup> The nature of this movement contributed to a growing crisis of governance.<sup>59</sup>

Hetherington and Rudolph are careful to say there is no strong evidence that Americans are polarized based on ideology or policy.<sup>60</sup> Rather, the key phenomenon is the polarization of trust by party.<sup>61</sup> For example, Republicans trust government “quite a lot when one of their own occupies the White

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51. See THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS 31–43 (2012) (discussing the rise of Newt Gingrich leading to Republican takeover of Congress in 1994).

52. JUDIS, *supra* note 1, at 46–51.

53. *Id.*

54. For a similar analysis, see GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 272 (2017).

55. HETHERINGTON & RUDOLPH, *supra* note 30, at 7.

56. *Id.*

57. *Id.*

58. *Id.* at 8.

59. *Id.*

60. *Id.* at 16–21. It should be said that there is considerable disagreement on this issue among political scientists. *Id.*

61. *Id.* at 8–11.

House. What Republicans do not trust is government headed by Democrats.”<sup>62</sup> Hetherington and Rudolph argue that, in the past, Democrats who trusted government, even during Republican administrations, provided the political consensus necessary (they term it “ideological sacrifice”) for those administrations to succeed in moving the machinery of government to make important policy changes.<sup>63</sup> But trust among Democrats declined significantly during George W. Bush’s second term, helping to explain why Bush made little headway on domestic policy.<sup>64</sup> When the Obama Administration came into office, the situation reversed and in dramatic fashion.<sup>65</sup> Republicans never trusted President Obama, and his running room to advance national policy after Democrats lost control of Congress in 2010 was accordingly very limited.<sup>66</sup>

What I wish to add to this picture is the role of policy disasters in reducing trust in government.<sup>67</sup> Political elites have made it considerably more difficult to reverse the decline in trust by making some drastic mistakes. Consider the role of the budget deficit in relation to Perot’s unexpected appeal in 1992.<sup>68</sup> I suggest this became one of Perot’s main issues because both parties told the American people the issue was of overriding importance—then failed to deliver. Let us call this “both-party failure.” Instances of both-party failure cast doubt on the efficacy of the system. The phenomenon of both-party failure was key to the rise of the immigration issue in the 2016 election, a point I develop in Part II. Close attention to Hetherington and Rudolph’s analysis shows the relevance of more recent policy disasters.<sup>69</sup> The Iraq War and the 2008 financial crisis were long over by the time Trump declared his candidacy, but they nonetheless were part of the deep background that made it possible.<sup>70</sup> These highly salient failures undermined the claims to expertise of both party and technocratic elites. These elites were no longer trusted by the public.

The Iraq War discredited everyone connected with it and contributed to both Democratic disenchantment with the Bush presidency and Trump’s ability to challenge party elites.<sup>71</sup> The financial crisis arguably discredited both

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62. *Id.* at 9.

63. *Id.* at 9–10.

64. *Id.* at 10.

65. *Id.*

66. *Id.* at 10–11.

67. For a discussion of policy disasters, see GRIFFIN, *supra* note 11.

68. JUDIS, *supra* note 1, at 48.

69. HETHERINGTON & RUDOLPH, *supra* note 30, at 72–95.

70. *Id.*

71. *Id.* at 10, 131–32. With respect to the effect of the Iraq War on the Republican party, see J.D. Vance, *Why Trump’s Antiwar Message Resonates with White America*, N.Y. TIMES (Apr. 4, 2016), <https://www.nytimes.com/2016/04/04/opinion/campaign-stops/why-trumps-antiwar-message-resonates-with-white-america.html>.

parties yet again, but the government's response was seized on by conservative elements in the Republican Party to discredit President Obama. After Obama unexpectedly (from the point of view of conservatives) won reelection, the policy process became stalemated, further undermining trust in both parties. On the Republican side, the rank and file were disappointed with the failure to unwind Obama's executive initiatives. On the Democratic side, the rank and file were just disappointed—period. So the groundwork was laid for the emergence of outsiders. But it is worth emphasizing that this happened because *both* parties were seen to fail the American people.

Another aspect of the run-up to the Trump candidacy that deserves mention is that all of these policy disasters could be plausibly understood as the failures of elites. There was never any groundswell of broad public support for the Iraq War and certainly none for the measures taken to alleviate the financial crisis.<sup>72</sup> Both of these disasters were technocratic elite-driven policymaking at its finest, which is to say they had little to do with any real idea of democracy. This produced a populist insurgency in both parties: a “left” version represented by Senator Bernie Sanders, and a “right” version represented by Donald Trump.<sup>73</sup>

Thus, the 2016 presidential election took place within a pervasive low-trust environment.<sup>74</sup> As Americans approached the polls, many of them expressed a loss of faith in the democratic process.<sup>75</sup> Why? Perhaps because from the point of view of the average citizen, we have had three “change” elections since 2000 after which, from the perspective of a significant element of both left and right opinion, there was no change at all.<sup>76</sup> This eventually produced a true populist insurgency.<sup>77</sup> These voters want to “blow up”

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72. Hetherington & Rudolph, *supra* note 30, at 131, 151.

73. JUDIS, *supra* note 1.

74. In addition to the survey evidence, this is well illustrated by Arlie Russell Hochschild's study of Republican Tea Party members in Louisiana. See ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* 48 (2016).

75. Nathaniel Persily & Jon Cohen, *Americans Are Losing Faith in Democracy—and in Each Other*, WASH. POST (Oct. 14, 2016), [https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4\\_story.html?hpid=hp\\_no-name\\_opinion-card-f%3Ahomepage%2Fstory&utm\\_term=.e7793035a7e1](https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?hpid=hp_no-name_opinion-card-f%3Ahomepage%2Fstory&utm_term=.e7793035a7e1).

76. Glenn Thrush, *10 Crucial Decisions That Reshaped America*, POLITICO (Dec. 9, 2016), <http://www.politico.com/magazine/story/2016/12/2016-presidential-election-10-moments-trump-clinton-214508> (calling the 2016 election the “third straight change election”).

77. On the notion of populism as a rejection of both political parties, see Sosnik, *supra* note 13.

our system of government or, at least, the way it typically works in Washington.<sup>78</sup> The election outcome produced disbelief. As *The Economist* remarked, “Half of America can scarcely believe the other half has chosen Mr. Trump.”<sup>79</sup>

## II. THE CONSTITUTION AS PROBLEM AND SOLUTION

I noted in Part I that it is now commonplace for scholars to see the Constitution as consisting of much more than the actual text. But if we agree that the Constitution in some sense includes the norms, practices, and institutions that implement it, crucial consequences follow for how we analyze the role of the Constitution in relation to the Trump phenomenon. In particular, we should avoid what I will call “externalism,” the view that whatever the significance of Trump’s victory and presidency, it is somehow happening in a sphere of action external to the “normal” operation of the Constitution. Rather, if we are indeed governed by a Constitution that has both formal and informal structures, that is, what I have called a constitutional order, then we have to take more seriously the possibility that Trump and Trumpism are internal to American constitutional development. Trump himself may in time be “solved” by some constitutional process (such as impeachment), but that would not change the reality that he was produced by the constitutional order itself.

Consider in this light the perspective that might be called “constitutional fundamentalism.” Fundamentalism is a form of externalism, and it will likely be a leading way of analyzing the constitutional meaning of the Trump presidency. I say this with some confidence because fundamentalism dominated the commentary with respect to the use of executive power during the Bush and Obama presidencies.<sup>80</sup> Fundamentalist critics typically argued that these presidents abused their power, violated basic rights, and departed from traditional legal norms. Invigorating the system of checks and balances was usually presented as the solution to executive overreaching. Such themes ought to sound familiar in light of Trump’s conflict with the federal judiciary over his ill-conceived travel ban.<sup>81</sup>

I offer an alternative perspective. Initially, if we observe multiple presidents with very different political orientations misbehaving, it is likely that their actions are *reflective*, rather than subversive, of the existing constitutional order. All presidents exercise their power within an institutional order.

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78. *Id.*

79. *How It Happened*, *ECONOMIST* (Nov. 12, 2016), <https://www.economist.com/news/united-states/21710028-donald-trump-won-fewer-votes-mitt-romneyin-2012-hillary-clinton-did-much-worse>.

80. See GRIFFIN, *supra* note 27, at 333 n.1.

81. See Bennett, *supra* note 37.

That order has been shaped, through both formal and informal legal means, over the course of American history. Perhaps this seems straightforward, yet it calls into question the soundness of the baseline to which fundamentalists implicitly appeal. To the extent the fundamentalist critique of executive power is rooted ultimately in an appeal to the authority of the checks and balances established in the eighteenth century, it is misguided. Such a critique assumes that we can call into being the eighteenth-century constitutional (institutional) order, yet this is no more possible than it is possible (or desirable) to time-jump back to the eighteenth century.

Further, there is a relevant sense in which fundamental systems, such as checks and balances themselves, produced the concentrated populist rage that fueled Trump's candidacy. Here I have in mind especially the policy logjam in Congress that developed during Obama's second term,<sup>82</sup> particularly with respect to immigration reform. In a major speech in November 2014, President Obama announced significant executive actions on immigration that became a source of partisan contention and litigation.<sup>83</sup> Yet in the speech, Obama balanced his unilateral actions against an account of a dysfunctional legislative process, which no one disputed.<sup>84</sup> In the wake of the 2012 reelection of President Obama, the Senate in June 2013 passed a bipartisan comprehensive immigration reform with a vote of 68-32. As Obama recounted, it then fell to Speaker John Boehner and the House leadership to take action.<sup>85</sup> Not only did they fail to take action, they refused to allow the measure to come to a vote on the House floor, although they knew it would certainly pass with support from both parties.<sup>86</sup> This was a fairly historic lapse in the legislative process.

As Obama described the measures he would take with respect to undocumented immigrants, he remarked, "Americans are tired of gridlock."<sup>87</sup> They most assuredly are!<sup>88</sup> Only about six months after Obama's speech, Donald

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82. See, e.g., Carl Hulse, *Three Separate, Equal and Dysfunctional Branches of Government*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/politics/three-separate-equal-and-dysfunctional-branches-of-government.html>.

83. *Transcript: Obama's Immigration Speech*, WASH. POST (Nov. 20, 2014), [https://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340\\_story.html?utm\\_term=.e16d98c905ef](https://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html?utm_term=.e16d98c905ef).

84. *Id.*

85. *Id.*

86. *Id.*; Tim Alberta, *John Boehner Unchained*, POLITICO (Nov.–Dec. 2017), <https://www.politico.com/magazine/story/2017/10/29/john-boehner-trump-house-republican-party-retirement-profile-feature-215741>.

87. *Transcript: Obama's Immigration Speech*, supra note 83.

88. As their legislative failures piled up, Republicans began to discover the discontent of their constituents in fall 2017. See Jonathan Martin & Alexander Burns, *For Republican Leaders in Congress, the Headaches Keep Mounting*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/politics/republicans-disarray-trump-senate-congress.html>.

Trump came down an escalator in Trump Tower in New York City and announced his candidacy for president.<sup>89</sup> His remarks on undocumented immigrants in particular struck a nerve (Mexican “rapists”).<sup>90</sup> But given that Congress had not enacted comprehensive immigration reform in 2013, Trump was enabled—that is, he was able to claim not only that America’s immigration situation was unacceptable and dangerous, but that Washington had *done nothing*. Surely Trump and Obama were both correct in observing that Congress had become dysfunctional. Because of the intransigence of the most conservative members in the House of Representatives, it had punted on one of the most crucial policy questions facing the country.

As I discussed in Part I, Ross Perot’s 1992 presidential run suggests a useful rule of thumb. When *both* parties tell the American people (perhaps for different reasons) that a policy problem must be solved, but then fail conspicuously to address it, this creates an unstable situation that allows relative outsiders to enter the political arena. The House’s failure to even hold a vote on the key issue of immigration reform created just this sort of opportunity. But such a political failure can also be a problem for the constitutional order. The inexperience of outsider candidates and the subsequent lack of effective action may well further increase distrust.

The problem with constitutional fundamentalism is that it tends to separate Trump from the Constitution, as if he were an external force to be caged by the system of checks and balances. This ignores the possibility that Trump might in some sense be a product of a dysfunctional (should we say “failing”?) constitutional order. Certainly some commentators may believe the system of checks and balances is working. My point is that this fails to foreground the far more urgent question of how Trump got into the White House in the first place.

I believe that, in the grip of externalism and fundamentalism, scholars tend to resist the notion that our constitutional order is in trouble and, indeed, might require an overhaul. Consider that many leading scholars are resistant to thinking about our current circumstances as possibly leading to a “constitutional crisis.”<sup>91</sup> But constitutional crises are historical events, and I hope we can agree that they are best studied as history, that is, taking into consideration the self-conscious understanding of the participants. I think it sensibly follows that it is best to proceed inductively by examining widely agreed-on instances of constitutional crises in American history and to build a theory

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89. *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

90. *Id.*

91. This is well illustrated by a recent *Vox* article. See Dylan Matthews, *I Asked 8 Experts if We’re in a Constitutional Crisis. Here’s What They Said*, VOX (Feb. 13, 2017, 8:30 AM), <http://www.vox.com/policy-and-politics/2017/2/13/14541974/constitutional-crisis-experts-unanimous>.

about what they are and why they occur. Nonetheless, this intuitive approach puts me at odds methodologically with some scholars who would rather proceed deductively from first premises.<sup>92</sup> They put forward criteria to identify constitutional crises in the past without asking what events were regarded as crises at the time. Speaking generally, I believe this leads scholars to mistakenly ignore several instances in the twentieth century (including Watergate and Iran-contra) that not only should be treated as constitutional crises, but that provide important clues about the nature of, and the problems with, the contemporary constitutional order.

In an earlier work, I argued that American constitutional crises typically involve the creation of a state of fundamental uncertainty.<sup>93</sup> Surely political stability is a key goal of any constitution, and it is certainly a quality attributed to the U.S. Constitution. In constitutional crises, however, the Constitution's normal reassuring polarity reverses and unexpectedly injects instability into daily politics. The Constitution's secure framework for politics becomes increasingly shaky. Now, in such a situation we might believe that it is the officials running the institutions that are the problem, not the Constitution itself. But we need to ask ourselves what the Constitution is. It is this question that lies at the heart of many conundrums in constitutional theory, including how to understand constitutional crises. If the Constitution is implemented or enforced through institutions, that is, through a constitutional order, then the operation of those institutions will tend to determine what the Constitution is in a practical sense. In other words, I think it is more useful to see constitutional crises as generated internally rather than externally. To be sure, there are many other bad scenarios that might happen, constitutionally speaking. The United States might be invaded, and we might only then discover some hidden flaw in the Constitution that prevents an effective government response. But I think history shows that this is implausible.

Now consider the current situation. As I have already argued, one respectable path for analysis is that Trump himself—the fact that he was able to seize control of the Republican Party and got into the White House—is the measure of the crisis.<sup>94</sup> Trump is arguably the product of a failing constitutional order, one riven by a profound lack of trust in government. These circumstances have given us a “chaos president,” to borrow Jeb Bush's

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92. See generally Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093 (2002). I previously critiqued these theories in GRIFFIN, *supra* note 27, at 141–47.

93. GRIFFIN, *supra* note 8, at 193–94.

94. If this seems a bit overwrought, try this column: Fred Kaplan, *Trump Is the Government*, SLATE (Feb. 24, 2017, 6:21 PM), [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2017/02/trump\\_s\\_fbi\\_flap\\_reveals\\_a\\_dangerously\\_self\\_centered\\_president.html](http://www.slate.com/articles/news_and_politics/war_stories/2017/02/trump_s_fbi_flap_reveals_a_dangerously_self_centered_president.html).

phrase.<sup>95</sup> Presumably, little good can come of this. But the initial response of many constitutional scholars is an unhelpful externalism. They portray Trump as a bumper car, so to speak, bouncing off a black box called the Constitution. According to constitutional fundamentalism, checks and balances will save the day.<sup>96</sup> Yet the question still lingers: where did Trump come from in the first place?

In earlier work, I also proposed that it is appropriate to use the word “crisis” in a situation in which the apparently normal operation of the constitutional system indicates “that something is fundamentally wrong with the way the system is operating as a whole.”<sup>97</sup> I pointed to the decline of trust in government, referencing Ross Perot’s surprising showing in the 1992 election, saying: “The emergence of a significant group of citizens who are profoundly alienated from politics and government and feel powerless to affect ostensibly democratic institutions is the most disturbing aspect of the contemporary constitutional system.”<sup>98</sup> As you may be able to tell, I am feeling pretty good about this twenty-year-old analysis in light of the populist insurgency hammering both political parties today.<sup>99</sup> It suggests constitutional crises can be the product of long-smoldering chains of dysfunction.

But suppose, in the end, most of Trump’s policy initiatives are frustrated by ordinary checks and balances. Would we be justified in concluding that the Constitution still works as advertised? Not in the current situation. Having Trump frustrated by standard-issue checks, along with the newer Washington gridlock that has stood in the way of all recent presidents, reproduces the highly dangerous and volatile set of circumstances that produced him in the first place.<sup>100</sup> However extreme Trump might seem, there is always something worse on the political horizon. Just as a policy logjam on issues such as immigration led to Trump’s rise, the frustration of continuous policy defeats could well drive Republican voters to even more extreme measures. To avoid this downward spiral, we need to offer voters in both parties an option

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95. Ben Kamisar, *Bush: Trump Would Be ‘A Chaos President’*, HILL (Dec. 15, 2015, 9:11 PM), <http://thehill.com/blogs/ballot-box/presidential-races/263364-bush-trump-would-be-a-chaos-president>.

96. This view is summarized in Daniel W. Drezner, *The Beclowning of the Executive Branch*, WASH. POST (Mar. 31, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/03/31/the-beclowning-of-the-executive-branch/?utm\\_term=.051680a7ad15](https://www.washingtonpost.com/posteverything/wp/2017/03/31/the-beclowning-of-the-executive-branch/?utm_term=.051680a7ad15).

97. GRIFFIN, *supra* note 8, at 194.

98. *Id.* at 200.

99. See, e.g., Paul Kane, *Trump’s Washington Means Civil War—for Both Parties*, WASH. POST (Apr. 1, 2017), [https://www.washingtonpost.com/powerpost/trumps-washington-means-civil-war—for-both-parties/2017/04/01/9a0bfe28-16e3-11e7-ada0-1489b735b3a3\\_story.html?utm\\_term=.43fac8bc81f5](https://www.washingtonpost.com/powerpost/trumps-washington-means-civil-war—for-both-parties/2017/04/01/9a0bfe28-16e3-11e7-ada0-1489b735b3a3_story.html?utm_term=.43fac8bc81f5).

100. This point is illustrated by the surprise election of outsider Senate candidate Roy Moore in Alabama. See Martin & Burns, *supra* note 88 (quoting Alabama Republican Senator Richard C. Shelby remarking, “[r]ight now, the Moore-Bannon faction prevails”).



they do not currently have at present—fundamental political and constitutional reform. The emphasis of responsible political elites should be on rebalancing the constitutional order rather than preserving it. That means constitutional change, whether formal or informal, should be on everyone’s agenda.<sup>101</sup>

### III. IN POLITICAL TIME OR A DYSFUNCTIONAL CONSTITUTIONAL ORDER?

Since Trump’s unexpected victory, scholars have been discussing how to place him in what Stephen Skowronek taught us to call “political time.”<sup>102</sup> Political time is how presidents relate to each other across American history.<sup>103</sup> So, for example, presidents such as Lincoln and FDR are “reconstructive” in that they used their substantial majorities to lead the Nation into fundamentally new policy territory.<sup>104</sup> Other presidents are their affiliates, such as Ulysses Grant and Harry Truman, respectively.<sup>105</sup> There are other categories—“preemptive” presidents like Nixon who act against governing regimes,<sup>106</sup> and “disjunctive” presidents like Carter who signal their end<sup>107</sup>—but my focus here is on the key role of reconstructive presidents.

It is clear that without at least the potential of reconstructive presidencies, whether we are still in what Skowronek calls “the circuit of political time”<sup>108</sup> would be brought into serious question. Skowronek’s account seems to suggest there cannot be an endless succession of affiliated or preemptive presidencies because party-political governing coalitions do not last forever.<sup>109</sup> But from the standpoint of 2017, who was the last reconstructive president? Following Skowronek’s lead, everyone assumes it was Ronald Reagan, who certainly set the template for the contemporary conservative Republican Party.<sup>110</sup> So it is especially noteworthy that Skowronek expressed considerable doubt about Reagan’s reconstructive status in the original presentation of his theory.<sup>111</sup> Although there were similarities between Reagan and FDR, there were also significant differences, which implied to

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101. It may well be on Trump’s! See Carl Hulse, *Trump Gets a Win He Wasn’t Counting On: He Saved the Filibuster*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/us/politics/trump-filibuster.html>.

102. SKOWRONEK, *supra* note 18, at 30, 49–52.

103. *Id.* at 30.

104. *Id.* at 34–39.

105. *Id.* at 35, 41–43.

106. *Id.* at 43–45.

107. *Id.* at 39–41.

108. *Id.* at 52.

109. *Id.* at 49–52.

110. *Id.* at 413.

111. *Id.* At another point, Skowronek commented that Reagan’s “reconstruction was, relatively speaking, more rhetorical than institutional.” *Id.* at 32.

Skowronek that the analytical usefulness of “political time” was coming to an end.<sup>112</sup> Unlike FDR (the last reconstructive president before Reagan), Reagan never gained full party control of Congress.<sup>113</sup> Democrats continued to hold the House and even regained control of the Senate in 1986. The force of Reagan’s reconstruction was largely limited to tax and budget policy. Even in this realm, his “administration created a monumental governing problem”<sup>114</sup> that ultimately “served less to open political possibilities in modern America than to short-circuit them.”<sup>115</sup> This implied that the notion of political time was in question.

As a possible explanation for what he calls “the waning of political time,”<sup>116</sup> Skowronek noted the growing significance of entrenched institutions and interest groups in Washington.<sup>117</sup> He highlighted “a pattern of greater institutional resilience in the face of these [reconstructive] presidents’ order-shattering authority.”<sup>118</sup> He speculated that following Reagan, we may be fated to endure a politics of “perpetual preemption,”<sup>119</sup> in which each president acquires authority by at least appearing to oppose the immediately preceding president and the reigning institutional regime.<sup>120</sup> In what follows, I explore the possibility that Skowronek was right to suggest that the presidents who followed Reagan and his affiliate George H. W. Bush have not been able to reproduce (or take advantage of) the logic of political time.

Skowronek’s model depends on the existence of a governing coalition dominated by one party and its ideology. This governing coalition winds the clock of presidential political time. Presidents either bring it into being during reconstructive times, affiliate with it in favorable times, or do their level best to maintain or oppose it in difficult times. But what if there is no dominant governing coalition?

After Reagan, American politics was arguably dominated by the reality of divided government, implying either a fundamentally divided governing coalition or the lack of such a coalition altogether. Another reality of post-Reagan America was the disappearance of the foreign and domestic policy context that existed when Reagan first appeared on the scene in the early 1960s, a context that persisted almost until the end of his presidency. With

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112. *Id.* at 413.

113. *Id.* at 414 (“The Republicans took control of the Senate for the first time in twenty-eight years, and, with the Democratic party in disarray, the administration quickly fashioned a working majority in the House of Representatives.”).

114. *Id.* at 422.

115. *Id.* at 429.

116. *Id.* at 413.

117. *Id.*

118. *Id.*

119. *Id.* at 442–46.

120. *Id.*

respect to foreign affairs, the Cold War still structured politics as Reagan took office, of which he took full advantage. On the domestic side, there is no doubt there was a growing impetus to reduce taxes and deregulate the economy in the 1970s. Yet by the Clinton and George W. Bush Administrations, these policy contexts had become much less compelling. The shock of the 9/11 attacks reset the foreign policy agenda, and the shock of the 2008 financial crisis strongly affected President Obama's domestic policy, but not in directions anticipated by Reagan's partial reconstruction.

A key indicator that political time is less helpful in understanding our current situation is the predicament of Reagan's most stalwart supporters. They are clearly at a loss to understand where Trump is coming from, particularly with respect to foreign policy.<sup>121</sup> Trump's relentless emphasis on zero-sum nationalism and the mortal threat of immigration is alien to them. Yet, Skowronek's model does not account in any obvious way for the obsolescence of the policy context that existed when Reagan took office in 1981. After all, the idea of a governing coalition appears to assume a persistent policy context that is continually addressed, whether well or badly. Once that policy context disappears, one would assume a new reconstructive president would appear on the scene. Yet just the opposite has occurred with respect to the last three presidents.

It is also telling that Bush's win in 2000, Obama's in 2008, and Trump's in 2016 were all understood as "change" elections—but by very different groups! Although there were obviously Americans looking for a change at each of these elections, surely the increasingly polarized and closely divided state of the electorate militates against any comprehensive "reconstructive" political change.<sup>122</sup> In such an environment, I suggest it is a mistake to continue to take the temperature of new presidents to see if a reconstructive change has occurred.<sup>123</sup> The broader reality is that they have become extraordinarily difficult or even impossible, as Skowronek originally hinted.

We should consider an alternative understanding of what is going on with respect to American politics, one that points to an increasingly dysfunctional constitutional order. To employ Skowronek's terms, it is certainly

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121. See, e.g., R.R. Reno, *Republicans Are Now the 'America First' Party*, N.Y. TIMES (Apr. 28, 2017), <https://www.nytimes.com/2017/04/28/opinion/sunday/republicans-are-now-the-america-first-party.html>.

122. In this respect, Hetherington and Rudolph's discussion is especially helpful. See HETHERINGTON & RUDOLPH, *supra* note 30.

123. A recent article by Skowronek simply assumes that a reconstructive presidency is still possible. See Stephen Skowronek, *Is Donald Trump the Great Disrupter? Probably Not.*, WASH. POST (Apr. 24, 2017), [https://www.washingtonpost.com/opinions/is-donald-trump-the-great-disrupter-probably-not/2017/04/24/99c86938-25d9-11e7-bb9d-8cd6118e1409\\_story.html?utm\\_term=.4b7c0ea67f71](https://www.washingtonpost.com/opinions/is-donald-trump-the-great-disrupter-probably-not/2017/04/24/99c86938-25d9-11e7-bb9d-8cd6118e1409_story.html?utm_term=.4b7c0ea67f71).

plausible that Trump is a “disjunctive” president, one that presages the collapse of Reagan’s coalition.<sup>124</sup> The problem America faces, however, is that the Democratic Party coalition is equally disjunctive in relation to the existing order. Both parties are disjunctive in the sense that they are increasingly assailed by voters with recognizably “populist” impulses who oppose the elites in charge in Washington.

Because of the enormous amount of state building that has occurred in prior administrations, we lack the ability to generate a reconstructive presidency. Our situation is more akin to the one Skowronek hinted at in his “waning of political time” discussion: a series of preemptive presidencies, in which each party attempts to demonstrate mastery over our resilient built-out, tenured-in state by *selectively* preempting policies of the prior president.<sup>125</sup> Certainly both Obama’s and Trump’s presidencies began this way: the presidents announced with great fanfare that they were by executive order repealing certain (often minor) policies of the preceding president.

Yet, the real problem goes deeper. The policy disasters that have occurred in recent years, including the Iraq War and the 2008 financial crisis, suggest that something is deeply wrong with the way the American state is organized.<sup>126</sup> An increasingly serious tension has developed between the unchanging formal Constitution and the dominant way we have handled state building through a process of informal constitutional change. It is this tension that is the source of many of our recent policy difficulties, and it is continually frustrating a succession of presidents that have sought to sponsor significant policy change. And this lack of meaningful policy progress has arguably so frustrated the American electorate that they turned to the most unqualified presidential candidate in history, Donald Trump.

#### IV. CONCLUSION: THE FUTURE OF THE CONSTITUTIONAL ORDER

It is entirely understandable that one prominent reaction to the Trump presidency is to more tightly embrace the Constitution and the values it protects. Yet for the reasons developed in this Essay, the future of the constitutional order is likely to depend on political elites growing more comfortable with the notion of reforming the Constitution, possibly in fundamental respects.<sup>127</sup> Failing to consider reasonable proposals for change in our present circumstances is the equivalent of endorsing a failed national policy process.

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124. See Jack M. Balkin, *Trump and Constitutional Time*, BALKINIZATION (Mar. 4, 2017, 3:46 PM), <https://balkin.blogspot.com/2017/03/trump-and-constitutional-time.html> (embedding YouTube video, Tulane Law, *Tulane Law School’s 2017 McGlinchey Lecture*, YOUTUBE (Mar. 2, 2017), [https://www.youtube.com/watch?v=AgMK\\_SVRQHQ](https://www.youtube.com/watch?v=AgMK_SVRQHQ)).

125. SKOWRONEK, *supra* note 18, at 413, 442–46.

126. See GRIFFIN, *supra* note 11.

127. *Id.*

This may well produce presidential candidates in the future that will be more unexpected, unusual, and politically extreme than Trump. Without significant reforms, the contemporary American constitutional order is likely not stable. It is that reality that needs to be addressed forthrightly.