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The Rule of Law and the Judiciary Under Assault? Or Exposed? Are We All Legal Realists Now?

- I. “The Least Dangerous Branch”: Some Thoughts on the Role of the Supreme Court in American Democracy
 - A. The Liberal and Democratic Counter-majoritarian Interpretation
 1. John Locke (1632-1704, *Two Treatises of Government*) on “the constituent power of the people” and the need to preserve their higher law against the infringement by the ordinary law of legislatures
 2. Another Tradition: Baron de Montesquieu (1689-1755, *The Spirit of the Laws*) and the Idea of Separation of Powers and Judicial Equality
 3. The American Innovation: the Democratic Interpretation of Judicial Review—Hamilton in *Federalists* #78, and *Mayberry vs. Madison* (1803)
 - B. Bringing the American Tradition into the Present
 1. The Liberal Interpretation: Ronald Dworkin (1931-2013, *Law’s Empire*) on the Court as the “Forum of Principle” and John Rawls (1921-2002, *Political Liberalism*) on “the Exemplar of Public Reason”
 2. The Democratic Interpretation: Bruce Ackerman (1943, *We the People*) On the role of the Court *and* Other Branches in Maintaining “The Living Constitution”
 - C. The Anti-Democratic Interpretation: Legal Realism, etc.
- II. The Doctrinal and Political Background to the Current Controversies Surrounding the Supreme Court and the Rule of Law
 - A. A Plea for Attention to Complexity and Diversity within American Law so as to Avoid the Liberal Mistake: Focus on Doctrinal Basis and not Outcomes Alone
 - B. The Trump Regulatory Revolution vs. the DC Circuit Court: How Long Will the Bulwark Hold?
 - C. The Diabolical Political Calculus Behind the Republican’s Partisan Play on the Federal Judiciary
 - D. Trump’s Sustained Attack on the Department of Justice

- E. Republican War on Judicial Independence at the State Level (North Carolina, Kansas, Oklahoma, Florida, Iowa, Missouri and South Carolina) and the Rise of Illiberal Democracy in America

- III. A Sustained Example: Is the First Amendment at Once Weaponized for Protecting Social Power and Obsolete for Protecting Political Speech?
 - A. The Roberts Court and the New Jurisprudence of First Amendment Economic Freedom: From Buckley vs. Valeo through Citizens United and McCutcheon vs. FEC to Janus vs. AFSCME
 - B. The Underlying Idea: Collapsing Politics and Markets and Hamstringing Efforts to Secure Equality and Limit Corporate Power (e.g. Jedediah Purdy)
 - C. The Obsolescence of the First Amendment to Protect Political Speech in an Age of Information Overload and Attention Scarcity (e.g. Tim Wu)

- IV. Likely Implications of Kavanaugh's Appointment to the Future of the Supreme Court
 - A. The Emergence of Partisan Alignments in Recent Supreme Court History
 - B. The Shift from Anthony Kennedy to Brett Kavanaugh
 - C. When the Democrats Return to Power: A New Lockner Era?

- V. Some Concluding Thoughts on the Dangers of Undermining the Idea of the Rule of Law
 - A. Can We Reconceive a Political Culture Founded on the Rule of Law? The Importance of Defending Principle in an Era of Illiberal Democracy
 - 1. We Are a Society of Laws, not People,
 - 2. The Law as an Impartial Instrument for Stabilizing Liberty
 - B. Reviving the Democratic Defense of the Constitution and Rejoining the Fight over Doctrine and the Politics of Constitutional Interpretation
 - C. One Instrument of Constitutional Reform: Judicial Term Limits
 - D. The Broader Campaign: Using Legislation and Public Discourse to Revive Constitutional Discourse as an Aspect of Democratic Politics
 - E. Or Are We All Legal Realists Now? Against Reciprocal Illiberalism