The Challenges to Political Legitimacy in Contemporary America

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Unlike other participants in this symposium, I come to the topic of whether American government is broken, and whether the political system is facing a crisis of legitimacy, not as quantitative analyst of public opinion data, though I benefit greatly from that work. I am a scholar of American political thought—as articulated chiefly by political and intellectual elites—and American political and constitutional development; and I've been asked to put current difficulties in historical perspective. My response to "Is Government Broken?" starts by agreeing with many contemporary conservative commentators like Glenn Beck and Charles Kesler who trace modern political polarization and the recent declines in public approval of national political leaders, and to a lesser degree national institutions, back to Progressive era.[1] That period saw the rise to new prominence of certain standards of legitimacy—especially democratic will and expert competence—that both expressed and reinforced new understandings of the Constitution and American political system. Despite major differences over policy, including banking, tariffs and above all slavery, most 19th century American leaders agreed that Enlightenment doctrines of reason that ascertained permanent principles, such as natural rights, in tandem with broadly Christian morality, provided the fundamental standards for

[1] Glenn Beck, for example, has made a series of videos pointing out Progressivism as the source of America's decline, and his website features articles by scholars like Ronald J. Pestritto of Hillsdale College arguing similarly. *See* Ronald J. Pestritto, *American Progressivism*, GLENN BECK (April 16, 2009), http://www.glennbeck.com/content/articles/article/198/23936/ (discussing the historical background and political transformation of the Progressive movement). *Cf.* Charles R. Kesler, *Barack Obama and the Crisis of Liberalism*, HERITAGE FOUND. (Oct. 15, 2012), http://thf_media.s3.amazonaws.com/2012/pdf/fp45.pdf (discussing President Obama's liberal political thought).

governmental legitimacy.[2] Though in a republic the people should rule, most believed like Madison that it was the reason and not the will of the people that deserved to rule.[3] And many felt that the Constitution should be venerated as an enduring embodiment of Enlightenment principles, perhaps even divine inspiration.

But in the Progressive era, the intellectual, economic, and demographic changes of the late 19th century led many Americans to question 18th and 19th century notions of unchanging natural rights and of traditionalist understandings of Christianity. They drew from the idea of evolution the conviction that policies and institutions should change to meet changing needs, and so they placed great stress both on evolving democratic choices and purposes, and modern scientific understandings of how public policies could competently realize those purposes, as the basic standards of governmental legitimacy. Many were notoriously critical of the Constitution as an outmoded, inefficient, undemocratic system, including the only political scientist elected President, Woodrow Wilson.[4]

Even so, Progressive attacks on 19th century understandings did not generate so strong a sense of the illegitimacy of American leaders and institutions then as now, in part because most Progressives continued to embrace broadly Christian standards of morality—even though this was now liberal social gospel morality, not fundamentalist Christianity—and many traditional forms of racial and gender orderings, hierarchies and roles in

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[2] For an overview of early American political thought, see Rogers M. Smith, *Our Republican Example: The Significance of American Experiments in Government in the Twenty-First Century*, 1 AMERICAN POLITICAL THOUGHT 106-121 (2012), from which this lecture is partly derived. *See also* JAMES W. CEASER, NATURE AND HISTORY IN AMERICAN POLITICAL DEVELOPMENT: A DEBATE (2006) (tracing "foundational ideas" and their use in historical public discourse).

[3] THE FEDERALIST NO. 49 (James Madison).

[4] *See, e.g.*, WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (Houghton, Mifflin and Company 1901) (1885) (President Wilson's doctoral dissertation on the inherent difficulties of the Constitution). *See also* Smith, *supra* note 2, at 112-119 (showing how scientific, theological, and economic developments during the 19th and 20th centuries contributed to the ideological polarization of the United States).

American society, which they claimed modern science endorsed.[5] Many Progressive Democrats like Brandeis also believed in the states as laboratories of democracy in ways that made them comfortable with maintaining doctrines of states' rights and federalism.[6] So most Progressives were less socially and culturally radical than their doubts about the Constitution might suggest.

But during the New Deal and the Great Society years, as Progressives revised their views into modern liberalism, most embraced strong national governmental programs with redistributive as well as regulatory goals—big government!—and they also embraced first egalitarian integrationist, then increasingly multiculturalist and feminist positions on race and gender issues, as well as ever more liberal theologies which often became forms of secular morality.[7] Ironically, at the same time, as Aziz Rana has shown, by the mid-20th century liberals had abandoned their attacks on the American Constitution and instead shared in its veneration, so long as it was understood as a "living Constitution," to be interpreted according to evolving democratic values and modern scientific knowledge.[8]

Despite its embrace of the Constitution, the liberalism that emerged in the third quarter of the 20th century was, even more than Progressivism, experienced by many Americans, especially older white Americans, as an assault on the cultural, racial, gender, religious, and economic systems and values that defined the America they believed in.[9] They joined in building the coalition of economic conservatives, national security conservatives, racial conservatives, and religious conservatives that formed the Reagan coalition and brought about the Reagan Revolution in 1980 that dominated American

[5] *See* Smith, *supra* note 2, at 112-119.
[6] G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management,* 31 PUBLIUS 37 (2001).
[7] ROGERS M. SMITH, POLITICAL PEOPLEHOOD: THE ROLES OF VALUES, INTERESTS, AND IDENTITIES 172-84 (2015).
[8] Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CAL. L. REV. 335, 359-69 (2015).
[9] Rogers M. Smith, *Identity Politics and the End of the Reagan Era*, 1 POLITICS, GROUPS, AND IDENTITIES 120-27 (2013).

politics in the last two decades of the 20th century and the beginning of the 21st.[10] This was also the time, as we know from analysts of congressional voting behavior and public opinion, when America underwent mounting political polarization, beginning in the late 1970s, and beginning first with the leadership of the two political parties, especially the Republicans who were moving right, though gradually American public opinion began to become more polarized as well. The two parties became more sorted into opposed ideological camps, one conservative, one liberal, than had been true through much of previous American history.[11] And what the history I have rehearsed suggests is that these camps and this polarization should be understood in part as a clash between liberal political world-views rooted in but going beyond the Progressive rejection of many 18th and 19th century conceptions of legitimacy, and valuing instead democracy, modern science, and a "living Constitution," versus modern proponents of more traditionalist understandings, whose standards of legitimacy continue to embrace more conservative forms of religiosity, older doctrines of natural rights and natural law, and a Constitution interpreted in light of the original understandings of its ratifiers—a view of the Constitution strongly promoted by Reagan's Attorney General Ed Meese and aimed, as the late Justice Scalia explained, at keeping the Constitution suitably dead.[12]

The polarization between these two views has involved not just disagreements over policies and interests, real and important though those have been. Many adherents of each view regard their opponents as endorsing fundamentally invalid, illegitimate conceptions of the American constitutional system, its values and purposes. So they can be unyielding,

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[10] *Id.*

[11] *See generally* MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS (2009) (analyzing American partisan politics); NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2d ed. 2016) (same).

[12] For an overview of the various discussions concerning the interpretation of the Constitution, see ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

especially conservatives, precisely because they regard their opponents not as a loyal opposition but as champions of illegitimacy. The results have included recurring threats of federal government shutdowns; paralysis on pressing issues such as immigration reform; and refusal even to consider President Obama's nominee to replace Justice Antonin Scalia.[13]

These examples show that modern partisan intransigency has risen to almost unprecedented heights, especially after Republicans gained control of Congress against Democratic President Barack Obama, beginning in 2010. Consequently, none of our governing institutions has performed as effectively as most Americans want, even as the Great Recession of 2008, which helped elect Barack Obama, has left many Americans, especially older and less educated Americans, struggling not to experience continuing losses in their economic and social statuses—what Anna Greenberg calls "the shrinking middle class."[14]

And so in 2016, we are seeing something new in regard to our topic. Precisely because American leaders and institutions have in many respects been paralyzed by modern political polarization and have failed to address many problems effectively, many Americans across the political spectrum are angry at the established leaders in *both* parties. They are flocking to outsider candidates, especially Trump and also Cruz in the Republican camp, and to a lesser degree, Bernie Sanders for the Democrats. Rather than choosing sides between the two polarized modern ideological camps, they are rejecting the legitimacy of modern American leadership and institutions still more radically—with

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[13] AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 4 (James A. Thurber & Antoine Yoshinaka eds., 2015). *See also* Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N. Y. TIMES (Mar. 17, 2016), http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html (discussing President Obama's nomination of Judge Merrick Garland to the Supreme Court).
[14] Anna Greenberg, Address at the Symposium of the Journal of Law & Public Affairs at the University of Pennsylvania Law School, "Is Government Broken?" (Mar. 25, 2016).

Trump supporters drawn to a kind of authoritarian, strong-man nationalism that is not especially concerned about traditional constitutional limitations or standards, and Sanders supporters attracted to a "living constitution" that they wish to usher into a whole new stage of life, a democratic socialist stage. The upshot is that both because the camps defining modern polarization do not see each other as legitimate, and because many other Americans do not see the polarized, paralyzed government that these camps have created as legitimate, belief in the legitimacy of our leadership and institutions is, as my colleagues have shown, lower today than probably at any time in the last century. Or at least, that's the cheerful view from my historical perspective.