

Constitutionalism and the American Imperial Imagination

Ash Bâli† and Aziz Rana††

Constitutionalism as a legal technology for structuring state power has spread around the world over the last century, as a practice and also as an ideal often linking the institutions of the state to commitments relating to political liberalism and free markets. Yet there is growing evidence that illiberal forms of constitutionalism may now be on the rise internationally. Some of the countervailing forces (economic crisis, national security threats, populism) that may limit the appeal and spread of liberal constitutionalism have been identified in the comparative-law literature as key drivers of this phenomenon. This Essay turns to a different explanation: we examine the degree to which American imperial ambitions have constituted a barrier to nation-state-level efforts at installing constitutionalism for reasons as varied as the failure of American nation-building projects and disenchantment with the putatively international liberal order led by the United States. We develop this argument with an analysis of the commitment to constitutionalism at the heart of the American century and its relationship to racial and economic policies pursued by American elites. We then trace how the international dimensions of the constitutional project receded with the end of the Cold War by tracking key changes to strategies of democracy promotion and multilateral governance under the Clinton, Bush, and Obama presidencies. Understanding the diffusion of constitutionalism and rule-based international governance as a means of projecting American power transnationally (as a domestic prescription) and globally (as an ordering principle) exposes the degree to which empire and constitutionalism have been deeply imbricated. By extension, we contend that the decline in constitutionalism represents a crisis in the articulation of American global power in the post-Cold War era.

INTRODUCTION

President Donald Trump's ascendance to the White House has been understood as signaling a breakdown in American global

† Professor of Law, UCLA School of Law.

†† Professor of Law, Cornell Law School. We are grateful to the organizers of The University of Chicago Law Review Symposium for inviting us to contribute to this issue and to the participants of the symposium on May 12–13, 2017, for the constructive criticism they offered on our preliminary draft of this Essay. For their helpful suggestions on our argument, we would also like to thank Devon Carbado, Cheryl Harris, Ran Hirschl, Aziz Huq, Darryl Li, Odette Lienau, Hiroshi Motomura, Samuel Moyn, K-Sue Park, Intisar Rabb, Kim Scheppele, Noah Zatz, and the participants at the Yale Law School's 2018 Middle East Legal Studies Seminar meeting in Lisbon. We are also grateful to Laura Bloom and Sam Millang for excellent research assistance.

leadership. For some, the last year reflects the end of the American century; for others, the combination of the Trump administration and Brexit suggests the demise of over two centuries of Anglo-American global leadership. In short, disorienting developments across the Atlantic in the last year have triggered questions about the stability and sustainability of an international order premised on a particular brand of American imperialism.¹ We argue that while the Trump administration has certainly broken with the decorum and diplomacy of past American presidential policies, the unraveling of the international order put in place under American leadership in the postwar period has been more than a quarter century in the making.

The postwar order that replaced the age of empires was one that reflected the American constitutional imagination and marked a break from the earlier era of formal colonial dependencies. By contrast with its predecessor, the American-led order, grounded in constitutional principles, had two international components. The first was a commitment to spreading market-based capitalist democracy and its correlate, liberal constitutionalism, through American bilateral and multilateral foreign policy.² The

¹ The United States today is not an empire in the traditional sense of a state that seeks to govern colonies directly or to assert permanent political sovereignty over foreign nations. Instead, as Professor John Agnew notes, American imperialism is closer to the concept of hegemony, in which the United States enrolls “others in the exercise of [its own] power by convincing, cajoling, and coercing” external players to take part in extending US economic and military influence. See John Agnew, *Hegemony: The New Shape of Global Power* 1–2 (Temple 2005). For our purposes, what makes American hegemony “imperial” is the extent to which it rests on a presumptive American right of continuous intervention. As Professor James Tully details, US defenses of free trade and open market access, going all the way back to the Monroe Doctrine, have long assumed that only by entrenching American legal, political, and economic institutions in neighboring countries can the world be made peaceable for commerce and democratic self-government. See James Tully, *2 Public Philosophy in a New Key: Imperialism and Civic Freedom* 143–49 (Cambridge 2008). The result in practice has been constant interference to transform often non-Western societies into mirror images of the United States. Even if the United States has for the most part not been committed to formal global empire, twentieth-century American authority was nonetheless built on an imperial claim that the United States “had both a right and a responsibility to replace local modes of authority with institutional structures marked by centralized political and economic power, private property, and wage labor.” Aziz Rana, *The Two Faces of American Freedom* 286 (Harvard 2010).

² See G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* 163–68 (Princeton 2001). We assume for the purposes of this Essay a close relationship between liberal constitutionalism and democracy, and treat democracy promotion as a mechanism for the diffusion of constitutionalism. Accordingly, the relationship between American empire and the spread of constitutionalism is related, on our account, to American democracy-promotion efforts more generally.

second was support for a rule-based international order that was understood as an extension of the American constitutional imagination to the challenges of global governance. Indeed, the postwar liberal international regime represented a clear expression of American constitutionalism from the drafting of the Universal Declaration of Human Rights (tied eventually to an “International Bill of Rights”) and the UN Charter (a “constitution” for world order), to the creation of a tight web of interlocking institutions governing everything from international monetary policy and global trade to health, education, and scientific cooperation. As a consequence, the United States served as a global hegemon in a multilateral framework whose legitimacy depended on legality and a kind of international social contract that would command consensual participation from the international community, albeit in a system that still preserved asymmetric benefits for its author.³ And during the Cold War, as the self-styled leader of the “free world,” America and its commitments to legality and capitalist democracy were contrasted with the authoritarian control economies of the Soviet sphere.

In this Essay, we explore the degree to which the version of American empire that characterized the postwar project has given way to competing commitments and preferences that have ultimately eroded basic faith at home and abroad in constitutionalism itself. The Cold War period was no doubt filled with gross violations of international legality, antidemocratic overthrows, and support for American-aligned dictatorships. Indeed, in many ways the defining feature of American Cold War power was the degree to which the promotion of liberal constitutionalism in actuality produced coercion and widespread violence on the ground. And as we suggest below, America’s departures from its own presumptive constitutional values were in truth not defections at all. They were instead hard baked into the very structure of how American policymakers attempted to marry universal claims with efforts to project power, often on highly racialized terms.

³ For a discussion of the United States as the architect of a far-reaching liberal international order in the second half of the twentieth century, see generally G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton 2011). For a more critical examination of American foreign policy elites’ self-presentation as authors of a liberal international order, see generally Perry Anderson, *American Foreign Policy and Its Thinkers* (Verso 2015).

This means that the vision of American imperium that marked the Cold War was always an unstable one, cyclically breaking down under the internal weight of its own inherent contradictions. But crucially, even in the context of these tensions—such as during the Vietnam War—the persistent tendency of policymakers was to revive and defend the ideology of American imperium. The destructive consequences of US power were justified, time and again, either as aberrations necessitated by the imperatives of anticommunism or unfortunate transitional developments on the way to full-fledged liberal democracy.

Perhaps most critically, despite these real and damaging consequences, the requirements of offering a credible alternative to the Soviet example pressed American officials to invest in developmental and reconstructive efforts as well as multilateral institutions that highlighted the compatibility of the American model with foreign prosperity and mutual constraint. In this way, the default American postwar order not only remained wedded to constitutional liberal democracy in its self-presentation. Especially during the heady postwar years of American economic largesse, it also embodied a plausible account both at home and abroad of shared economic and political security.⁴

These characteristics of the postwar order were further manifest in what Professor Samuel Huntington memorably framed as the “waves of democratization” that spread through the international system.⁵ The end of World War II was marked by American assistance to help postfascist Western European states resurrect market democracies. Postcolonial independence brought a wave of new states that embraced constitutions—along with flags and anthems—as markers of self-determination.⁶ Joining international human-rights treaties became a rite of passage as states gained sovereignty and entered the United Nations. In later waves, countries emerging from military rule in Latin America and postcommunist reforms in Eastern Europe appeared to confirm the transnational spread of constitutional democracy as an incident of American-led international order.

⁴ See Part I.B.

⁵ See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* 15 (Oklahoma 1991).

⁶ See generally Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (SUNY 2002).

This meant that for all the profound violence and real democracy *demotion* of the Cold War years, liberal constitutionalism as a “default design choice”⁷ did diffuse broadly in the decades following World War II. While this earlier era of democratization depended on many factors, this diffusion was facilitated, on our account, by the background conditions of multilateral order and the presentation of constitutional democracy as the legitimate domestic political order for countries maintaining good standing in the American-led “free world.” Although it was viewed as a system without ideological competitors by the end of the Cold War, this seemingly “default” framework nonetheless depended on American commitments that underwrote the postwar international order. While the decline of liberal constitutionalism may be tied to numerous factors, the gradual American retreat from its own international and domestic model has surely played a role.

During the Cold War, American leaders commonly regarded the constraints of international institutions as conducive to entrenching the nation’s hegemony. But with the collapse of the Soviet Union, the fact of unipolarity seemed to remove many of the external pressures that had previously connected national self-interest to international legal restraint.⁸ Moreover, in the absence of an alternative model as a foil against which the United States proclaimed its democratic commitments, other strategic priorities gained salience. In particular, counterterrorism and the national security state became increasingly central to American governance imperatives. In the very regions where American analysts awaited the arrival of a “fourth wave” of democracy—notably the Muslim world—these new imperatives not only displaced constitutional priorities but were in many cases in direct tension with them.⁹

Certainly, during the Cold War there had always been a tension between democratization and anticommunism, leading to the

⁷ Tom Ginsburg, Aziz Z. Huq, and Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U Chi L Rev 239, 239 (2018).

⁸ For the classic statement of the argument in favor of international institutions as a means of extending American hegemony, see generally Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton 1984). For an argument that the post–Cold War era presents different challenges that are less bound to resolution through international institutions, see generally Charles Krauthammer, *The Unipolar Moment*, 70.1 Foreign Aff 23 (1990).

⁹ See Stephen R. Grand, *Starting in Egypt: The Fourth Wave of Democratization?* (Brookings, Feb 10, 2011), archived at <http://perma.cc/RH4Q-96QG>.

support of pliable dictatorships.¹⁰ But in the post–World War II years, such support was presented as transitional or as still bound to a narrative of shared economic growth that would in time generate liberal democratic regimes. However, with the Muslim world styled as an incubator of terrorist threat and a general American retreat from the domestic and international welfare policies that marked the early Cold War, the United States increasingly moved simply to consolidate executive power abroad.¹¹ This consolidation persisted without any plausible account of political transition or collective economic improvement—and despite half-hearted invocations of “democracy promotion.” In essence, the Cold War’s coercive security means became increasingly disconnected from any credible aspirational ends.

In some ways, the Trump administration represents the apotheosis of these broad international and transnational trends. The Cold War era had been marked by a persistent cycle in which American policymakers elaborated a framework of constitutional values and norms only to see those norms break down in political practice. But the post–Cold War era culminating in Trump has now seemingly ended the cycle. It has produced a final collapse of commitment to the values themselves and, thus, of the basic justifications for American imperium.¹² At the domestic level, the president shows little deference to constitutional norms at home—decrying judicial independence when it undermines executive fiat¹³ and setting aside long-standing practices in areas ranging from conflict-of-interest rules to the treatment of the White House press corps.¹⁴ On the international front, Trump entered office announcing a determination to withdraw from key

¹⁰ See Thomas Carothers, *A Quarter-Century of Promoting Democracy*, 18 *J Democracy* 112, 112 (Oct 2007) (“In the 1980s, democracy aid had to struggle to become something more than just a side element of anticommunist security policies.”).

¹¹ See *id.* at 114.

¹² In the memorable formulation of Stephen Wertheim, Trump may be “the first president to take office who explicitly rejects American exceptionalism.” Stephen Wertheim, *Trump and American Exceptionalism* (Foreign Affairs, Jan 3, 2017), archived <http://perma.cc/LVH9-3R45>.

¹³ See, for example, Amy B. Wang, *Trump Lashes Out at ‘So-Called Judge’ Who Temporarily Blocked Travel Ban* (Wash Post, Feb 4, 2017), online at <http://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban> (visited Dec 12, 2017) (Perma archive unavailable).

¹⁴ See, for example, *Donald Trump: A List of Potential Conflicts of Interest* (BBC, Apr 18, 2017), archived at <http://perma.cc/376P-PTB6>; Mathew Ingram, *Turmoil in the White*

American commitments in multilateral agreements from NAFTA to the Paris Climate Agreement, proposed to slash funding to the State Department and other domestic agencies with foreign policy or foreign aid responsibilities, called into question the country's commitment to NATO, and evinced a pronounced hostility to the United Nations.¹⁵ Trump has also expressed disdain for projects of nation building and promised to cut support for American foreign policy programs designed to advance democracy abroad.¹⁶

While Trump's intemperate behavior is clearly unusual, his boastful unilateralism is not. The post-Cold War period, from the Clinton administration through the Obama administration, has more often been characterized by departures from the rule-based order of twentieth-century international institutions than support for them.¹⁷ In this sense, events of the last year reflect an accumulating momentum decades in the making rather than the eccentricities of an accidental president. A slow trickle of defections from earlier multilateral commitments by the United States has gathered into a tidal shift, reducing the coherence and stability of liberal constitutional design as a default internationally and transnationally. Thus, to understand the continuities between Trump and earlier administrations requires an appreciation for the complex role liberal constitutionalism and American exceptionalism have played in both creating and undermining an international social contract premised on US hegemony.

Over the following pages, we lay out this argument in greater detail, emphasizing how as the domestic creedal commitment tying constitutionalism back to America's founding narrative came under pressure domestically in the post-Cold War era, its imperial correlates—capitalist democratization and a rule-based international ordering principle—began to lose support. We view this as an explanation for the decline in the spread of liberal constitutionalism that is consistent with and indeed underlies

House Press Corps Plays into Trump's Hands (Fortune, Mar 14, 2017), archived at <http://perma.cc/RZ6Z-9V5C>.

¹⁵ See Mark Agrast, *No Ordinary Time* *2–3 (ASIL, Jan–Mar 2017), archived at <http://perma.cc/5AFY-BAZZ>.

¹⁶ See Thomas Carothers, *Democracy Promotion under Trump: What Has Been Lost? What Remains?* (Carnegie Endowment for International Peace, Sept 6, 2017), online at <http://carnegieendowment.org/2017/09/06/democracy-promotion-under-trump-what-has-been-lost-what-remains-pub-73021> (visited Dec 12, 2017) (Perma archive unavailable).

¹⁷ See Part II.A.

other hypotheses in the literature, but one that remains underappreciated. We begin with an analysis of the commitment to constitutionalism at the heart of the American century and its relationship to racial and economic policies pursued by American elites. We then trace how the international dimensions of the constitutional project receded with the end of the Cold War by tracking key changes to strategies of democracy promotion and multilateral governance under the Clinton, Bush, and Obama presidencies. Understanding the diffusion of constitutionalism and rule-based international governance as a means of projecting American power transnationally (as a domestic prescription) and globally (as an ordering principle) exposes the degree to which empire and constitutionalism have been deeply imbricated. By extension, we contend that the decline in constitutionalism represents a crisis in the articulation of American global power in the post-Cold War era in which international order has been re-framed around a Global War on Terror.

I. CONSTITUTIONALISM AND THE AMERICAN CENTURY

The American post-World War II vision of global order pulled together a set of arguments that had been percolating among policymakers and political elites for the first half of the twentieth century. In this Part, we highlight how with the United States' emergence onto the global stage, the language of constitutionalism became central to justifying external power and to explaining the presumptive distinctions between American and European imperium. We also emphasize the manner in which constitutionalism creatively married notions of universal inclusion and self-government with racial hierarchies about global stewardship—even during the era of decolonization. Finally, we explore perhaps the great paradox of the Cold War: how American constitutionalism embodied a credible global model that was at the same time constitutively linked on the ground to practices of violence and lawlessness.

A. Constitutionalism as the Principle of American Power

At the dawn of the twentieth century, elites who favored an aggressive American role abroad had long found themselves facing a basic dilemma. Policies, ranging from participating in World

War I to engaging directly with European power politics to establishing a permanent peacetime security infrastructure, all faced intense internal opposition and seemed to contradict longstanding isolationist and antimilitarist sentiments. In particular, they cut against popular assumptions that foreign entanglements as well as the creation of a large professional military would inevitably undermine republican institutions and self-government. Indeed, a classic tenet of nineteenth-century American foreign policy held that isolation from Europe and its internecine conflicts sustained domestic tranquility. None other than Alexander Hamilton had famously argued in Federalist 8 that the barrier of the Atlantic Ocean offered Americans an “insulated situation”¹⁸ that did more than anything else to preserve domestic security.

These established ideas raised significant popular doubts about the legitimacy of enhanced American interventionism. In response, defenders of greater international authority began—against the backdrop of American militarism in the Philippines, the Americas, and especially during World War I—to intertwine new foreign policy commitments with an account of the federal Constitution in national identity. Such political elites increasingly placed the Constitution at the center of American exceptionalism and viewed the document and the domestic culture it promoted as an implicit justification for emerging American hegemony.

According to this view, the feature that most distinguished the American political project from old-world Europe was the Constitution. Whereas European communities were the product of feudalism as well as political and religious absolutism, the Constitution highlighted the extent to which the American experiment had been built from its founding on an effort to fulfill Enlightenment principles. As David Jayne Hill, Republican Party stalwart, ambassador to Germany, and president of Rochester University, wrote in his 1916 book, *Americanism: What It Is*, the federal Constitution above all “developed here in America a new estimate of human values, and this has led to a new understanding of life.”¹⁹ Contrasting European monarchical despotism with American commitments to liberty and self-government, Hill declared that the American colonists sought to “prevent forever the

¹⁸ Federalist 8 (Hamilton), in *The Federalist* 44, 49 (Wesleyan 1961) (Jacob E. Cooke, ed).

¹⁹ David Jayne Hill, *Americanism: What It Is* viii (D. Appleton 1916).

recurrence of absolutism in *every* form, whether official or popular, whether of dominant individuals or of popular majorities,” thereby producing the “original and distinctive contribution of the American mind to political theory . . . that there should be *nothing* in government that is not governed *by law*.”²⁰ In effect, Hill and others mapped out an early twentieth-century variation of what Professor Nikhil Pal Singh has called “American universalism”²¹—namely, the idea that what marks out the United States as exceptional is its status as the place where Enlightenment commitments truly took historical root.

At stake in such claims was more than the belief that the Constitution safeguarded liberties at home. It also upheld the view that the Constitution spoke to a special mission abroad. According to Hill, European powers sought to divide the world according to a principle of “imperialism”²² and thus treated other communities as little more than material spoils. Given these facts, a peaceful and stable international order required a strong American presence. This was because the culture of American constitutionalism was “antithetical to Imperialism, whose watchword is unlimited power”²³ and thus offered a necessary counterbalance on the global stage. Supposedly in opposition to empire, the constitutional principle meant that American authority was centrally about creating the conditions in foreign, oftentimes non-European, societies for peaceful self-government. With the world consumed in global conflict and instability, the United States had a responsibility to ensure that the principle of constitutionalism, rather than that of imperialism, dominated the international order.²⁴

By the 1940s, the war with Nazi Germany and the growing confrontation with the Soviet Union pushed these arguments

²⁰ Id at 27.

²¹ See Nikhil Pal Singh, *Black Is a Country: Race and the Unfinished Struggle for Democracy* 17–18 (Harvard 2004) (“‘American universalism,’ historian John Higham summarizes, is ‘our egalitarian ideology . . . molded by the Enlightenment and forged in the revolution . . . simultaneously a civic credo, a social vision and a definition of nationhood.’”).

²² Hill, *Americanism* at 179 (cited in note 19).

²³ Id at 134.

²⁴ Id at 223–24:

When the American people have had time to realize the character and extent of the emergency our age is called upon to meet—and the moment for action admits of no delay—their decision cannot be doubtful. The call to duty may require sacrifices, but we shall be a nobler people for making them.

linking constitutionalism, tutelage, and American power to the political center. In justifying American involvement in World War II, those in the Roosevelt administration focused on the perceived cultural and political differences between the United States and the country's collectivist or totalitarian foes. In particular, commentators and policymakers once more rallied around the claim that the United States had been defined from the Founding by neither race nor religion, but rather by a civic faith in fundamental rights, the rule of law, and basic equality—Enlightenment principles that they argued made the country the first truly universal nation. As the editors of the nascent liberal journal, *Common Ground*, declared in the fall of 1940:

Never has it been more important that we become intelligently aware of the ground Americans of various strains have in common; . . . that we reawaken the old American Dream, a dream which, in its powerful emphasis on the fundamental worth and dignity of every human being, can be a bond of unity no totalitarian attack can break.²⁵

The Swedish sociologist Gunnar Myrdal offered perhaps the most seminal popular presentation of these ideas in *An American Dilemma*, a formative text on race relations and American identity for mid-twentieth-century political elites. Myrdal contended that the Constitution embodied what he called “the American creed”²⁶ and through the text “the nation early laid down as the moral basis for its existence the principles of equality and liberty.”²⁷ Myrdal argued that, although racist and archaic practices may have continued to persist in pockets—or entire regions—of the country, these practices were incompatible with national values. “The main trend” in American history was “the gradual realization of the American Creed.”²⁸ So pure were the country's

²⁵ Gary Gerstle, *American Crucible: Race and Nation in the Twentieth Century* 193–94 (Princeton 2001).

²⁶ See generally Gunnar Myrdal, 2 *An American Dilemma: The Negro Problem and Modern Democracy* (Harper & Row 1969) (originally published 1944). Myrdal contended that “American civilization early acquired a flavor of enlightenment which has affected the ordinary American's whole personality” and generated a creedal commitment to “liberty, equality, justice, and fair opportunity for everybody.” Gunnar Myrdal, 1 *An American Dilemma: The Negro Problem and Modern Democracy* lxx, lxxii (Harper & Row 1969).

²⁷ Myrdal, 2 *An American Dilemma* at 1021 (cited in note 26).

²⁸ Id.

founding motives that America could be seen, at its core, as nothing less than “humanity in miniature.”²⁹

Myrdal, along with many Cold War policymakers influenced by *American Dilemma*, employed these creedal arguments to then call for a postwar order premised on American preeminence. Precisely because the United States was a nation founded on pluralism, tolerance, and the rule of law—embodied concretely in the Constitution—American power internationally stood “warmheartedly against oppression in all the world.”³⁰ Given that the country’s constitutional values expressed the global community’s ideals, *pax Americana* necessarily involved a defense of liberal goals against illiberal threats. Such creedal constitutionalism thus gave an account of the justness of American security prerogatives and provided the ideological foundations for the “American Century.”

Yet, for all the claims about the opposition between American constitutionalism and European imperialism, it is essential to appreciate the extent to which these notions of American exceptionalism rested on background judgments about racial hierarchy and nonwhite dependence. In the early decades of the twentieth century, the figure that best embodied this interconnection was none other than President Woodrow Wilson, liberal internationalist and domestic segregationist. Wilson viewed the world as divided into distinct ethnocultural “peoples” at different stages in the process of political evolution.³¹ European Americans, especially of Anglo-Saxon descent, stood at the forefront of this evolution, due to their long-standing acculturation in the practices of republican freedom. While democratic self-government was a universal good and all peoples had the potential eventually to enjoy its benefits, only those who had reached political maturity were ready in the present. “Only a long apprenticeship of obedience can secure” less developed peoples “the precious possession” of real self-government, Wilson stated, “a thing no more to be bought than given.”³²

Precisely because the United States had supposedly reached the end stage of ethnocultural development—and was not stained

²⁹ Id.

³⁰ Id.

³¹ See Woodrow Wilson, *The Place of the United States in Constitutional Development*, excerpted in W. Cameron Forbes, ed, 2 *The Philippine Islands* 511, 511–12 (Houghton Mifflin 1928).

³² Id at 512.

by the absolutism and internecine violence marking Europe—it had a unique global role to play in shepherding less developed peoples on the path to freedom. In effect, emerging accounts of American universalism, grounded in constitutional experience, reaffirmed rather than undermined white American supervision and interventionism. Indeed, for this very reason, regardless of American self-presentation the new American imperium often echoed the old European variety. This is perhaps best illustrated by publishing magnate Henry Luce’s own famous call in 1941 to “create the first great American Century.”³³ For Luce, Americans enjoyed a right to global dominance because they were nothing less than “inheritors of all the great principles of Western civilization.”³⁴ In this way, even the language of exceptionalism vis-à-vis other empires placed US elites and policymakers in a long line of European officials, officials who too justified their nation’s global power based on special cultural attributes and historic destiny. And perhaps most important for those on the receiving end of American power in the first half of the twentieth century, the new politics of US global authority could seem awfully similar to its European rivals.

Critically, even in the post-World War II era of decolonization, the linking of a constitutionally grounded American universalism with racial hierarchy did not recede. Indeed, it remained essential to justifying the expanding Cold War politics of permanent global interventionism. This is most powerfully underscored by how Wilsonian ideas about ethnocultural peoplehood and stages of political development morphed into perhaps the most dominant discourse of early Cold War foreign policy: modernization theory. Modernization theorists, both in the American social sciences and in government, routinely described the world as on a relatively linear path from traditional to modern society.³⁵ While modern societies combined liberal-democratic constitutionalism with economic growth, urbanization, and high educational attainment, traditional societies, as historian Nils Gilman notes, were understood to be “inward looking, inert, passive toward nature, superstitious, fearful of change, and economically simple.”³⁶

³³ Henry R. Luce, *The American Century*, 23 *Diplomatic Hist* 159, 171 (1999).

³⁴ *Id.* at 170.

³⁵ See Nils Gilman, *Mandarins of the Future: Modernization Theory in Cold War America* 1–3 (John Hopkins 2003).

³⁶ *Id.* at 5.

Moreover, the totality of the non-European world was generally described as “traditional” with the United States depicted as the ideal historical end point of modernity.³⁷

Not surprisingly, this linking of constitutionally grounded American universalism and racial hierarchy meant that global security and progress required reconstituting defeated powers and newly postcolonial states on American institutional terms. First, it emphasized the centrality of constitution writing, in Japan, Germany, and elsewhere, as part of the projection of American influence. This was because spreading American influence entailed spreading the political-legal forms of American domestic society, especially those seen as conducive to pluralism, understood in terms of Madisonian checks and balances. Second, it also entailed promoting the idea of constitutionalism itself as a global international principle. And the heart of constitutionalism was not merely formal legal texts, but above all a commitment to legal restraint and collective decisionmaking. Hence, in constructing postwar institutions, American policymakers from both political parties focused especially on the proliferation of multilateral international legal regimes to govern virtually every issue of global significance.³⁸

B. Violence, Constraint, and Shared Prosperity in the American Cold War Model

The long-term result was the establishment of a very particular governing global order and Cold War vision, one framed around constitutional fidelity as well as American exceptionalism and international hegemony. It also, paradoxically, led to a remarkable quality of Cold War politics: the extent to which promoting liberal constitutionalism abroad actually *required*—as a matter of sustained practice—subverting local self-determination on the ground. If anything, one can tell the story of the Cold War—with its history of overthrows and political assassinations—as governed far more by American lawlessness than by legal restraint.

³⁷ Id at 5–6.

³⁸ See Ikenberry, *Liberal Leviathan* at 182 (cited in note 3) (“As Stewart Patrick suggests, ‘One reason that multilateralism was so compelling to the Roosevelt and Truman administrations was that it resonated with the liberal political culture that form[ed] the core of American national identity.’”).

This was for two interrelated reasons. First, policymakers persistently argued that American violations of the constitutional principle were the product of the existential threat posed by the Soviet Union.³⁹ This threat was of such a scale that in some circumstances it required fighting the violence of the Soviet sphere with the counterviolence of coups, assassinations, and covert operations.⁴⁰ Elites conceived of these practices as highlighting the ethical bind facing the United States, an exceptional nation forced against its own actual preferences to employ dirty political means in a world of violence and disorder. Indeed, the very discomfort Americans supposedly experienced with this harsh reality further underlined the specialness of the national project—it spoke to the extent to which the country was fundamentally moral in its own ends and self-understanding.⁴¹

But alongside this argument from political necessity was a second claim grounded in judgments about ethnocultural limitations. Following modernization theories, scholars and officials often argued that the great threat to transition from traditional to modern society in the Third World was too hasty an embrace of populist majoritarianism. As Gilman notes, American policymakers worried, against the backdrop of economic underdevelopment, that mass democratic pressure could lead to the “pathological” form of modernity epitomized by the Soviet Union.⁴² Given this alternative, autocrats who served internally as stewards of

³⁹ See, for example, Jeane J. Kirkpatrick, *Dictatorships and Double Standards* (Commentary, Nov 1, 1979), online at <http://www.commentarymagazine.com/articles/dictatorships-double-standards> (visited Dec 12, 2017) (Perma archive unavailable).

⁴⁰ For a comprehensive account of how American officials, perceiving existential threat, used guerrilla tactics and fought terror with “counter-terror,” see generally Michael McClintock, *Instruments of Statecraft: U.S. Guerilla Warfare, Counter-Insurgency, and Counter-Terrorism, 1940–1990* (Pantheon 1992).

⁴¹ It was just this tendency of Cold War elites to engage in self-absolution—by focusing on the perceived justice of the country’s ends—that so worried Reinhold Niebuhr about the direction of American foreign policy in the 1950s. Despite being a “cold warrior” himself and an ardent critic of the Soviet Union, Niebuhr in 1952’s *The Irony of American History* emphasized the messianic consistencies between Soviet and American ideologies. American identity may have been grounded in the idea that it “knew nothing of sin or guilt,” but its actions—like using nuclear weapons against Japan and potentially using them again—could be morally grave. Reinhold Niebuhr, *The Irony of American History* 39 (Charles Scribner’s Sons 1954). Under these circumstances, for the United States to continue to “believe[] itself to be peculiarly innocent” was at best a dangerous illusion and at worst a threat to the world. Id.

⁴² Gilman, *Mandarins of the Future* at 14 (cited in note 35).

modernization—promoting property rights, literacy, and technical and administrative expertise even if they constrained political liberty—facilitated the preconditions for mature liberal democracy. All of this meant that during the Cold War, American lawlessness in practice was systematically presented as either aberrational or the product of the ethnocultural immaturity of newly independent states in the non-European world.

What made such arguments plausible to many elites—both within the United States as well as abroad—was that American police power went hand in hand with a credible story of global betterment. The specter of the Soviet Union not only justified interventionist violence, it also created the need for an achievable account of shared prosperity. Although the Soviet Union was not nearly as wealthy as the United States, it offered a clear example in the post-World War II years of an impoverished state that had rapidly industrialized. Indeed, this example better approximated the particular circumstances across war-torn Europe and post-colonial Asia and Africa than did American economic and political history.⁴³ And it led American social scientists and policymakers to argue, in the words of Professor Max Milliken (head of the Center for International Studies at MIT), that “[t]he best counter to Communist appeals is a demonstration that these same [development] problems are capable of solution by other means than those the Communists propose.”⁴⁴

All of this meant that American Cold War policymakers recognized the need for international multilateral institutions to provide tangible material benefits and highlighted to them the link between global constitutionalism and shared economic progress. This was most obviously underscored by the Bretton Woods institutions, which imagined a multilateral and rule-bound framework to manage the global economy, and by the European Recovery Plan, better known as the Marshall Plan. Both were organized on the principle that the United States as the dominant economic power should guarantee a global financial system aimed at promoting reconstruction and development and premised on the free flow of American capital. Although this certainly allowed American corporations to penetrate, often exploitatively, new markets, it also was tied to a conscious desire to

⁴³ See *id.* at 43.

⁴⁴ *Id.*

produce practical economic achievements that could be juxtaposed against the Soviet alternative.⁴⁵

The result was a remarkable tension in American Cold War imperialism. On the one hand, the high tide of the Cold War saw American direct involvement or complicity in truly staggering forms of mass violence across large swathes of the world, epitomized most obviously for the domestic audience by the war in Vietnam. In this way, it is hardly an exaggeration to say that American constitutionalism as the principle of global power, either in terms of the political-legal institutions promoted abroad or the overall multilateral international order meant to govern economic and security policy, systematically produced illiberalism and lawlessness. And as anticolonial critics often contended, such illiberalism seemed undergirded by the persistence of racialized notions of cultural capacity.⁴⁶

Yet at the same time, even for many elites in the Third World, the American example remained alluring. To begin with, elites from Turkey to India to Indonesia often internalized judgments about traditionalism and modernity and so accepted underlying and fundamentally racialized development narratives about the path to prosperity.⁴⁷ But more critically, both the example of a growing American economy and the commitment of US policymakers to invest in multilateral economic and security institutions sustained faith that American imperialism could actually lift all boats. As Secretary of State Dean Acheson famously said of the importance of financial and technical support for the Third

⁴⁵ Id at 36–38.

⁴⁶ It was for this reason that Stokely Carmichael and Charles Hamilton in their seminal statement of black radicalism, *Black Power*, emphasized the logical continuities between the justifications for American global power and specific US support for apartheid regimes like South Africa. As they declared of both the inherent racial tendencies of American imperialism and of the importance of black activists to develop their own independent foreign policy to contest that of the national security state: “It seems inevitable that this nation would move to protect its financial interests in South Africa, which means protecting white rule in South Africa. Black people in this country then have the responsibility to oppose, at least to neutralize, that effort by white America.” Stokely Carmichael and Charles V. Hamilton, *Black Power: The Politics of Liberation in America* xi (Random House 1967).

⁴⁷ As just one example, General Suharto’s authoritarian regime in Indonesia, marked by spasms of genocidal violence in the mid-1960s, was largely justified by local elites both internally and to the international community on developmental grounds regarding what “accelerated modernization” required politically. See generally Brad Simpson, *Indonesia’s “Accelerated Modernization” and the Global Discourse of Development, 1960–1975*, 33 *Diplomatic Hist* 467 (2009).

World, which ultimately led to the establishment of the US Agency of International Development (USAID), the goal was to “use material means to a non-material end.”⁴⁸ For Acheson, the ultimate aspiration was a global community of liberal-capitalist states, constitutionally governed and committed to providing for the basic social welfare of its citizens. This vision gave both purpose to American power and had real appeal as a viable model, even if it went hand in hand in practice with political coercion or economic extraction.

II. THE BREAKDOWN IN CONSTITUTIONAL LOGICS

The end of the Cold War produced hopes that the bipolar standoff that had paralyzed much of the postwar international security system centered on the United Nations would give way to a new era of multilateral cooperation under American leadership. The new unipolar moment would be one in which the principles America had sought to project through the Cold War—democratic governance in domestic political systems and multilateral rule-based order internationally—might now be fully realized.⁴⁹ Moreover, high levels of defense spending in the United States and among its allies could now be reinvested in social programs, paying a peace dividend and enabling new spending on development and governance goals. The promise that American-led international order would deliver stability, economic prosperity, and political liberty seemed finally within reach.

Instead, the next quarter century witnessed a series of defections from multilateralism by the United States, acting largely uncontested, and an initial period of expansion was followed by a decline in the spread of constitutionalism and democracy as domestic models of governance. In the place of a peace dividend, the 1990s witnessed the dismantling of what remained of the social welfare state and the emergence of patterns of capital mobility and capital flight that later came to be identified with predatory globalization. The resulting record has been one of a slow unraveling of multilateral ordering principles coupled with a profound crisis in both the plausibility and perceived legitimacy of the American-backed international order. As American imperial adventures have rewritten rules governing international security,

⁴⁸ Gilman, *Mandarins of the Future* at 71 (cited in note 35).

⁴⁹ See Krauthammer, 70.1 *Foreign Aff* at 29 (cited in note 8).

yawning inequalities generated by market capitalism and the failure of its nation-building projects on the ground have also tarnished the appeal of American-branded models of democratic governance. At the same time, competing models of governance—particularly of managerial authoritarianism—may be gaining traction over the logic of liberal constitutionalism.⁵⁰

In this Part, we review the history of the post–Cold War period to examine how and why American international and transnational commitments unraveled in the absence of the Soviet foil. Critical to this account is a shift in the American approach to constitutionalism. As we have argued, in the Cold War context, the United States routinely defected from constitutional commitments for instrumental reasons or as part of arguments about “developmental” dictatorships, but it treated such defections as aberrational or transitional. In the post–Cold War period, we contend that the United States has defected from constitutionalism not simply as a means to realize competing priorities, but because of a deeper ambivalence and indeed fundamental drift in basic global vision. If anything, as underscored by the Global War on Terror, what is noteworthy about the present moment is that the old coercive means of Cold War security policy have persisted but now occur disconnected from previous aspirational ends.

A. From New World Order to Unilateral Exceptionalism

President George H.W. Bush proclaimed the birth of “a new world order”⁵¹ led by the United States in the wake of the fall of the Soviet Union. Echoing ideas of the United States serving as an enlightened hegemon—a view that came to dominate policymaking in the mid-twentieth century—there was a hope that the spirit of the Marshall Plan would animate American-led efforts to assist Eastern European transitions. At the same time, a newly strengthened UN Security Council would use its enforcement powers to deter threats to international peace and security. In some ways, the 1991 Gulf War was seen as evidence of the construction of such an order with the Security Council authorizing intervention to deter aggression by an erstwhile American ally.

⁵⁰ See, for example, Brahma Chellaney, *The Challenge from Authoritarian Capitalism to Liberal Democracy* (China-US Focus, Oct 6, 2016), archived at <http://perma.cc/96SX-MFKF>.

⁵¹ George Bush, *Address before a Joint Session of the Congress on the State of the Union* (American Presidency Project, Jan 29, 1991), archived at <http://perma.cc/GRV7-DE7C>.

Yet enthusiasm for an intervention to liberate Kuwait gave way to concerns about the enforcement of no-fly zones seemingly without clear authorization and the imposition of a sanctions regime with punishing consequences for civilians.⁵²

In fact, the Gulf War may be remembered as marking a high point of post-Cold War international cooperation in the authorization of collective action. But its aftermath—and the Clinton administration’s approach to “muscular diplomacy” with selective reliance on international frameworks—was far more telling for the international order coming into focus in the 1990s. Despite rhetorical commitment to multilateral ordering principles, the Clinton administration set a series of precedents that signaled American ambivalence toward internationalism and a willingness to act unilaterally without regard for those principles.

Examples of instances in which the “new world order” gave way to an American disengagement include the American resistance to signing the Land Mines Convention, the reluctance to sign the Rome Statute establishing the International Criminal Court (ICC), and the military campaign in Kosovo.⁵³ In this same period, international-law scholars identified a new trend among American policymakers and academics that came to be described as the “New Sovereignists.” One scholar studying this form of rising anti-internationalism described its adherents as “resist[ing] the incorporation of international norms and drap[ing] the power to do so in the mantle of constitutional legitimacy,” which allowed the government to “pick and choose the international conventions and laws that serve its purpose and reject those that do not.”⁵⁴ This approach—“internationalism à la carte”—provided cover for the Senate’s rejection of the Comprehensive Test Ban Treaty, the US failure to submit the Kyoto Protocol for Senate approval, and the failure to accede to the

⁵² See, for example, Ewen MacAskill, *Second Official Quits UN Iraq Team* (The Guardian, Feb 15, 2000), archived at <http://perma.cc/5A8Y-H3MS> (noting that UN “sanctions against Iraq suffered a new setback yesterday after another high-ranking official was reported to have resigned in protest at the suffering of the civilian population”); *No-Fly Zones: The Legal Position* (BBC, Feb 19, 2001), archived at <http://perma.cc/9PZA-GJAS> (noting that “unlike the military campaign to expel Iraqi forces from Kuwait, the no-fly zones were not authorised by the UN”).

⁵³ For a critique of Clinton-era unilateralism along these lines, see Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 NYU L Rev 1971, 1980–81 (2004).

⁵⁴ Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, 79 Foreign Aff 9, 9 (Nov–Dec 2000).

Convention on the Rights of the Child.⁵⁵ In many of these instances, the United States participated in negotiations and helped shape the regimes that it subsequently rejected.⁵⁶

Unilateralism in this period also included American use of force without international authorization. President Bill Clinton's decision to bomb Sudan in response to al-Qaeda attacks against US embassies elsewhere in Africa suggests that "the preemptive and unilateral use of U.S. military power was [already] perceived as necessary prior to [George W.] Bush's election."⁵⁷ Another Clinton-era doctrine, that of identifying and seeking to isolate or impose sanctions on "rogue states," also exemplified a preference for selectively referencing international frameworks to justify far-reaching coercive policies. One scholar notes that the "rogue states" doctrine best encompasses the Clinton approach to international security questions due to its "lack of status in international law, its declaratory and unilateral nature, its rooting in a realist calculus of US interests, [and] its articulation in terms of a 'warning to enemies.'"⁵⁸

With respect to the hope that the post-Cold War "new world order" might give rise to a Marshall Plan for Eastern Europe, the investment that did arrive took the form of aggressive privatization policies backed by the World Bank rather than the earlier New Deal-inflected social-welfarist approach.⁵⁹ In many ways, the turn to privatization was the product of American domestic developments that had emerged during the latter part of the Cold War itself. By the 1970s, the early postwar order was showing profound signs of strain. Economic crisis, social rebellion, and the

⁵⁵ Id at 9–10.

⁵⁶ See generally, for example, Jon Hovi, Detlef F. Sprinz, and Guri Bang, *Why the United States Did Not Become a Party to the Kyoto Protocol: German, Norwegian, and US Perspectives*, 18 *Eur J Intl Rel* 129 (2010); John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 *Pace Intl L Rev* 361 (1999) (discussing the US role in ICC negotiations); *United States "Unsigning" Treaty on War Crimes Court* (Human Rights Watch, May 6, 2002), archived at <http://perma.cc/M8ZZ-P3UU>.

⁵⁷ Melvyn P. Leffler, *Bush's Foreign Policy*, 144 *Foreign Pol* 22, 24 (Sept–Oct 2004).

⁵⁸ John Dumbrell, *Was There a Clinton Doctrine? President Clinton's Foreign Policy Reconsidered*, 13 *Diplomacy & Statecraft* 43, 55 (June 2002).

⁵⁹ See, for example, Jeffrey D. Sachs, *Accelerating Privatization in Eastern Europe: The Case of Poland*, in Lawrence H. Summers and Shekhar Shah, eds, *Proceedings of the World Bank Annual Conference on Development Economics: 1991* 15, 15 (World Bank 1992) (arguing that the "need to accelerate privatization is the paramount economic policy issue facing Eastern Europe").

costs of military failure in Vietnam together generated deep suspicions among emerging elites in both parties regarding the very economic viability of social welfarism. Beginning during the Carter administration (and becoming common wisdom under President Ronald Reagan), blame for ongoing crises was laid squarely at the feet of a supposedly bloated government and a corrupt labor movement. Politicians and economists turned to the market and to policies of market liberalization as the solution to all manner of social ill.⁶⁰ It was not a surprise, then, that by the 1990s what the United States exported abroad was “shock therapy” rather than a global New Deal.

The post–Cold War results for Eastern Europe and elsewhere were dire to say the least. Rapid privatization led to massive transfers of public wealth into private hands and the ensuing corruption and inequality that still mark much of the region from Russia to Hungary.⁶¹ A perhaps equally important result was that the attachment of the model of constitutionalism to prescriptions of privatization and market liberalization produced a Beltway consensus that tied liberalism to what many Eastern Europeans experienced as rapacious forms of capitalism.

In a sense, these developments embodied an obvious continuity with the Cold War connection between capitalist property arrangements and liberal constitutionalism. But recall again that at least during the early Cold War, the social-welfarist principles of American economic policy seemed plausibly to tie American economic interest and foreign development. “Shock therapy” highlighted that as Keynesian and welfarist commitments declined in the United States, especially after the 1970s, the promotion of aggressive privatization was no longer tied to actual material improvements overseas. The development formulas that were embraced as part of the new consensus—in structuring economies and requiring rule-of-law and governance reforms—largely failed to produce either market-based prosperity or stable

⁶⁰ See generally, for example, Jefferson Cowie, *Stayin' Alive: The 1970s and the Last Days of the Working Class* (New Press 2010).

⁶¹ See, for example, Peter Rutland, *Mission Impossible? The IMF and the Failure of the Market Transition in Russia*, 25 *Rev Intl Stud* 183, 190 (Dec 1999). Professor Peter Rutland notes that the IMF's proposed remedies in Russia and beyond “have always tended to lead to indebtedness, inequality and impoverishment.” *Id.* at 198.

political order among recipient states.⁶² Austerity and wealth transfers ran directly against social needs and the almost talismanic focus on these among US policymakers as the only viable economic options created a defense of austerity almost for its own sake. On the one hand, Clinton-era unilateralism produced a precedent in places like Kosovo for American-led coalitions to use force without legal authorization that presaged over fifteen years of continuous war since 2001. On the other hand, policy prescriptions for the post–Cold War transitions in Eastern Europe and beyond tied political liberalization to privatization and markets in ways that associated constitutionalism with neoliberal economics—but pointedly not with actual shared material betterment.⁶³

The Bush administration doubled down on the unilateralism and neoliberal policy prescriptions of the Clinton administration while shedding any rhetorical defense of multilateralism. The first few months of the Bush administration signaled a further retreat from multilateral engagements with the abrogation of the Anti-Ballistic Missile Treaty with Russia, the “unsigned” of the Rome Statute, the repudiation of the Kyoto Protocol, and opposition to a draft UN convention to reduce small-arms trafficking.⁶⁴ Professor Harold Koh described these and other examples, including the apparent repudiation of the Geneva Conventions, as evidence that the United States had established itself as part of an “axis of non-obedience.”⁶⁵ The disengagement from multilateralism even extended to areas in which international cooperation had been a long-standing priority, such as policies regarding nuclear nonproliferation and weapons of mass destruction (WMD). The Bush administration distanced itself from the disarmament commitments within the Non-Proliferation Treaty (NPT), repudiated commitments made by the United States at the 2000 NPT

⁶² For a compelling discussion of the harm wrought by the development strategies backed by the Washington consensus in Africa, see generally William Easterly, *The Tyranny of Experts: Economists, Dictators, and the Forgotten Rights of the Poor* (Basic Books 2013).

⁶³ See Joshua Kurlantzick, *Democracy in Retreat: The Revolt of the Middle Class and the Worldwide Decline of Representative Government* 59 (Yale 2013) (“[E]conomic change was linked to political change, and a program of free markets and free politics was the only item on the menu.”).

⁶⁴ See Stewart Patrick, “The Mission Determines the Coalition”: *The United States and Multilateral Cooperation after 9/11*, in Bruce D. Jones, Shepard Forman, and Richard Gowan, eds, *Cooperating for Peace and Security: Evolving Institutions and Arrangements in a Context of Changing U.S. Security Policy* 20, 25 (Cambridge 2010).

⁶⁵ Harold H. Koh, *The Value of Process*, 11 *Intl Legal Theory* 27, 29 (2005).

Review Conference, and welcomed India's development of nuclear technologies, eventually concluding a civil nuclear deal with the NPT nonsignatory country.⁶⁶ In lieu of multilateral agreements like the NPT, the Bush administration developed a flexible ad hoc coalition, the Proliferation Security Initiative, with a narrow agenda and scope of activities involving coercive interdictions of suspected proliferation activities, without international legal authorization.⁶⁷ Even as the Bush administration went to war in Iraq over WMD concerns, it weakened the frameworks designed to deter WMD proliferation.

In the aftermath of the September 11 attacks, the combination of catastrophic threats, resurgent nationalism, and the suspension of most of the remaining legislative checks on the administration's conduct of its foreign policy, resulted in an open embrace of preemption and unilateralism that is best exemplified in the United States' 2002 National Security Strategy (NSS).⁶⁸ For the rest of the world, the NSS represented a doctrine of unfettered use of force and an embrace of "preventive" war-making.⁶⁹ This approach extended the earlier "rogue state" doctrine by reference to the threats of WMD and terrorism to a new "Axis of Evil."⁷⁰ In the place of the "new world order" proclaimed by his father and characterized by multilateral cooperation, the younger Bush sought to create a selective antiterrorist alliance as part of his declaration of a Global War on Terror.

In some ways, especially when considered through the prism of the Iraq war, the Global War on Terror seemed to reboot many familiar elements of Cold War policy. Officials at times combined a Manichean good-versus-evil worldview with classic Cold War claims about the capacity of American stewardship to transform

⁶⁶ See Patrick, "The Mission Determines the Coalition" at 41 (cited in note 64). See also generally Mario E. Carranza, *Can the NPT Survive? The Theory and Practice of US Nuclear Non-proliferation Policy after September 11*, 27 *Contemp Security Pol* 489 (2006).

⁶⁷ Carranza, 27 *Contemp Security Pol* at 503 (cited in note 66).

⁶⁸ See generally *The National Security Strategy of the United States of America* (White House, Sept 2002), archived at <http://perma.cc/FWJ4-AKKD>.

⁶⁹ See, for example, Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 *Am J Intl L* 607, 619 (2003).

⁷⁰ The original three countries designated as members of this axis were Iraq, Iran, and North Korea. Within a year, analysts argued that the axis also extended to Syria, Libya, and Cuba, encompassing most of the "rogue states" from the Clinton era. See, for example, Frank Gardner, *Who's Who in the 'Axis of Evil'* (BBC, Dec 20, 2003), archived at <http://perma.cc/H5B9-2G76>.

traditional and violence-prone Muslim societies into modern liberal capitalist nation-states. The Iraq war, in particular, was presented as an opportunity to liberate the population from retrograde authoritarianism and to establish a democratic model for the Middle East. But the failure of the Iraq war quickly collapsed American expectations of a “domino effect” of democratization in the region as well as the credibility of figures within the Bush administration who emphasized the old transformative account of American power.⁷¹

Indeed, the debacle of the Iraq intervention and the devastating sectarianism and civil conflict that followed definitively disconnected the Global War on Terror from any modicum of liberal aspirations. Instead, familiar Orientalist tropes concerning the Muslim world’s irreducible cultural resistance to modernity increasingly gained dominance.⁷² In this way, previous racial hierarchies persisted in shaping American policy, but only now disconnected from any faith in progressive and emancipatory change. Instead, a racialized conception of Muslims as implacably hostile to the West underwrote practices of containment in which counterterrorism amounted to pacification, with very little of substance to offer besides the stability of a police state.

The Global War on Terror was so broadly conceived that it produced a potentially indefinite armed conflict on what could easily become a global battlefield against a nebulous set of foes comprised of nonstate actors and their alleged state sponsors.⁷³ The combination of the arguments proffered to authorize the Iraq intervention and the conduct of the Global War on Terror in Afghanistan led some to worry that American exceptionalism

⁷¹ See Paul R. Pillar, *The Neocons’ Undemocratic Domino* (National Interest, Aug 15, 2011), archived at <http://perma.cc/8KD2-JAZ8>.

⁷² The idea that the Middle East has been resistant to progress and was “left behind” as much of the rest of the world followed a western trajectory of development and democratization underwrites claims that the region is an incubator of violence in need of management and containment. Professor Edward Said, the author of the classic analysis of this phenomenon in his eponymous pathbreaking 1978 treatise, *Orientalism*, provided an assessment of how these tropes suffuse the framing of the “war on terror” in an article written some twenty-five years later. See Edward Said, *A Window on the World* (The Guardian, Aug 1, 2003), archived at <http://perma.cc/D33P-ZK5C>.

⁷³ In justifying American policies of targeted killing in countries with which the United States is not formally at war, the Department of Justice eventually characterized the war against al-Qaeda and its affiliates as a global noninternational armed conflict (something like a global civil war). See generally Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-international Armed Conflicts*, 89 Intl L Stud 696 (2013).

and unilateralism had become a threat to a rule-based international order and undermined the legitimacy of international law and international organizations.⁷⁴

The Global War on Terror brought into focus an international order in which American exceptionalism was no longer tied to a commitment to rule-based presumptions. International-law scholarship turned to theorizing the “state of exception” to make sense of the United States’ systematic repudiation of existing legal limits under its new counterterrorism framings.⁷⁵ While American unilateralism was certainly not unprecedented, the abandonment of the rhetorical commitment to law signaled a retreat from the defense of the multilateral institutions that had been constitutive of US global governance strategy since the end of World War II. At least one distinguished American scholar of international law read this change as representing a “system abrogation.”⁷⁶

B. Bush, Obama, and the Failure of the “Fourth Wave”

The American rejection of constitutionalism as the central principle of the international order provided the broader context for the decline itself of liberal constitutionalism as a general model. As the United States shifted focus to counterterrorism priorities, it reduced its funding for democracy, human-rights, and governance programs while the focus of remaining funds often centered on shoring up the security sector among recipients.⁷⁷ The slowing spread of constitutionalism is also tied to a set of expectations concerning democratization in the postcolonial world that did not materialize. As the Cold War ended, Professor Huntington declared that a “third wave” of democracy had characterized the

⁷⁴ See, for example, Winston P. Nagan and Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 Berkeley J Intl L 375, 438 (2004).

⁷⁵ This trend led to a pronounced uptick of interest among scholars of law and the social sciences in the work of Italian philosopher Giorgio Agamben and his theory of the “state of exception.” See generally, for example, Stephen Humphreys, Book Review, *Legalizing Lawlessness: On Giorgio Agamben’s State of Exception*, 17 Eur J Intl L 677 (2006). See also generally Jason Ralph, *The Laws of War and the State of the American Exception*, 35 Rev Intl Stud 631 (2009); Mark Danner, *Torture and the Forever War* (MIT 2013).

⁷⁶ Franck, 97 Am J Intl L at 620 (cited in note 69) (referring to the UN charter system specifically).

⁷⁷ See generally Kurlantzick, *Democracy in Retreat* (cited in note 63). See also Larry Diamond, *Democracy in Decline: How Washington Can Reverse the Tide*, 95 Foreign Aff 151, 152 (July–Aug 2016); E. Gyimah-Boadi, *Africa’s Waning Democratic Commitment*, 26 J Democracy 101, 108 (Jan 2015).

final quarter of the twentieth century, spanning Latin America, the Asia-Pacific region, Eastern Europe, and sub-Saharan Africa.⁷⁸ At the turn of the twenty-first century, there was much anticipation of a “fourth wave” of democratization affecting the Muslim world in particular.⁷⁹ Yet the Global War on Terror cast the United States in oppositional terms to much of the Muslim world, even if the Bush administration was at pains to claim that it was not at war with Islam as such. The centrality of the Muslim world as an incubator of terror in the Bush paradigm put paid to the idea of democracy promotion.⁸⁰ Indeed, racialized presumptions about the risks attendant to democracy in the Muslim world—where free elections might empower political Islam—placed a fourth wave at odds with realizing counterterrorism goals. Ultimately, the Global War on Terror displaced the fourth wave in framing a future trajectory for Muslim-majority states.

The Bush administration’s antiterrorist alliance not only departed from existing international legal constraints on coercive force, but also encouraged its allies to do the same. The prohibition on torture and arbitrary detention quickly gave way around the world to practices of extraordinary rendition and secret detention to facilitate coercive interrogation. Moreover, as the legal sociologist Kim Lane Scheppele observed, the Global War on Terror was transformed into “an international state of emergency that requires other countries to make exceptions to both international law and their constitutional orders.”⁸¹ The spread of liberal constitutionalism, once viewed as the inevitable correlate of the end of the Cold War, was now supplanted by other priorities. The Bush administration replaced the language of democracy with an emphasis on “moderation,” especially among its antiterrorism allies in the Muslim world.⁸² Further, the need for allies among

⁷⁸ Huntington, *The Third Wave* at 21 (cited in note 5).

⁷⁹ See, for example, Larry Diamond, *The Coming Wave*, 23 *J Democracy* 5, 5 (Jan 2012).

⁸⁰ Francis Fukuyama argued, for example, that by overestimating the threat of radical Islam, the Bush administration undercut its own efforts. See Francis Fukuyama, *After Neoconservatism* (NY Times, Feb 19, 2006), online at <http://www.nytimes.com/2006/02/19/magazine/after-neoconservatism.html> (visited Dec 12, 2017) (Perma archive unavailable).

⁸¹ See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 *U Pa J Const L* 1001, 1003 (2004) (emphasis omitted).

⁸² Ash Bâli and Aziz Rana, *American Overreach: Strategic Interests and Millennial Ambitions in the Middle East*, 15 *Geopolitics* 210, 224–25 (2010).

countries bordering Iraq and Afghanistan meant outright democracy *demotion* where geostrategic interests so required.⁸³

The Global War on Terror also precipitated failed American efforts to translate belligerent occupation into imposed constitutionalism domestically in Iraq and Afghanistan.⁸⁴ Two key attributes of American efforts to install constitutionalism in these countries tarnished the broader model of liberal constitutionalism. First, constitutionalism was identified quite literally with imperial imposition. By undertaking constitution-drafting exercises under conditions of occupation and using constituent assemblies appointed under the supervision of a foreign occupying force, the United States tarred constitutionalism with the brush of collaboration. Second, the resulting political systems failed to deliver the most basic requirements of effective governance, such as channeling the competition for power through electoral institutions or establishing a state capable of exercising a monopoly on force. In short, American-style imposed constitutionalism was viewed in much of the Middle East and the Muslim world as both normatively unappealing and functionally flawed.⁸⁵ The sheer management competence and economic performance of alternative models—particularly the East Asian managerial authoritarianism identified with Singapore and China⁸⁶—would have much to recommend it against a backdrop of corruption, state violence, and lack

⁸³ See Barbara Ann J. Rieffer and Kristan Mercer, *US Democracy Promotion: The Clinton and Bush Administrations*, 19 *Global Society* 385, 393–96 (2005).

⁸⁴ See generally, for example, Feisal Amin Rasoul al-Istrabadi, *A Constitution without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 *Tex L Rev* 1627 (2009). See also Kurlantzick, *Democracy in Retreat* at 181–82 (cited in note 63) (discussing the sidelining of democratic institutions in Afghanistan under the United States-backed leadership of President Hamid Karzai); Rosemary Foot, *Exceptionalism Again: The Bush Administration, the "Global War on Terror" and Human Rights*, 26 *L & Hist Rev* 707, 723 (2008); *Iraq 10 Years Later, Creeping Authoritarianism: US, UK and Iraqi Governments Contribute to Abuses, Lack of Security* (Human Rights Watch, Mar 19, 2013), archived at <http://perma.cc/4CEM-PVYX>.

⁸⁵ See Shibley Telhami, *The World through Arab Eyes: Arab Public Opinion and the Reshaping of the Middle East* 152–53 (Basic Books 2013). Another source of credibility deficit for the United States is the perception that it engages in selective democracy promotion in the Middle East. See Katerina Dalacoura, *US Democracy Promotion in the Arab Middle East since 11 September 2001: A Critique*, 81 *Intl Aff* 963, 973 (2005).

⁸⁶ See, for example, Andrew J. Nathan, *China's Challenge*, 26 *J Democracy* 156, 156–59 (Jan 2015); John Williamson, *Is the "Beijing Consensus" Now Dominant?*, 13 *Asia Pol* 1, 4 (2012).

of basic services that characterized American nation-building exercises, with billions of dollars spent in ultimately futile bids to shore up failing constitutional orders.

The credibility of managerial authoritarianism as an alternative model became even more pronounced following the 2007 global financial crisis precipitated by decades of deregulation and the predatory lending policies that were rampant under the Bush administration. The recession that followed the crisis laid bare the racialized impact of rapacious capitalism at home⁸⁷ while devastating the economies of numerous countries tied to the American-led international financial order. The result was an international loss of faith in market-driven American economic stewardship, given the centrality of the American banking sector in generating and magnifying the global recession. And in exemplifying the failure of the American approach to provide actual material prosperity, the recession further compounded the declining appeal of the country's constitutional model.

In fact, to the extent that Chinese foreign investment strategies held on to elements of the American economic model, China's delinking of governance from democratic imperatives spoke to the viability of an alternative that offered stability without constitutional corollaries.⁸⁸ At a deeper level, as illustrated by a decade of Chinese investment in Africa, Chinese managed authoritarianism highlighted the fundamentally contingent relationship between market capitalism and liberal constitutionalism.⁸⁹ Managed authoritarianism need not be thought of as transitional; market capitalism and liberal constitutionalism were not necessarily wedded to one another—neither in the present nor in the eventual future.

Just as important, for the first time in decades, the financial crisis also systematically punctured faith in market-based solutions within the United States. Policymakers had been promoting these strategies abroad and failing to deliver results, but that rec-

⁸⁷ See generally Sarah Burd-Sharps and Rebecca Rasch, *Impact of the US Housing Crisis on the Racial Wealth Gap across Generations* (Social Science Research Council, June 2015), archived at <http://perma.cc/KEY9-4T26>.

⁸⁸ See Richard Hornik, *China's Coming FDI Offensive* (Harvard Business Review, May 4, 2011), archived at <http://perma.cc/5DA8-N2SM>.

⁸⁹ See generally Xiaojun Li, *Does Conditionality Still Work? China's Development Assistance and Democracy in Africa* (China and the World Program, July 9, 2017), archived at <http://perma.cc/32ST-LLN2>.

ord of incompetence had not reverberated at home. Now even internal elites and domestic publics came to question the value and legitimacy of these projects.⁹⁰ The definitive abandonment of Keynesian policies in the middle decades of the Cold War gave way to prescriptions that immiserated populations on the receiving end of American development aid. Eventually, the domestic equivalent of these policies produced a crisis at home about the relationship between democracy and unregulated capitalism.

Following the bellicosity and unilateralism of the Bush administration, the election of President Barack Obama rekindled international hopes that the American brand of constitutionalism could still result in competent leadership and commitment to rule-based international order. The Nobel Peace Prize awarded to Obama within less than a year of his election was perhaps the clearest example of this hope. The Nobel committee cited Obama's promotion of nuclear nonproliferation and his fostering of a more constructive climate for international relations through outreach to the Muslim world as the basis for awarding him the Prize.⁹¹

Yet Obama showed a marked ambivalence toward multilateralism, and while he softened the rhetorical approach taken by the Bush administration, he extended the preference for ad hoc coalitions over multilateral institutions. One of his earliest engagements with nuclear policy, for example, was not an effort to shore up the NPT but rather the convening of a Nuclear Security Summit in April 2010 that was a meeting of an ad hoc and informal coalition of forty-seven states to enter into voluntary commitments relating to safeguarding nuclear materials within their borders.⁹² The Obama administration also continued policies of forgoing participation in the ICC and the Ottawa Treaty (on land mines) and treating multilateralism instrumentally through a se-

⁹⁰ The comment of a financial analyst quoted by the *Financial Times* in October 2008 captures the loss of faith in markets prompted by the global recession: "The events we've seen this week represent a once-in-a-generation increase in risk aversion and total lack of faith in the financial system surviving in its current state." John Authers, et al, *Market Crash Shakes World* (Fin Times, Oct 10, 2008), online at <http://www.ft.com/content/a0eac1e2-96f0-11dd-8cc4-000077b07658> (visited Oct 19, 2017) (Perma archive unavailable).

⁹¹ *Obama Wins 2009 Nobel Peace Prize* (BBC, Oct 9, 2009), archived at <http://perma.cc/2X2K-3DQJ>.

⁹² See David Skidmore, *The Obama Presidency and US Foreign Policy: Where's the Multilateralism?*, 13 *Intl Stud Persp* 43, 47 (2012).

lective policy of international cooperation when it suited geostrategic objectives.⁹³ While Obama restored some measure of American reputational legitimacy, he also preserved the asserted American prerogative to use force in counterterrorism operations around the world. As drone strikes extended to US citizens abroad, some argued that the American license to kill in the Global War on Terror was undermining not only rule of law as an international matter but also basic constitutional constraints within the United States.⁹⁴

The discretionary unilateralism of American drone strikes was mirrored by an increasing reliance on unilateral executive action domestically under the Obama administration. As partisan polarization crippled the ability of the administration to pursue policy preferences with legislative cooperation, Obama found himself relying on theories of inherent executive power to govern. For example, rather than seek congressional authorization to take part in a coalition bombing campaign in Libya, Obama employed a Justice Department opinion supporting his unilateral authority to make the determination to join the war in Libya.⁹⁵ Critics argued that he was continuing the Bush-era practice of using politicized legal advice to evade constitutional constraints and forge an imperial presidency.⁹⁶ Just as with its predecessors, the new administration had seemingly allowed the short-term policy payoff of unilateralism both internationally and domestically to obscure the long-term costs of undermining basic rule-of-law values.

The Libya intervention looked much like Iraq by 2012—a regime-change military intervention producing chaos and violence rather than the promise of democratization and constitutionalism. Moreover, by the end of Obama's second term, American constitutionalism itself may have looked less like a model than a problem.

⁹³ See Peter Rudolf, *Liberal Hegemony and US Foreign Policy under Barack Obama* *3–4 (Stiftung Wissenschaft und Politik, Aug 2016), archived at <http://perma.cc/B8EK-BFW3>.

⁹⁴ See, for example, Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killings of Citizens*, 2011 Utah L Rev 1203, 1206–07.

⁹⁵ See generally Office of Legal Counsel, *Authority to Use Military Force in Libya: Memorandum Opinion for the Attorney General* (Apr 1, 2011), archived at <http://perma.cc/GMR6-S63C>.

⁹⁶ See, for example, Bruce Ackerman, *Obama's Unconstitutional War* (Foreign Policy, Mar 24, 2011), archived at <http://perma.cc/JPX5-FG27>. See also Dawn Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 Houston L Rev 1065, 1075 (2016).

Obama's last years in office were largely characterized by partisan dysfunction and rule by executive orders, as signature policy achievements were increasingly accomplished through unilateral action.⁹⁷ The concentration of power in the American executive became a new basis for authoritarians around the world to invoke the US constitutional example in favor of their own practices.⁹⁸

Obama also exhibited little appetite for returning to democracy promotion.⁹⁹ Indeed, the Arab uprisings were met, to the disappointment of many scholars, with a renewed emphasis on moderation.¹⁰⁰ Once constitution-writing exercises began in Egypt and Tunisia, they won tepid support that fell away, again, when a military coup brought a new authoritarian to power in Egypt.¹⁰¹ Elsewhere, Obama showed the same proclivity for favoring charismatic leaders over political liberalization as his predecessor.¹⁰² In Afghanistan, President Hamid Karzai prolonged his increasingly authoritarian rule over Afghanistan with US support through the first six years of Obama's presidency. It was no doubt the case that the Obama administration's wariness about nation-building and democratization efforts reflected clear lessons drawn from the Bush administration's misadventures. But the problem was that as the United States continued to actively intervene in countries from Libya to Afghanistan, its actions combined aggressive attacks on established state institutions with thin commitments to reconstruction. The results, unsurprisingly, were quite dim for democratization and constitutionalism in the region.

Under Bush, American detention and interrogation practices undermined the prohibition on torture and allowed dictators to

⁹⁷ See Erin Hawley, *Obama's Curtain Call: A Look Back on a Legacy of Executive Overreach* (The Hill, Dec 24, 2016), archived at <http://perma.cc/KEN5-KGDK>.

⁹⁸ See Laura Pitel, *Erdogan to Pursue Ambition for Executive Presidency in Turkey* (Fin Times, Oct 12, 2016), online at <http://www.ft.com/content/effaf39a-908b-11e6-8df8-d3778b55a923> (visited Oct 13, 2017) (Perma archive unavailable) (citing claims by the Turkish president that in seeking to increase the powers of the executive in Turkey he was pursuing the creation of an American-style presidency).

⁹⁹ See Thomas Carothers, *Democracy Aid at 25: Time to Choose*, 26 J Democracy 59, 71 (Jan 2015).

¹⁰⁰ See Rosa Brooks, *Democracy Promotion: Done Right, a Progressive Cause*, 23 Democracy 18, 18–19 (Winter 2012).

¹⁰¹ See Michael Crowley, *'We Caved': What Happened When Barack Obama's Idealistic Rhetoric Collided with the Cold Realities of War and Dictatorship in the Middle East and Beyond* (Politico Mag, Jan–Feb 2016), archived at <http://perma.cc/F2MZ-3KUC>.

¹⁰² See Diamond, 95 Foreign Aff at 154–55 (cited in note 77).

point to the US example in defending their own human-rights records.¹⁰³ In the aftermath of the financial crisis, hyperpartisanship, and a spotlight on racial inequalities in the United States under Obama, America's brand of constitutionalism itself came to be associated with political and economic dysfunction.¹⁰⁴ And across both administrations American interventionism undermined the case for democracy. The Trump administration's slogan of "America First" augurs a ratcheting up of unilateralism and nativism in the United States that will do little to restore confidence in America's willingness to adhere to rule-of-law principles internationally. Nor will the American record of democracy demotion do much to shore up liberal constitutionalism abroad as the basic features of the model are called into question domestically by President Trump.¹⁰⁵ In this sense, at least, the character of America's contemporary imperial ambitions represents an increasing constraint on the global appeal of constitutionalism.

CONCLUSION

Ultimately, what we have argued in the preceding parts is that the most common way of thinking about the relationship between constitutionalism and empire fundamentally misunderstands how American power has operated during and after the Cold War. The tendency of scholars is to imagine these as opposed categories, or at least in tension, with the collapse of the constitutional principle creating the conditions in domestic and international life for discretionary imperial ambition. But what these arguments fail to appreciate is the extent to which constitutional ideology and the twentieth-century rise of *pax Americana* have been deeply interpenetrated. Indeed, constitutionalism may well

¹⁰³ See generally David Luban, *Torture, Power, and Law* (Cambridge 2014); Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (Palgrave MacMillan 2008); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (Doubleday 2008). See also Sheri Fink and James Risen, *Psychologists Open a Window on Brutal C.I.A. Interrogations* (NY Times, June 21, 2017), online at http://www.nytimes.com/interactive/2017/06/20/us/cia-torture.html?_r=0 (visited Dec 13, 2017) (Perma archive unavailable).

¹⁰⁴ A recent study documents the declining appeal of the American model of constitutionalism, noting the role played by the parochialism of the Supreme Court and the perceived dysfunction of American governance. See generally David S. Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 NYU L Rev 762 (2012).

¹⁰⁵ See, for example, David Cole, *Trump Is Violating the Constitution* (NY Rev Books, Feb 23, 2017), archived at <http://perma.cc/B87U-UMST>.

be understood as the *definitive* language of American international police power and primacy. This means that discourses of constitutional commitment have been a critical foundation for justifying and expanding the sphere of American influence. It also means that the current decline in the appeal of constitutionalism speaks to a crisis in the articulation of American global power.

Again, none of this is to say that constitutionalism actually systematically constrained security excess at home or abroad during the peak of American Cold War identity. In fact, as discussed earlier, constitutionalism was a central ideological tool in the service of both foreign intervention and the expansion of the state's national security infrastructure. Constitutionalism was the defining language and legitimating ideology of American violence. Exceptionalist discourses and constitutional attachment were routinely leveraged not just to defend particular foreign adventures, but also to underwrite the overall justness of a growing security apparatus and global military footprint. This was because, for Cold War political elites, preserving constitutional values—given the presumption about international instability and Soviet threat—required projecting American power and safeguarding the constitutional state from all perceived dangers wherever they may occur.

In this way, constitutionalism and American global hegemony are perhaps best seen as operating in tandem and giving sustenance to one another. Moreover, this suggests that rather than aberrations from the constitutional ideal, the modes of violence and rights violation that were endemic to Cold War American imperium were essential to the policymaking vision itself—despite talk to the contrary of hypocrisy or political necessity. Still, it is key to appreciate how the creedal and constitutional presentation of the country nonetheless gave ethical meaning and purpose to American power. It may have sanctioned coercion, but it also established the terms for what responsible global action consisted in (multilateralism as well as transnational promotion of democracy, economic development, and constitution writing) and it provided a language both within the United States and internationally about why American authority—whatever the destructive implications—might be legitimate.

Thus, what distinguishes that earlier period of American imperial ambition from the present is not primarily about means or security practices. The Global War on Terror and the Cold War

were both marked by racialized logics and heightened degrees of violence. It is rather that the US retreat as a matter of basic principle from its own organizing frameworks has generated an imperial politics devoid of coherent justification. When the current president refuses to recognize a qualitative or ethical distinction between American and Russian politics and voices on both the left and right emphasize accelerating economic inequality and decline, we have reached a point at which it is no longer merely foreign critics or domestic dissidents that challenge the idea that American power is exceptional, constrained, or necessarily tied to shared material prosperity. These presumptions, and with them the link between empire, constitutionalism, and market-based growth that shaped the Cold War imagination, have become so eroded that they seem increasingly unsustainable even as a matter of internal self-perception.

Perhaps this is most typified by the fact that whatever “model” defines the Trump presidency, President Trump and those around him hardly seem to be political innovators. Rather, as numerous commentators have noted, the Trump administration appears to be riding a wave of resurgent right-wing populism, from Hungarian Prime Minister Viktor Orbán to the Philippine President Rodrigo Duterte, and so drawing from a well-worn global authoritarian playbook.¹⁰⁶ This inversion, whereby ruling elites import authoritarian repertoires in place of the American exceptionalism they once projected, has profound implications. On the one hand, there is no doubt that constitutional logics provided a cover for acts of security violence at home and abroad. But on the other hand, it is nonetheless true that these logics also provided the conceptual language to challenge those very practices as hypocritical and to undergird the basic institutions of a multilateral global order. To the extent that the appeal both for US policymakers and foreign actors of American-styled constitutionalism is in decline, this means that American power itself faces a clear crisis in legitimacy. The point is not that American economic or military might will simply disappear or recede before other global competitors. But rather, as the basic logics justifying

¹⁰⁶ See, for example, Christian Caryl, *We've Got to Face It: Trump Is Riding a Global Trend* (Foreign Policy, Sept 26, 2016), archived at <http://perma.cc/M8WK-SAYY>; Ruth Ben-Ghiat, *Trump's Authoritarian Playbook—What's Next?* (CNN, July 20, 2017), archived at <http://perma.cc/6783-VXX2>.

American power break down, the question of *why* the United States should enjoy preeminence becomes ever more acute.

The global community finds itself subject to the whims of a preeminent state power whose principal actors have step-by-step over the last three decades seemingly lost clarity about that state's objectives and overarching global vision. If the American imperial project—as an expression of American exceptionalism and constitutional commitment—seems less and less plausible, the question is what will take its place. In a sense, the global community now encounters a moment of increased political openness, with real uncertainty about what will fill the vacuum.

The pessimistic worry is that for all the many flaws of constitutional imagination, if a future order is premised ideologically on the United States' or some other state's raw power, the space for self-constraint and rule-based limitations will continue to recede. But that is not the only possibility. There may also be new space for alternative orderings to emerge in an international system defined by multipolarity or one in which numerous competing hegemony dominate their own regional spheres. As the aspirational ambitions of an American-led liberal international order recede, so too do the legitimating frames that have often served to validate or obscure acts of real violence. Trump's ascendance has made plain the nature of what has for decades been the American orientation to the world, an orientation guided by neoliberal commitments, national security presumptions, and unilateral coercion. The silver lining may be that in the absence of credible American global leadership, other powers or global civil-society movements, acting singly or in concert, may yet embrace the aspirational potential of a new international order. Although such an order might not speak the language of American constitutionalism, it also might not be weighed down by US geostrategic constraints and coercive imperatives.