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The Dangers to the American Rule of Law Will Outlast the Next Election

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THE DANGERS TO THE AMERICAN RULE OF LAW WILL OUTLAST THE NEXT ELECTION

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According to many constitutional lawyers and political scientists, the presidential administration of Donald Trump (for scholars on the left), or the response to that presidency (for scholars on the right) poses serious dangers to American constitutional democracy and the rule of law. However, this Essay argues that a more careful understanding of the contemporary dangers to the American rule of law are both broader-based and longer-term: inequality among the public, and epistemic polarization among the public as well as among legal elites (including constitutional law professors themselves), undermine the capacity of the American people to use the political tools available in our constitutional system to resist any power-grabbing executive, regardless of ideology. The rule of law conflicts of the Trump administration, while dangerous in their own right, are fundamentally symptoms of this broader political and legal crisis.

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† Professor of Law, Northwestern University. I thank Sean Sullivan and the participants in the fall 2019 conference on Investors and the Rule of Law at the Loyola University Chicago School of Law's Institute for Investor Protection for feedback on an earlier version of this Essay, and Caitlin Bare for excellent research assistance. Finally, I thank the editors of the *Cardozo Law Review de•novo* for their careful editing and patience with my terrible Bluebook-phobia.

INTRODUCTION: SHOULD WE FEAR FOR THE RULE OF LAW?

The rule of law is a basic evaluative criterion of a constitutional democracy such as the United States. At a bare minimum, the rule of law requires that the executive use its fearsome power consistent with preexisting law, including the Constitution. If that minimal criterion is not satisfied, a country cannot continue to be a democracy. This is so because a democratic people is a corporate entity that can only express its will through the laws: if the executive deploys the state's force outside those legal constraints, the people lose their ability to control the state's monopoly over legitimate violence.[1]

This Essay argues that the American rule of law is in danger and analyzes the causes of that danger. Part I describes the superficial (or perhaps I should say "short-term") threats to the rule of law represented by the potential lawlessness of the current presidential administration, as well as the bureaucratic "deep state."[2] However, the remainder of this Essay argues that these threats are not the real challenge for the United States: the genuine (and medium-to-long-term) rule of law danger comes from broader properties of the American public and its legal, political, and social elites—and is likely to persist even if the current president loses the imminent election and departs office in January 2021.[3] Part II paves the way for this argument by more fully elucidating the concept of the rule of law and the social/political strategic preconditions of its maintenance in a legal and political system—an account that hinges on the capacity for collective public action in defense of official legal

1 *See generally* Paul Gowder, *The Rule of Law Against Sovereign Immunity in a Democratic State*, 93 TEX. L. REV. SEE ALSO 247, 250–52 (2015) (explaining the dependence of democracy on the rule of law).

2 *See infra* Part I.

3 *See infra* Parts II–III.

fidelity.[4] Finally, Part III describes two kinds of polarization: (a) "interest polarization," or the divergence of interests among the population, rooted in social, political and economic inequality, which undermines the capacity of the general public to act in concert to hold their leaders to compliance with the law; and (b) "epistemic polarization," or the failure of the people to maintain the capacity to come to a collective judgment about what their laws require of their leaders and whether those requirements have been obeyed.[5]

In the course of considering epistemic polarization, this Essay reserves special attention for the role of elites, including those elites within legal academia as well as the bench and bar. A central part of the duty of academics, along with judges (who are obviously the most important), journalists, and others, in preserving the rule of law is to signal to the general public an evaluation of the compliance of their leaders with the laws. They owe this duty not because legal and academic elites enjoy some special entitlement to come to a judgment about the conduct of political leaders, but simply because a healthy rule of law state features a division of labor that relieves ordinary citizens of the day-to-day chore of constantly monitoring the behavior of their politicians and their continued fidelity to the constitutional system. Put differently, ordinary citizens ought to be able to rely on their highly-compensated and high-status specialists to help them collectively operate the constraints their laws place on those who govern them.

Unfortunately, legal academics and elites are themselves members of society, and subject to its underlying polarization. The greatest struggle for the scholarly study of the law and the social sciences is our own situatedness. Those of us who study a society are also members of a society, often of that society itself, and, if not, then of some other society with its own epistemic standpoint. The interests and experiences derived from our social positions permanently color our efforts to make sense of our worlds.[6] Thus, while this Essay cannot generate concrete policy recommendations for a solution to the polarization that poses such a danger to the American rule of law (diagnosis will, alas, have to be sufficient), at the very least, I write to encourage those of us within the legal profession and academia to try to transcend our own epistemic silos.

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4 *See infra* Part II.

5 *See infra* Part III.

6 *See generally* Paul Gowder, *Critical Race Science and Critical Race Philosophy of Science*, 83 FORDHAM L. REV. 3155 (2015).

I. THE SUPERFICIAL DANGERS TO THE RULE OF LAW

I begin by noting that there has never been the rule of law in the United States, at least not for all. Black Americans continue to be subject to arbitrary police violence as well as rampant abuse of police and prosecutorial discretion in the regime of mass incarceration, although the particular causal pathway from racial injustice to mass incarceration has recently been the subject of some scholarly debate.[7] In our current political environment, it is imperative to also note that there are many reports of arbitrary police action against groups of persons, such as Latinx individuals, whose ethnic, racial, or religious identity is associated with stereotypes about undocumented immigration status, and that these arbitrary actions long precede the presidential administration of Donald Trump.[8]

The United States has arguably had a version of the rule of law for whites, however imperfect, for some time. But even if we assume the privileged standpoint of those who have not been the persistent victims of racialized lawlessness, the attentive reader may have noticed that many historians, political scientists, and constitutional law scholars have

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7 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

8 *See* ANNA SCHOENFELDER, NATASHA RIVERA SILBER, & NANCY MORAWETZ, UNCOVERING USBP: BONUS PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS 17–19 (2013), https://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf [https://perma.cc/HE7C-WFWU] (reporting on documents revealed by Freedom of Information Act litigation revealing large statistical disparity in ethnic/racial backgrounds of lawfully present persons, including U.S. citizens, wrongly arrested by Border Patrol); Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447 (2006) (detailing origins of late 1990's Arizona immigration raid in race and class-based animus, use of race and class as proxies for immigration status in conduct of raid); *see also* Adiel Kaplan & Vanessa Swales, *Border Patrol Searches Have Increased on Greyhound, Other Buses Far from Border*, NBC NEWS (June 5, 2019, 4:30 AM), https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-border-n1012596 [https://perma.cc/D8ZR-RK87] (describing passenger reports of racial profiling by Border Patrol agents in suspicionless bus interrogations); Alex Kane, *Even Muslim-American Citizens Have Been Caught in the Net of Trump's Travel Ban*, NATION (Mar. 23, 2017), https://www.thenation.com/article/even-muslim-american-citizens-have-been-caught-in-the-net-of-trumps-travel-ban [https://perma.cc/T5PL-ZLE8] (recounting instances of interrogation of lawful Muslim residents and citizens at border, including Muhammad Ali's son); *see generally* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (forbidding race as sole basis for immigration interrogation, but permitting racial profiling in conjunction with other factors).

expressed alarm about dangers to America's rule of law since Donald Trump began to occupy the White House.[9]

For those on the left (among which I count myself, although I shall endeavor as well as possible to transcend my own partisan attachments), the behavior of Donald Trump seems to be a particular sign of trouble for the rule of law. The United States president has taken to Twitter to, inter alia, declare that merely alleging that his campaign collaborated with Russians is "TREASONOUS,"[10] pronounce an impeachment process to be nothing more than a "COUP,"[11] and muse about whether the

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9 Observe the growing literature from academics in these disciplines about the danger to the Constitution or to democracy. *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 117–18 (2018). The various contributions to CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018), are also illustrative. In particular, see the chapter by Stephen Holmes, *How Democracies Perish*, *in* CAN IT HAPPEN HERE?, *supra*, at 387, 387–427, which most closely resembles my own approach to the problem. *See also* WILLIAM G. HOWELL & TERRY M. MOE, PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY (2020); YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER & HOW TO SAVE IT (2018); Robert C. Lieberman, Suzanne Mettler, Thomas B. Pepinsky, Kenneth M. Roberts, & Richard Valelly, *The Trump Presidency and American Democracy: A Historical and Comparative Analysis*, 17 PERSP. ON POL. 470 (2019); Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1 (2018); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018). I observe for conceptual clarity that the rule of law is not reducible to democracy or the Constitution, but that the destruction of either would most likely also entail the destruction of the rule of law, as most paths to doing so go through officials ignoring the legal constraints on their behavior. However, while a President who is free to ignore the Constitution would unquestionably count as a failure of the rule of law (since, after all, the Constitution is law that binds the President), we should be careful to distinguish between a threat to democracy and a threat to the rule of law as such. It might be possible for the U.S. to slip into a kind of lawful non-democracy in which the President takes advantage of extreme political polarization to win laws permitting the destruction of democratic autonomy, such as by entrenching the power of his allies. One example of tactics potentially leading to such a state of affairs is the "constitutional hardball" in which the Republican-dominated legislature in North Carolina stripped the incoming Democratic governor of power before he could take office. LEVITSKY & ZIBLATT, *supra*, at 209–12. That behavior is anti-democratic, but does not necessarily undermine the rule of law. It may, however, presage a later destruction of the rule of law. *See generally* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018) (describing strategies by which budding autocrats use legal means to consolidate their power).

10 Donald J. Trump (@realDonaldTrump), TWITTER (May 8, 2019, 10:38 AM), https://twitter.com/realdonaldtrump/status/1126134364436406272 [https://perma.cc/86S9-WMYR] ("'Everyone wants to know who needs to be accountable, because it took up two years of our lives talking about this Russian involvement. It proved No Collusion, & people want to trace it back to see how this all happened?' @ainsleyearhardt @foxandfriends TREASONOUS HOAX!").

11 Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 1, 2019, 7:41 PM), https://twitter.com/realDonaldTrump/status/1179179573541511176 [https://perma.cc/DPH9-DYL2] ("As I learn more and more each day, I am coming to the conclusion that what is taking place is not an impeachment, it is a COUP, intended to take away the Power of the….").

appropriate response to a leading congressional Democrat allegedly making up evidence against him would be to "Arrest for Treason?"[12]

While it might be easy to discount statements made over Twitter, the content of such statements, uttered by the man who commands the entire federal military and law enforcement apparatus, must not be taken lightly. The talk of treason raises legitimate rule of law fears because it suggests a willingness (indeed, openly threatens) to engage in partisan prosecutions in defiance of both the Constitution's Treason Clause (which provides that the crime covers a very limited scope of behavior) and its Speech or Debate Clause, which protects members of Congress from legal punishment even for saying things that the President believes are made up on the floor of the Capitol.[13] Treason charges or allegations, and related allegations of terrorism, subversion, sedition, espionage, or other crimes of disloyalty, have been a familiar weapon of autocrats against opposition leaders, activists, journalists, academics, and other enemies of a regime.[14]

Moreover, the threat to engage in partisan use of criminal allegations becomes more credible in the context of the President's related attacks on the norm that prosecutorial choices should be based on the law, rather than on partisan considerations. For example, the President also took to Twitter to criticize his own attorney general for filing criminal charges against Republican members of Congress ahead of the midterms, and thus putting control over the seats in question.[15] More recently, the Department of Justice reduced its sentencing recommendations for Roger Stone, a convicted Trump associate, after Trump tweeted about its unfairness—leading some to worry that he has, in effect, pressured the

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12 Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 30, 2019, 8:12 AM), https://twitter.com/realdonaldtrump/status/1178643854737772545 [https://perma.cc/S42N-XRUZ] ("Rep. Adam Schiff illegally made up a FAKE & terrible statement, pretended it to be mine as the most important part of my call to the Ukrainian President, and read it aloud to Congress and the American people. It bore NO relationship to what I said on the call. Arrest for Treason?").

13 U.S. CONST. art. III, § 3; U.S. CONST. art. I, § 6.

14 For examples of the abuse of accusations of treason and similar charges by contemporary autocrats, see Michael J. Abramowitz & Sarah Repucci, *Democracy Beleaguered*, 28 J. DEMOCRACY 128, 137–38 (2018) (discussing Cambodia); Bahar Baser, Samim Akgönül, & Ahmet Erdi Öztürk, *'Academics for Peace' in Turkey: A Case of Criminalizing Dissent and Critical Thought via Counter-Terrorism Policy*, 10 CRITICAL STUD. ON TERRORISM 274 (2017) (discussing Turkey); Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37 (2015) (discussing Venezuela); Moses Khisa, *Managing Elite Defection in Museveni's Uganda: The 2016 Elections in Perspective*, 10 J. EASTERN AFR. STUD. 729 (2017) (discussing Uganda); Freek van der Vet, *"When They Come for You": Legal Mobilization in New Authoritarian Russia*, 52 L. & SOC'Y REV. 301 (2018) (discussing Russia).

15 Donald J. Trump, (@realDonaldTrump), TWITTER (Sept. 3, 2018, 2:25 PM), https://twitter.com/realdonaldtrump/status/1036681588573130752 [https://perma.cc/3Q47-EU8V] ("Two long running, Obama era, investigations of two very popular Republican Congressmen were brought to a well publicized charge, just ahead of the Mid-Terms, by the Jeff Sessions Justice Department. Two easy wins now in doubt because there is not enough time. Good job Jeff……").

Department of Justice to grant leniency for criminal conduct to his political allies.[16]

As for the talk of coups, that seems to imply that the standard responses to coups (i.e., the use of military force) would be permissible in response to the lawful process of impeachment. The characterization of such impeachment as a "coup" reflects, I would suggest, a troubling unwillingness to distinguish between the use of the mechanisms provided by the Constitution to check a President and the criminal acts of enemies of the state.[17]

Moreover, this willingness to use the power of the state for partisan political, rather than law-enforcement ends, seems to have trickled down into the ranks of the federal law enforcement apparatus. In particular, the nation's border forces, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP), seem to have taken Trump's actions as license to enforce their own political

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16 Editorial, *Did the Justice Department Cave to Trump in the Roger Stone Case? We Need to Know*, L.A. TIMES (Feb. 12, 2020, 3:51 PM), https://www.latimes.com/opinion/story/2020-02-12/editorial-justice-department-trump-roger-stone-case [https://perma.cc/8UAN-RFCR].

17 Horrifyingly, the President's evident unwillingness to treat political opposition as legitimate rather than as "treason" has led some commentators to envision truly dark paths down which the United States might soon walk. Two retired military officers recently took to the pages of *Defense One* to speculate about the possible necessity of an *actual* coup in defense of the constitutionally mandated transfer of power if Trump should lose the impending election and refuse to step down. *See* John Nagl & Paul Yingling, *". . . All Enemies, Foreign and Domestic": An Open Letter to Gen. Milley*, DEF. ONE (Aug. 11, 2020), https://www.defenseone.com/ideas/2020/08/all-enemies-foreign-and-domestic-open-letter-gen-milley/167625 [https://perma.cc/RUZ5-A8XQ] ("These powerful crosscurrents—Mr. Trump's electoral defeat, his assault on the integrity of our elections, his impending criminal prosecution, and his creation of a private army—will collide on January 20. Rather than accept the peaceful transfer of power that has been the hallmark of American democracy since its inception. Mr. Trump may refuse to leave office. . . . At this moment of Constitutional crisis, only two options remain. Under the first, U.S. military forces escort the former president from the White House grounds. Trump's little green men, so intimidating to lightly armed federal law enforcement agents, step aside and fade away, realizing they would not constitute a good morning's work for a brigade of the 82nd Airborne. Under the second, the U.S. military remains inert while the Constitution dies. . . . As the senior military officer of the United States, the choice between these two options lies with you. In the Constitutional crisis described above, your duty is to give unambiguous orders directing U.S. military forces to support the Constitutional transfer of power."). While it is obviously worrisome that former military personnel are outright calling for the military to step in and take action against the President, it must also be noted that the fears they express about the peaceful transfer of power are not unwarranted. As this Essay was heading to press, the President outright declined, at a press conference, to promise a peaceful transfer of power should he lose, and instead went into a rant about "out of control" ballots, appearing to condition his willingness to leave office on election authorities' willingness to "[g]et rid of the ballots." Alex Leary & Lindsay Wise, *President Again Declines to Say He Will Accept Election Result, Questions Reliability of Ballots*, WALL ST. J. (Sept. 24, 2020, 11:00 PM), https://www.wsj.com/articles/republicans-commit-to-peaceful-transfer-of-power-after-trump-declines-to-do-so-11600958190 [https://perma.cc/ND3J-59VK].

predilections as law.[18] For example, they have demanded that journalists admit that they do "propaganda" before allowing them to cross the border,[19] and have denied the minimal protections of human rights law to asylum seekers.[20]

Most alarmingly of all, the lawless character of the nation's immigration enforcement agencies has evidently bled into domestic law enforcement. In the summer 2020 protests against police brutality, Trump deployed a special forces unit of the Border Patrol into Portland, Oregon.[21] Those federal forces engaged in particularly dramatic violations of ordinary American legal order, such as arresting protestors without charge or any probable cause to believe they had committed a crime, and violently battering a 53-year-old Navy veteran who had come to a protest to nonviolently ask them about the legal character of their actions.[22]

Trump's encouragement of private violence at his political rallies also suggests a disposition to resolve political disagreements with force rather than pursuant to law.[23] Trump has also denied the legitimacy of

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18 *See generally* Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772 [https://perma.cc/C8FR-ABZV]. However, the rule of law violations of these agencies also substantially precede Trump. For an extensive catalogue, see ELIZABETH F. COHEN, ILLEGAL: HOW AMERICA'S LAWLESS IMMIGRATION REGIME THREATENS US ALL (2020).

19 *See* Marc Tracy, *A Journalist Says He Was Hounded by a U.S. Customs Agent*, N.Y. TIMES (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/business/journalist-us-customs-border-agent.html [https://perma.cc/S86P-RPHR]; James Risen, *Trump's Attacks on the Press Fuel Harassment of Journalists at the Border*, INTERCEPT (Oct. 8, 2019, 3:28 PM), https://theintercept.com/2019/10/08/cbp-trump-journalists [https://perma.cc/7HAX-XATV].

20 *See* AMNESTY INTERNATIONAL, USA: 'YOU DON'T HAVE ANY RIGHTS HERE': ILLEGAL PUSHBACKS, ARBITRARY DETENTION & ILL-TREATMENT OF ASYLUM-SEEKERS IN THE UNITED STATES 4–6, 11–12 (2018), https://www.amnesty.org/download/Documents/AMR5191012018ENGLISH.PDF [https://perma.cc/WB3Q-M4L6].

21 Ed Pilkington, *'These Are His People': Inside the Elite Border Patrol Unit Trump Sent to Portland*, GUARDIAN (July 27, 2020, 5:00 EDT), https://www.theguardian.com/us-news/2020/jul/27/trump-border-patrol-troops-portland-bortac [https://perma.cc/3BH5-6TPC].

22 John Ismay, *A Navy Veteran Had a Question for the Feds in Portland. They Beat Him in Response.*, N.Y. TIMES (July 20, 2020), https://www.nytimes.com/2020/07/20/us/portland-protests-navy-christopher-david.html [https://perma.cc/S34S-MVXE]; Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OR. PUB. BROADCASTING (July 16, 2020, 7:46 PM), https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters [https://perma.cc/V3BE-PXCG]. Political theorist Jacob Levy predicted something like this problem in 2018. *See* Jacob T. Levy, *Law and Border*, NISKANEN CTR. (July 25, 2018), https://www.niskanencenter.org/law-and-border [https://perma.cc/UYG8-JM5Q] (arguing that the creation of a lawless state of affairs in border enforcement poses a threat to the rule of law in the interior). On the absence of legal constraints in border enforcement, see generally COHEN, *supra* note 18.

23 *See* Libby Cathey & Meghan Keneally, *A Look Back at Trump Comments Perceived by Some as Encouraging Violence*, ABC NEWS (May 30, 2020, 5:00 AM), https://abcnews.go.com/Politics/

basic American constitutional institutions such as the independent judiciary. For example, he asserted, in an interview with the *Wall Street Journal*, that a Mexican-American judge had a conflict of interest in presiding over fraud litigation involving Trump University because of that judge's ethnicity.[24] Finally, in both the 2016 and the 2020 elections, Trump has denied the legitimacy of the ongoing election process.[25] In 2016, he claimed that the vote would be rigged as well as that he was unsure whether he would accept its outcome,[26] and in 2020, he refused, due to allegedly "out of control" ballots, to promise a peaceful transfer of power.[27]

That catalogue of infamies notwithstanding, we must pause before concluding that the rule of law fears are all on one side. There are real rule of law concerns raised in Trump's defense as well, and those of us, like myself, who are on the left, and who also care about the rule of law, must not let our ideological commitments blind us to the potential that some of that which we are tempted to celebrate may also represent a threat.

In particular, it is genuinely troubling that so much of the damning information about Trump's behavior has been anonymously leaked by military and intelligence officials.[28] To those who fear Trump, these are

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back-trump-comments-perceived-encouraging-violence/story?id=48415766 [https://perma.cc/25M6-4XU9] ("'Get him out,' he said of a protester. 'Try not to hurt him. If you do, I'll defend you in court. Don't worry about it.'").

24 Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict'*, WALL ST. J. (June 3, 2016, 10:03 AM), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442 [https://perma.cc/Y6MK-64C4].

25 On 2016, see Patrick Healy & Jonathan Martin, *Donald Trump Won't Say if He'll Accept Result of Election*, N.Y. TIMES (Oct. 19, 2016), https://www.nytimes.com/2016/10/20/us/politics/presidential-debate.html [https://perma.cc/4UD6-TRQ4]. On 2020, see Leary & Wise, *supra* note 17. The undersigned has articulated additional reasons to worry about Trump's threat to the rule of law, in particular relating to the deprofessionalization of homeland security agencies and the reasonable grounds to fear that they may be more loyal to him personally than to the law, but also to attempts to intimidate the free press and integrate his personal finances with public property and public ends. *See* Paul Gowder, *The Trump Threat to the Rule of Law and the Constitution*, NISKANEN CTR. (Feb. 3, 2017), https://www.niskanencenter.org/trump-threat-rule-law-constitution [https://perma.cc/3A52-R2LB]; *see also* Jonathan Havercroft, Antje Wiener, Mattias Kumm, & Jeffrey L. Dunoff, *Editorial: Donald Trump as Global Constitutional Breaching Experiment*, 7 GLOBAL CONSTITUTIONALISM 1, 4–5 (2018) (describing still further alarming behavior, though arguing that thus far we have seen sufficient resistance to attempts to undermine democracy, constitutionalism, and the rule of law to be confident about the defense of the current institutional order).

26 *See* Healy & Martin, *supra* note 25.

27 *See* Leary & Wise, *supra* note 17.

28 *See, e.g.*, Jack Goldsmith, Opinion, *The 'Deep State' is Real. But Are its Leaks Against Trump Justified?*, GUARDIAN (Apr. 22, 2018, 2:00 EDT), https://www.theguardian.com/commentisfree/2018/apr/22/leaks-trump-deep-state-fbi-cia-michael-flynn [https://perma.cc/R4AT-QTZH] (noting that "unusually sensitive leaks of intelligence information designed to

whistleblowers, but to those who support him, the idea that the security agencies can directly interfere in electoral politics in such a fashion is itself indicative of a slide toward authoritarianism.[29] We should not disregard those worries. Since 9/11, we have given the intelligence and military agencies immense discretion, and we do have substantial evidence that this discretion has been abused—let us not forget about the tortures and extraordinary renditions and the lawless state of exception of Guantanamo Bay,[30] nor even about recent revelations that the Federal Bureau of Investigation (FBI) has disobeyed legal restrictions on the use of intelligence information collected under the authority of the U.S. Foreign Intelligence Surveillance Court.[31] That grim pattern of behavior adds credibility to accusations of intelligence community impropriety.

It is possible that this behavior with respect to the use of the immense surveillance powers of the "deep state" represents a kind of lawless culture that raises the broader prospect of those powers escaping legal control. We cannot ignore the allegations of the right that these powers were turned against Donald Trump, even if you ultimately believe that Trump himself represents a greater threat to the rule of law. Indeed, it may be the case that both Trump and the intelligence agencies whose

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discredit [Trump] and his senior leadership have poured forth from current and former intelligence officials . . . .").

29 Jack Goldsmith, *Paradoxes of the Deep State*, *in* CAN IT HAPPEN HERE?, *supra* note 9, at 105, 105–33 captures these worries. The fact that retired military officers can find a platform in military-oriented publications to urge the Chairman of the Joint Chiefs of Staff to plan to remove Trump from office in January, *see* Nagl & Yingling, *supra* note 17, also suggests some fairly significant reason for concern about the integrity of the nation's security services. *See* Kori Schake & Jim Golby, *The Military Won't Save Us—and You Shouldn't Want Them To*, DEF. ONE (Aug. 12, 2020), https://www.defenseone.com/ideas/2020/08/military-wont-save-us-and-you-shouldnt-want-them/167661 [https://perma.cc/MV5W-GKQQ] (criticizing Nagl and Yingling's editorial for failing to pay due regard to the norm of civilian control of the military).

30 About these post-9/11 abuses, see generally RYAN ALFORD, PERMANENT STATE OF EMERGENCY: UNCHECKED EXECUTIVE POWER AND THE DEMISE OF THE RULE OF LAW (2017).

31 *See* Charlie Savage, *F.B.I. Practices for Intercepted Emails Violated 4th Amendment, Judge Ruled*, N.Y. TIMES (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/us/politics/fbi-fisa-court.html [https://perma.cc/7K5G-LGQP]. The problematic foreign intelligence surveillance machine was turned against Trump's associates during the 2016 presidential campaign (in the course of investigating Russian electoral interference), and there is some legitimate uncertainty about whether the botched surveillance authorization for Trump associate Carter Page in particular is the result of failures in the general process for authorizing surveillance of United States persons or a particular "deep state" bias against Trump. *See* Benjamin Wittes, *Thoughts on the Horowitz Report, Part III: The FISA Findings*, LAWFARE (Jan. 15, 2020, 11:34 AM), https://www.lawfareblog.com/thoughts-horowitz-report-part-iii-fisa-findings [https://perma.cc/E8XN-ZM2P] (raising the question of whether the Carter Page FISA investigation resulted from incompetence or political bias); Benjamin Wittes, *The Inspector General's Disturbing FISA Memo*, LAWFARE (Mar. 31, 2020, 8:34 PM), https://www.lawfareblog.com/inspector-generals-disturbing-fisa-memo [https://perma.cc/X9LW-NND6] (arguing that the Inspector General's audit results indicate that FBI conduct with respect to Carter Page was a symptom of broader failures in the FISA process rather than a deep state conspiracy).

personnel (at least in some cases) oppose him are dire threats to the continuation of lawful, constitutional, democratic government in the United States.

Ultimately, however, the rule of law is larger than such transient political facts. It would be a serious mistake to conclude that the heart of any threat to the rule of law consists primarily in the misbehavior of particular executive branch officials, whether those officials are the president or the security services. The rule of law is in the first instance about the extent to which there are constraints that effectively compel officials to obey the law, not about whether those officials have lawful or lawless characters.[32]

In other words, the rule of law is institutional, not behavioral—what officials do can be *evidence* of the failure of the rule of law, insofar as observing officials casually violating the law gives us good reason to believe that they do not have to fear sanctions for doing so, and hence that the legal and political institutions of their state do not constrain them. But official disobedience is not the thing itself—you can have a state in which the rule of law has failed, but there is no official disobedience (if officials merely obey the law out of the goodness of their hearts), and you can have a state in which there is official disobedience, but the rule of law has not failed (if officials are irrational and disobey the law, but are promptly removed from office for doing so). Hence, our inquiry into the state of the rule of law in the United States must focus, in the first instance, on the capacity of our institutions and the people who stand behind them to actually force the president and intelligence officials to follow the law.

We should understand the behavior of individuals such as Trump (or intelligence community leakers), from this perspective, as potential precipitating factors for a rule of law collapse that may or may not already be latent in the community. That is, officials who attempt to defy the legal constraints on their actions may *reveal* that the underlying institutions and dispositions that would hold them to the law are dysfunctional. By so revealing, such lawbreakers may bring about the final collapse of those constraints, for revealing the inability of society at large to hold them to the law both communicates to other would-be malefactors that they too can toss aside the law, and communicates to the general public that efforts

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32 PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 25 (2016). Another way to put the same point: Richard Nixon, like Trump, doubtless had a lawless character. But when Nixon illegally tried to abuse the powers of the presidency, Congress and the Supreme Court, backed by the press and ultimately the American people, successfully chased him off. Our task today is to determine the extent to which we retain the institutional and social capacity to keep our executives under control regardless of the extent of their personal criminal dispositions, and to figure out how to rebuild that capacity if (as I suggest in this Essay) we do not have it.

to enforce legal constraints against their leaders will be futile.[33] (Of course, such officials also pose the short-term threat that they may use their lawless acts to destroy the institutions that would otherwise keep them in check.) But the heart of the problem is not the individual behavior, but the background conditions that allow the individuals to test the laws and get away with it.

Thus, we must make a small sojourn into the nature of the rule of law as well as the strategic preconditions for its existence, an exegesis,[34] which draws on my prior research on the subject. Thereafter, this Essay will describe the threat posed by polarization to the strategic preconditions of the rule of law,[35] and argue that a key threat to the continuing existence of the rule of law is polarization among both the general populace and political, legal, and intellectual elites and experts. It will distinguish between interest polarization[36] and epistemic polarization.[37] It will close by considering the interaction of those two forms of polarization.[38]

II. THE RULE OF LAW: WHAT AND HOW?

In my prior research, I have explicated an account of the rule of law consisting in three principles of sequentially increasing demandingness.[39] Here, I describe them in relatively abbreviated and informal terms: (a) the principle of *regularity* requires that state officials actually be constrained to use the coercive powers their positions give them only pursuant to preexisting law;[40] (b) the principle of *publicity* requires that ordinary people within the ambit of the state be capable of actually making use of the law in order to constrain official behavior, both on an individual level (for example, to defend themselves in criminal cases) and on a collective level;[41] and (c) the principle of *generality* requires that the laws actually treat all within the ambit of the law as equals, which transpires when variations in the legal treatment of people are justified by public reasons.[42] We should understand the rule of law as a continuum, that is,

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33 For an example of how such communication could bring down a shaky legal order, see the discussion in Paul Gowder, *What the Laws Demand of Socrates—and of Us*, 98 MONIST 360 (2015).

34 *See infra* Part II.

35 *See infra* Part III.

36 *See infra* Section III.A.

37 *See infra* Section III.B.

38 *See infra* Section III.C.

39 *See generally* GOWDER, *supra* note 32.

40 *See id.* at 7.

41 *Id.*

42 *Id.*

as a political ideal that can be satisfied to greater or lesser degree, either by satisfying less demanding but not more demanding principles, or by satisfying principles with greater or lesser scope and reliability.[43]

However, in most realistic states, it should be difficult to observe regularity in the absence of publicity. Officials are unlikely to be effectively constrained by the law unless those whom the law protects (which might be less than everyone in the society, in the case of non-general states) have the ability to observe the law and official compliance with it, and, most importantly, work together to sanction those who have violated it. This is because the constraint of the powerful by law is at bottom a problem of collective action.[44]

The basic formal dynamic is that political leaders have incentives to build and maintain institutions that permit their own power to be constrained, but those incentives depend on them discounting the future to a fairly modest degree. For example, as political scientist Mancur Olson famously argued, leaders have some incentive to protect the rule of law in order to promote economic growth, and thereby increase the long-run rents they can capture.[45] In addition, leaders may have an incentive to build the rule of law in order to facilitate their own capacity to credibly commit to punishing ordinary people for violations of law, and hence more effectively have their wills carried out.[46] Moreover, leaders potentially have an incentive to promote rule of law institutions in order to protect themselves in case they are removed from power.[47]

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43 *Id.* at 26. Incidentally, this logic explains why, as I noted at the beginning of this Essay, the United States can more or less have the rule of law for whites but not, or less so, for citizens of color.

44 *See generally id.* at 97–119, 143–67; Gowder, *supra* note 33; Gillian K. Hadfield & Barry R. Weingast, *Microfoundations of the Rule of Law*, 17 ANN. REV. POL. SCI. 21 (2014); Sonia Mittal & Barry Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century*, 29 J.L. ECON. & ORG. 278 (2013).

45 Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567 (1993).

46 GOWDER, *supra* note 32, at 59–61.

47 The literature on constitutionalism and reducing the stakes of politics has primarily focused on the incentives for interest groups who are not in power to remain in the political community and refrain from violent resistance or overthrow. *E.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005); Mittal & Weingast, *supra* note 44, at 279. However, the point applies to leaders as well: the guarantee that one will not just be clapped into prison when one leaves power encourages the peaceful surrender of power and post-change-of-power stability. *See* Tonja Jacobi, Sonia Mittal, & Barry R. Weingast, *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 NW. U.L. REV. 601, 601–14 (2015) (describing stake-reduction for masses and elites in the context of general theory of constitutional stability). This idea forms part of the basis of amnesty agreements in transitional justice contexts. *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE 51–59 (2000); Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915 (2009). It is also prominent in the literature on ending civil

However, such leaders may suffer from time-inconsistency. If someone who discounts the future too heavily finds themselves with a lot of power, they may be tempted to dismantle the legal constraints on their behavior. In that event, those whom they oppress will not be able to bring them back within the ambit of the law by individual resistance—political leaders typically control enough raw coercive power to push aside individual resistance.[48] Rather, those who suffer from official lawbreaking will only be able to enforce the constraints of the law if they can mobilize the public at large, or some sufficiently powerful subset thereof, to collective action.[49]

I have argued that we should understand the classic institutions of the rule of law as supports for such action.[50] For example, independent judges are valuable not because they have any of their own power to directly constrain powerful officials to obey the law, but because they are capable of sending credible signals to the public about when officials have disobeyed it.[51] Hence, they are potentially capable of creating common knowledge about the practical effects of the law on official behavior, and making it possible for the public to mobilize—either through the political system or, in extremis, through force—to bring officials back in line.[52]

From this perspective, the real threats to the rule of law are not official misbehavior, but either a failure of public commitment to the law—the degeneration of the law to the point that it does not appear to genuinely be in the interest of the public at large to work together to hold it together rather than supporting authoritarians who are inclined to topple it—or the failure of the capacity of legal institutions to send a broadly credible signal of official misconduct if needed.

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wars, in which many scholars identify a commitment problem impeding efforts to make peace—combatants cannot credibly commit to complying with peace agreements rather than consolidating power by cracking down on the other side, leading scholars such as Michaela Mattes and Burcu Savun to identify "fear-reducing" provisions as a key element of such agreements. Michaela Mattes & Burcu Savun, *Fostering Peace After Civil War: Commitment Problems and Agreement Design*, 53 INT'L STUD. Q. 737 (2009). In this context, we can see the rule of law as a fear-reducing social innovation, insofar as it creates institutional impediments to repression or retaliation by political victors. *See also* Holmes, *supra* note 9.

48 *See* GOWDER, *supra* note 32, at 105–06.

49 *Id.* In the present context, mass action means both action in the voting booth (punishing lawless officials who violate, and the politicians who allow their misbehavior to go unchecked, by voting them out of office) and, if necessary, in the streets with protest and similar activities.

50 *Id.* at 118, 154–57.

51 *Id.*; *see also* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009) (giving a broader account of the signaling function of judicial review).

52 *See* GOWDER, *supra* note 32, at 118, 154–57. Of course, in a well-functioning system, these threats remain off the equilibrium path, and this is why, in a well-functioning rule of law system, we can observe the strange phenomenon of an effectively powerless Supreme Court routinely being obeyed by the people who control the guns and the money.

Moreover, collective action to resist the powerful depends crucially on trust.[53] A citizen considering whether to resist lawless official action needs to know that a sufficient number of his or her fellows are committed to participating in acts of resistance—and, in order for that commitment to be meaningful, that they agree about what kinds of official acts constitute violations of the law.

The foregoing claim is, I contend, obviously true when citizen resistance might be met with coercive opposition from the government, as when the level of resistance needed from citizens reaches civil disobedience or other officially disapproved acts (or when the government has shown a tendency to respond to lawful peaceful protest with police violence). Citizens engaging in such resistance must have enough support from their fellows to avoid being immediately squashed by the state. But I further contend that a similar trust calculus also applies in ordinary electoral politics: to the extent citizens must sacrifice their other interests (such as their interest in voting for a candidate who more closely represents their policy preferences) in order to expend their vote to punish a lawbreaking official, they only have a rational incentive to do so if they believe that vote to be likely to be effective.

Thus, in the absence of widespread knowledge about a general commitment to the rule of law (i.e., trust), a polity may suffer from a phenomenon analogous to what Timur Kuran has called "preference falsification," where opposition to the regime is widespread but latent, because nobody trusts their fellows enough to show or act upon that opposition.[54] From this it follows that another failure condition for the rule of law is widespread citizen inability to actually come to reliable beliefs about the extent to which it is in the interests of their fellows (as those fellows perceive their interests) to defend the rule of law. Relatedly, the rule of law may also fail even if there is a widespread and generally known shared interest in the rule of law, if citizens do not know the extent to which their fellow citizens also share a common set of credible signals of lawless official behavior (and hence do not know that they can come to the necessary common beliefs about when coordinated action is necessary to support that action).

One useful way to describe (or a dimension of) these different failure conditions for the rule of law is as two forms of polarization, one relating to interests ("interest polarization"), and the other relating to knowledge

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53 See generally Gowder, *supra* note 33, at 360–61, for a detailed argument.

54 *See generally* Timur Kuran, *Sparks and Prairie Fires: A Theory of Unanticipated Political Revolution*, 61 PUB. CHOICE 41 (1989).

("epistemic polarization").[55] I now turn to a description of those two concepts.

III. THE PROBLEM OF POLARIZATION

A. *Interest Polarization and Inequality*

I shall use the term "interest polarization" for one possible consequence of a highly unequal legal system or a highly unequal society at large, in which increasingly few citizens see the existing legal order as sufficiently better than the available alternatives to be willing to defend it.[56] The basic logic of this idea is that if existing political and legal institutions are not serving the interests of some citizens, for example, in the context of severe oppression, those citizens may lack an incentive to do anything to support its maintenance and may even begin to work for its destruction. To the extent the rule of law depends on those citizens' support (which in turn depends on the balance of power in that society),[57] their unwillingness to provide that support may allow official lawlessness to go unchecked and the rule of law equilibrium to collapse. The same may also obtain if some citizens or other political, social, or economic actors (such as multinational corporations) become so powerful that they prefer a world in which the law fails and they can unrestrainedly exploit others over a world in which the law protects them from exploitation.[58] The term "polarization" is appropriate insofar as it captures the notion that the public may be divided into camps who have radically different

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55 There is a robust literature in political science on the role of polarization in democratic decline. However, that literature typically focuses on partisan polarization. For example, some political scientists focus on the strong negative affect by members of one party against the other, and the equivalent phenomenon among political elites, whose priorities become harming the other side rather than winning elections. *See, e.g.*, SUZANNE METTLER & ROBERT C. LIEBERMAN, FOUR THREATS: THE RECURRING CRISES OF AMERICAN DEMOCRACY (2020) (describing partisan polarization through American history and in the present as one of the leading causes of destructive social conflict and democratic degeneration). While this kind of polarization is also critically important (and we really ought to heed Mettler and Lieberman's warnings), it is not precisely the same as the conception of polarization at play in this Essay. I am concerned less with the beliefs, goals, and incentives of politicians acting in their lawmaking capacities or citizens acting as partisans, and more with the beliefs, goals, and incentives of legal elites and citizens acting in their capacity as committed members of a shared constitutional order.

56 *Cf.* Huq & Ginsburg, *supra* note 9, at 80–81 (describing the observable association between inequality and a nation's sliding into authoritarianism, as well as evidence of increasing authoritarian tendencies within the American people).

57 *See generally* GOWDER, *supra* note 32, at 97–119, 143–67.

58 This second prospect may also obtain if the tools of law enforcement are such that it is possible both for those powerful actors to be protected by law and for those whom they exploit to not be so protected. *See infra* notes 69–83 and accompanying text (discussing the "dual state").

standpoints on the legal system in virtue of the simple fact that it is much less obviously consistent with the basic interests of some citizens (if at all) than others.

During the Obama administration, this worry was most saliently captured by the increasing prominence of police killings of African-Americans, and the seeming inability (or unwillingness) of the government at all levels to stop it.[59] The philosopher Bernard Boxill has traced out two traditions in African-American political thought, what he calls the "assimilationist" and "separatist" traditions.[60] But we could instead call them the "still trying to get the protections of law" and the "just giving up" traditions. There has always been a tension within the African-American community as to whether the correct response to the arbitrary violence that the state has always authorized against African Americans, whether through slavery, through Jim Crow lynchings, or through police murders, is to fight even harder to secure the protections of law for all, or to simply throw one's hands up and seek alternatives in violence—or, as the Black Panthers did, confronting police with law-books in one hand and guns in the other, try to do both at once.[61] Arguably, increasing disillusionment with the evidence of open season for police killings of Black Americans drove some of the sizable drop in Black electoral turnout between 2012 and 2016[62]—although voter suppression after the end of the Voting Rights Act preclearance formula, which was struck down in *Shelby County v. Holder*,[63] the associated

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59 *See* GOWDER, *supra* note 32, at 153 (discussing this worry).

60 Bernard Boxill, *Two Traditions in African American Political Philosophy*, *in* AFRICAN-AMERICAN PERSPECTIVES AND PHILOSOPHICAL TRADITIONS 119 (John P. Pittman ed., 1997).

61 On the "law-books," see Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1768 (1997). On the conjunction of rule of law ideals with armed self-defense, see Meredith Roman, *The Black Panther Party and the Struggle for Human Rights*, 5 SPECTRUM: J. ON BLACK MEN 7, 14 (2016) ("Yet, the [Black Panther Party] recognized that arming African Americans with knowledge of the law would not automatically guarantee that law enforcement officials would respect their human rights. They also advocated that African Americans arm themselves in self-defense against the indiscriminate violence of law enforcement officials until they actually enjoyed equal protection before the law."). For a more general survey of Black Americans' struggles to reconcile the experience of oppression with a commitment to democratic constitutional legalism, see Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U.L. REV. 335 (2019).

62 According to census data, Black voters suffered a 7% decline in turnout between 2012 and 2016. *See* Thom File, *Voting in America: A Look at the 2016 Presidential Election*, U.S. CENSUS BUREAU (May 10, 2017), https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html [https://perma.cc/87VY-DGQ2].

63 Shelby Cty. v. Holder, 570 U.S. 529 (2013). On the end of Voting Rights Act preclearance, see TOMAS LOPEZ, *SHELBY COUNTY:* ONE YEAR LATER, BRENNAN CTR. FOR JUST. (June 24, 2014), https://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf [https://perma.cc/L7FZ-HYYR] (recounting the enactment of restrictive voting laws after *Shelby*

increase in racially biased voter ID laws,[64] as well as the world-historical event of Barack Obama being on the ballot in 2008–12 may also have been involved.[65]

On the other side of America's race line, one of the now standard explanations of the 2016 election is a similar phenomenon on behalf of rural whites. Experiencing economic disinvestment in their communities, a staggering rate of opiate deaths, and other pathologies born of urban-rural inequality, and, on some accounts, hearing a public discourse that focused on remedying injustice against communities of color primarily in urban areas but ignored their own suffering, white voters in rural areas lashed out at the political establishment via votes for Trump.[66] To the extent that is true, it is a story of a kind of political alienation that may have been reflected in a "let's blow up the world" approach to voting for Donald Trump, one that privileged causing chaos over any kind of policy commitment.[67]

The key worry that this may suggest for the rule of law is that the same forces that lead to political alienation could also lead to legal alienation. In the face of dire inequality, in which it does not seem like

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County, including many ID laws); Adriane Fresh, *The Effect of the Voting Rights Act on Enfranchisement: Evidence from North Carolina*, 80 J. POL. 713 (2018) (estimating increased voter turnout from the introduction of preclearance).

64 *See* Zoltan Hajnal, Nazita Lajevardi, & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 368 (2017) (identifying "a substantial increase in the gap between white and nonwhite turnout in strict voter ID states"); *see also* LOPEZ, *supra* note 63.

65 On President Obama's effect on Black turnout, see Luke J. Keele & Ismail K. White, *African American Turnout and African American Candidates*, 7 POL. SCI. RES. & METHODS 431 (2019) (reviewing conflicting literature and presenting results suggesting skepticism about the effect of Black candidates on Black turnout in general).

66 *See* Francis Fukuyama, *American Political Decay or Renewal?: The Meaning of the 2016 Election*, 95 FOREIGN AFF. 58, 62–63 (2016) (blaming "identity politics" and the associated perception that the interests of poor whites are neglected for driving white voters away from the Democratic party); James S. Goodwin, Yong-Fang Kuo, David Brown, David Juurlink, & Mukaila Raji, *Association of Chronic Opioid Use with Presidential Voting Patterns in US Counties in 2016*, JAMA NETWORK OPEN (June 22, 2018), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2685627 [https://perma.cc/7TZW-76B7] (measuring heavy opioid use rate and socioeconomic status associated with county-level Trump support in 2016 election); Shannon M. Monnat & David L. Brown, *More than a Rural Revolt: Landscapes of Despair and the 2016 Presidential Election*, 55 J. RURAL STUD. 227, 229 (2017) (identifying poor economic and health indicators as associated with Trump vote).

67 Of course, "populist" methods of politics such as those used by Trump may encourage the disaffected to perceive their interests in this fashion, and thus exacerbate the preexisting effects of inequality. On populism, the rule of law, and Trump as well as European far-right parties, see Nicola Lacey, *Populism and the Rule of Law*, 15 ANN. REV. L. & SOC. SCI. 79 (2019). For a comparison between Trump and Latin-American populism, see Carlos de la Torre, *Trump's Populism: Lessons from Latin America*, 20 POSTCOLONIAL STUD. 187 (2017). *See generally* Nadia Urbinati, *Political Theory of Populism*, 22 ANN. REV. POL. SCI. 111 (2019) (describing the phenomenon of populism).

the government at large, whether interpreted primarily as a political system or primarily as a legal system, is genuinely serving those who are at the bottom of the socioeconomic hierarchy, there may be little reason for the worst-off to engage in costly and even risky collective action to preserve the rule of law. Alternatively, those who are doing badly may begin to care less about the preservation of a legal order that does not seem to serve them, and to instead act politically, if they act at all, on the basis of other, less public-regarding, interests. Some hint of this may be seen in the stubborn persistence of a baseline 40% or so approval rate for Donald Trump, seemingly no matter what he does.[68] Another possible worry is that this approval rating may suggest to him that key constituencies, whether in the electorate (and hence in Congress) or even in the armed services and police forces, may continue to support him if he escalates his challenges to legal propriety.[69]

In addition to this short-term problem of interest polarization, we may face a long-term structural problem which revolves around the disjunction between the public law and the private law dimensions of the rule of law. This is a disjunction that is reflected in the academic literature in a divergence between the rule of law scholarship in public law and in private law.

For those whose primary areas of study and practice are in the economic realm, the significance of the rule of law centers on ideas such as secure property rights, enforceable agreements, and, more abstractly, stable expectations which allow people to make complex plans, and, thereby, in part, promote economic development.[70] By contrast, for those of us in the public law realm, the rule of law has a different valence, one exemplified more by its dark contrasts—executives who cast aside the legal restraints on their behavior, and with it, the sovereignty of a democratic people; police who kick in doors and railroad suspects—and the heart of the ideal is not stable expectations so much as a social world

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68 *See How Popular is Donald Trump?*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/trump-approval-ratings [https://perma.cc/B33H-UJ6M] (tracking the record of Donald Trump's approval ratings).

69 On this note, some scholars have argued that the extensive federal bureaucracy is likely to resist authoritarianism by Trump. *See* Tyler Cowen, *Could Fascism Come to America?, in* CAN IT HAPPEN HERE?, *supra* note 9, at 37, 37–55; *see generally* Yadira González de Lara, Avner Greif, & Saumitra Jha, *The Administrative Foundations of Self-Enforcing Constitutions*, 98 AM. ECON. REV. 105 (2008) (explaining the role of "administrative" intermediaries in holding high leaders to law). However, I confess to a lack of confidence in Cowen's thesis, in part because there is no particular reason to believe that the bureaucracy itself is immune to polarization—as evidenced by, for example, the contrast between the intelligence personnel resistance described by Goldsmith, and the enthusiastic embrace of Trump's worst impulses by the nation's immigration and border agencies. *Compare* Goldsmith, *supra* note 29, *with supra* notes 18–20 and accompanying text.

70 *See* Peter J. Boettke & Rosolino Candela, *Hayek, Leoni, and Law as the Fifth Factor of Production*, 42 ATLANTIC ECON. J. 123 (2014); GOWDER, *supra* note 32, at 2, 68–70.

in which all can stand tall secure in their legal equality and their freedom from arbitrary power.[71]

Recognizing the disjunction between those two visions of the rule of law, some scholars have suggested that it is possible for there to be a "dual state" in which the private law conception is achieved while the public law is cast aside—in which property rights are protected for investors while security forces are given license to run rampant against those who would dare advocate for their regulation, or who would demand accountability for the violation of noneconomic private rights by those in power.[72] This has been the perennial dream of authoritarian capitalism, most salient in the Pinochet dictatorship in Chile.[73] Such experiences have led some scholars to suggest that the rule of law may have merely contingent value, for example, at the later stages of the introduction of capitalism, or even that arbitrary powers are positively beneficial for the introduction of capitalist forms of economic organization.[74]

Classical forms of the dual state rooted in the violent and lawless repression of dissent, it seems to me, are fundamentally unstable in the long run, for a violently authoritarian capitalist dual state requires legions of low-level dispensers of violence to carry out one's beatings, disappearances, and the like in order to hold power with terror, as well as intermediate officials to command them. Neither those armies of thugs nor their intermediate commanders necessarily have an interest in promoting the dual part of the dual state, that is, in refraining from expropriation and corruption, and thus may undermine the protection of property and contract essential to the dual state. However, it might be that such a dual state is possible to the extent it generates sufficient prosperity

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71 GOWDER, *supra* note 32, at 7–57.

72 For the genesis of the term "dual state," see ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (E.A. Shils trans., Lawbook Exch. 2006) (1941).

73 For an argument that Pinochet's Chile had a kind of rule of law, see Robert Barros, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile*, *in* DEMOCRACY AND THE RULE OF LAW 188, 188–219 (José María Maravall & Adam Przeworski eds., 2003). For a presentation of Pinochet's economic policy, see Angelo Codevilla, *Is Pinochet the Model?*, 72 FOREIGN AFF. 127 (1993). On the lawless behavior of the regime, see REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Phillip Berryman trans., U.S. Inst. of Peace 2002) (1993), https://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf [https://perma.cc/R4W3-FKBN] (recounting numerous deaths by torture and other forms of egregious state criminality).

74 *See, e.g.*, Carlos Santiso, *The Elusive Quest for the Rule of Law: Promoting Judicial Reform in Latin America*, 23 BRAZ. J. POL. ECON. 112, 119 (2003). ("[T]he swift and decisive decision-making needed to implement first-generation market reforms often requires a pliant judiciary . . . . [G]overnment by executive decree, while an asset in the initial phase of economic reform, progressively becomes a liability in the second phase of reform.").

to permit its legions of violence dispensers to become well-paid and highly bureaucratized.

Contemporary China arguably is developing something like a modern, technocratic and bureaucratized, second-wave dual state. While China manifestly exercises arbitrary power over the day-to-day lives of its citizens, as exemplified by its cruel mistreatment of the Uighurs,[75] as well as its brutal crackdown against dissent in Hong Kong,[76] that power seems to be compatible with the capacity of a massive business sector to operate with, at least, sufficient security of property and contract to make a profit.[77] In part, this may be due to the development of technological

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75 *See, e.g.*, Lily Kuo, *'If You Enter a Camp, You Never Come Out': Inside China's War on Islam*, GUARDIAN (Jan. 11, 2019, 7:15 EST), https://www.theguardian.com/world/2019/jan/11/if-you-enter-a-camp-you-never-come-out-inside-chinas-war-on-islam [https://perma.cc/C39E-ZHT7] ("[T]he building is not a formal prison or university, but an internment camp where Muslim minorities, mainly Uighurs, are sent against their will and without trial for months or even years.").

76 *See, e.g.*, Zeynep Tufekci, *The Hong Kong Protesters Aren't Driven by Hope*, ATLANTIC (Nov. 12, 2019), https://amp.theatlantic.com/amp/article/601804 [https://perma.cc/A68D-ALJT] ("Almost every protest results in videos of protesters being beaten by the police. Many are live-streamed, to horrified viewers. Thousands have been arrested. Fearful accounts are coming out of the police stations, alleging torture, sexual assault, and rape."); Keith Bradsher, Elaine Yu, & Steven Lee Myers, *With Security Law as a Cudgel, Beijing Cracks Down on Hong Kong*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/world/asia/hong-kong-election-national-security-law.html [https://perma.cc/XD8J-32X5].

77 Of course, China's economic system is complicated indeed. Much of it is in the form of state-owned enterprises, which, for obvious reasons, need not fear state expropriation (although such enterprises may need to fear the individual expropriation of powerful officials). On the scope of state-owned enterprises, see Philip C.C. Huang, *Profit-Making State Firms and China's Development Experience: "State Capitalism" or "Socialist Market Economy"?*, 38 MOD. CHINA 591, 593 (2012). Some private businesses may succeed in virtue of being embedded in symbiotic patronage networks with government officials. *See* Yuhua Wang, *Coercive Capacity and the Durability of the Chinese Communist State*, 47 COMMUNIST & POST-COMMUNIST STUD. 13 (2014); *see also* Yuhua Wang, *Beyond Local Protectionism: China's State–Business Relations in the Last Two Decades*, 226 CHINA Q. 319 (2016). For an interesting discussion of the various tools of economic predictability that may be available to the Chinese economy, see Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003). It may also be the case that legal protections for businesses are the result of the need to promote foreign investment, and hence businesses that are foreign-owned, trade with foreigners, or share (geographic, market sector) legal regimes with foreign investors may be more protected. *See* YUHUA WANG, TYING THE AUTOCRAT'S HANDS: THE RISE OF THE RULE OF LAW IN CHINA (2015).

At any rate, I am no expert in the Chinese economy or the mechanisms by which the expectations of economic actors are secured, but I merely note here that we may safely infer, from the immense success of the Chinese economy, that those expectations have somehow been secured to at least a minimal degree. It is striking how the Chinese economy has managed to boom even in the face of some profound built-in uncertainties about the basics of economic activity, such as the stability of land tenure. *See, e.g.*, Gregory M. Stein, *What Will China Do When Land Use Rights Begin to Expire?*, 50 VAND. J. TRANSNAT'L L. 625 (2017) (describing possible consequences of short-term land-use rights in China). However, at least one scholar has argued that the absence of stable legal expectations, in conjunction with patronage networks, has been positively

tools to exercise arbitrary power without the direct application of violence, such as pervasive surveillance combined with the capacity to ratchet down the affordances of daily life in order to sanction disfavored citizens.[78] The infamous "social credit score," pursuant to which individuals perceived to have misbehaved by the lights of some official are not beaten up but, at least in the future, may be simply prevented, by an entry in some database, from being able to purchase train tickets, may stand as the exemplar of this pervasive—and remarkably thug-free—capacity to deliver coercion, potentially on an arbitrary basis.[79] And while China undoubtedly delivers some of its arbitrary power with violence (it requires soldiers to put the Uighurs into concentration camps),[80] its violence seems, at least from the outside, to be particularly well controlled, at least insofar as it does not seem to pose a threat to the stability of the government or its economy.[81]

In that sense, China might represent a novel variation on the discretionary administrative state that classical rule of law scholars feared, in which ordinary citizens are simply subject to increasingly oppressive bureaucratic supervision.[82] It remains to be seen whether this version of arbitrary power will ultimately be compatible with the preconditions of economic success, but the economic, military, and political prominence of China thus far suggests that it may well be.

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advantageous for Chinese economic development. *See* Shaun Goldfinch, *The Advantages of Ambiguity? Development, Rule Formation and Property Rights During Transition in China*, 40 ASIAN STUD. REV. 394 (2016).

78 *See* Andrea Kendall-Taylor, Erica Frantz, & Joseph Wright, *The Digital Dictators: How Technology Strengthens Autocracy*, 99 FOREIGN AFF. 103, 109–12 (2020) (describing pervasive and technologically advanced Chinese surveillance).

79 *See* Louise Matsakis, *How the West Got China's Social Credit System Wrong*, WIRED (July 29, 2019, 3:25 PM), https://www.wired.com/story/china-social-credit-score-system [https://perma.cc/FD2T-7RFT] (arguing that early fears about the social credit system have not yet panned out, while also noting that some thirteen million people are on an official blacklist barring them from access to certain kinds of transportation and schooling, as punishment for violating court rulings); Yu-Jie Chen, Ching-Fu Lin, & Han-Wei Liu, *"Rule of Trust": The Power and Perils of China's Social Credit Megaproject*, 32 COLUM. J. ASIAN L. 1, 14 (2018) (identifying goals of the system as including coverage for a vast array of potential "trust-breaking behavior" beyond, for example, violating court judgments, such as "'spreading rumors' on the internet").

80 *See supra* note 75 and accompanying text (describing Chinese concentration camps for Uighurs).

81 Here, however, I write on very shaky ground, as I do not claim to be conversant in the research on the effectiveness of top-level leader control over security forces in China. According to one scholar of Chinese politics, China has been able to control the police in part by skillfully sharing authority and bureaucratic spoils with police chiefs. *See* Yuhua Wang, *Empowering the Police: How the Chinese Communist Party Manages Its Coercive Leaders*, 219 CHINA Q. 625 (2014).

82 *See generally* Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1074–76 (2014) (describing classical rule of law critique of administration in the form of the welfare state).

If a dual state is possible without undermining the stability of those legal rules that protect the holders of property, then property-holding elites may lack an incentive to support legal constraints that may protect non-property-holders.[83] This is especially true if the absence of the rule of law with respect to non-property-holders facilitates the exploitation of labor or otherwise promotes the profits of property-holders. For that reason, the problem of China represents an urgent research question for rule of law advocates in the United States as well—what, precisely, is it that keeps the Chinese government from expropriating Alibaba, Foxconn, and the other immense economic enterprises in the country—and is that factor: (a) sufficiently stable, relative to the likely shocks that China may experience, to permit it to continue and to permit the leaders of those companies to feel relatively secure even in the absence of a general rule of law protecting, for example, the Uighurs; and (b) capable of being exported to other social, economic, and political contexts, such as the United States? If so, the rule of law in the contexts to which that model might be exported is in danger, for such a model permits the interests of property-holders and non-property-holders in the protection of the rule of law to diverge.

B. *Epistemic Polarization: Hunting with the Owl of Minerva*

In Part I of this Essay, I noted the existence of genuine rule of law worries on both sides of our contemporary ideological divide. But the

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83 We have already seen some indirect evidence of this tendency in the shameful capitulation of American companies to China, like Apple's willingness to remove from the App Store an application to track the Hong Kong police, *see* Jack Nicas, *Apple Removes App That Helps Hong Kong Protesters Track the Police*, N.Y. TIMES (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/technology/apple-hong-kong-app.html [https://perma.cc/WD36-27ZF], even as Apple retains some minimal courage in the United States, for example, by refusing FBI demands to hack the phones of domestic terrorists, *see* Eric Lichtblau & Katie Benner, *Apple Fights Order to Unlock San Bernardino Gunman's iPhone*, N.Y. TIMES (Feb. 17, 2016), https://www.nytimes.com/2016/02/18/technology/apple-timothy-cook-fbi-san-bernardino.html [https://perma.cc/R3AY-RFWC].

It is also important to note that the possibility of establishing a dual state might not be the only way that interest polarization could lead to a breakdown in the rule of law. Another grim scenario is one in which the state provides legal protections to nobody, but the wealthy and powerful are able to defend their own property with mercenaries. To the extent the owners of capital believe that they might be able to protect themselves in the absence of a legal order, once again, they may lack sufficient incentive to defend the rule of law in unison with non-property-owners. *See, e.g.*, Noah Gallagher Shannon, *Climate Chaos Is Coming—and the Pinkertons Are Ready*, N.Y. TIMES MAG. (Apr. 10, 2019), https://www.nytimes.com/interactive/2019/04/10/magazine/climate-change-pinkertons.html [https://perma.cc/8NEK-JRWU] (describing preparations of the infamous security firm to conduct paramilitary corporate property and personnel protection operations in anticipated breakdowns of law and order caused by climate change).

potential leakage of our ideological divisions into our estimations of the state of the rule of law itself represents a substantial cause for fear.

By "epistemic polarization," I mean the problem of radically different sets of knowledge and belief held by those committed to the rule of law from different ideological starting points, which may impair the capacity to develop the shared beliefs necessary for collective action. Such polarization is not, of course, limited to the rule of law, and indeed may be most vividly illustrated in differences in response across party lines to the COVID-19 crisis.[84]

Suppose it is the case that I and my fellow leftists, and our equivalents a similar distance on the right, are equally committed to the rule of law and to the maintenance of the existing legal system, but have radically different perceptions of whence the short-term threat comes. Due to familiar pathologies from social psychology as well as partisan networks, such as partisan informational bias and group polarization,[85] it may be that I and my counterparts on the right may come, in good faith, to opposite views about the nature of the threat—because, for example, my right-wing mirror image has access to different kinds of information about intelligence community whistleblowers (or, as the other side says, tactical leakers) and different doctrinal and normative starting points about the set of things that the President is entitled to do.[86]

Epistemic polarization is not just (and may not be primarily) a general, public phenomenon. It is also an expert phenomenon that undermines our ability to diagnose rule of law threats in the first place. Arguably, legal academics, political scientists, and other scholars who care about such things, stand in a similar position as the courts and the

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84 *See generally* Ted Van Green & Alec Tyson, *5 Facts About Partisan Reactions to COVID-19 in the U.S.*, PEW RES. CTR. (Apr. 2, 2020), https://www.pewresearch.org/fact-tank/2020/04/02/5-facts-about-partisan-reactions-to-covid-19-in-the-u-s [https://perma.cc/7J8H-CVU3].

85 *See, e.g.*, Jennifer Jerit & Jason Barabas, *Partisan Perceptual Bias and the Information Environment*, 74 J. POL. 672 (2012); Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175 (2002).

86 For example, a conservative could even accept the evidence of Donald Trump's lawless dispositions, recited *supra* Part I, and nonetheless believe in good faith that: (1) those dispositions will not be successfully translated into destructive constitutional outcomes, whether because of Trump's own lack of competence or because of the effectiveness of controls exercised on him by, inter alia, the bureaucracy, the press, the public, and politicians from either or both parties; and (2) that the actions of Trump's opponents, including intelligence community leakers and some of his ideological or partisan opponents in elected office, themselves threaten destructive constitutional outcomes. Consider impeachment. It seems to me that it is possible to believe in good faith that: (a) impeachment is constitutionally impermissible in the absence of evidence of conduct that would subject the President to criminal prosecution; (b) Trump's behavior with respect to Ukraine would not be subject to criminal prosecution; and (c) efforts of congressional Democrats to bring about Trump's impeachment for that reason represented lawless efforts—although, I hasten to add, not even remotely a "*coup*"—to undermine presidential power in constitutionally impermissible ways. I disagree with that argument, but a reasonable person with different epistemic starting points could believe it.

free press. That is, all are expert (or potentially expert) evaluators of whether officials are complying with the law, and hence as among those institutions that, in a healthy rule of law system, would help send signals on which the public could coordinate—in particular, signals to tell the public when their officials are disobeying the law, and hence when it is time to take mass action to sanction those officials. (Obviously, the judgments of the courts ought to generally count for rather more than ours.)

Ideally functioning institutions for coordination would have the capacity to aggregate different interests and epistemic standpoints to generate something like common knowledge of the conditions under which collective action is necessary to defend the rule of law. Considering courts again as the key example, one of the reasons why ordinary citizens should be able to rely on the judgment of a well-functioning Supreme Court is that such a well-functioning court should be relatively immune from epistemic polarization, insofar as it should have the capacity to generate and display consensus from diverse subgroups of legal experts within the institution itself; or, to the extent there are disagreements, those disagreements ought not to just track partisan backgrounds of the justices.[87] Arguably, such ideal consensus could also increase the capacity of judicial institutions (and likewise, academics, the press, and others) to win the trust of the public at large, to be seen as representing judgments that transcend ideology and interest rather than reflect them. However, that last proposition—commonly believed, for example, among lawyers who have attended to the motivations of Chief Justices like Marshall and Warren to produce unanimous opinions in important cases—may not be supported by the evidence.[88]

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87 Moreover, such consensus can increase the individual confidence of members of those institutions, at least to the extent that those members are reasonably well-behaved Bayesian reasoners who take into account the beliefs of epistemic peers in forming their own. *See generally* David Christensen, *Disagreement as Evidence: The Epistemology of Controversy*, 4 PHIL. COMPASS 756 (2009) (discussing the philosophical debate about the epistemic importance of taking peer reasoners' beliefs into account); Ruth Weintraub, *Can Steadfast Peer Disagreement Be Rational?*, 63 PHIL. Q. 740 (2013) (same). Shifting to scholars, I myself began, when Trump took office, less confident than I otherwise would have been in my judgment about the dangers posed by Donald Trump because competent people on the other partisan side did not seem to universally agree.

88 For a discussion on this view, and alternative hypotheses for why some Chief Justices have preferred unanimity, see Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 804–05 (2015). For some empirical evidence that casts doubt on the claim that public acceptance of a decision is enhanced by unanimity, see Michael F. Salamone, *Judicial Consensus and Public Opinion: Conditional Response to Supreme Court Majority Size*, 67 POL. RES. Q. 320 (2014), and works cited therein. *See also* Henrik Litleré Bentsen, *Dissent, Legitimacy, and Public Support for Court Decisions: Evidence from a Survey-Based Experiment*, 53 L. & SOC'Y REV. 588 (2019). Salamone and Bentsen offer evidence that dissents might increase

Even if unanimity does not enhance public trust, it still seems eminently plausible that blatant partisan decisionmaking—such as a large number of prominent decisions in which the Court is divided along the lines of the party of the president who appointed a given justice—can undermine that trust. And, if epistemic polarization in fact extends to the point that the Supreme Court is widely distrusted, it no longer can send credible signals of official lawbreaking. Thus, its capacity to facilitate public coordination in defense of the rule of law may be seriously undermined.

If this is a problem for courts, it is an even worse problem for the press, academia, and the like, since the Supreme Court usually has the advantage of clear decision rules to aggregate divided opinions. Even in a controversial 5-4 decision along partisan lines, the public can identify the outcome. For that reason, if the public generally accepts the legitimacy of the Supreme Court as constitutional interpreter, they can coordinate even on the basis of a highly polarized result (at least until things get so bad that the people have to deal with pluralities, and proliferations of complex opinions without a clear outcome).[89] But other institutions that may serve as a coordinating function and currently appear to be highly polarized, like the press and academia, do not benefit from such a rule. Accordingly, it is much clearer that polarization in the case of academia and the press hurts their ability to help the public determine the lawfulness of their officials, for those polarized institutions cannot send clear signals at all.

At least as a tentative hypothesis, then, it seems reasonable to state that if experts—in bench, bar, academy, political institutions, and the press—display radical epistemic polarization, looking at the world and seeing entirely different phenomena, that undermines their capacity to help the general public figure out whether they need to mobilize to keep their officials in line.

Moreover, ordinary citizens may reasonably make inferences about their fellow citizens' beliefs based on the beliefs of those who have platforms. So, in a world where journalists, academics, and the like regularly display extreme disagreement about the lawfulness of official behavior, it is reasonable for a citizen to conclude that the general

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the perceived legitimacy of a decision, and suggest that this is because such dissents may be taken to represent procedural justice by having all sides of an argument heard. *See id.* at 589–90; Salamone, *supra*, at 322.

89 For example, regardless of what one might think of the correctness of *Bush v. Gore*, 531 U.S. 98 (2000), one can believe that had Al Gore refused to accept the decision, and had Bill Clinton attempted to turn the presidency over to Gore rather than Bush, even those of us on the left who thought that the decision was an outrageous betrayal of judicial neutrality would nonetheless be motivated to take to the streets in defense of the orderly and lawful transfer of power, and the existence of a rule that says that what five justices vote for counts as the result would have provided something to coordinate on notwithstanding a diversity of substantive views.

population also suffers from such disagreements. Such a citizen may thus conclude that their fellows cannot be counted on to support them in collective action. That, in turn, undermines the incentives for our hypothetical citizen to engage in collective action themselves, for the simple reason that the expected benefit (likelihood of success) from participating in collective action increases with the number of participants (this is so for the reasons noted in Part II, namely, that citizens need to be aware of the likelihood of their fellows' participation in collective action in order to know how safe and how likely to succeed their own actions will be).

It may be that I am overestimating the amount of polarization from which the United States is suffering, whether interest or epistemic and mass or elite. But there is empirical evidence to suggest that we have good reason to be worried about the degree of epistemic polarization with respect to the rule of law.[90] Moreover—this is the ultimate point of this Part—if there really is such extreme polarization, whether epistemic or interest-based, it is a danger to the rule of law regardless of the intentions of the current occupant of the Oval Office. The mere fact that half of our legal and political experts are screaming "this guy is an authoritarian in waiting, and we have to stop him," while the other half are screaming "efforts to stop him are nothing but a lawless coup," itself communicates information. It tells our fellow citizens that they cannot rely on one another to act in a unified fashion in the event that they perceive official lawlessness; and it sends the same message to those who hold official power and may wish to abuse it. So, even if Donald Trump has no plans to cast aside the rule of law, some later president might (even if they are a Democrat!), and that later president can observe our inability to come to enough of a consensus evaluation of Trump's behavior to decide what to do about it. Such a president has an incentive to grab power, because they know that the rest of us cannot get it together long enough to resist them. This is very troubling indeed.

I think there is strong reason to believe that we are presently experiencing an extreme degree of epistemic polarization, particularly in the judiciary. As Jack Balkin explains in a recent book, judges are embedded in networks of legal elites (including politicians and law professors) whose opinions matter to them, and, in times of political polarization, as the opinions of those elites diverge, we can expect judicial perceptions of even what the basic norms of democracy (or, I

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90 Political scientists have found broad areas of agreement among the general public about the features of a constitutional democracy that are important, but substantial disagreement, particularly between Trump supporters and opponents, about whether the United States is doing well or badly by those features—a finding that supports the worries about epistemic polarization raised in this Essay. *See* John M. Carey, Gretchen Helmke, Brendan Nyhan, Mitchell Sanders, & Susan Stokes, *Searching for Bright Lines in the Trump Presidency*, 17 PERSP. ON POL. 699 (2019).

would add, the rule of law) require to diverge.[91] In this way, political polarization in the ordinary, political scientist's sense can lead to epistemic polarization in the sense elucidated in this Essay. Put differently, partisan (political science-style) polarization drives a divergence in the views, including legal views, of non-judicial legal and social elites, and, since judges are embedded in social networks of such elites, ultimately leads to judicial divergence as well.[92] This is doubly the case when, as Balkin also points out, the appointment process has been deeply politicized, in particular, with a President who has chosen to appoint judges who have been explicitly vetted by conservative legal elites.[93]

While Balkin points to the Supreme Court as a key indicator of judicial polarization,[94] I think we can also see it in quite a striking way in the lower courts' response to the COVID-19 pandemic. At least two Trump-appointed district court judges have struck down state and municipal public health orders to prevent the transmission of COVID-19.[95] In doing so, both have disregarded longstanding controlling Supreme Court precedent,[96] and, more importantly, offered legal

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91 JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 118–21, 137–38, 141–42 (2020).

92 *Id.*; *see supra* note 55 (explaining the difference between the standard political science use of "polarization," and the use of "polarization" in this Essay).

93 BALKIN, *supra* note 91, at 120. Balkin also aptly points out that the "constitutional hardball" to which parties resort in a highly politically polarized appointments process is likely to degrade trust in the judicial system. *Id.* at 140–41. (As this Essay goes to press, the polarized appointments process reached a new fever pitch with the passing of Justice Ginsburg, which is discussed in a postscript below. *See infra* Postscript.) This further exacerbates the worries I have described in this Essay about the ability of the courts, and particularly the Supreme Court, to credibly signal to the public whether their elected officials are obeying the law. Consider the following thought experiment: suppose that before a replacement for Justice Ginsburg is confirmed and amidst contentious Congressional hearings on the nomination, the Supreme Court, in a tied 4-4 decision with John Roberts voting with the liberals, affirms a lower-court order requiring Donald Trump to turn over his tax returns to the House of Representatives. Now suppose Trump decides to defy the decision and take to Twitter accusing half of the Justices of being liberals bent on undermining his efforts to make America great. Does the recent history of partisan warfare over judicial nominations (as described in BALKIN, *supra* note 91, at 131–33) provide much reason to believe that those actions would cost him a significant amount of support in the electorate?

94 *See, e.g.*, BALKIN, *supra* note 91, at 145 (describing a Justice Thomas dissent in the census case as reflecting the perception that evidence relied on by the majority is "nothing more than a liberal conspiracy theory"); *see also* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2582 (2019) (Thomas, J., concurring in part and dissenting in part) ("I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web.").

95 *See* Cty. of Butler v. Wolf, No. 20-CV-677, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020); On Fire Christian Ctr. v. Fischer, No. 20-CV-264, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020).

96 *See* Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905) (establishing a deferential standard for reviewing actions of elected branches in response to public health emergencies).

arguments that, I would submit, are strikingly orthogonal (even alien) to the mainstream legal consensus.[97]

In the first of those cases, a district court judge explicitly and openly appealed to the language of Christian theology (complete with Bible quotes) to explain the basis of his ruling in favor of a church that had (allegedly) been ordered to not hold Easter services due to the danger of COVID-19 transmission.[98] In my view, such statements blatantly violate the norm of judicial neutrality.[99] I would go further: the extensive discussions of Christian orthodoxy had no legitimate judicial purpose, and, for that reason, the court itself violated the Establishment Clause by including them in its opinion.[100] In effect, such an opinion suggests to the

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97 The opinions in question are Judge Justin R. Walker's memorandum opinion in support of the grant of a temporary restraining order in *On Fire Christian Center*, and Judge William S. Stickman IV's opinion granting judgment for the plaintiffs in *Wolf*.

98 *On Fire Christian Ctr.*, 2020 WL 1820249, at *1–2 ("On Holy Thursday, an American mayor criminalized the communal celebration of Easter. That sentence is one that this Court never expected to see outside the pages of a dystopian novel, or perhaps the pages of The Onion. . . . According to St. Paul, the first pilgrim was Abel. With Enoch, Noah, Abraham, Isaac, Jacob, and Sara, they 'died in faith, not having received the promises' of God's promised kingdom. But they saw 'them afar off, and were persuaded of them, and embraced them, and confessed that they were strangers and pilgrims on the earth.'" (quoting *Hebrews* 11:13)); *id.* at *8 ("[M]any Christians take comfort and draw strength from Christ's promise that 'where two or three are gathered together in My name, there am I in the midst of them.'" (quoting *Matthew* 18:20)); *id.* at *10 ("But to the nonbeliever, the Passion of Jesus—the betrayals, the torture, the state-sponsored murder of God's only Son, and the empty tomb on the third day—makes no sense at all. And even to the believer, or at least to some of them, it can be incomprehensible as well. But for the men and women of On Fire, Christ's sacrifice isn't about the logic of this world. Nor is their Easter Sunday celebration. The reason they will be there for each other and their Lord is the reason they believe He was and is there for us. For them, for all believers, 'it isn't a matter of reason; finally, it's a matter of love.'" (quoting ROBERT BOLT, A MAN FOR ALL SEASONS 141 (1990))).

99 *See, e.g.*, William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL'Y REV. 347, 349 (2006) (articulating a vision of judicial neutrality from the perspective of a believer according to which his faith "should not be applied as a source of authority in judging"); *see also* 28 U.S.C. § 455(a) (2018) (requiring a judge to recuse himself whenever "his impartiality might reasonably be questioned").

100 The Bible quotes and extended references to polarizing characterizations of elements of Christian theology such as "the state-sponsored murder of God's only Son," *On Fire Christian Ctr.*, 2020 WL 1820249, at *10, bore no relationship to the legal questions the court was asked to resolve. As the court itself recognized, the actual legal issues were: (1) whether the COVID-19 restrictions were neutral between religion and non-religion; and (2) whether the city could meet strict scrutiny in enforcing those restrictions. *Id.* at *6–9. Whether or not God's son was murdered by the state, or whom St. Paul thinks the first pilgrim was, are wholly irrelevant to those legal issues.

The closest thing I can come up with to an argument for the relevance of the copious religious language in the court's opinion is the idea that, arguably, some of the discussion of theology could be relevant to the issue of whether the plaintiff's beliefs were sincerely held, *see id.* at *9 (identifying sincere belief as an element of statutory challenge to COVID-19 order). Certainly one can imagine a case in which the government tries to parse religious doctrine to deny that a challenger sincerely believes in the obligation that the government is burdening, leading a court to

reader that the judge's own (apparent) religious beliefs were the deciding factor in his decision.

In the twenty years since I myself graduated law school, I have never dreamed that I would see a judicial opinion in a federal court invoking "the state-sponsored murder of God's only Son."[101] But of course I think that way, I am a member of the left-leaning wing of the legal elite (I guess). The conservative legal elites whose opinion Judge Walker doubtless cares much more about are probably less likely to share my evaluation of his opinion (though it is hard for me to model their views in my own mind). Indeed, there is strong evidence to suggest that conservative legal elites approve of Judge Walker's decision to give a sermon from the bench, as, not long after he issued that opinion, the Senate confirmed his promotion to the U.S. Court of Appeals for the District of Columbia Circuit.[102] Walker's opinion and his subsequent promotion thus illustrate that hybrid partisan-epistemic polarization crosses the judiciary, the academy, and the political realm.

The second recent COVID-19 opinion is just as surprising, but for different reasons. In striking down the Governor of Pennsylvania's COVID-19 business closure orders, the court held that there was a

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briefly describe that doctrine by way of explaining its ruling against the government. But that claim to relevance manifestly fails in *On Fire Christian Center*, for at least two reasons.

First, nothing in the opinion suggests that plaintiff's sincerity was in dispute. Moreover, given the universally known importance of Easter to Christians, it is frankly impossible to believe that the court perceived any such dispute. Second, establishing a plaintiff's sincerity even in the event of a dispute does not require a detailed theological presentation, in over-the-top-language, about pilgrims and "the state-sponsored murder of God's only Son," *id.* at *10. The court need only have noted that the members and leaders of the church held a sincere belief that their religion obligated them to meet on Easter. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014) ("As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception."); *id.* at 725 ("Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." (alteration in original) (internal citation omitted)).

Thus, there was no secular purpose for the court's religious excursus, and, for that reason, it was unconstitutional. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 41–42 (1980) (holding that posting of Ten Commandments on schoolhouse wall violates Establishment Clause because of its lack of a secular function, and evident effect merely to induce schoolchildren to engage in religious contemplation).

101 *On Fire Christian Ctr.*, 2020 WL 1820249, at *10.

102 Madison Alder, *Senate Confirms McConnell Protege Walker to D.C. Circuit*, BLOOMBERG L. (June 18, 2020, 2:34 PM), https://news.bloomberglaw.com/us-law-week/senate-confirms-mcconnell-protege-justin-walker-to-d-c-circuit [https://perma.cc/A4F8-2DPV]. This suggests that Walker's views and judicial conduct are, somehow, sufficiently close to the mainstream of the network of right-wing legal elites to have them be comfortable with his being raised to that high post, at least to the extent those elites exercise influence over the President and over the Republican senators who voted for Walker's second confirmation.

substantive due process fundamental right, under the Fourteenth Amendment, to "*support himself by pursuing a chosen occupation*."[103] This, as any lawyer who has completed a 1L Constitutional Law course will recognize, is the idea of the infamous *Lochner v. New York* case,[104] with its appeal to "the general right of an individual to be free in his person and in his power to contract in relation to his own labor."[105] The district court cited *Lochner*, and said the following about that case and the jurisprudential era it represents: it "was considerably recalibrated and de-emphasized by the New Deal Supreme Court and later jurisprudence. Nevertheless, our Supreme Court has never repudiated the recognition that a citizen has the right to work for a living and pursue his or her chosen occupation."[106] To a member of the left-leaning side of the legal profession, this passage is truly astonishing: *Lochner* is among the most discredited rulings in constitutional history,[107] and the Supreme Court has repeatedly not only indicated that its abuse of the doctrine of substantive due process to find a fundamental right against ordinary regulation of economic life was incorrect, but even used it as a kind of epitome of judicial overreach.[108] Hence, dissenters in fundamental rights cases routinely accuse the majority of illicitly resurrecting *Lochner*.[109] Yet, as Jamal Greene points out, libertarian legal scholars have made some efforts to rehabilitate *Lochner*.[110] Illustrating Balkin's points about the

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103 Cty. of Butler v. Wolf, No. 20-CV-677, 2020 WL 5510690, at *24–25 (W.D. Pa. Sept. 14, 2020).

104 Lochner v. New York, 198 U.S. 45 (1905) (holding that bakers had constitutional right to make their own decisions about hours to work; state of New York could not by statute limit those hours).

105 *Id.* at 58.

106 *Wolf*, 2020 WL 5510690, at *25.

107 *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–18 (2011) (noting that *Lochner* is "firmly within the anticanon" and "earns the scorn of every lawyer on the reservation").

108 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 694 (2015) (Roberts, C.J., dissenting) ("[T]he majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York* . . . ."); Griswold v. Connecticut, 381 U.S. 479, 524 (1965) (Black, J., dissenting) ("I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the *Lochner, Coppage* [*v. Kansas*, 236 U.S. 1 (1915)], *Adkins* [*v. Children's Hospital*, 261 U.S. 525 (1923)], [*Jay*] *Burns* [*Baking Co. v. Bryan*, 264 U.S. 504 (1924)] line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now.").

109 *See* sources cited *supra* note 108.

110 Greene, *supra* note 107, at 417. It is important to note that we need not deny the existence of some due process liberty interest in a right to pursue one's profession, for example, as recognized by the post-*Lochner* procedural due process case of *Greene v. McElroy*, 360 U.S. 474, 492 (1959), to see why the invocation of *Lochner* itself is troubling. There is a large gap between individualized action that deprives a plaintiff of their security clearance, and hence, career via a secret judicial process, *see id.*, and general exercises of a state's police power to regulate economic life in pursuit of the public interest, here, to prevent the spread of a deadly disease. It was that latter power that the court's positive invocation of *Lochner* cast into doubt, shockingly.

relationship between academic polarization and judicial polarization,[111] it would seem that those rehabilitative efforts have borne fruit in at least the one case.

My point is not to criticize those two cases (although I believe there is much to criticize). Rather, it is, in a sense, didactic and directed at my fellow left-leaning and even centrist[112] law professors, lawyers, and (in the unlikely event they should be listening) judges: take a look at those two cases, and contemplate how utterly bizarre it will (I believe) seem to you to see Christian theology in one of them, and *Lochner* cited approvingly in the other. Then contemplate that these are not cases with high structural partisan stakes—the cases did not revolve around, for example, voting rights, or the power of the President versus Congress, or even hot-button culture war issues like abortion or LGBT rights—yet the kinds of arguments that seemed plausible to these Trump-appointed judges and the audiences they care about are wildly out of the bounds of what we in the legal left and mainstream consider appropriate. Now consider what might happen in a case where the political stakes are truly high, where the government has (by our lights) cast aside the legal restraints on its conduct—and consider, and share my alarm, about the prospect that the judiciary may not be able to speak to the public with one voice or *even in one jurisprudential language*. The rule of law is in critical danger.

C. *When Epistemic and Interest Polarization Combine*

The state of affairs in the United States may pose even more reason for concern than I have already articulated. Interest polarization and epistemic polarization are not wholly separate, and can combine in a kind of death spiral rooted in the fact that one's sense of how one's own interests are to be vindicated depends on one's perception of the interests of others.

This is how one might read the very worrying spread of calls for the incarceration of one's political opponents, which began with Trump's campaign slogan "lock her up," and spread, during the Democratic primary, to calls to "lock him up" chanted *about* Trump, at a baseball

111 BALKIN, *supra* note 91, at 118–21.

112 As Balkin points out, the legal left and the legal center are not that distinct from one another—liberals have dominated mainstream legal thought. *See id.* at 121. It is not just those who identify with the left who, I suspect, will be shocked by the invocation of Christian theology and the rehabilitation of *Lochner* in the federal courts of 2020.

game and a Bernie Sanders rally.[113] Some Democrats may have concluded, from Trump's behavior, that many Republicans are not committed to peaceful and lawful methods of resolving political disputes. But since peaceful and lawful methods of resolving political disputes are only in equilibrium when that commitment is shared across partisan lines, if it is true that Republicans have begun to treat politics as war, then it is rational for Democrats to set aside their own commitment to peaceful and lawful methods of resolving political disputes. And Democrats can reason thusly even if they are misinformed about the extent to which Republicans have cast aside their commitment to the law; the same point, of course, goes in the other direction as well.[114] We could, without too

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113 See the description and commentary in Daniel W. Drezner, *Why 'Lock Him Up' is Almost as Bad as 'Lock Her Up'*, WASH. POST (Nov. 4, 2019, 12:46 PM), https://www.washingtonpost.com/outlook/2019/11/04/why-lock-him-up-is-almost-bad-lock-her-up [https://perma.cc/MW99-JRNC]. The problem with this chant is, as discussed, about providing an incentive for the peaceful surrender of power. *See supra* note 47 and accompanying text. If Trump perceives a substantial risk that he will simply be thrown into prison once he no longer commands the Department of Justice, that reduces his incentive to step down if he loses the election. *See* Jacobi, Mittal, & Weingast, *supra* note 47, at 601–14 (describing stake-reduction for masses and elites in the context of general theory of constitutional stability). Similarly worrying was then-candidate Elizabeth Warren's promise to create a special Department of Justice task force to prosecute members of the Trump Administration. Elizabeth Warren (@ewarren), TWITTER (Feb. 12, 2020, 12:15 PM), https://twitter.com/ewarren/status/1227642422907330561 [https://perma.cc/36DN-FLNY] ("I am the only candidate to propose an independent DOJ task force to investigate crimes by Trump administration officials. Every Democratic candidate must commit to it—so Trump officials know they will be held accountable by career prosecutors once he is out of office."). There is a genuine dilemma (which can be typically found under the scholarly rubric of "transitional justice") about whether one should prosecute the crimes of a previous administration (and hence potentially undermine the willingness of future criminals to peacefully surrender power), or grant them an amnesty (and hence signal to future criminals that their misconduct may be committed with impunity). *See generally* Paul Gowder, *Trust and Commitment: How Athens Rebuilt the Rule of Law*, *in* THEORIZING TRANSITIONAL JUSTICE 225 (Claudio Corradetti, Nir Eiskovits, & Jack Volpe Rotondi eds., 2015) (discussing rule of law considerations surrounding amnesty). But promising prosecutions in advance and as part of a political campaign—and promising to create a special and implicitly at least potentially partisan prosecutorial unit to do so—is clearly dangerous.

114 For this reason, it is particularly alarming that the Attorney General of the United States, in a lecture before the Federalist Society, asserted that "in waging a scorched earth, no-holds-barred war of 'Resistance' against this Administration, it is the Left that is engaged in the systematic shredding of norms and the undermining of the rule of law." William P. Barr, Att'y Gen., U.S. Dep't of Justice, 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's National Lawyers Convention (Nov. 15, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture [https://perma.cc/4WTX-DFHS]. Barr went so far as to claim that this disregard for the rule of law is an inherent and eternal feature of the political left:

> In any age, the so-called progressives treat politics as their religion. Their holy mission is to use the coercive power of the State to remake man and society in their own image, according to an abstract ideal of perfection. Whatever means they use are therefore justified because, by definition, they are a virtuous people pursing a deific end. They are

much hyperbole, describe such a situation as a death-spiral of distrust, in which partisan groups in the community inaccurately perceive their interests as diverging, and begin to act as if that was true—genuinely disregarding the constraints of the law in order to fend off perceived threats from the other side—hence, reinforcing the perception of interest divergence and, in turn, the pathological behavior, and so forth. In that sense, epistemic polarization can lead to interest polarization. Thus, the spread of "Lock (Him/Her) Up."

This is a more general point. As scholars like Timur Kuran have shown us, coordination problems are fundamentally information problems.[115] If, as I have suggested, maintaining the rule of law is about the coordination of people with different interests, then it is at bottom about the maintenance of sufficient trust in one's fellow citizens to perceive it as rational to sacrifice short-term interests in political victories of various kinds in order to preserve the long-run benefits of a functioning legal order.[116] And our epistemic polarization may directly undermine that capacity.

CONCLUSION: THE DANGER IS US

At the end of the Preface to *Elements of the Philosophy of Right*, G.W.F. Hegel gave us the famous aphorism usually translated as something like "the owl of Minerva spreads its wings only at dusk."[117] Like everything else in Hegel, that passage is subject to a multitude of readings, but one reading that appeals to me is as a comment on the inability of philosophy to place itself outside of history—what philosophy does is teach us about the path that we have taken to get to the place where we are, and not so much to provide a roadmap to the next stage of historical development.[118]

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willing to use any means necessary to gain momentary advantage in achieving their end, regardless of collateral consequences and the systemic implications.

Id. By thus denying that his political opponents are even capable of being committed to lawful methods of political change, Barr clearly contributed to a narrative according to which tit-for-tat retaliation or preemptive lawlessness would be acceptable for the right.

115 Kuran's theory of preference falsification explains sudden revolutionary change by a change in the information environment, whereby citizens who suddenly discover that their fellows are opposed to the regime may become able to engage in collective action. *See* Kuran, *supra* note 54 and discussion therein.

116 *See supra* text accompanying notes 53–54.

117 G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 23 (Allen W. Wood ed., H.B. Nisbet trans., 1991) ("[T]he owl of Minerva begins its flight only with the onset of dusk.").

118 *See generally* Gary Shapiro, *The Owl of Minerva and the Colors of the Night*, 1 PHIL. & LITERATURE 276 (1977).

It seems to me that a similar principle applies to political science and to law. There is no, to borrow Thomas Nagel's phrase, "view from nowhere"[119] outside of the societies and the periods of time in which we live. And this is an inherent threat to the identification of the dangers in our current state of affairs. I look at Donald Trump's behavior, and the behavior of ICE and the Border Patrol, and I fear for the rule of law. But I am also a member of this society, and my ability to see is limited by my boundedness in place, in time, and in the social world. Those fears could be biased by my horror at the policies that Trump espouses, and that those agencies implement. It could be that the greater threat in terms of elite behavior is the practice of intelligence agencies undermining the executive's control of their conduct, including by leaking information that is damaging to him. And our current degree of polarization within the institutions, particularly the courts, but also the press and academia, that communicate trained judgment to the public about whether officials have complied with the law, makes it difficult for any of us, to say nothing of the public at large, to have confidence in our judgments.

But the limitations of the Owl of Minerva are bounded in the case of the rule of law. For even though I, like the rest of us, cannot easily look at the world from outside our own polarization, we can observe that polarization, both in the elite institutions of bench and bar, and academy and press, and in the public itself. And, I have argued, regardless of whether I am right about the dangers posed by Trump, the polarization itself poses a severe threat to the rule of law.

Importantly, polarization also threatens our capacity, as a demos, to resist other rule of law dangers. For example, it seems to me quite likely that the role of the Homeland Security immigration agencies (CBP and ICE) in domestic law enforcement poses a serious threat to the rule of law, because those agencies lack a culture of compliance with law, and hence are readily available as a tool of arbitrary executive coercion—as we saw in Portland.[120] However, the American people will only be able to rein in such agencies if we can come to some broad-based consensus

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119 THOMAS NAGEL, THE VIEW FROM NOWHERE 70 (1986).

120 *See* discussion *supra* notes 21–22 and accompanying text. The mere existence of coercive agencies that do not socialize their members to comport with the law is a threat to the rule of law, for even if such agencies are created for a narrow role—such as guarding the border and arresting undocumented immigrants—their lack of an internal culture of legal compliance makes them a ready tool to be deployed by any executive (regardless of their political party) who wishes to break free of the law's constraints. This point is an adaptation of one of David Luban's most important objections to torture: even if a liberal democracy only permits torture in "ticking time-bomb" scenarios, in order to do so, it must employ and train torturers and bureaucracies of torturers—and the tools of torture are not so easily constrained. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1445–52 (2005). The same goes for creating agencies with a habit and culture of exercising power beyond the constraints of law. On the importance of the socialization of legal officials in rule of law states, see generally E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 262–64 (1975).

about the extent to which even those who lack legal immigration status are nonetheless entitled to some constitutional protections, and work collectively within the political sphere to impose reforms on the Department of Homeland Security. If we could do so, we could simultaneously reduce interest polarization (by improving the extent to which all in the territory of the United States enjoy legal rights) and epistemic polarization (by publicly demonstrating our commitment to the rule of law). But the trick, of course, is to get there.

I presently lack the capacity to make meaningful recommendations about further concrete and immediate steps for progress in society at large, at least not beyond either the obvious (we have to do something about inequality in this country), or the solipsistic (liberal and conservative constitutional law professors need to stop shouting at one another, start trying to find shared commitments, and work together on them—surely there are *some* such commitments).[121] The norm in law journals of closing one's work with concrete recommendations is probably counterproductive at any rate, to the extent it encourages facile policy proposals by those who have not done the difficult work to actually consider the consequences or implementation details of those proposals. Instead, I simply close with a call for those who do have ideas on how we might reduce our polarization, and restore cross-partisan credibility to the institutions—the most important of which are the courts and the press, but academia as well—that ought to signal to the public the extent to which their officials are complying with the law, to join together in a research program to try to sort it out. The rule of law may depend on it.

POSTSCRIPT: ON THE PASSING OF JUSTICE GINSBURG AND THE ACCELERATING CRISIS

On the eve of this Essay's publication, Justice Ruth Bader Ginsburg passed away. Her death comes at the worst possible time for the

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[121] The degree of ideological polarization among constitutional law faculty in particular is deeply troubling. For a particularly atrocious example perpetrated by someone with whom I ideologically agree, see Mark Tushnet, *Epistemic Closure and the Schechter Case* 1 n.1 (Harvard Pub. Law Working Paper No. 19-42, Sept. 24, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436689 [https://perma.cc/EL8L-6LCV] (refusing to cite blog posts from conservative scholars disagreeing with his prior commentary in order to "limit the number of 'clicks' the responses get"). This behavior is clearly unacceptable. Maybe some of the traditional institutions of academic work can help in the case of the constitutional law academy—for example, could constitutional law professors from the left and from the right make a serious effort to co-author pieces with one another articulating some kind of joint view on the basics of the responsibilities of constitutional government, or at least carrying out a formal dialogue in that form, and hence with the slowness and civility and honesty constraints of scholarly inquiry rather than the speed and unregulated communication of Twitter? Speaking personally, I would be delighted to entertain offers to try out such experiments from my counterparts on the right.

institutional legitimacy of the Supreme Court, as Republicans will doubtless rush to install a partisan justice, while Democrats will doubtless rush to impede the nomination as much as possible, and, should they win the White House and the Senate in the impending election, may very well seek to "pack" the court, in order to reverse the extreme rightward shift occasioned by any Trump nominee by increasing the number of Justices and providing Joe Biden with several immediate appointments.[122]

Should the parties pursue those strategies, it is difficult to imagine how the American people can continue to perceive the Supreme Court as a legitimate arbiter of official legal propriety. And yet, because the constitutional stakes of Supreme Court appointments in a system with lifetime terms for Justices, strong constitutional review, and extreme partisan conflict are so high, it would be irrational for partisans of either party not to take these measures. Indeed, my own political commitments lead me personally to hope for a court-packing strategy in view of the likely dire costs to important policy issues such as climate change, the prevention of racialized police brutality, health care reform, and women's reproductive autonomy from years of a Supreme Court with Neil Gorsuch at its ideological center.

Thus, I fear that it is likely to become substantially more difficult for the Supreme Court to credibly interpret the law for the public—not because of its ideology (a Gorsuch-centered Court built without partisan political bloodshed could remain credible) but because of the process by which its members are selected. And a likely consequence of the declining credibility of the Supreme Court (and, for similar reasons, of lower courts) is that those of us who care about lawful government will almost certainly struggle in the coming years to identify when public officials are following the laws protecting individual rights and their own democratic accountability.

For those of us within the legal system, those grim likelihoods (at least in my estimation) behoove us to act with even greater urgency to figure out alternative means to make it possible for there to be at least a minimal patchwork of public consensus on what the law demands of government actors. (Institutional reforms to replace life tenure with long, fixed terms for the Justices seems like a good long-term first start, but will do nothing to solve our problems in the immediate future—and to get even that, we would have to build enough cross-partisan consensus to get the Constitution amended. Right now, that seems like a fantasy.)

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122 In view of the timing of Justice Ginsburg's death shortly before publication, and the exigencies of cite-checking for law review publication, I have added this postscript without citations. The reader may consult the pages of any of our newspapers or popular long-form intellectual outlets for extensive commentary advocating things like court-packing. It is, of course, always uncertain whether elected officials will follow the advice of their co-partisans in the intelligentsia.

Moreover, it is reasonable to expect a growth in demands for structural change in the countermajoritarian institutions that brought the United States to this dire pass. It is shocking that our system has conferred upon a minority party (at least judging by the Presidential popular vote in 2016 and the 2018 midterm results) the power to entrench its own ideology in constitutional jurisprudence. It is unbelievable that Democrats will sit idly by and allow it to happen, at least in the long term. Perhaps drastic action will not happen immediately, but it is ludicrous to expect a party that represents a growing majority of the population to tolerate a political structure that relegates it to a minority position in national government for very long. For that reason—in the medium-to-long term if not in the short term—it seems entirely plausible to expect that at a minimum movements like statehood for Puerto Rico and the District of Columbia as well as challenges at the state level to the electoral college system (such as efforts to create an interstate compact to allocate electoral votes to popular vote winners) will grow in strength. And this may all be to the good, democratically speaking. But such efforts, if they come to pass, will undoubtedly be perceived by Republicans as "constitutional hardball" which will further our existing political, and then epistemic, polarization.

If I am right that we are entering a period of time that will be particularly conducive to movements for structural reconstruction, then we have additional reason to fear for the rule of law, for opportunistic populist political leaders from either side of our ideological divide might seek to arrogate power to themselves under the guise of implementing majoritarian reforms. It is likely to be profoundly difficult to distinguish between democratic reforms to our obsolete institutions and the gutting of the legal constraints on power, either of which will appear in the form of political leaders claiming a mandate from the people to make deep changes in our constitutional order. This is true whether such changes come from the right or the left. From my standpoint, as a rule of law scholar within the latter of those political alignments, I both desperately hope for reforms to the countermajoritarian institutions that I see as entrenching reactionaries in power, but also desperately fear the destabilizing consequences of any such reforms.

The crisis is upon us. The future is drastically uncertain. Our only way forward as a demos is to genuinely come to know one another, our shared commitments, and the places where our visions for lawful constitutional democratic governance overlap, and then seek to pursue those, together, from the ambition to continue forward together as a political community. Let us start in the law. Let us build social capital, as a profession, spanning bench, bar, and academy, working together across ideological lines on shared projects within our professional domain that can

reinforce, to one another, our knowledge of one another and our commitment to the rule of law. I would like to be able to offer more than that, but I cannot.