

# Hyper-Polarization, Executive Power, and the Constitution

By [Peter Berkowitz](#) - RCP Contributor  
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Polarization, or a tendency toward the extremes, is a matter of degrees and frequently vexes free and democratic government. The hyper-polarization that disfigures American politics today -- the determination to view fellow citizens who vote differently as mortal enemies -- subverts free and democratic government.

A healthy liberal democracy thrives on a diversity of opinions. Hashing matters out in public frequently gets messy and often makes a hash of matters. But the gains that come from putting competing opinions to the test of open discussion with fellow citizens representing a range of perspectives and parties offset the inconveniences and unlovely aspects of democratic give-and-take. Free-flowing debate exposes errors to the light of day, refines evidence and argument, and develops the habit of listening and considering before dismissing or embracing.

The hyper-polarization that plagues the United States stifles the conversation among citizens that is democracy's lifeblood. To benefit from the public exchange of opinion -- indeed, to sustain it -- citizens must respect others and trust that their views will be heard fairly and responded to in civil fashion. That can't happen when a significant segment of the right despises the left and believes they are enemies of the state and a significant segment of the left despises the right and believes they are enemies of the state.

Hyper-polarization differs from the endless disagreements about policy and the normal opportunism and hypocrisy that mark democratic debate. Between 2001 and 2016, for example, views on executive power tended to reflect preferences in the most recent presidential election. As polarization intensified, the opportunism and hypocrisy got harder to swallow, but the controversies followed a familiar pattern.

During the presidency of George W. Bush, Republicans argued for far-reaching presidential powers, encompassing the authority to employ highly coercive interrogation techniques against enemy combatants, to detain them indefinitely, and to intercept a wide range of foreign and domestic communications. Democrats accused Bush of shredding the Constitution.

Subsequently, Democrats defended President Barack Obama's still more expansive interpretation of presidential power. It included sending Americans into battle in Libya without congressional authorization, making new law through executive fiat to grant approximately 5 million undocumented immigrants the eligibility for temporary legal status, and promulgating a "dear colleague letter" that sidestepped the legally prescribed regulatory process in order to compel

colleges and universities to deny the accused in campus sexual-misconduct cases elementary due-process protections. Republicans were aghast not only at Obama's substantive policies but at the latitudinous view of executive power that informed them.

Donald Trump's victory in the 2016 Republican primaries changed the terms of the debate. While frequently speaking in characteristically grandiose and sweeping terms of the extent of his power as president, President Trump did not surpass Bush or Obama in expanding executive power. Nevertheless, the self-proclaimed "resistance" to Trump's presidency -- launched before he entered the White House and set in motion publicly and behind the scenes before he won the election -- indefatigably challenged his very exercise of executive power.

With Trump's presidency, polarization in America turned into hyper-polarization. The anger and bitterness that had been increasingly rearing their ugly heads metastasized into fury and hate engulfing the body politic.

To slow down the spread of these destructive passions and lower the temperature of American politics, it will be necessary to exercise virtues of evenhandedness, toleration, and civility while embracing shared principles that can frame political controversies, bridge disagreements, and yield accommodations and compromises -- sometimes favoring the right, sometimes favoring the left -- with which both sides can live. In "The President Who Would Not Be King: Executive Power Under the Constitution," Michael McConnell exhibits those virtues and shows that those principles can be discovered in the Constitution.

A Stanford Law School professor and my colleague at the Hoover Institution, McConnell did not in the first place undertake to counter hyper-polarization. The work of an eminent scholar of constitutional law, his book authoritatively reconstructs the original understanding of Article II -- which lays out the scope and character of the president's powers, eligibility for the office and the manner in which the president is chosen, presidential duties, and the actions for which the president may be removed from office -- and related constitutional provisions in order to illuminate contemporary controversies over executive power.

At the same time, McConnell's study of the Constitution's original design and his treatment of executive power furnish a nonpartisan standpoint for organizing partisan political disputes of all shapes and sizes. In addition, his unfailing judiciousness in considering evidence, sorting through claims, and reasonably interpreting and impartially applying constitutional principles provides a model of virtues that undergird free and robust discussion.

Among the leading questions at the Philadelphia convention of 1787, according to McConnell, was how to "achieve the independence, vigor, secrecy, and dispatch necessary for an effective executive without rendering him an elected monarch?" Taking advantage of executive power -- which, as the president's constitutional responsibility as commander-in-chief demonstrates, extends well beyond implementing the law made by the legislative branch -- without opening the door to illiberal and anti-democratic government remains the central question for constitutional government concerning presidential power.

To understand the delegates' answer, McConnell argues, we must become students of history. Only by grasping how the Constitution's clauses would have been understood by Americans at the time of the document's drafting and ratification by the states can we appreciate the Constitution's legal meaning. That in turn requires detailed examination of British political and legal history in which the drafters were steeped as well as of the writings of Locke and Montesquieu among other seminal thinkers who shaped the era's leading ideas and major intellectual currents.

Some will disparage -- or praise -- such an approach as conservative. In fact, it lies at the very heart of the judicial enterprise. If federal judges confronting cases and controversies about the supreme law of the land are not construing the Constitution as understood by those who composed it and expressly consented to it -- the authority of which is tacitly affirmed in every generation by those who live under it and enjoy the rights it secures and the prosperity it promotes -- then they depart from the specific grant of power the Constitution assigns to the judicial branch.

Because language is malleable, judges will encounter -- in even the most carefully crafted charters of government -- play in the joints and face the responsibility of filling in gaps, overcoming ambiguities, and reconciling conflicts. Whether they discharge that responsibility in light, or in defiance, of the Constitution's text, structure, and history makes all the difference.

"Constitutional text and original meaning are the only hope we have for finding principles that could constrain modern assertions of presidential prerogative," writes McConnell. And the principles of free and democratic government embedded in the Constitution are the only hope we have for establishing a common ground on which to conduct constructive public discourse; refine opinions about law, policy, and politics; and advance the public interest.

McConnell places on a sounder footing the jurisprudence of the presidency and the separation of powers. Legal scholars and experts in political ideas and constitutional government will derive great benefit from his meticulous and trenchant account of the work of the Philadelphia convention; of the distribution between Congress and the presidency of what were considered "royal powers" in the British political tradition; of the internal logic of Article II; and, not least, of the application of constitutional text and original meaning to classic Supreme Court cases and contemporary controversies about executive power.

Amid the hyper-polarization racking the country, McConnell's demonstration of the centrality and wisdom of the Constitution along with the spirit of his argument, at once rigorous and generous, also contribute to the still more urgent task of stabilizing liberal democracy in America.

*Peter Berkowitz is the Tad and Dianne Taube Senior Fellow at the Hoover Institution, Stanford University. His writings are posted at [PeterBerkowitz.com](http://PeterBerkowitz.com) and he can be followed on Twitter @BerkowitzPeter.*

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