

When Strong Institutions Undermine Strong Democracies

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Self-enforcing democracies require institutions that lower the stakes of electoral success and failure. In this vein, liberal democratic theorists have long touted the benefits of building (or at least tolerating) strong counter-majoritarian institutions (hereafter CMI). The central question explored in this brief essay is how countermajoritarianism may instead come to unravel a constitutional democracy. The answer we develop hinges on what happens to an advanced democracy when strong CMIs become captured by one party. Applying this logic to democratic backsliding in contemporary United States, this essay thus examines the flip side of familiar arguments about developing democracies, strong institutions, and the purportedly stabilizing effects of countermajoritarianism.

At the most obvious level, the idea that counter-majoritarianism cuts against democracy is contained in the term itself. Indeed, for the Federalists who sought to expand the powers of the nascent American government, while also bowing to pressure from the Anti-Federalists to contain these powers, this was precisely the point. The structure of the U.S. Constitution was explicitly designed to create a republic that was at once robust and circumscribed. The Madisonian solution achieved this brilliantly by dividing power across the three branches of government, creating a system of mutual checks and balances across these branches, and adopting provisions aimed at protecting state and individual rights.

Importantly, however, compliance with the new American constitution was also achieved by building in protections for smaller states, which would then ripple across the federal institutional landscape. Consider the U.S. Senate. Because citizens from less populous states are effectively over-represented in the upper chamber of Congress, they not only have enjoyed outsized influence in the legislative branch, but they also have historically carried more weight, via the electoral college, in selecting the president (and in trying him in case of impeachment). Because both of these branches shape the composition Supreme Court, citizens from smaller states have always effectively exercised more influence over the federal judiciary as well.

For many modern positive political theorists, the stability generating advantages of the Senate and other CMIs contained in the U.S. Constitution have tended to outweigh the normatively unattractive, or even downright morally repugnant, disadvantages enumerated by Constitution's many critics (e.g. Dahl 2003; Levinson 2006). Barry Weingast, one of most cogent proponents of this view, has long argued that, however unpalatable certain CMIs appear (the three-fifths clause being the most egregious of these), such provisions have been crucial for maintaining democratic stability throughout most of American history (Weingast 1997; 2016; also see Alberts, Warshaw, and Weingast 2012; Mittal and Weingast 2011).

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Within the literature on democratic transitions following the Third Wave, similar arguments about the necessary trade-offs inherent in institutional design and the advantages of CMI abound. In Przeworski's canonical model (1991), the calculus of democracy rests on convincing today's electoral losers to stick with the democratic game in the expectation that they may yet become tomorrow's winners. Cast in a simple repeated game theory framework, democracy becomes self-enforcing only when the cumulative value of compliance for all relevant groups or parties exceeds the cumulative value of subversion (1991: 29-30).

Precisely because CMIs limit the power of the current majority, the stakes for outgoing authoritarian elites under democracy diminish. In turn, because of the uncertainty inherent in democracy, the current majority becomes willing to accept institutional constraints on their power to protect their interests into the future. Yet, notice that this last component — which presumes a kind of forward-looking insurance logic that drives current majorities to accept institutional limits on their present power — only makes sense if CMIs would protect the current majority's interests in the event that they lose power.

This leads us to a core distinction of whether CMIs are designed to be universal, or whether they are targeted and accrue to one group (see Alberts, Warshaw, Weingast 2012 for a discussion of this distinction). CMIs that protect individual minorities equally (e.g. civil and political liberties), or set up independent institutions that limit governments equally, regardless of which party is in power (e.g. independent constitutional courts), satisfy the limit condition for all political actors, at least in theory (cf. Weingast 2016).

Those, however, that create special enclaves for certain groups are not only often normatively problematic (particularly in historical hindsight), but they are also potentially problematic for compliance with the constitutional order itself. "Helping the Right to win" as O'Donnell and Schmitter (1986) famously put it in their treatise on democratic transitions will be accepted by the Left only as long as neither the Left nor the Right can credibly threaten to subvert democracy by other means. The CMI, then, in the language of Brinks, Levitsky, and Murillo (2019), is functioning but weak; it is "blessing" an equilibrium that is still essentially based on the outside option of force. Partly recognizing this, scholars have duly implied that as the Right's outside options for democratic subversion decline, the most authoritarian of the CMIs will be reformed.²

But the teleology of CMIs and their effects on democratic consolidation can also be reversed. If universalist CMIs become captured, democratic deconsolidation, not stability, follows. In a mirror image of the chain of events and choices described above, imagine a status quo in which there are two parties competing for power and CMIs serve to limit and constrain more or less equally the power of whichever party is in the majority. Thus, democracy begins as self-enforcing under this constitutional regime in the sense usually meant by positive political theory.

² In Alberts, Warshaw, and Weingast's (2012) optimistic analytic narrative of post-authoritarian Chile, for example, they argue that CMIs helped to moderate both the Left and Right and were therefore essential for convincing Pinochet to leave power and stabilizing democracy. Over time, however, as actors across the political spectrum developed trust in one and another and the outside option of a military coup receded, reform became possible and democratic consolidation was eventually achieved.

Now imagine a shock to the system such that at least some important CMI no longer affects both parties equally. Adopting the terminology used above, the CMI instead becomes a partisan enclave rather than a universal limit on majority rule. Several consequences follow. First and most importantly, the inability of the suddenly disadvantaged party to retaliate within the bounds of the constitution enables the advantaged party to begin to leverage the CMI to entrench itself further in power (Helmke, Kroeger, and Paine 2020). In this sense, simply by politicians acting in their own self-interest, the CMI potentially transforms into precisely the sort of majoritarian tool liberal theorists have argued it was developed to thwart.

Second and relatedly, because the CMI is embedded within a broader constitutional context, its capture begins to spill over onto other institutions, which can serve to further tilt the playing field in the direction of the majoritarian party.

Third, because the newly advantaged party now has to work less hard to appeal to the electorate, accountability also begins to suffer. With their electoral fortunes boosted mechanically, party leaders have less incentive to campaign on, let alone implement, policies that the majority of citizens favor. Hence, in this context, populism may turn out be less of a danger than simply a decline into elite authoritarianism.

Fourth, disadvantaged party elites and their supporters will now also have less of a stake in maintaining the constitutional status quo. Whether this matters or not for democratic stability, of course, depends on the extent to which they enjoy any outside option of force or violence. Not all dissatisfied political actors become revolutionaries, many just end up as frustrated reformers. That said, to the extent that capturing CMIs also lowers the legitimacy of the constitutional order across board, it opens up further opportunities for ruling elites to selectively undermine checks and balances. Thus, the democratic unravelling via CMIs becomes self-enforcing.

Is this a plausible framework for understanding the dynamics of democratic backsliding in the contemporary United States? Perhaps. Let us return to the Senate. The U.S. Senate has always been severely malapportioned in favor of smaller states and rural voters. Census data back to the 1790s shows that about half of the U.S. population has only been represented by a fifth of the Senate.³ Demographic projections suggest that malapportionment is only getting worse: within the next two decades more than two thirds of citizens will be represented by less a third of the Senate.⁴

While malapportionment clearly undermines political equality (Dahl 2003), the additional problem for democratic stability outlined above only emerges if such bias allows one party to capture the institution. We are not yet there, but again the trend is concerning. Although majority control of the Senate has switched between Democrats and Republicans far more over the last four decades than during most of the early and mid-20th century (see Lee 2016: 25-26), since the 1980s the GOP bias in both houses of Congress has grown considerably. According to partisan bias measures developed by The Cook Political Report, 2016 saw the widest gap between the

³ Philip Bum. "By 2040, two-thirds of Americans will be represented by 30 percent of the Senate." The Washington Post. November 28, 2017. <https://www.washingtonpost.com/news/politics/wp/2017/11/28/by-2040-two-thirds-of-americans-will-be-represented-by-30-percent-of-the-senate/>

⁴ Ibid.

national presidential result and the median Senate seat in American history. With majority control of the Senate in play in 2020 in states like Colorado, Maine, North Carolina, and Arizona, it is obviously premature to suggest that the U.S. Senate has already been captured. But given geographic and partisan sorting trends, whereby the Left continues to build support in urban populous states and the Right grows increasingly dominant in the de-populating zones of America, the senatorial playing field is increasingly tilted against the Left.

We have already witnessed how this bias has emboldened Republican Senators to abandon forbearance (Levitsky and Ziblatt 2018; Fishkin and Pozen 2018). Efforts at self-entrenchment via the Senate have been most obvious with respect to the judiciary. In addition to refusing to grant a hearing to confirm Supreme Court nominee, Merrick Garland, the 114th senate refused to confirm scores of lower court judges.⁵ Under Trump, the Republicans have thus been able to substantially remake the ideological complexion of the federal judiciary. A maneuver that, in turn, has a host of downstream consequences for a range of anti-democratic tactics, such as gerrymandering and voter suppression, which help to solidify further the tilt to the Right.

Republicans' power to capitalize on this bias has been exercised deliberately and strategically, but it is just as important to note that it also simply filters through the system mechanically. No deliberate "hardball" tactics were needed to ensure that Republican Presidents (George W Bush and Donald Trump) were able to win the electoral college, although neither won the popular vote. Meanwhile, the Republican's post-2008 big-tent strategy has been abandoned. Insulated by CMI, the Right has been free to espouse a series of policies (e.g. rolling back the Affordable Care Act, anti-gay marriage, and banning abortion) that are not supported by the majority of the American people.

What about the effects of the threat of CMI capture on the Left? Thus far, we see little evidence that there is any desire to abandon the U.S Constitution outright, but there are certainly signs of an increasing demand to reform it. Rising star in the Democratic Party and current presidential hopeful, Mayor Pete Buttigieg, made major institutional reform a top priority of his early campaign, including calls to abandon the electoral college, and reform the judiciary. In a country where the constitution is both barely understood and broadly revered, this alone is remarkable.⁶

Where, then, does this leave us with respect to existing theories about democracy and strong institutions?

We know now that history, despite Fukiyama's well-known proclamation, did not end in the 1990s. At the time, though, scholars of advanced democracies certainly had some good reasons to believe that it might have. Political science has taught us that democracies don't die above a certain GDP; and, above a certain age, neither do constitutions. Strong institutions meant strong

⁵ Russell Wheeler. "Senate obstructionism handed a raft of judicial vacancies to Trump – what has he done with them?" Brookings. June 4, 2018. <https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump/>

⁶ Bright Line Watch results, however, suggest that the electorate hasn't quite caught up with the Left's growing discontent. Polling shows that support for changing the size of the Supreme Court actually fare more poorly among left-leaning respondents than right-leaning respondents (Bright Line Watch. "Democratic transgressions and constitutional hardball: Bright Line Watch October 2019 surveys." <http://brightlinewatch.org/democratic-transgressions-and-constitutional-hardball-bright-line-watch-october-2019-surveys/>).

democracies. This supposition, in turn, informed concerns about weak institutions in the developing world. But American politics in the new millennium belies the idea that any democracy is ever fully safe. Still, we are only beginning to grasp the multitude of ways in which a democracy may die. This essay takes a new step in that effort by highlighting how strong institutions can be co-opted and how democracy can unravel precisely by politicians exploiting the formal institutional rules of the game. Countermajoritarian coups, if they come, succeed not in spite of strong institutions, but because of them.

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