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## REGULATING POLITICAL RISKS

Adrian Vermeule\*

BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (Harvard Univ. Press 2010). Pp. 280. Hardcover. \$29.95.

Bruce Ackerman warns us that we may soon witness *The Decline and Fall of the American Republic*.<sup>1</sup> What exactly are we being warned about, and how should we react? I will sketch a framework for thinking about these questions and then apply the framework both to Ackerman's general thesis and to his more specific claims about civil-military relations.

Ackerman wants to "sound[] the alarm" about the risk that the Madisonian republic will fail.<sup>2</sup> Depending upon how exactly this risk is specified, the outcome might be plebiscitary democracy, or pseudo-democracy, or else outright authoritarian rule. The main dangers are an "extremist presidency"<sup>3</sup> that "may become the springboard for an authoritarian takeover"<sup>4</sup> and a "politicized military"<sup>5</sup> that slips off the bonds of civilian control.

One useful lens through which to evaluate an argument of this sort is risk regulation, here applied to political risks. In this framework, constitutions and other instruments of public law can be understood as devices for regulating political risks in cost-justified ways. Many of the standard tools of risk regulation analysis can be applied, with appropriate modifications, to analyze political risks and to evaluate the institutions that attempt to manage those risks.

Within this framework, I have three questions to pose to Ackerman. As to each question, I will first address the general line of Ackerman's argument and then address the specific issues surrounding civil-military relations.

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\* John H. Watson Professor of Law, Harvard Law School. Prepared as a response to the Tanner Lectures given by Bruce Ackerman at Princeton University, April 7-9, 2010. I thank the organizers and participants, especially Philip Pettit and Jeff Tulis, and thank Jack Goldsmith, Matthew Stephenson, Mark Tushnet and John Yoo for helpful comments.

1. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).
2. *Id.* at 4-6, 119-20.
3. *Id.* at 15-41.
4. *Id.* at 40.
5. *Id.* at 43-64.

## I. WHAT HARMS?

What exactly are the risks that Ackerman wants to warn us about? “The Decline and Fall of the American Republic” is an ambiguous concern. Does it mean that the American polity will no longer be a Madisonian-republican polity, but will still be a democracy in some sense — a plebiscitary, president-centered democracy, with legislators and judges (and perhaps also bureaucrats) relegated to the sidelines, but with free and fair elections?<sup>6</sup> Or does it mean the Fall of the Republic in Plutarch’s sense<sup>7</sup> — the disappearance not only of republicanism but of democracy as well, and a transition to authoritarianism, either openly or in the form of pseudo-democracy with pseudo-elections? The risk of a transition from republicanism to plebiscitary democracy is more plausible but less grave; the risk of (de jure or de facto) authoritarianism is more grave and less plausible. The ambiguity allows Ackerman to combine these two elements in such a way as to make his warnings seem both plausible and grave. However, if we pin down the nature of the threatened harm, I believe that either the plausibility or gravity of the warnings will suffer. Perhaps Ackerman believes that plebiscitary democracy is an unstable regime that inevitably degenerates into authoritarianism, but this is an uncertain extrapolation from what he actually says, as well as being an intrinsically dubious claim.

There is a similar ambiguity, on a smaller scale, about the nature of the harms Ackerman fears in the specific setting of civil-military relations. In some passages, Ackerman’s concern appears to be that the military will display *excessive autonomy from politics*, while in others, the concern appears to be that the military will display *insufficient autonomy from politics*. Of course both these things would be bad, and I think Ackerman means to say that the “politicized military” is a military that is simultaneously too independent of presidential control (or civilian control generally) and yet also intervenes in civilian politics. However, it is jarring to see Ackerman caution against the charismatic presidency in Chapter One, and then caution against the excessively autonomous military in Chapter Two, when the former is the canonical cure for the latter.<sup>8</sup> The classic check on excessive bureaucratic autonomy, military or otherwise, is a Weberian plebiscitary President who has sufficient electoral and charismatic legitimacy to bring the (military) bureaucracy to heel.<sup>9</sup> Weber’s position has a second-best logic from which Ackerman could profit: in an imperfect world, the

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6. See ACKERMAN, *supra* note 1, at 11 (noting that “the death of the Republic does not necessarily mean the end of *democracy*”) (emphasis in original). This leaves the ambiguity unresolved.

7. More accurately, the sense attributed to Plutarch by modern translators and editors. See, e.g., PLUTARCH, THE FALL OF THE ROMAN REPUBLIC: SIX LIVES (Rex Warner trans., Penguin Group rev. ed. 2006). Ackerman’s title conflates the fall of the Republic with Edward Gibbon’s *The Decline and Fall of the Roman Empire*. Between the fall of the Republic and the decline of the Empire, however, there lay several centuries (depending upon when the decline is dated), and new peaks of prosperity and glory.

8. A final ambiguity, related to the foregoing, is that Ackerman seems unsure whether the problem is that the military has an excessively autonomous culture or an excessively partisan one. At one point Ackerman gives statistics to support the latter possibility, showing that a high percentage of the officer corps register as Republican. ACKERMAN, *supra* note 1, at 61-62. Yet if this is the key source of divergence between the preferences of the military and of the civilian leadership, one would expect less friction when a Republican holds the White House. The facts do not bear this out; conflicts between the military and the White House were at least as serious under the second Bush as under Clinton. See John Yoo, *Administration of War*, 58 DUKE L.J. 2277, 2287-92, 2301 (2009).

9. The locus classicus is MAX WEBER, *The President of the Reich*, in WEBER: POLITICAL WRITINGS 304, 304-08 (Peter Lassman & Ronald Speirs eds., 1994).

charismatic presidency, however undesirable in itself, may save the larger system from the pathologies that it otherwise generates.<sup>10</sup>

## 2. LOW-PROBABILITY EVENTS?<sup>11</sup>

Let us assume that there is some well-defined set of political risks in the neighborhood, and also that epistemically warranted probabilities<sup>12</sup> can be attached to those risks. Well, what are those probabilities? For concreteness, let us focus on the most serious risk that Ackerman discerns: the risk that American presidentialism will degenerate into the rule of one man. Does Ackerman really think that risk of a coup by Barack Obama or some successor is appreciably higher than, say, the 1 in 250,000 chance that the giant asteroid 99942 Apophis will strike Earth in the year 2036?<sup>13</sup> If the risk is sufficiently low, then even if the harms would be high should the risk materialize, the expected harm may be low, and costly institutional precautions against autocracy may not be cost-justified.

Let me here record my own probability assessment, which is that the risk of a coup by the executive — an autogolpe — is vanishingly low in America in 2010, or for the foreseeable future. I should state (what I take to be) the epistemic warrant for this view, both in historical and in comparative terms.

First, as to the historical evidence, even the most powerful “constitutional dictators” in American history, Lincoln and Roosevelt, felt politically constrained to hold elections, even in the depths of war and economic crisis. If America were to have an executive coup, it would probably have happened long before now. The existence of a long line of jeremiads against presidential Caesarism — books by James Burnham and Arthur Schlesinger are only the most familiar examples<sup>14</sup> — makes each new doomsayer marginally less plausible than the preceding one.

To be sure, the risk of autocracy might be modeled as a “fat-tail risk” or “Taleb distribution,”<sup>15</sup> in which there are repeated rewards from expansive presidential power, accompanied by a small constant hazard of a very large loss. Yet it is unclear whether this is the right model; a claim that some risk follows a Taleb distribution is always

10. See Sven Eliaeson, *Constitutional Caesarism: Weber's Politics in their German Context*, in *THE CAMBRIDGE COMPANION TO WEBER* 131, 143 (Stephen Turner ed., 2000).

11. A familiar issue, relevant here, is the distinction between *risk* and *uncertainty*. If the analyst can assign probabilities to the relevant risks, we are in the domain of risk properly so-called; if not, then we are in the domain of uncertainty. (If the analyst can neither attach probabilities to outcomes, nor even specify the range of possible outcomes, then we are in the domain of radical *ignorance*). Ackerman sometimes seems to employ a risk-based framework, see, e.g., ACKERMAN, *supra* note 1, at 12 (calling for “measures that might sensibly reduce the risk”), and I will follow suit. An uncertainty-based framework would require my second question to be translated into a different language, but the substance would remain unchanged; the first and third questions would be unaffected.

12. For an explanation of the qualifier “epistemically warranted,” see Adrian Vermeule, *Eclectic Decision Theory*, JOTWELL: CONSTITUTIONAL LAW (Oct. 27, 2009), <http://conlaw.jotwell.com/eclectic-decision-theory>.

13. Press Release, NASA, NASA Refines Asteroid Apophis' Path Toward Earth (Oct. 7, 2009), available at [http://www.nasa.gov/home/hqnews/2009/oct/HQ\\_09-232\\_Apophis\\_Update.html](http://www.nasa.gov/home/hqnews/2009/oct/HQ_09-232_Apophis_Update.html).

14. See Jack Goldsmith, *The Accountable Presidency*, THE NEW REPUBLIC (Feb. 1, 2010), <http://www.npr.com/article/books-and-arts/the-accountable-presidency>.

15. See NASSIM NICHOLAS TALEB, *FOOLED BY RANDOMNESS: THE HIDDEN ROLE OF CHANCE IN LIFE AND IN THE MARKETS* (2004); NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* (2007).

difficult to falsify, as the claim itself implies that the disaster scenario is extremely unlikely to be observed in any given time frame. What is clear is that even in periods of far greater instability than exists today or is likely to exist tomorrow, the core of the constitution remained intact. For his part, Ackerman gives us almost no affirmative evidence that the risk of autocracy is real, putting aside his vivid literary scenarios.

Second, there is by now some increasingly solid evidence in comparative politics on risk factors for dictatorship.<sup>16</sup> One of the most striking findings in this literature is that *the best safeguard for democracy is wealth*.<sup>17</sup> No democracy has fallen in a nation whose average per capita income was greater than a little over \$6,000 in 1995 dollars.<sup>18</sup> (In Weimar Germany in 1933, average per capita income was \$3,556).<sup>19</sup> Stated in 2008 dollars, average per capita income in the United States is no less than \$39,751.<sup>20</sup> It is unclear whether this extremely robust correlation reflects underlying causal forces, but if it does, the United States is unlikely to become a dictatorship in the foreseeable future simply because of its enormous wealth.

What if anything might cause the association between wealth and the stability of democracy? One account is that “the intensity of distributional conflicts is lower at higher income levels.”<sup>21</sup> On this model, as income rises, the marginal utility of further increases in income declines, so the relatively poor will have less to gain (in utility terms) from subverting the democratic order in order to redistribute wealth to themselves, while the relatively rich will have less to lose from majoritarian redistribution under democracy. The poor will accept less redistribution, the rich will accept more, the set of policies that are politically acceptable to both sides expands, and no social group thinks it is worthwhile to gamble on a bid for dictatorship. All this is at the research frontier of comparative politics, so uncertainties abound. At a minimum, however, Ackerman ought to address the risk factors more systematically, and with attention to the comparative evidence.

Similar points apply to the risk of a coup by the military. There is a crucial ambiguity here about whether Ackerman envisages a military coup *against* the President or a military coup *in support of* the President as being the more serious threat.<sup>22</sup> Again, either would be bad, but the two possibilities are inconsistent alternatives in the sense that both cannot occur. It is not inconsistent, however, to believe that both risks are extremely low. Above, I have given some comparative evidence for the low risk of an authoritarian presidential-military coup in wealthy democracies. As to a military coup against the President, the very bureaucratization of the military that Ackerman

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16. Portions of this paragraph and the next are adapted from Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, (Univ. of Chi. Pub. Law, Working Paper No. 276, Harvard Univ. Pub. Law, Working Paper No. 09-44, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1473858](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473858).

17. See Adam Przeworski et al., *What Makes Democracies Endure?*, 7 J. DEMOCRACY 39, 40-41 (1996).

18. See *id.*; see also ANGUS MADDISON, *THE WORLD ECONOMY: HISTORICAL STATISTICS* 58-69, 87-89, 100-01, 105, 110, 142-48, 180-87, 218-24 (2003).

19. MADDISON, *supra* note 18, at 62.

20. *Per Capita Personal Income by State, 1990 to 2010*, UNIVERSITY OF NEW MEXICO: BUREAU OF BUSINESS AND ECONOMIC RESEARCH, <http://bber.unm.edu/econ/us-pci.htm> (last visited Nov. 12, 2011).

21. Przeworski et al., *supra* note 17, at 41 (citing SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 51 (1981)).

22. See ACKERMAN, *supra* note 1, at 43-64.

underscores means that charismatic generals like MacArthur are less in evidence today. The recent civil-military conflicts that Ackerman details seem like penny-ante stuff compared to McClellan's outright disobedience to Lincoln as enemy troops moved within striking distance of Washington, or MacArthur's ominous suggestion that generals owe their allegiance to "the country and its Constitution" rather than to "those who temporarily exercise the authority of the executive branch of Government."<sup>23</sup> Furthermore, no general on the scene today has anything like the popular following that would be necessary to support a coup.

### 3. SELF-DEFEATING PRECAUTIONS

Suppose that Ackerman were to identify political risks that are well-defined and substantial, as opposed to conjectural (however vivid the literary scenarios on offer). The final question is what precautions to take against those risks, and the answer is to take only those precautions whose benefits exceed their costs.<sup>24</sup> One problem is that precautions may impose excessive collateral costs, like designing houses as concrete bunkers capable of withstanding a strike by 99942 Apophis. Ackerman focuses on the Type I error — the risks and costs of excessive presidential and military power — but says very little about the Type II error, the risks and costs of insufficient presidential or military power. The run-up to World War II illustrates the costs of a constitutional order that is excessively risk-averse about presidential power. Legal scholars like Edward Corwin accused Franklin D. Roosevelt of being a tyrant for his destroyers-for-bases deal, which circumvented Congress; but Roosevelt has been vindicated by the judgment of history. Presidential power should be neither minimized nor maximized, but optimized. The same should be true for military power and autonomy. Nations facing increased security threats rationally afford the military greater leeway.

A second problem is that precautions against political risks may even prove self-defeating, in the sense that they exacerbate the very risks they are intended to prevent. I will mention only one major example of the latter concern; the separation of executive and legislative powers might increase, rather than reduce, the risk of executive dictatorship.<sup>25</sup> Suppose that in a system with an independently elected president, constitutional designers set up elaborate vetogates, legislative and judicial oversight, and other checks and balances, all with an eye to minimizing the risks of executive dictatorship. However, these checks and balances create gridlock and make it difficult to pass necessary reforms. Where the status quo becomes increasingly unacceptable to many, as in times of economic or political crisis, the public demands or at least accepts a dictator who can sweep away the institutional obstacles to reform.<sup>26</sup> Here the very elaborateness of the designers' precautions against dictatorship creates pent-up public demand that itself leads to dictatorship. Comparative politics provides (contested)

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23. 97 CONG. REC. app. A4721, A4722 (1951) (statement of General Douglas MacArthur), *quoted in* Yoo, *supra* note 8, at 2284-85.

24. See CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

25. This paragraph is adapted from Posner & Vermeule, *supra* note 16.

26. See, e.g., Jonathan Hartlyn, *Presidentialism and Colombian Politics*, in 2 *THE FAILURE OF PRESIDENTIAL DEMOCRACY: THE CASE OF LATIN AMERICA* 220, 222-23 (Juan J. Linz & Arturo Valenzuela eds., 1994).

evidence for this story, especially from Latin America.<sup>27</sup>

Likewise, the New Deal, which Ackerman famously believes amounted to a “constitutional moment” of higher lawmaking, can be understood as our brush with the Latin American scenario, in which Roosevelt achieved near-dictatorial stature precisely because he seemed the best hope for overcoming the excessive status quo bias of the Madisonian constitution. Finally, as Ackerman points out, the separation of powers can undermine political control of the military if it allows the military to “play its civilian masters against each other.”<sup>28</sup> Thus, one comparative study of civil-military relations finds that civilian control is greater in the United Kingdom than in the United States.<sup>29</sup>

Where does Ackerman stand on the separation of powers? Sometimes he suggests that the separation of powers exacerbates the risk of a “runaway presidency”<sup>30</sup> and of a politicized military.<sup>31</sup> Yet in other passages, he suggests that the goal should be to reinvigorate the Madisonian system, whose central and praiseworthy feature is precisely that it slows down the pace of political change.<sup>32</sup> Given that the gridlock arising from the separation of executive and legislative powers is plausibly a risk factor for the dictatorship that Ackerman fears, and given that the separation of powers tends to produce a degree of military autonomy that Ackerman seems to find excessive, reinvigorating the separation of powers might simply recreate the conditions that Ackerman laments and indeed exacerbate the risks that Ackerman warns us against.

In other writings, Ackerman suggests fusing executive and legislative powers in a parliamentary regime, but with a written constitution and judicial oversight, as in some continental democracies.<sup>33</sup> Yet Weimar, the implicit backdrop to many of Ackerman’s most lurid scenarios of dictatorship, was just such a regime (although judicial review was infrequently exercised).<sup>34</sup> If we put Weimar aside as a fledgling, unconsolidated democracy in the throes of various economic and social crises, does this not strengthen the view that economics and demography matter more than institutions, and that the consolidated and fabulously wealthy American democracy circa 2011 is extremely unlikely to slide into authoritarianism?

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27. See *id.*; Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in 2 THE FAILURE OF PRESIDENTIAL DEMOCRACY: THE CASE OF LATIN AMERICA, *supra* note 26, at 3, 5-8; Przeworski et al., *supra* note 17, at 44-46. The Latin American evidence is contested in JOSÉ ANTONIO CHEIBUB, *PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY* 1-3 (2007), which argues that the correlation between presidentialism and dictatorship is merely an artifact of selection effects: polities that are less stable to begin with are more likely to have presidential systems.

28. Yoo, *supra* note 8, at 2304.

29. DEBORAH D. AVANT, *POLITICAL INSTITUTIONS AND MILITARY CHANGE: LESSONS FROM PERIPHERAL WARS* 21-23 (1994).

30. ACKERMAN, *supra* note 1, at 6, 33, 89.

31. *Id.* at 43.

32. See *id.* at 148-49.

33. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV 633 (2000).

34. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 6-8 (2d ed. 1997).

Both here and throughout, I am not so much confident that Ackerman is wrong as uncertain what his views actually are; or if I do understand them, they seem internally inconsistent in important respects. My main suggestion, then, is that an analytic framework that sees public law as a tool for regulating political risks would help clarify Ackerman's claims sufficiently so that we can evaluate their merits.

