6

The Unwritten Rules of American Politics

On March 4, 1933, as American families gathered around their radios during the darkest days of the Great Depression to listen to Franklin D. Roosevelt's first inaugural address, they heard his deliberate, thunderous voice declare, "I shall ask the Congress for the one remaining instrument to meet the crisis: broad executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe." Roosevelt was invoking the most open-ended enumerated power the Constitution offered him as president—war powers—to confront a *domestic* crisis.

Roosevelt concluded that even this wasn't enough. In November 1936, he was reelected with 61 percent of the vote—the largest popular presidential mandate in American history. But he found his ambitious policy agenda straitjacketed by an unexpected source: the conservative (and, in his view, backward-looking) Supreme Court—a body composed entirely of men who had completed their legal educations in the nineteenth century. Never had the Supreme Court been as active in blocking legislation as it was in 1935 and 1936. The Court found large portions of the New Deal program unconstitutional,

often on questionable grounds. Roosevelt's agenda was hanging in the balance.

So in February 1937, two weeks into his second term, Roosevelt unveiled a proposal to expand the size of the Supreme Court. The "court-packing scheme," as his opponents called it, took advantage of a gap in the Constitution: Article III does not specify the number of Supreme Court justices. Roosevelt's proposal would have allowed him to add a new justice to the Court for every member over seventy years of age, with a maximum court size of fifteen. Since six justices were seventy or older, Roosevelt would be able to name six judges immediately. The president's motivation was, perhaps, understandable—he sought a more secure legal basis to achieve the goals of the New Deal. Had it passed, however, it would have set a dangerous precedent. The Court would have become hyperpoliticized, its membership, size, and selection rules open to constant manipulation, not unlike Argentina under Perón or Venezuela under Chávez. Had Roosevelt passed his judicial act, a key norm—that presidents should not undermine another coequal branch—would have been demolished.

But the norm held. Roosevelt's court-packing plan faced greater opposition than any other initiative undertaken during his presidency. It was opposed not only by Republicans but by the press, prominent lawyers and judges, and a surprisingly large number of fellow Democrats. Within months, the proposal was dead—killed by a Congress dominated by Roosevelt's own party. Even amid a crisis as profound as the Great Depression, the system of checks and balances had worked.

The American republic was not born with strong democratic norms. In fact, its early years were a textbook case of politics

without guardrails. As we have seen, norms of mutual toleration were at best embryonic in the 1780s and 1790s: Far from accepting one another as legitimate rivals, Federalists and Republicans initially suspected each other of treason.

This climate of partisan hostility and distrust encouraged what we would today call constitutional hardball. In 1798, the Federalists passed the Sedition Act, which, though purportedly criminalizing false statements against the government, was so vague that it virtually criminalized criticism of the government. The act was used to target Republican Party newspapers and activists. In the 1800 election, which pitted President Adams, a Federalist, against Jefferson, the leader of the Republican opposition, each side aimed for a permanent victory—to put the other party out of business forever. Federalist leader Alexander Hamilton talked of finding a "legal and constitutional step" to block Jefferson's ascent to the presidency, while Jefferson described the election as a last opportunity to save America from monarchy. Jefferson's victory did not put an end to the intense partisan acrimony. The lame-duck Federalist Congress reduced the size of the Supreme Court from six to five to limit Jefferson's influence over the Court. With its new majority, the Republican Congress repealed the move, and a few years later, it expanded the Court to seven to give Jefferson another appointment.

It took several decades for this hard-edged quest for permanent victory to subside. The demands of everyday politics and the rise of a new generation of career politicians helped lower the stakes of competition. The post-Revolutionary generation grew accustomed to the idea that one sometimes wins and sometimes loses in politics—and that rivals need not be enemies. Typical of this new view was Martin Van Buren, a founder of the modern Democratic Party and later U.S. president. According to Richard Hofstadter, Van Buren

> typified the spirit of the amiable county courthouse lawyer translated to politics, the lawyer who may enjoy over a period of many years a series of animated courtroom duels with an antagonist, but who sustains outside the courtroom the mutual respect, often the genial friendship, of the co-professional.

Although Van Buren had "many opponents" during his career, a biographer writes, he had "few enemies." Whereas the founders had only grudgingly accepted partisan opposition, Van Buren's generation took it for granted. The politics of total opposition had become the politics of mutual toleration.

America's nascent norms soon unraveled, however, over an issue the founders had tried to suppress: slavery. During the 1850s, an increasingly open conflict over slavery's future polarized the country, investing politics with what one historian has called a new "emotional intensity." To white southern planters and their Democratic allies, abolitionism—a cause associated with the new Republican Party—posed an existential threat. South Carolina senator John C. Calhoun, one of slavery's most influential defenders, described a postemancipation South in near-apocalyptic terms, in which former slaves would be

> raised above the whites . . . in the political and social scale. We would, in a word, change conditions with them—a degradation greater than has ever yet fallen to the lot of a free and enlightened people, and one from which we could not escape . . . but by fleeing the homes of ourselves and ancestors, and by abandoning our country to our former slaves, to become the permanent abode of disorder, anarchy, poverty, misery and wretchedness.

Polarization over slavery shattered America's still-fragile norm of mutual toleration. Democratic representative Henry Shaw assailed Republicans as "traitors to the Constitution and the Union," while Georgia senator Robert Toombs vowed to "never permit this federal government to pass into the traitorous hands of the Black Republican Party." Antislavery politicians, for their part, accused proslavery politicians of "treason" and "sedition."

The erosion of basic norms expanded the zone of acceptable political action. Several years before shots were fired at Fort Sumter, partisan violence pervaded Congress. Yale historian Joanne Freeman estimates that there were 125 incidents of violence—including stabbings, canings, and the pulling of pistols—on the floor of the U.S. House and Senate between 1830 and 1860. Before long, Americans would be killing each other in the hundreds of thousands.

The Civil War broke America's democracy. One-third of American states did not participate in the 1864 election; twenty-two of fifty Senate seats and more than a quarter of House seats were left vacant. President Lincoln famously suspended habeas corpus and issued constitutionally dubious executive orders, though, of course, one notable executive order freed the slaves. And following the Union victory, much of the former Confederacy was placed under military rule.

The trauma of the Civil War left Americans with searing questions about what went wrong. The sheer destruction—including more than 600,000 dead—shattered many northern intellectuals' belief in the superiority of their form of democracy. Was the U.S. Constitution not the providentially inspired document it had been thought to be? This wave of self-examination gave rise to a new interest in unwritten rules. In 1885, the then–political science professor Woodrow Wilson, the son of a southern Confederate family, published a book about Congress that explored the disparity between the promise of constitutional arrangements and the way institutions really worked. In addition to good laws, America needed effective norms.

Rebuilding democratic norms after a civil war is never easy, and America was no exception. The wounds of war healed slowly; Democrats and Republicans only grudgingly accepted one another as legitimate rivals. At an 1876 campaign event for Republican candidate Rutherford B. Hayes, politician Robert Ingersoll spoke out against Democrats in ghastly terms:

> Every man that tried to destroy this nation was a Democrat. Every enemy this great Republic has had for twenty years has been a Democrat. . . . Every man that denied to the Union prisoners even the worm-eaten crust of famine, and when some poor, emaciated Union patriot, driven to insanity by famine, saw in an insane dream the face of his mother, and she beckoned him and he followed, hoping to press her lips once again against his fevered face, and when he stepped one step beyond the dead line, the wretch that put the bullet through his loving, throbbing heart was—and is—a Democrat.

This kind of rhetoric, known as "waving the bloody shirt," persisted for years.

With enduring partisan animosity came constitutional hardball. In 1866, the Republican Congress reduced the size of the Supreme Court from ten to seven to prevent President Andrew Johnson, a Democrat whom Republicans viewed as subverting Reconstruction, from making any appointments, and a year later, it passed the Tenure of Office Act, which prohibited

Johnson from removing Lincoln's cabinet members without Senate approval. Viewing the law as a violation of his constitutional authority, Johnson ignored it—a "high misdemeanor" for which he was impeached in 1868.

Gradually, though, as the Civil War generation passed from the scene, Democrats and Republicans learned to live with one another. They heeded the words of former House Speaker James Blaine, who in 1880 advised fellow Republicans to "fold up the bloody shirt" and shift the debate to economic issues.

It was not just time, however, that healed partisan wounds. Mutual toleration was established only after the issue of racial equality was removed from the political agenda. Two events were critical in this regard. The first was the infamous Compromise of 1877, which ended the 1876 presidential election dispute and elevated Republican Rutherford B. Hayes to the presidency in exchange for a promise to remove federal troops from the South. The pact effectively ended Reconstruction, which, by stripping away hard-fought federal protections for African Americans, allowed southern Democrats to undo basic democratic rights and consolidate single-party rule. The second event was the failure of Henry Cabot Lodge's 1890 Federal Elections Bill, which would have allowed federal oversight of congressional elections to ensure the realization of black suffrage. The bill's failure ended federal efforts to protect African American voting rights in the South, thereby ensuring their demise.

It is difficult to overstate the tragic significance of these events. Because civil and voting rights were regarded by many southern Democrats as a fundamental threat, the parties' agreement to abandon those issues provided a basis for restoring mutual toleration. The disenfranchisement of African Americans preserved white supremacy and Democratic Party dominance

in the South, which helped maintain the Democrats' national viability. With racial equality off the agenda, southern Democrats' fears subsided. Only then did partisan hostility begin to soften. Paradoxically, then, the norms that would later serve as a foundation for American democracy emerged out of a profoundly undemocratic arrangement: racial exclusion and the consolidation of single-party rule in the South.

After Democrats and Republicans accepted each other as legitimate rivals, polarization gradually declined, giving rise to the kind of politics that would characterize American democracy for the decades that followed. Bipartisan cooperation enabled a series of important reforms, including the Sixteenth Amendment (1913), which permitted the federal income tax, the Seventeenth Amendment (1913), which established the direct election of U.S. senators, and the Nineteenth Amendment (1919), which granted women the right to vote.

Mutual toleration, in turn, encouraged forbearance. By the late nineteenth century, informal conventions or work-arounds had already begun to permeate all branches of government, enabling our system of checks and balances to function reasonably well. The importance of these norms was not lost on outside observers. In his two-volume masterpiece, *The American Commonwealth* (1888), British scholar James Bryce wrote that it was not the U.S. Constitution itself that made the American political system work but rather what he called "usages": our unwritten rules.

By the turn of the twentieth century, then, norms of mutual toleration and institutional forbearance were well-established. Indeed, they became the foundation of our much-admired system of checks and balances. For our constitutional system to

function as we expect it to, the executive branch, Congress, and the judiciary must strike a delicate balance. On the one hand, Congress and the courts must oversee and, when necessary, check the power of the president. They must be democracy's watchdogs. On the other, Congress and the courts must allow the government to operate. This is where forbearance comes in. For a presidential democracy to succeed, institutions that are muscular enough to check the president must routinely underuse that power.

In the absence of these norms, this balance becomes harder to sustain. When partisan hatred trumps politicians' commitment to the spirit of the Constitution, a system of checks and balances risks being subverted in two ways. Under divided government, where legislative or judicial institutions are in the hands of the opposition, the risk is constitutional hardball, in which the opposition deploys its institutional prerogatives as far as it can extend them—defunding the government, blocking all presidential judicial appointments, and perhaps even voting to remove the president. In this scenario, legislative and judicial watchdogs become partisan attack dogs.

Under unified government, where legislative and judicial institutions are in the hands of the president's party, the risk is not confrontation but abdication. If partisan animosity prevails over mutual toleration, those in control of congress may prioritize defense of the president over the performance of their constitutional duties. In an effort to stave off opposition victory, they may abandon their oversight role, enabling the president to get away with abusive, illegal, and even authoritarian acts. Such a transformation from watchdog into lapdog—think of Perón's acquiescent congress in Argentina or the *chavista* supreme court in Venezuela—can be an important enabler of authoritarian rule.

The American system of checks and balances, therefore, requires that public officials use their institutional prerogatives judiciously. U.S. presidents, congressional leaders, and Supreme Court justices enjoy a range of powers that, if deployed without restraint, could undermine the system. Consider six of these powers. Three are available to the president: executive orders, the presidential pardon, and court packing. Another three lie with the Congress: the filibuster, the Senate's power of advice and consent, and impeachment. Whether these prerogatives are formally stipulated in the Constitution or merely permitted under the Constitution, their weaponization could easily result in deadlock, dysfunction, and even democratic breakdown. For most of the twentieth century, however, American politicians used them all with remarkable forbearance.

We begin with presidential power. The American presidency is a potent—and potentially dominant—institution, due, in part, to gaps in the Constitution. Article II of the Constitution, which lays out the formal powers of the presidency, does not clearly define its limits. It is virtually silent on the president's authority to act unilaterally, via executive orders or decrees. Presidential power has, moreover, swelled over the last century. Driven by the imperatives of war and depression, the executive branch has built up vast legal, administrative, budgetary, intelligence, and war-making capacities, transforming itself into what historian Arthur M. Schlesinger Jr. famously called the "Imperial Presidency." Postwar American presidents controlled the largest military force in the world. And the challenges of governing a global superpower and complex industrial economy and society generated ever-growing demands for more concentrated executive action. By the early twenty-first century,

administrative resources at the executive's disposal were so vast that legal scholar Bruce Ackerman described the presidency as a "constitutional battering ram."

The immense powers of the executive branch create a temptation for presidents to rule unilaterally—at the margins of Congress and the judiciary. Presidents who find their agenda stalled can circumvent the legislature by issuing executive orders, proclamations, directives, executive agreements, or presidential memoranda, which can assume the weight of law without the endorsement of Congress. The Constitution does not prohibit such action.

Likewise, presidents can circumvent the judiciary, either by refusing to abide by court rulings, as Lincoln did when the Supreme Court rejected his suspension of the writ of habeas corpus, or by using the prerogative of the presidential pardon. Alexander Hamilton argued in Federalist 74 that because the power of pardon was so far-reaching, it would "naturally inspire scrupulousness and caution." But in the hands of a president without scruples or caution, the pardon can be used to thoroughly shield the government from judicial checks. The president can even pardon himself. Such action, though constitutional, would undermine the independence of the judiciary.

Given the vast potential for unilateral action, nearly all of which is either prescribed or permitted by the Constitution, the importance of executive forbearance is hard to overstate. George Washington was an important precedent-setting figure in this regard. Washington knew his presidency would help establish the future scope of executive authority; as he put it, "I walk on untrodden ground. There is scarcely any part of my conduct which may not hereafter be drawn into precedent." As the occupant of an office many feared would become a new form of monarchy, Washington worked hard to establish norms

and practices that would complement—and strengthen—constitutional rules. He energetically defended his designated areas of authority but was careful not to encroach on areas within the domain of Congress. He limited his use of the veto to bills he regarded as constitutionally dubious, issuing only two vetoes in eight years and writing that he "signed many bills with which my Judgement is at variance," out of "motives of respect to the legislature." Washington was also reluctant to issue decrees that could be seen as encroaching on congressional jurisdiction. In eight years, he issued only eight executive orders.

Throughout his life, Washington had learned that he "gained power from his readiness to give it up." Thanks to his enormous prestige, this forbearance infused many of the American republic's other nascent political institutions. As historian Gordon Wood put it, "If any single person was responsible for establishing the young Republic on a firm footing, it was Washington."

Norms of presidential restraint took hold. Although occasionally tested, especially during wartime, they were robust enough to constrain even our most ambitious presidents. Consider Theodore Roosevelt, who ascended to the office in 1901 after President William McKinley's assassination. Roosevelt subscribed to what he called the stewardship theory of the presidency, which asserted that all executive actions were allowed unless expressly prohibited by law. This expansive view of presidential power, Roosevelt's fondness for populist-style appeals to "the people," and his "boundless energy and ambition" alarmed contemporary observers, including leaders of his own Republican Party. President McKinley's powerful advisor, Mark Hanna, had warned against selecting Roosevelt as his vice president, reportedly saying, "Don't you realize that there's only one life between that madman and the White House?" As president, however, Roosevelt acted with surprising restraint.

He took great care, for example, to avoid appearing to bully Congress by speaking directly to the people or attacking individual members of Congress as they debated crucial votes. In the end, Roosevelt operated well within the bounds of our constitutional checks and balances.

Even as the executive's legal, administrative, military, and intelligence capabilities soared during the twentieth century, presidents abided by established norms of self-limitation in their interactions with Congress and the courts. Outside of wartime, they were judicious in their use of executive orders. They never used pardons for self-protection or narrow political gain, and most sought the advice of the Justice Department before issuing them. And, crucially, twentieth-century presidents rarely defied other branches of government, as Lincoln and Andrew Johnson had done during the nineteenth century. President Harry Truman complied with the Supreme Court's blocking of his 1952 executive order to nationalize the steel industry in the face of a strike that he viewed as a national emergency. Eisenhower enforced the Supreme Court's *Brown v. Board of Education* decision despite his own displeasure with it. Even Nixon acceded to congressional demands that he turn over his secret tapes after the Supreme Court ruled in Congress's favor.

So although the office of the American presidency strengthened during the twentieth century, American presidents demonstrated considerable restraint in their exercise of that power. Even in the absence of constitutional barriers, unilateral executive action remained largely a wartime exception, rather than the rule.

A similar story can be told about presidential court packing. Court packing may take one of two forms: impeaching unfriendly Supreme Court justices and replacing them with partisan allies, or altering the size of the Court and filling the new seats with loyalists. Both of these maneuvers are, strictly speaking, legal; the Constitution permits impeachment and does not specify the size of the Supreme Court. Presidents may purge and pack the Court without violating the letter of the law. They have not done so, however, for well over a century.

The only instance of Supreme Court impeachment in American history occurred in 1804, when the Republican-dominated House of Representatives voted to impeach Justice Samuel Chase, an "ardent Federalist" who had campaigned against Jefferson and criticized him during his presidency. Viewing Chase's behavior as sedition, Jefferson pushed for his impeachment. Although Republicans tried to wrap the move in legality, the impeachment was, by all accounts, a "political persecution from beginning to end." The Senate acquitted Chase, setting a powerful precedent against impeachment.

The Supreme Court's size was a more frequent target of partisan machinations during America's first century. Beginning with the Federalists' move to shrink the Court to deny President-elect Jefferson an appointment, the U.S. Supreme Court changed size seven times between 1800 and 1869—each time for political reasons. By the late nineteenth century, however, court packing was widely viewed as unacceptable. In an 1893 book on the American political system, future president Woodrow Wilson wrote that "such outrages" were "a violation of the spirit of the Constitution." Former President Benjamin Harrison wrote around the same time that although expanding the Court "is very tempting to partisans," it would be "destructive, fatally so to our constitutional union." By the 1920s, British journalist H. W. Horwill concluded that there existed an informal norm "strong enough to prohibit the most powerful

President and Congress, whatever the provocation, from taking a course which would make the Supreme Court the plaything of party politics."

President Franklin Roosevelt, of course, violated this particular norm with his 1937 court-packing effort. As constitutional scholars Lee Epstein and Jeffrey Segal wrote, Roosevelt's norm-violating proposal was "extraordinary in its hubris." Equally extraordinary, however, was the resistance it generated. At the time, Roosevelt was extremely popular—he had just been re-elected in a historic landslide, and his Democratic allies enjoyed solid majorities in both houses of Congress. Few American presidents have ever enjoyed such political strength. Yet court packing triggered across-the-board opposition. Media criticism was fierce—the *San Francisco Chronicle* described the plan as an "open declaration of war on the Supreme Court." And congressional opposition was immediate, not only from Republicans but also from many Democrats. Missouri senator James A. Reed called Roosevelt's proposal "a step toward making himself dictator in fact." Edward Cox, a Democratic congressman from Georgia, warned that it would "change the meaning of our basic laws and our whole system of government" and thus represented "the most terrible threat to constitutional government that has ever arisen in the entire history of the country." Even loyal New Dealers turned against Roosevelt. Wyoming senator Joseph O'Mahoney was such a close ally that he had been seated next to Eleanor Roosevelt at a pre-inaugural dinner at the White House only two weeks earlier. Yet O'Mahoney opposed the Court plan, writing to a friend, "The whole mess smells of Machiavelli and Machiavelli stinks!"

It is worth noting that the Supreme Court itself played a major role in defeating Roosevelt's plan. In a move that has been described as a "masterly retreat" to preserve the Supreme Court's integrity, the previously anti–New Deal Court quickly reversed itself on a series of decisions. In spring 1937, the Court ruled in quick succession in favor of several pieces of New Deal legislation, including the National Labor Relations Act and Roosevelt's Social Security legislation. With the New Deal program on more secure constitutional ground, liberal Democrats in Congress could more easily oppose the president's Court plan. In July 1937, it died in the Senate. The president, at the peak of his popularity and power, strained against the limits of his constitutional authority and was blocked. Never again would an American president try to pack the Supreme Court.

Norms of forbearance also operate in Congress. Take the U.S. Senate. As a body whose original purpose was to protect minorities from the power of majorities (which, the founders believed, would be represented by the House), the Senate was designed, from its inception, to allow deliberation. It developed a range of tools—many of them unwritten—that enabled legislative minorities, and even individual senators, to slow down or block projects put forth by the majority. Prior to 1917, the Senate lacked any rules limiting discussion, which meant that any senator could prevent a vote on (or "filibuster") any legislation indefinitely by simply prolonging debate.

These informal prerogatives are essential checks and balances, serving as both a source of protection for minority parties and a constraint on potentially overreaching presidents. Without forbearance, however, they could easily lead to gridlock and conflict. As political scientist Donald Matthews wrote:

> [Each senator] has vast power over the chamber's rules. A single senator, for example, can slow the Senate almost to a halt by systematically objecting to all unanimous consent requests. A few, by exercising their right to filibuster, can block the passage of all bills.

For most of American history, such dysfunction did not occur, in part because prevailing norms discouraged senators from overusing their political authority. As Matthews observed, although tools such as the filibuster "exist as a potential threat, the amazing thing is that they are rarely used. The spirit of reciprocity results in much, if not most, of the senators' actual power not being exercised."

Matthews's seminal study of the U.S. Senate during the late 1950s highlights how informal norms, or what he called "folkways," helped the institution function. Two of these folkways are closely associated with forbearance: courtesy and reciprocity. Courtesy meant, first and foremost, avoiding personal or embarrassing attacks on fellow senators. The cardinal rule, Matthews observed, was for senators to not let "political disagreements influence personal feelings." This was difficult, for, as one senator put it, "it is hard not to call a man a liar when you know he is one." But senators viewed courtesy as critical to their success, since, as one senator put it, "your enemies on one issue may be your friends on the next." In the words of another senator, political self-preservation "dictates at least a semblance of friendship. And then before you know it, you really are friends."

Norms of reciprocity entailed restraint in the use of one's power so as not to overly antagonize other senators and endanger future cooperation. In his study, Matthews concludes, "If a senator does push his formal power to the limit, he has broken the implicit bargain and can expect, not cooperation from his colleagues, but only retaliation in kind," making legislative work much more difficult. As one senator described the norm, "It's not a matter of friendship; it's just a matter of, 'I won't be an S.O.B. if you won't be one.'"

No institutional tool illustrates the importance of these norms more clearly than the filibuster. Prior to 1917, again, any senator could obstruct legislation by using a filibuster to delay a vote indefinitely. Yet this rarely happened. Though available to any senator, at any time, most senators treated the filibuster as a "procedural weapon of last resort." According to one count, only twenty-three manifest filibusters occurred during the entire nineteenth century. A modest increase in filibuster use in the early twentieth century gave rise to the 1917 cloture rule, by which two-thirds (now three-fifths) of the Senate could vote to end debate. But even then, only thirty filibusters occurred between 1880 and 1917, according to political scientists Sarah Binder and Steven Smith. Filibuster use remained low through the late 1960s—in fact, between 1917 and 1959, the Senate saw an average of only one per congressional term.

Another congressional prerogative central to the system of checks and balances is the Senate's power of "advice and consent" over presidential appointments to the Supreme Court and other key positions. Though stipulated in the Constitution, the actual scope of the Senate's advice and consent role is open to interpretation and debate. In theory, the Senate could block presidents from appointing any of their preferred cabinet members or justices—an act that, though nominally constitutional, would hobble the government. This has not happened, in part, because of an established Senate norm of deferring to presidents to fill their cabinets and open Supreme Court seats. Only nine presidential cabinet nominations were blocked between 1800

and 2005; when the Senate blocked Calvin Coolidge's attorney general pick in 1925, Coolidge angrily accused the Senate of violating an "unbroken practice of three generations permitting the president to choose his own cabinet."

The Senate has always reserved the right to reject individual Supreme Court nominees. Even President Washington had a nomination blocked in 1795. But the Senate has historically been judicious in the use of this right. Between 1880 and 1980, more than 90 percent of Supreme Court nominees were approved, and only three presidents—Grover Cleveland, Herbert Hoover, and Richard Nixon—had nominees rejected. Highly qualified nominees were invariably approved even when senators disagreed with them ideologically. The ultraconservative Antonin Scalia, a Reagan appointee, was approved in 1986 by a vote of 98 to 0, despite the fact that the Democrats had more than enough votes (47) to filibuster.

Whether or not individual nominees are approved, the Senate has long accepted the president's ultimate authority to appoint justices. In the 150-year span between 1866 and 2016, the Senate never once prevented the president from filling a Supreme Court seat. On seventy-four occasions during this period, presidents attempted to fill Court vacancies prior to the election of their successor. And on all seventy-four occasions—though not always on the first try—they were allowed to do so.

Finally, one of the most potentially explosive prerogatives granted to Congress by the Constitution is the power to remove a sitting president via impeachment. This, British scholar James Bryce noted more than a century ago, is "the heaviest piece of artillery in the congressional arsenal." But, Bryce continued, "because it is so heavy, it is unfit for ordinary use." If deployed casually, constitutional scholar Keith Whittington warns, impeachment can become a "partisan tool for undermining electoral officials and overturning electoral results."

This is precisely what happened, as we have already noted, in Paraguay in 2012 with the two-day "quickie" impeachment of Fernando Lugo, and in Ecuador in 1997 with the removal of Abdalá Bucaram on bogus grounds of "mental incapacity." In these cases, impeachment was weaponized—the leaders of congress used it to remove a president they didn't like.

In theory, American presidents could suffer Lugo's or Bucaram's fate. The legal barriers to impeachment in the United States are actually quite low. Constitutionally, it only takes a simple majority in the House of Representatives. Although the conviction and removal of a president requires a two-thirds vote in the Senate, impeachment without conviction is still a traumatic event that can weaken presidents to the point of political impotence—as occurred with Andrew Johnson after 1868.

Unlike in Paraguay or Ecuador, however, impeachment in the United States has long been governed by norms of forbearance. Constitutional scholar Mark Tushnet describes the norm: "The House of Representatives should not aggressively carry out an impeachment unless . . . there is a reasonable probability that the impeachment will result in the target's removal from office." Since removal requires a two-thirds vote in the Senate, this means that impeachment should have at least some bipartisan support. After Johnson's impeachment in 1868, there were no serious congressional efforts to impeach the president until the Nixon scandal more than a century later.

America's system of checks and balances worked in the twentieth century because it was embedded in robust norms of mutual

toleration and forbearance. This is not to say that America ever experienced an unadulterated golden age, where some variant of the gentlemanly Queensberry boxing rules of good sportsmanship governed the country's politics. At various points, democratic norms have been challenged and even violated. Three such incidents are worth noting.

One we have already explored: Roosevelt's unprecedented concentration of executive power during the Great Depression and World War II. Beyond the court-packing attempt, Roosevelt's reliance on unilateral action posed a serious challenge to traditional checks and balances. His use of executive orders—more than 3,000 during his presidency, averaging more than 300 a year—was unmatched at the time or since. His decision to seek a third (and later a fourth) term in office shattered a nearly 150-year-old norm restricting the president to two terms.

Roosevelt's presidency never slid into autocracy, however. There are many reasons for this, but one of them is that many of Roosevelt's executive excesses triggered bipartisan resistance. The court-packing scheme was rejected by both parties, and although Roosevelt destroyed the unwritten rule limiting presidents to two terms in office, support for the old norm was so strong that in 1947, less than two years after his death, a bipartisan coalition in Congress passed the Twenty-Second Amendment, which enshrined it in the Constitution. The guardrails were tested during the Roosevelt era, but they held.

McCarthyism posed the second significant challenge to America's institutions, threatening norms of mutual toleration in the early 1950s. The rise of communism scared many Americans, particularly after the Soviet Union emerged as a nuclear superpower in the late 1940s. Anticommunist hysteria could be harnessed for partisan ends: Politicians could red-bait, or seek

votes by casting their opponents as communists or communist sympathizers.

Between 1946 and 1954, anticommunism found its way into partisan politics. The advent of the Cold War had created a frenzy over national security, and the Republican Party, which had been out of national power for nearly twenty years, was searching desperately for a new electoral appeal.

Wisconsin senator Joseph McCarthy found such an appeal. First elected to the Senate in 1947, McCarthy took the national stage on February 9, 1950, with an infamous speech in front of the Ohio County Republican Women's Club in Wheeling, West Virginia. McCarthy ranted against communism and the presence of "traitors" within, and then stumbled onto a line that instantly became iconic: "I have here in my hand a list of 205 names that were made known to the Secretary of State and who nevertheless are still working and shaping the policy of the State Department." The reaction was immediate. The press went wild. McCarthy, a demagogue who loved the attention, began repeating the speech, realizing he had hit upon a political gold mine. Democrats were outraged. Moderate Republicans were alarmed, but conservative Republicans saw the potential political benefits and supported McCarthy. Republican senator Robert Taft passed on the message, "Keep talking." Three days later, McCarthy sent a wire to President Truman that said, "Pick up your phone and ask [Secretary of State Dean] Acheson how many Communists he failed to discharge. . . . Failure on your part will label the Democratic Party of being the bedfellow of international Communism."

Red-baiting became a common tactic among Republican candidates in the early 1950s. Richard Nixon deployed it in his 1950 Senate campaign, vilifying his Democratic rival, Helen

Gahagan Douglas, as the "Pink Lady," who "follows the Communist line." In Florida, Republican George Smathers unleashed a vicious campaign to defeat incumbent Claude Pepper, labeling his Democratic rival "Red Pepper."

By the time of the 1952 presidential race, it was clear that McCarthy's virulent anticommunism was a useful club with which to beat Democrats. McCarthy was called in to speak in races across the country. Even moderate Republican presidential candidate Dwight Eisenhower, though ambivalent about McCarthy, relied on the political energy he generated. McCarthy repeatedly impugned Democratic candidate Adlai Stevenson as a traitor, intentionally confusing his name with that of accused Soviet spy Alger Hiss. Eisenhower initially resisted joint appearances with McCarthy, but at the insistence of the Republican National Committee, the two men campaigned together in Wisconsin a month before the election.

The McCarthyite assault on mutual toleration peaked in 1952. With Eisenhower installed in the White House, Republican leaders found McCarthy's tactics less useful. And McCarthy's attacks on the Eisenhower administration and, especially, on the U.S. Army, left him disgraced. The turning point came in the live-televised 1954 Army–McCarthy hearings in which McCarthy was humbled by Army chief counsel Joseph Welch, who responded to McCarthy's baseless accusations by saying, "Have you no sense of decency, sir? At long last, have you left no sense of decency?" McCarthy's popularity declined, and six months later the Senate voted to censure him, effectively ending his career.

McCarthy's fall discredited the practice of red-baiting, giving rise to a new pejorative label: "McCarthyism." After 1954, few Republicans so overtly employed the tactic, and those who

did were criticized. Even Nixon, always pragmatic, began to reconsider his use of McCarthyite rhetoric. According to a biographer, even the vice president "was at pains to acknowledge the loyalty of the Democratic Party" during his 1956 reelection campaign. Although groups such as the extremist John Birch Society "kept the McCarthyist spirit alive," they operated at the Republican Party's fringes. But norms of mutual toleration remained intact within the dominant factions of both parties until late in the twentieth century.

The third notable test of America's democratic institutions was the authoritarian behavior of the Nixon administration. Despite his public gestures toward it in the 1950s, Nixon never fully embraced norms of mutual toleration. He viewed public opponents and the press as enemies, and he and his staff justified illicit activities with the claim that their domestic opponents—often depicted as anarchists and communists—posed a threat to the nation or the constitutional order. In ordering H. R. Haldeman to organize a break-in at the Brookings Institution in 1971 (an act that was never carried out), Nixon told his aide, "We're up against an enemy, a conspiracy. We're using any means. . . . Is that clear?" Likewise, Watergate conspirator G. Gordon Liddy justified the 1972 break-in of the Democratic National Committee headquarters by claiming that the White House was "at war, internally as well as externally."

The Nixon administration's path away from democratic norms began with widespread wiretapping and other surveillance of journalists, opposition activists, the Democratic National Committee, and prominent Democrats such as Senator Edward Kennedy. In November 1970, Nixon sent a memo to Haldeman ordering him to compile a list of the administration's opponents to develop an "intelligence program . . . to

take them on." Hundreds of names, including "dozens of Democrats," made the list. The administration also deployed the Internal Revenue Service as a political weapon, auditing such key opponents as National Democratic Committee Chair Larry O'Brien. Most prominent, however, was Nixon's campaign to sabotage his Democratic rivals in the 1972 election, which culminated in the botched Watergate break-in.

As is well known, Nixon's criminal assault on democratic institutions was contained. In February 1973, the Senate established a bipartisan Select Committee on Presidential Campaign Activities, chaired by Democratic senator Sam Ervin of North Carolina. The Ervin committee was bipartisan: Its vice chair, Tennessee Republican Howard Baker, described its mission as a "bipartisan search for the unvarnished truth." As the committee began its work, nearly a dozen Republican senators joined Democrats in calling for an independent special prosecutor. Archibald Cox was named in May. By mid-1973, investigations were closing in on Nixon. Senate hearings revealed the existence of secret White House tapes that could implicate the president. Cox requested that Nixon release the tapes—a demand that was echoed by leaders of both parties. Nixon played hardball, refusing to turn over the tapes and eventually firing Cox, but to no avail.

The move triggered widespread calls for Nixon's resignation, and the House Judiciary Committee, chaired by New Jersey representative Peter Rodino, took initial steps toward impeachment proceedings. On July 24, 1974, the Supreme Court ruled that Nixon must turn over the tapes. By then, Rodino had sufficient Republican support on the Judiciary Committee to move ahead with impeachment. Although Nixon held out hope that he could muster up the 34 Republican votes needed to avoid a Senate conviction, Senate Republicans sent Barry Goldwater to

inform him of the inevitability of impeachment. When Nixon asked Goldwater how many votes he had, Goldwater reportedly replied, "Ten at most, maybe less." Two days later, Nixon resigned. Due in part to bipartisan cooperation, Congress and the courts had checked the abuse of presidential power.

America's democratic institutions were challenged on several occasions during the twentieth century, but each of these challenges was effectively contained. The guardrails held, as politicians from both parties—and often, society as a whole—pushed back against violations that might have threatened democracy. As a result, episodes of intolerance and partisan warfare never escalated into the kind of "death spiral" that destroyed democracies in Europe in the 1930s and Latin America in the 1960s and 1970s.

We must conclude with a troubling caveat, however. The norms sustaining our political system rested, to a considerable degree, on racial exclusion. The stability of the period between the end of Reconstruction and the 1980s was rooted in an original sin: the Compromise of 1877 and its aftermath, which permitted the de-democratization of the South and the consolidation of Jim Crow. Racial exclusion contributed directly to the partisan civility and cooperation that came to characterize twentieth-century American politics. The "solid South" emerged as a powerful conservative force within the Democratic Party, simultaneously vetoing civil rights and serving as a bridge to Republicans. Southern Democrats' ideological proximity to conservative Republicans reduced polarization and facilitated bipartisanship. But it did so at the great cost of keeping civil rights—and America's full democratization—off the political agenda.

America's democratic norms, then, were born in a context of exclusion. As long as the political community was restricted largely to whites, Democrats and Republicans had much in common. Neither party was likely to view the other as an existential threat. The process of racial inclusion that began after World War II and culminated in the 1964 Civil Rights Act and 1965 Voting Rights Act would, at long last, fully democratize the United States. But it would also polarize it, posing the greatest challenge to established forms of mutual toleration and forbearance since Reconstruction.

7

The Unraveling

On the afternoon of Saturday, February 13, 2016, a San Antonio newspaper reported that Supreme Court Justice Antonin Scalia had died in his sleep while on a hunting trip in Texas. Social media erupted. Within minutes, a former Republican staffer and founder of the conservative legal publication *The Federalist* tweeted, "If Scalia has actually passed away, the Senate must refuse to confirm any justices in 2016 and leave the nomination to the next president." Shortly afterward, the communications director for Republican senator Mike Lee tweeted, "What is less than zero? The chances of Obama successfully appointing a Supreme Court Justice to replace Scalia." By early evening, Senate Majority Leader Mitch McConnell issued a statement sending his condolences to the Scalia family but also declaring, "This vacancy should not be filled until we have a new president."

On March 16, 2016, President Barack Obama nominated appellate judge Merrick Garland to fill Scalia's seat. No one doubted that Garland was a qualified candidate, and by all accounts he was an ideological moderate. But for the first time in American history, the U.S. Senate refused to even consider an