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## Points of Crisis or, Is It All Over?

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# Points of Crisis or, Is It All Over?

MAIMON SCHWARZSCHILD\*

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## I. INTRODUCTION

In mid-January of this year, Carl Bildt, cochair of the European Council on Foreign Relations,<sup>1</sup> tweeted: “Government in US shut down. Complete meltdown in UK politics. Protest wave forces Macron into wide dialogue in France. Just mess in Italy. Still no government in Sweden. Another day these days.”<sup>2</sup> In its 2018 Annual Report, Freedom House—its Establishment credentials comparable to the Councils on Foreign Relations’—declared

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1. *The ECFR Council*, EUROPEAN COUNCIL ON FOREIGN REL., <https://www.ecfr.eu/council> [<https://perma.cc/98LX-QSJD>].

2. Carl Bildt (@carlbildt), TWITTER (Jan. 15, 2019, 10:47 PM), <https://twitter.com/carlbildt/status/1085428432413122561> [<https://perma.cc/NQB4-3Y7K>].

that “democracy face[s] its most serious crisis in decades.”<sup>3</sup> The idea that democratic politics, institutions, and culture are in crisis is widespread in many democratic countries, particularly in the United States and in Europe. It may be one of the few ideas commonly held both on the political left and right, however differently the causes are seen from those differing vantage points.

Very broadly, there are perhaps three overall views about this: (1) a sense of crisis from a left-of-center or leftist standpoint; (2) the same from a right-of-center or rightist standpoint and (3) a view held by at least a few writers and observers both on the left and on the right that the situation, at least in the United States, is not unprecedented historically and may be less critical than it might seem or than some suggest.

On the political left, the idea that democracy is, or may be, in crisis is generally expressed as anxiety about populism. The election of President Trump in the United States and the referendum vote in Britain to leave the European Union are typically, in fact almost invariably, cited as examples of dangerous populism.<sup>4</sup> Populism, in turn, is associated—especially when this anxiety is expressed in more sophisticated form—with illiberal democracy: the idea that populist majorities might, or already do, exercise majoritarian power to undermine or cut back liberal institutions and safeguards.<sup>5</sup> Illiberal democracy opens the door, on this view, to the rise of autocratic leaders. A frightening rise, or recrudescence, of nationalism is said to be another, and related, source of crisis. Finally, growing economic inequality is said to be a source or symptom of democratic crisis.

On the political right, the sense of crisis is fueled by the growth of identity politics, with its tendency to tear society into irreconcilably aggrieved tribes; by the apparently relentless growth of public debt and what is seen as the failure of the “blue model” of government benefits and expenditure; by diminishing scope for free expression, spreading from the campuses to other spheres of national life; by erosion of democratic sovereignty in the face of less-accountable supranational arrangements; by the growth of home-grown bureaucratic power, likewise more or less insulated from democratic accountability; by large-scale, unassimilated, and possibly unassimilable migration, arriving outside legal channels; and by social “coming

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3. MICHAEL J. ABRAMOWITZ, *FREEDOM IN THE WORLD 2018: DEMOCRACY IN CRISIS* (2018), <https://freedomhouse.org/report/freedom-world/freedom-world-2018> [<https://perma.cc/6QME-F3GA>].

4. See, e.g., Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (Harvard Kennedy Sch. Faculty Research Working Paper Series, Working Paper No. RWP16-026, 2016).

5. See William A. Galston, *The Populist Challenge to Liberal Democracy*, 29 *J. DEMOCRACY* 5, 11 (2018).

apart” as described by Charles Murray, Robert Putnam, and others,<sup>6</sup> with accelerating distance between a social stratum with intact families, strong education, vocational success, and a relatively high rate of religious affiliation, and growing numbers of people with diminishing shares of any of these, afflicted instead with drugs, ill health, and an air of hopelessness.<sup>7</sup>

## II. CRISIS FROM RIGHT, LEFT, AND CENTER

### A. *Crisis Seen From the Left*

In the academic legal literature, Kim Scheppelle writes of democratic crisis from what can fairly be called the mainstream liberal point of view.<sup>8</sup> She begins a recent article on autocratic legalism:

By now, we know the pattern. A constitutional democracy, flawed but in reasonably good standing, is hit by a transformative election. A charismatic new leader comes to power, propelled by the growing impatience that the electorate feels with things as they are. The leader promises to sweep away the dysfunctions of partisanship, gridlock, bureaucracy. He claims to call things by their right names and to speak the unspeakable. He rails against entrenched power, entrenched people, entrenched structure. He rallies the people by assuring them that the state belongs to them, only them. He wins an upset victory over the establishment forces and starts a constitutional revolution.

Around the world, liberal constitutionalism is taking a hit from charismatic leaders like these whose signature promise is to *not* play by the old rules.<sup>9</sup>

Whatever the unintended or intended innuendo of this opening, Scheppelle’s article turns out to be primarily about Hungary—with more than a glance at Poland—where Scheppelle sees autocracy establishing itself using legal means and constitutional forms.<sup>10</sup>

To outside observers who simply note that elections continue to occur and nothing illegal is going on in these places, it may seem that these democracies are in good (or good enough) health. But the autocrats who hijack constitutions seek to benefit from the superficial appearance of both democracy and legality within

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6. See generally CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960–2010* (2012); ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* (2015).

7. PUTNAM, *supra* note 6, at 61–65, 223–25.

8. See generally Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

9. *Id.* at 545–46. But cf. Christopher Caldwell, *Hungary and the Future of Europe*, 19 CLAREMONT R. BOOKS 57 (2019) (offering a thoughtful and largely positive assessment of Hungary’s Prime Minister Viktor Orban).

10. See Scheppelle, *supra* note 8, at 549–54.

their states. They use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state. Because these autocrats push their illiberal measures with electoral backing and use constitutional or legal methods to accomplish their aims, they can hide their autocratic designs in the pluralism of legitimate legal forms.<sup>11</sup>

Scheppele cites a variety of moves to cut back or undermine institutional checks and balances, independent media, and civil society in Hungary and in Poland.<sup>12</sup> There may be genuine cause for concern about the future of liberal democracy in these countries, as there surely is in countries like Turkey and Venezuela, which Scheppele mentions very briefly as further examples of autocracy establishing itself, at least to some extent, by majoritarian and formally lawful means.<sup>13</sup> All these countries have long histories of autocracy and generally short experience with democracy,<sup>14</sup> so the implications of their stories may be uncertain for more established democracies.

It is often unclear, moreover, what moves by an elected government seriously threaten democratic norms and which legitimately carry out the government's mandate within the broad framework of an ongoing liberal democracy. When an American president boasts that he "has a phone" by which to govern, or tries to commit the country to a major international agreement like the Paris Climate Accord without submitting it for Senate ratification as a treaty,<sup>15</sup> this may or may not undermine the democratic balance. The threat of autocracy is sometimes, or often, in the partisan eye of the beholder. The governments of Hungary and Poland, it is clear, are currently very unpopular with the hierarchs of the European Union, at least in part because these countries decline to accept numbers of migrants, mostly young men from Muslim lands, originally admitted to Germany by Chancellor Merkel with possibly unforeseen consequences in Germany.<sup>16</sup> Hungary and Poland increasingly show signs of resisting European Union ambitions on other matters as well.<sup>17</sup> Scheppele is evidently devoted to the European Union establishment. She writes that:

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11. *Id.* at 547–48.

12. *Id.* at 549–50, 553.

13. *Id.* at 562.

14. *Id.*

15. See Richard Morrison, *Despite Trump Repudiation, Paris Climate Treaty Still Needs a Senate Vote*, COMPETITIVE ENTERPRISE INST. (May 29, 2018), <https://cei.org/blog/despite-trump-repudiation-paris-climate-treaty-still-needs-senate-vote> [<https://perma.cc/BTM7-SZ7K>].

16. See *EU Targets Poland, Hungary and Czechs for Not Taking Refugees*, BBC (June 13, 2017), <https://www.bbc.com/news/world-europe-40259268> [<https://perma.cc/DBR4-LX6G>].

17. See Caldwell, *supra* note 9, at 61.

[A]dvocates of Brexit (known as Brexiteers in the United Kingdom) [so known, that is, to their opponents] have used some of the same strategies as the autocratic legalists by invoking the results of a deeply unclear plebiscite to prevent meaningful debate either about what the first plebiscite meant or about whether a second plebiscite would be a worthwhile endeavor, claiming the superior democratic authenticity of the first and shouting down all who have the temerity to disagree.<sup>18</sup>

This is deeply intemperate at best. The referendum on whether the United Kingdom should leave the European Union was fundamentally clear—as advocates on all sides affirmed in the run-up to the vote—and the call for a second referendum, coming from the most unreconciled “Remainers,” has certainly not been “shouted down” although Britain might or might not now submit, tamely or otherwise, to the Remainers’ demand.<sup>19</sup> Scheppele’s alarm about Hungary and Poland, or animus toward their governments, in short, may be colored by her partisanship: she may be far readier to see autocracy or a crisis of democracy there, than in the case of other governments with which she is more in sympathy.

Still, the concern is valid, if scarcely new, that majority rule on the one hand and safeguards for political minorities—and liberal restraints upon majorities in general—on the other are potentially or actually in tension, and that there is reason for vigilance in any democracy. This concern was pretty fully set out by Aristotle, as well as in the *Federalist Papers* and by de Tocqueville.<sup>20</sup> But the dangers are especially acute the more divided the society, when majorities and political minorities are far apart, and common ground or mutual solidarity are hard to come by. Under these conditions, a victory for the majority on any question is liable to seem—and perhaps actually to be—devastating to the minority. And democratic societies today are all too obviously divided over a host of matters: this is surely at the root of the sense that democracy might be in crisis.

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18. Scheppele, *supra* note 8, at 568.

19. See Jessica Elgot & Lucy Campbell, *Len McCluskey: There is No Path to a Second Brexit Referendum*, *GUARDIAN* (Aug. 14, 2019, 11:52 AM), <https://www.theguardian.com/uk-news/2019/aug/14/no-path-to-a-second-referendum-says-unite-leader> [<https://perma.cc/5A3V-9LY2>].

20. See generally THE FEDERALIST NO. 10, at 49 (James Madison) (Lawrence Goldman ed., 2008) (exploring how republican government serves as a check on factions and the tyranny of the majority); Patrick Coby, *Aristotle’s Three Cities and the Problem of Faction*, 50 J. POL. 896 (1988) (on the strengths and dangers of democracy in Aristotle’s thought); Morton J. Horowitz, *Tocqueville and the Tyranny of the Majority*, 28 R. POL. 293 (1966) (on Tocqueville’s contribution to American thinking about the problem of tyranny of the majority).

The sense of crisis on the political left, like the parallel sense on the right, actually subdivides and comes with different emphases and nuances, and sometimes with quite conflicting assessments. For some on the liberal left, their alarm about populism seems to boil down to fury that their candidate lost a presidential election in the United States or that a majority in Britain voted, against the almost unanimous urgings of the “great and the good,” to withdraw from the European Union. But there are deeper, and in some ways less predictable, accounts as well. Yascha Mounk’s *The People vs. Democracy: Why Our Freedom Is In Danger & How To Save It*, for example, duly claims that “authoritarian populism” is creating a crisis of liberal democracy, and that “the most striking manifestation of democracy’s crisis” is the election of President Trump.<sup>21</sup> But Mounk blames this crisis, at least in part, on liberal political elites who insulate themselves from popular concerns, and who turn power over to unelected administrative bureaucracies, courts, and international bodies: “undemocratic liberalism” helped to breed “illiberal democracy.”<sup>22</sup> Moreover, Mounk criticizes at least some facets of identity politics, insists on freedom of speech, and deplors the growth of anti-Americanism on the American left.<sup>23</sup> Mounk’s suggestions for “How to Save” democracy are conventionally “progressive”—more economic equality and social justice—but his book makes various points along the way that are critical of the progressive movement, giving grounds for skepticism about its political agenda.<sup>24</sup>

### *B. Crisis Seen From the Right*

On the political right, too, there are differences of emphasis and of nuance, and sometimes more, among those who share the widespread sense that democracy faces a crisis. Peter Berkowitz, who actually resists the idea that Americans’ differences are now unbridgeable, nonetheless writes that the country confronts formidable challenges:

On the increasingly risible grounds of disinterested expertise, our profligate and inexorably expanding federal government has subjected the nation to a morass of intrusive, inefficient, and often indecipherable rules and regulations. Senior figures in the permanent bureaucracy have set aside impartial administration of the law to commandeer state power to advance partisan agendas. A civilized immigration policy consistent with the rule of law and the right of sovereign nation-states to control their borders eludes both parties. . . . [I]ncome inequality in America widens, good jobs flow out of the country’s industrial heartland, and the national debt balloons to massive proportions. Popular culture frequently

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21. YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT 2* (2018).

22. *Id.* at 28.

23. *See generally id.* at 183–252.

24. *See id.*

revels in the low, the mean, and the tawdry. The combined dysfunction of the state, the economy, and culture operates to fray the fabric of family life, erode the underpinnings of faith, and sap vitality from communities. And many members of the prestige media appear to believe that their professional responsibilities require them to put bringing down the president ahead of getting the story right, even as the president goes overboard in declaring the press “the enemy of the people.”

Our educational institutions make matters worse. They lend their authority to the scurrilous charge that free speech, due process, and a core curriculum rooted in Western civilization promote persecution based on race, class, and gender. And they cultivate the self-aggrandizing claim that the greater the victim status of the group with which one identifies, the more deserving is one’s speech, the less the formalities of due process should stand in the way of one’s accusations and ambitions, and the more the curriculum should elaborate one’s oppression and vindicate one’s demands.<sup>25</sup>

Angelo Codevilla and Charles Kesler at the *Claremont Review of Books* have, if anything, a sharper sense that America and the West have entered into a kind of “cold civil war.”<sup>26</sup> Codevilla says: “American society has divided along unreconcilable visions of the good, held by countrymen who increasingly regard each other as enemies.”<sup>27</sup> Fearing that common ground, at least for now, can no longer be found, Codevilla and Kesler urge a radical decentralization of American life.<sup>28</sup> Codevilla writes:

Any attempt by either side to coerce the other into submission augurs only the fate that has befallen other peoples who let themselves slide into revolution. It follows that the path to peace must lie in each side’s contentment to have its own way—but only among those who consent to it. This implies limiting the U.S. government’s reach to what it can grasp without wrecking what remains of our national cohesion.

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Blue states and red states deal differently with some matters of health, education, welfare, and police. It does no good to insist that all do all things uniformly. . . . Time to relearn federalism.<sup>29</sup>

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25. Peter Berkowitz, *Anti-Liberal Zealotry Part I: Our Immoderation*, REAL CLEAR POL’Y (Sept. 14, 2018), [https://www.realclearpolicy.com/articles/2018/09/14/anti-liberal\\_zealotry\\_our\\_immoderation.html](https://www.realclearpolicy.com/articles/2018/09/14/anti-liberal_zealotry_our_immoderation.html) [https://perma.cc/LEP9-7DC5].

26. See generally Angelo M. Codevilla, *The Cold Civil War*, 17 CLAREMONT R. BOOKS 24 (2017); Charles R. Kesler, *America’s Cold Civil War*, 47 IMPRIMIS 1 (2018).

27. Codevilla, *supra* note 26, at 25.

28. See Codevilla, *supra* note 26, at 25–27; Kesler, *supra* note 26, at 4–5.

29. Codevilla, *supra* note 26, at 25, 27.



Patrick Deneen goes further, in a recent book entitled *Why Liberalism Failed*.<sup>30</sup> Deneen blames Lockean liberalism, Enlightenment rationalism, and the untethered pursuit of freedom for today's political and social pathologies.<sup>31</sup> Deneen's disavowal of "selfish" liberalism, as against the communitarian alternative in which he puts his hopes, draws on anti-Enlightenment ideas from the political left as well as from the right, and his book bespeaks despair at the liberal order, viewed from either ideological standpoint or from both.<sup>32</sup>

Some observers and writers, to be sure, both on the political right and on the left, are more optimistic, suggesting that America and its democratic institutions faced worse times in the past and weathered them and emerged strong. The paleoconservative Pat Buchanan asked *Is This Worse than '68?* and argues that 1968 was worse.<sup>33</sup> That year brought the assassinations of Robert Kennedy and Martin Luther King, mass violence at the Democratic national convention in Chicago, devastating racial riots in major cities, student upheaval at Columbia and Berkeley and on campuses across the country, the beginnings of the "Weatherman" bomb attacks around the country, all against the background of a large-scale war in Vietnam about which the country was ever more bitterly divided.<sup>34</sup> "No, 2018 is not 1968, at least not yet," concluded Buchanan.<sup>35</sup> This is less than giddy optimism, it must be said, and at other moments Buchanan's journalism takes a more apocalyptic tone.

### C. . . . And From the Center

On the center-left, Walter Russell Mead cites an era of "ineffective politicians, frequent scandals, racial backsliding, polarized and irresponsible news media, populists spouting quack economic remedies, growing suspicion of elites and experts, frightening outbreaks of violence, major job losses, . . . anti-immigrant agitation, declining social mobility, . . . [and] rising inequality"—actually a description of American life in the "gilded age" decades after the Civil War—as a parallel to the present.<sup>36</sup> The industrial revolution overwhelmed America in the late nineteenth century, and the information

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30. PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018).

31. *See id.* at 47–49, 81, 115.

32. *Id.* at 20, 34.

33. Patrick J. Buchanan, *Is This Worse than '68?*, BUCHANAN (Oct. 30, 2018), <https://buchanan.org/blog/is-this-worse-than-68-130409> [<https://perma.cc/KSJ3-YWF8>].

34. *Id.*

35. *Id.*

36. Walter Russell Mead, *The Big Shift: How American Democracy Fails Its Way to Success*, FOREIGN AFF., May/June 2018, at 10, 10.

revolution, says Mead, is disrupting the existing order today in comparable ways:

The effects of rapid change are often unwelcome, but the process of transformation is one of growth and development, not of decline and fall. Indeed, the ability to cope with change remains one of the United States' greatest sources of strength. . . . There is reason to believe that, once again, the United States can find a path to an open and humane society that capitalizes on the riches that the new economy will produce.<sup>37</sup>

Mead's essay is subtitled "How American Democracy Fails Its Way to Success," but Mead hedges his bets:

The foundations of societies are quaking at home, even as the international order threatens to splinter. In the United States, policymakers and politicians now find themselves accountable to a public that may become defensive and antagonistic under the stress of economic and cultural change. . . . To reflect on the upheavals that accompanied the Industrial Revolution—the most destructive wars and the most unspeakable tyrannies in the history of our species—is to realize just how much peril we face.<sup>38</sup>

Mead thinks a future of affluence and freedom is possible, but liberal democracy has "turned out not to be the end of history," and we face "problems whose origins cannot be fully understood, and whose solutions will ultimately require intellectual and political architecture that does not yet exist."<sup>39</sup>

If "[t]he foundations of societies are quaking at home" is the view of a comparatively sanguine observer, it is a measure of how widespread is the sense that liberal institutions are in trouble, or at least face real and possibly unprecedented threats.<sup>40</sup> The English philosopher John Gray believes that, at least until recently, liberals too often imagined that the future would be theirs: that nationalism and religion would no longer be deciding forces in politics, that rivalry for territory and resources would be left behind, and that basic freedoms would be protected in a universal framework of human rights.<sup>41</sup> Now, Gray writes:

Nearly all liberal regimes are confronted by a two-headed internal threat. On the one hand are the forces usually described as populist—movements on the far right and left that challenge the post-Cold-War model. Corbynite Labour falls into this

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37. *Id.* at 11–12.

38. *Id.* at 19.

39. *Id.* at 15–16.

40. *Id.* at 19.

41. John Gray, *Age of the Strongman*, NEW STATESMAN, May 25, 2018, at 23, 24.

category, as well as the alt-right in the [United States] and the neo-anarchist Five Star movement in Italy. On the other hand there is what might be called alt-liberalism—a mutant version of liberal ideology that repudiates the Western civilisation that gave birth to a liberal way of life. Embedded chiefly in the universities, where they shape teaching in the humanities and social sciences, alt-liberals may appear an insignificant force in politics. But while they cannot command a popular majority in any democratic country they shape the agenda on sections of the left, and weaken parties of the centre to which many voters were attached in the past.

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The denial by liberals of any responsibility for the conditions that have fuelled rising anti-liberal movements is the cardinal fact of contemporary politics. What this denial presages is not any higher phase of history—a revamped liberal order, or some purer version of socialism—but a new authoritarian era.<sup>42</sup>

Gray writes regularly for the left-wing *New Statesman*, but his pungent and impatient thinking is neither conventionally leftist nor rightist. He concludes:

The new tribe of alt-liberals reject the historic inheritance of liberalism as an obstacle to progress, with free expression attacked as a bulwark of oppression. Culture wars divide society and the generations, making long-term strategy impractical.

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... Societies that are progressively discarding the freedoms by which liberalism was once defined are ill-equipped in the contest with advancing authoritarianism. ... Anyone who still cherishes tolerance and individual freedom must face the challenge of finding ways of defending these values as the liberal order continues its decomposition.<sup>43</sup>

### III. THREE CAUSES OF CRISIS

It seems to me that there are at least three things—no doubt among others—that may truly be creating a crisis for liberal government in the United States and similarly, in various ways, in other countries as well. The first is the growth of government by administrative bureaucracy, insulated from democratic accountability and unchecked by effective separation of powers. The second is the growth of a one-sided and intolerant ideological monoculture, originating in the universities and colleges and taking root in secondary and primary schools, in the media, and even in a growing number of corporate bureaucracies. The third is the rising level of political and social division, enmity, even hatred, which sometimes seems

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42. *Id.*

43. *Id.* at 27.

reminiscent of the angry climate in the years leading up to the American Civil War.<sup>44</sup>

### A. *Administrative Overreach*

The growing power of administrative agencies in the United States is fairly well known. Federal administrative agencies began on a modest scale in the late nineteenth century, grew somewhat during the Progressive Era in the early twentieth century, and expanded dramatically in the 1930s under the New Deal; their powers have expanded further since the 1960s.<sup>45</sup> These agencies are established by Acts of Congress, with broad mandates to issue rules and regulations, and to adjudicate disputes. The courts have—until now—accepted what amount to broad delegations of legislative and adjudicative power, in theory so long as Congress lays down “intelligible principles” for the administrative agency in question.<sup>46</sup> In practice, the agencies’ rule-making leeway is broad. The courts give “deference” both to agency interpretations of the statutes that supposedly govern them, and to agency interpretations of the rules and regulations propounded by the agencies themselves.<sup>47</sup>

Administrative rules and regulations now govern wide areas of American life: not only financial, commercial, and industrial practices and workplace conditions, but medical policy, energy policy, educational policy—even the details of schoolroom discipline—environmental policy, and much more.<sup>48</sup> The Code of Federal Regulations ran to about 10,000 pages in 1950, 71,000 pages in 1975, and 175,000 pages in 2014.<sup>49</sup> State governments,

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44. See generally DAVID M. POTTER, *THE IMPENDING CRISIS 1848–1861* (Don E. Fehrenbacher ed., 1976) (a brilliant, and in the present context somewhat chilling, account of the moral and political divisions leading up to the Civil War).

45. See Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 124–27 (2016).

46. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

47. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837, 844 (1984) (deference to agency interpretation of governing statutes); *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deference to agency interpretation of agency regulations). See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

48. See, e.g., DeMuth, *supra* note 45, at 124–25.

49. See FED. REGISTER, *CODE OF FEDERAL REGULATIONS TOTAL PAGES AND VOLUMES 1938–2014*, <https://www.federalregister.gov/uploads/2015/05/Code-of-Federal-Regulations-Total-Pages-and-Volumes-1938-2014.pdf> [<https://perma.cc/7LCP-S8WR>].

as well, maintain their own administrative rule-making bureaucracies, in some cases very extensive ones.<sup>50</sup>

Unlike elected legislators, administrative rule makers are not directly accountable to the voters, and in most cases they are scarcely accountable indirectly, given the complexity and lack of transparency of much of what they do, and the sheer numbers of agencies and rulemakers.<sup>51</sup> Even congressional oversight and control of the administrative agencies is practically very limited. Whereas traditional political theory stipulated a legislative branch that would press or exceed the outer limits of its power, in the present era the tendency is toward congressional abdication.<sup>52</sup> For the administrative state to be democratically accountable, even indirectly, elected legislators would at least have to be accountable to the voters for the rules, regulations, and policies of the administrative agencies. Given the scope and structure of administrative power, and the ways in which Congress insulates itself from responsibility, in practice there is little or no such accountability.

Moreover, administrative government evades a fundamental requirement of liberal democracy, namely separation of powers. In liberal principle, dating at least to Locke and Montesquieu, there is the idea that legislative, executive, and judicial functions ought to be separate, and that civil liberty depends importantly on the checks and balances inherent in separation of powers.<sup>53</sup> As Federalist 47 put it, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny.”<sup>54</sup> Administrative agencies notoriously exercise a mix of quasi-legislative, executive, and judicial powers. Professor Lawson described the process memorably several decades ago, taking the Federal Trade Commission as an example:

The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission’s rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission’s findings warrant

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50. See, e.g., CAL. CODE REGS., tits. 1–28 (2019).

51. See DeMuth, *supra* note 45, at 124–25.

52. See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The hydraulic pressure within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”). But see Michael Greve, *Bloc Party Federalism*, 42 HARV. J.L. & PUB. POL’Y 279, 301 (2019) (arguing that this picture of Congress pressing to expand its own lawmaking power has now become “untenable”).

53. See generally M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS ch. 4 (2d ed. 1998); Alex Tuckness, *Locke’s Political Philosophy*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/locke-political/> [<https://perma.cc/4L3T-RLUH>] (last updated June 21, 2018).

54. THE FEDERALIST No. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008).

an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.<sup>55</sup>

When citizens' lives are ever-more-pervasively governed by such administrative rules, regulations, and "guidances," propounded by authorities whose democratic accountability is occluded at best, and whose powers are at once quasi-legislative, executive, and judicial, citizens may reasonably question—as they increasingly do—whether and to what extent they are governed, in practice, by liberal or democratically responsive institutions.

### *B. The Death of Free Speech*

A second challenge to liberal democracy comes from the growth of one-party orthodoxy in the institutions where free debate and the threshing out of competing ideas might otherwise be fostered, especially the universities and colleges. There is now extensive social science evidence of political and ideological homogeneity in American higher education, confirming what is experienced by most of us, day-to-day, on academic faculties throughout the country.<sup>56</sup> Numerous studies report virtual or actual unanimity of left-of-center to leftist views among college and university faculty.<sup>57</sup> The studies vary somewhat in their techniques and samples and in the questions they ask, so the precise numbers differ from study to study, but the overall picture is quite consistent. In one recent study of fifty-one of the most highly ranked liberal arts colleges, the ratio of registered Democrats

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55. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248–49 (1994) (footnote omitted).

56. Joshua Dunn, *The Steep Price of Political Homogeneity: Political Bias Undermines Education Scholarship*, EDUC. WEEK (Jan. 11, 2017), <https://www.edweek.org/ew/articles/2017/01/11/the-steep-price-of-political-homogeneity.html?print=1> [<https://perma.cc/X46Z-AEJP>].

57. See, e.g., Scott Jaschik, *Research Confirms that Professors Lean Left, But Questions Assumptions About What This Means for Conservatives*, INSIDE HIGHER ED (Feb. 27, 2017, 3:00 AM), <https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means> [<https://perma.cc/G34W-QB9Y>].

to Republicans among tenured and tenure-track faculty is more than ten to one; 39% of the liberal arts colleges had no registered Republicans at all among their professors.<sup>58</sup> The handful of Republicans were mostly found in relatively nonpolitical departments like engineering, chemistry, physics, and computer science; in humanities and social science departments the ratios were considerably more lopsided—as though ten-to-one were not lopsided enough.<sup>59</sup> A recent study of law faculty, which probed political contributions, not just party registration, arrived at similar results for the American law professoriate: some 15% of law professors are counted as conservative, a majority of them moderate conservatives, whereas only about one-quarter of the far more numerous liberal or leftist law professors are in the mere moderate category.<sup>60</sup>

It is not just that the professors all, or virtually all, hold left-of-center or leftist views. Colleges and universities are now the epicenter of a trend, or wave, of opposition to free thought and free speech: “islands of repression,” as they began to be described some decades ago, in what was then perhaps optimistically thought to be, and sure to remain, an off campus “sea of freedom.”<sup>61</sup> The jargon of the one-party campus has become familiar: microaggressions, safe spaces, trigger warnings, “no-platforming.” Speakers are shouted down at campus forums, or assaulted physically, or disinvented before they arrive.<sup>62</sup> Ideas, views, and facts that challenge or differ from the campus orthodoxy are condemned as “hate speech.”<sup>63</sup> With progressive or leftist opinion now virtually unanimous among faculty in relevant fields and among administrators, anathemas—and more than occasional incidents of vandalism and threats of mob violence—are increasingly targeted at campus figures, or at would-be speakers, who might have been thought safely on the left, yet are accused of offending the quickly evolving orthodoxy

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58. Mitchell Langbert, *Homogeneous: The Political Affiliations of Elite Liberal Arts College Faculty*, 31 *ACAD. QUESTIONS* 186, 186 (2018).

59. *See id.* at 190–91.

60. Adam Bonica et al., *The Legal Academy’s Ideological Uniformity*, 47 *J. LEGAL STUD.* 1, 10 (2018).

61. Chester E. Finn, Jr., *The Campus: “An Island of Repression in a Sea of Freedom,”* COMMENTARY, Sept. 1989, at 17, 23 (“Meanwhile, in the realms of intellectual inquiry and expression, [campuses] permit less diversity, turning the campus (in the memorable phrase of civil rights scholar Abigail Thernstrom) into ‘an island of repression in a sea of freedom.’”).

62. For examples of campus political hysteria at Yale, Emory, the University of Michigan, and others, with the active collusion of campus administrators in each case, see Heather MacDonald, *Drawing the Line At Last*, CITY J. (Apr. 22, 2019), <https://www.city-journal.org/free-speech-camille-paglia> [<https://perma.cc/6TZV-9KG9>].

63. *See Campus Protests and Free Speech: The Colliding of the American Mind*, ECONOMIST (June 4, 2016) <https://www.economist.com/international/2016/06/04/the-colliding-of-the-american-mind> [<https://perma.cc/5ZZJ-E7G8>].

by their still more “woke” accusers.<sup>64</sup> There have been scenes of groveling apologies, reminiscent of confessions at show trials, by accused faculty and staff, some of them subjected to “re-education” by their far from educated accusers.<sup>65</sup> As one liberal writer observes, these are not “just a bunch of weird, unfortunate events that somehow keep happening over and over,” nor “a series of one-off episodes. They are carrying out the ideals of a movement that regards the delegitimization of dissent as a first-order goal.”<sup>66</sup>

It might be replied that the suppression of free speech and intellectual independence on campus might be regrettable, but that it does not threaten the free institutions of a democratic society. After all, there continue to be other forums for debate, for example online, where vehement expressions of opinion of various sorts are commonplace. But the quality of that debate is open to serious question. Extremist cascades on the internet, and cyber mobbing, are widely noted.<sup>67</sup> Universities and colleges, by contrast, adhering to principles of academic freedom and enlightened debate, have been considered a fundamental resource for a free society in America, at least since Thomas Jefferson, with that in mind, devoted himself to establishing the University of Virginia.<sup>68</sup> The transformation of higher education into an ideological monoculture goes far towards discrediting that resource.

Moreover, unlike Las Vegas, what happens on campus does not stay on campus. The shibboleths of the campus left are increasingly making an appearance elsewhere, including in corporate life. “Diversity training,” inculcating the idea of “unconscious” or “implicit bias,” is now an \$8 billion

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64. See Kyle Swenson, *Black-Clad Anti-Fa Members Attack Peaceful Right-Wing Demonstrators in Berkeley*, WASH. POST (Aug. 28, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/black-clad-antifa-attack-right-wing-demonstrators-in-berkeley/> [https://perma.cc/MQS9-A68D].

65. See, e.g., Mona Charen, *Special Snowflakes? Or Fascists?*, ETHICS & PUB. POL’Y CTR. (Nov. 13, 2015), <https://eppc.org/publications/special-snowflakes-or-fascists/> [https://perma.cc/JGL9-72L6].

66. Jonathan Chait, *Can We Start Taking Political Correctness Seriously Now?*, N.Y. MAG. (Nov. 10, 2015, 9:01 AM), <http://nymag.com/daily/intelligencer/2015/11/can-we-take-political-correctness-seriously-now.html> [https://perma.cc/8HQS-HEKX].

67. See, e.g., Robert Knight, Opinion, *The Cyber-Bullies’ Moment*, WASH. TIMES (May 12, 2019), <https://www.washingtontimes.com/news/2019/may12/conservatives-punished-censored-online-for-violati/> [https://perma.cc/33PJ-TFJK].

68. See, e.g., James Carpenter, *Thomas Jefferson and the Ideology of Democratic Schooling*, 21 DEMOCRACY & EDUC., no. 2, 2013, at 1, 2–3, 9–10.



industry in the United States.<sup>69</sup> Google's 100,000 employees were effectively put on notice, and many elsewhere will have taken note, when a software engineer at Google, James Damore, was summarily fired for citing well-established facts about average differences in men's and women's interests, and hence "advancing harmful gender stereotypes," to explain why more women were not employed as tech engineers.<sup>70</sup> Internet semi-monopolies like Google do not punish only their own employees for deviation from ideological dogma: there is evidence of politicized skewing of online search engines, and outright banning of disfavored voices by major platforms, like Facebook.<sup>71</sup> This does not bode well for the internet as an alternative forum for free debate, higher education having substantially opted out of free exchange of political and social ideas. A recent poll by Rasmussen found that only 26% of American adults now believe they have freedom of speech, whilst 68% think they have to be careful not to say something "politically incorrect" that might get them into trouble.<sup>72</sup> Free debate has rightly been called a sine qua non of democracy.<sup>73</sup> If free inquiry and free expression are widely at risk, not only on campus but increasingly elsewhere as well, citizens have reason for thinking that democratic institutions and democratic life are at risk as well.

### C. *A Split Society*

A third ominous trend for the future of democracy is the stark and conspicuous growth of mutual antipathy, even hatred, between adherents of conflicting political faiths. Numerous surveys, by the Pew Research Center, among others, confirm what most of us see, hear, and experience directly: that Americans are more bitterly divided along political lines

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69. See Rik Kirkland & Iris Bohnet, *Focusing on What Works for Workplace Diversity*, MCKINSEY & CO. (Apr. 2017), <https://www.mckinsey.com/featured-insights/gender-equality/focusing-on-what-works-for-workplace-diversity> [<https://perma.cc/D264-3B3Y>] ("About \$8 billion a year is spent on diversity trainings in the United States alone.").

70. See Steven Hayward, *Google Fires Gender Dissenter*, POWERLINE BLOG (Aug. 7, 2017), <https://www.powerlineblog.com/archives/2017/08/google-fires-gender-dissenter.php> [<https://perma.cc/G94W-UXZ4>].

71. See, e.g., Peter Van Buren, *When Censorship Moves Way Beyond Alex Jones*, AM. CONSERVATIVE (June 17, 2019), <https://www.theamericanconservative.com/articles/break-up-the-social-media-companies-to-protect-free-speech/> [<https://perma.cc/292B-ASLY>].

72. *Few Think They Have True Freedom of Speech Today*, RASMUSSEN REP. (Dec. 12, 2018), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/december\\_2018/few\\_think\\_they\\_have\\_true\\_freedom\\_of\\_speech\\_today](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/december_2018/few_think_they_have_true_freedom_of_speech_today) [<https://perma.cc/VU6A-FZEP>].

73. See, e.g., Andrew A. Michta, *The Rise of Unfreedom in the West*, AM. INT. (Mar. 19, 2019), <https://www.the-american-interest.com/2019/03/19/the-rise-of-unfreedom-in-the-west/> [<https://perma.cc/CY4J-FMMJ>].

than at any time in recent memory.<sup>74</sup> The Pew Surveys report that the median Democrat is “more consistently liberal” and the median Republican “more consistently conservative” than in earlier decades; and there is widespread and deep personal distaste for the “other side”—“negative opinions are now more widely held and intensely felt than in the past.”<sup>75</sup> Americans’ human associations are increasingly divided by politics: only 7% of Republicans and only 6% of Democrats say they have many friends in the opposing party.<sup>76</sup> The great majority of Americans who are married or living with a partner—77% of respondents to a Pew poll—say their spouse or partner belongs to the same political party.<sup>77</sup> Research suggests that political allegiances are changing how and where Americans work and shop: there are frequent calls to boycott this or that business, and growing numbers of people are inclined to buy or invest, to seek or to offer employment, based on political affiliations or expressions of ideological consanguinity.<sup>78</sup>

Moreover, ordinary human encounters—whether a government officer trying to eat at a family restaurant, or an elderly citizen seen in a café wearing a Make America Great Again (MAGA) cap—can lead to high pitched political bullying, with at least the threat of violence.<sup>79</sup> It is not

74. See *The Partisan Divide on Political Values Grows Even Wider*, PEW RES. CTR. (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> [<https://perma.cc/6P8R-YGVP>].

75. *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>  
*The Partisan Divide on Political Values Grows Even Wider: Partisan Animosity, Personal Politics, Views of Trump*, PEW RES. CTR. (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/8-partisan-animosity-personal-politics-views-of-trump/> [<https://perma.cc/AL3V-QGQZ>].

76. *Partisanship and Political Animosity in 2016: Partisan Environments, Views of Political Conversations and Disagreements*, PEW RES. CTR. (June 22, 2016), <https://www.people-press.org/2016/06/22/3-partisan-environments-views-of-political-conversations-and-disagreements/#partisan-environments-friends-spouses-and-family-ties> [<https://perma.cc/2B7N-SFH2>].

77. *Id.*

78. See Christopher McConnell et al., *Research: Political Polarization Is Changing How Americans Work and Shop*, HARV. BUS. REV. (May 19, 2017), <https://hbr.org/2017/05/research-political-polarization-is-changing-how-americans-work-and-shop> [<https://perma.cc/T3SU-R633>].

79. See Julia Lurie, *Trump Officials Can No Longer Eat Out in Peace*, MOTHER JONES (June 23, 2018), <https://www.motherjones.com/politics/2018/06/trump-officials-sanders-nielsen-miller-accosted-restaurants/> [<https://perma.cc/6G3U-HHFV>] (covering various Trump administration aides accosted at different restaurants over the course of one week). For examples of private citizens accosted for wearing MAGA caps, see Jim

just that there have been a number of violent political attacks, a very few of them homicidal or near homicidal, although in the present climate these have resonance beyond their numbers, but that political invective has become so commonplace. The political vitriol from Hollywood figures and late night comedians, much of it unmeasured and quite a lot of it unhinged, is too often matched by what one hears informally from neighbors and acquaintances.<sup>80</sup>

It has reached a point that political and ideological allegiance are at or near the heart of one's identity for a growing number of Americans.<sup>81</sup> In a pointed 2017 Article entitled *The Primal Scream of Identity Politics*, Mary Eberstadt attributes the growth of identity politics and ideological tribalism, especially among younger people, to family breakdown, which creates an emotional void and an almost desperate craving to fill it.<sup>82</sup> Eberstadt does not mention the widespread decline in religious affiliation, but others have noted that it is increasingly common for political ideology to take on a quasi-religious cast.<sup>83</sup> All this tends towards more or less irreconcilable enmity between conflicting political cultures, which sometimes seem to be coalescing into virtually separate political nations.

This climate of political disaffinity, even hatred, matters for the future of liberal government, because democratic institutions presuppose a degree of social solidarity. There has to be general respect for the formal rules and informal conventions. People, at least most people, have to accept the results of elections with a measure of good grace—and there must be grounds

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Treacher, *A Red Hat Never Hurt Anybody*, PJ MEDIA (Apr. 4, 2019), <https://pjmedia.com/trending/a-red-hat-never-hurt-anybody/> [<https://perma.cc/3TMJ-MPX5>].

80. After CNN broadcast an out of context video of Covington Catholic high school boys that seemed to suggest, falsely, that the boys were guilty of some sort of misconduct at a pro-life demonstration, an outpouring of Twitter hatred towards them ensued, with such tweets as “LOCK THE KIDS IN THE SCHOOL AND BURN THAT BITCH TO THE GROUND” and “MAGA kids go screaming, hats first, into the wood chipper,” somewhat extreme but by no means uncharacteristic samples of the genre. See James Bowman, *Not the Same as Shame*, 37 NEW CRITERION 56, 58 (2019).

81. See Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342/> [<https://perma.cc/42UU-THB9>].

82. Mary Eberstadt, *The Primal Scream of Identity Politics*, WKLY. STANDARD (Oct. 27, 2017), <https://www.weeklystandard.com/mary-eberstadt/the-primal-scream-of-identity-politics-2010234> [

83. There is evidence that Americans are growing more divided religiously as well as politically, gravitating either towards intense religious commitment or towards assertive secularism, with mild religious affiliation declining, and with religious belief and nonbelief increasingly conflated with political identification. See Mark Movsesian, *The Devout and the Nones*, FIRST THINGS (Apr. 22, 2019), <https://www.firstthings.com/web-exclusives/2019/04/the-devout-and-the-nones> [<https://perma.cc/H9F7-KFKT>]. As Movsesian puts it, “[T]he historical record of societies that polarize along religious lines is not especially hopeful—especially when polarization begins to affect politics.” *Id.*

for confidence that elections are honestly conducted. Perhaps above all, the losing party in any election needs a fair chance to win in the future, with some assurance that the constitutional forms will not be transformed out of recognition in the meantime, at their expense; that the governors will not openly deplore the governed and treat their needs and interests with contempt; and that rules, regulations, and institutional pressures likewise will not be deployed in the meantime to crush them and their constituents' way of life. In short, a democracy presupposes that citizens, at least for the most part, treat political opponents as fellow citizens with whom one disagrees, not as enemies.

It might reasonably be replied that American democracy has been bitterly divided at various times in the past: that only once, when the house divided was half slave and half free, has this led to breakdown and civil war. Michael Barone, in his political and social history of America *Our Country: The Shaping of America from Roosevelt to Reagan*, describes the country's situation in 1930 thus:

The United States in 1930 was a country of vastly different cultures, whose people barely understood—and lived in some fear of—one another. It was a country whose vast expanse of land had fostered and protected diversity, if only because, as one historian put it, “it invited those who had differences to solve their problems by separation instead of accommodation.” . . . It was a country in which widely differing notions of what moral imperatives required had the potential of setting citizen against citizen and group against group. It was a country in which the political system was dominated by two traditional parties largely defined in terms of issues raised by a war in the previous century; this system, would suddenly be faced with challenges it had never anticipated and forced to respond to the collapse of an economy the growth of which it had come to take for granted.<sup>84</sup>

At the same time, “It was a country of noble traditions of tolerance and liberty, which was mostly free of the yearnings for goose-stepping unity and conformity that would soon produce such hideous consequences in Europe.”<sup>85</sup>

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84. MICHAEL BARONE, *OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN* 25 (1990).

85. *Id.*

#### IV. CONCLUSION

Adam Smith's remark that "there is a great deal of ruin in a nation" has long since been a byword for the resiliency of nations, especially more or less liberal nations, to absorb trouble and conflict.<sup>86</sup> Oswald Spengler announced the *Decline of the West* a century ago, and Arnold Toynbee's twelve-volume *Study of History* likewise prophesied civilizational suicide: as of yet, none has come to pass, or at least—whatever the balance of civilizational gains and losses—the West, and American democracy, still show signs of life.<sup>87</sup>

Yet, a sense of democratic crisis is widely felt now on the political left, on the political right, and quite broadly among the democratic public at large. And this at a time when general conditions of life are reasonably good, or at least not disastrously bad. There has been no world war, nor an economic collapse, and the standard of material life continues to rise, at least by many significant criteria, for many if not most people in America and other western democracies.

But it is safe to predict that times will not always be good. Various European democracies, and others with at least the beginnings of liberal institutions, collapsed—and yielded to fanaticism and tyranny—in the twentieth century in the wake of defeat in war, economic depression, hyperinflation, and in the face of violence from within and from without. Perhaps it is too Spenglerian to suggest that the present sources of democratic crisis—such as, no doubt among others, the growth of bureaucratic power, the erosion of free expression especially in the institutions that should foster it, and the growth of ideological tribalism and political odium—might actually bring down liberal institutions in America, or similarly elsewhere. But it might be best if these things, or at least some of them, were ameliorated, so that we won't need to find out.

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86. See, e.g., Ian Simpson Ross, *THE LIFE OF ADAM SMITH* 381 (2d. 2010) ("Be assured, my young friend, that there is a great deal of ruin in a nation." (citing JOHN SINCLAIR, *THE CORRESPONDENCE OF THE RIGHT HONOURABLE SIR JOHN SINCLAIR, BART.* 390–91 (London, Oxford Univ. 1831))).

87. But cf. Abba Eban, *The Toynbee Heresy*, 11 *ISRAEL STUD.* 91, 103 (2006). See generally OSWALD SPENGLER, *THE DECLINE OF THE WEST: FORM AND ACTUALITY* 16–21 (Charles Francis Atkinson trans., 1926); ARNOLD J. TOYNBEE, *A STUDY OF HISTORY* 360–75 (D.C. Somervell ed., 1947).