

When Strong Institutions Undermine Strong Democracies

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This brief essay describes a new type of regime change in which strong institutions undermine strong democracies. Although scholars and pundits have begun to recognize the variety of ways in which constitutions can be weaponized to hollow out democracy, the process has not been adequately conceptualized, nor well theorized.

The emerging literature on democratic backsliding has made substantial headway in describing the consequences of polarization, identifying problems of constitutional hardball, and pinpointing the role of norms in sustaining democracy. To date, however, formal institutions are cast largely in a supporting role. Under the presumption of institutional *weakness*, scholars conceptualize the constitutional rules of the game as incomplete contracts subject to competing interpretations and manipulation. Regardless of the precise words on paper, nefarious actors can always seize the opportunity to undermine democracy. Specific constitutional provisions matter only when they permit obviously authoritarian actions.¹

But this offers a far too limited understanding of the role that formal institutions play. In our view, constitutions may not only permit backsliding, they can incite it. *Strong* institutions can unravel seemingly strong democracies. When institutions are designed to solve one problem but persist even after circumstances change, new actors who benefit from specific provisions can weaponize the old rules. Democratic erosion occurs not in spite of institutional strength, but because of it.

The main points of our argument are as follows:

- 1) Self-enforcing democracies often entail managing tradeoffs that limit the power of the majority to ensure the allegiance of the minority. The literature has long justified counter-majoritarian institutions (hereafter CMIs) as a necessary solution to buying democratic stability at the price of democratic equality. But, contrary to such arguments, such institutions can also incentivize democratic erosion; under certain circumstances, CMIs thus undermine both equality *and* stability. In particular, whenever institutionally protected groups lack an outside option of force, CMIs risk becoming net negative for democracy.
- 2) CMIs vary on three major dimensions: a) whether they affect the majority's power to govern, or whether they effect the likelihood that the majority will win the election; b)

¹ For example, Article 48 of Weimar Constitution allowed the President to take emergency measures without consulting the *Reichstag*.

whether they are hard-wired into the constitution, or whether they are malleable by political actors; and c) whether they affect all parties who are out of power equally (universalist CMI), or whether they benefit some parties when they are in the minority more than other parties (partisan CMI). Regarding the last of these distinctions, scholars have (rather optimistically) argued that some partisan CMI will become universalist as democracies consolidate. We highlight the opposite trajectory whereby universalist CMI instead become captured by one party and democracy thus erodes.

- 3) We argue that whether CMI remain partisan or universalist depends crucially on how the social bases of support for political parties evolve. In the United States, which is the main empirical case on which we focus, small states and rural voters have always been advantaged by the U.S. Constitution. But such advantages have not always accrued to one party over another. This, however, has changed as voters have demographically sorted along partisan lines: geographical protections for certain minority group populations now provide a distinct partisan advantage for the Republican Party across major previously neutral CMI, such as the U.S. Senate and the Electoral College.
- 4) Once partisan capture has taken hold in one institutional arena, the system of checks and balances built in to the U.S. Constitution does little to abate it. Indeed, precisely because the different branches and levels of government are designed to influence one another through selection and sanctioning the effects of partisan capture ripple through the system both mechanically and exponentially. Constitutional safeguards once designed to prevent tyranny of the majority increasingly lend themselves to creating a tyranny of the minority.
- 5) But not all spillover effects are purely mechanical: the partisan tilting of CMI in one institutional arena creates powerful strategic incentives by the advantaged party either to abandon forbearance within a particular institution, or to use its leverage in that arena to capture other institutions. This is what scholars have broadly referred to as constitutional hardball, which is a new kind of equilibrium in which advantaged party leaders push constitutional prerogatives for partisan advantage to the hilt and abandon norms of restraint and mutual cooperation. The result is a process of democratic erosion via existing institutions, which is *inherently asymmetric* between the two parties. Simply put, if norms of forbearance naturally require both parties to cooperate; norms of hardball merely need one party to defect.

The remainder of the essay offers a first cut at exploring and elaborating these arguments.

Countermajoritarian Institutions: Existing Research and Concepts

In modern democracies, leaders are selected via competitive elections with mass franchises. Majority rule is the core tenet of democratic leadership selection. We focus on institutions in democracies that counter the majority will—countermajoritarian institutions (CMIs). We first discuss existing arguments about CMIs, and then we introduce important conceptual distinctions that link different types of CMIs to prospects for democratic survival.

Existing arguments. In the canonical formulation of Przeworski (1991), democratic survival requires buy-in from political winners and losers. Democracy becomes self-enforcing only when the cumulative value of compliance for all relevant groups or parties exceeds the cumulative value of subversion (Przeworski 1991, 29–30). Thus, today’s political winners must agree to put their seats up for future elections, which creates the possibility of becoming tomorrow’s losers; and refrain from tyrannical actions against today’s political losers. The institutions must also convince today’s electoral losers to stick with the democratic game in the expectation that they may yet become tomorrow’s winners.

According to many arguments, unfettered majority rule can undermine the commitment of either the winning or losing faction to democratic governance. On the one hand, absent checks, winning factions might not govern responsibly. For example, the majority can trample on the rights of out-of-power factions. Such dangers can justify dividing up powers among institutions. On the other hand, losers might not agree to lose peacefully. A faction that never has a chance to win majoritarian elections can attempt to violently overthrow the constitutional order. This danger can justify biasing the electoral system to assist factions that would otherwise be a permanent minority.

These arguments, in effect, posit that countermajoritarian institutions (CMIs) create a basement level of democracy. On the one hand, CMIs dilute the core principle of majority rule. On the other hand, CMIs ensure a mostly democratic constitutional order by moderating the actions of winners and by preventing losers from violently overthrowing the constitutional order. As long as the anti-democratic distortions are not too severe, the ends of CMIs can be seen as justifying the means of promoting self-enforcing democracy.

For the U.S. Federalists who sought to simultaneously expand and contain the powers of the nascent American government, constraining majority rule 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 by dividing power across the three branches of government. By creating a system of mutual checks and balances, the framers sought to place both individual and states’ rights beyond the whims of any given electoral majority. Critics have long cast various CMIs embedded into the Constitution as normatively unattractive, if not morally repugnant; with the three-fifths clause the most egregious (see, for example, Dahl 2003; Levinson 2006). However, proponents

contend that 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).

Beyond the United States, similar arguments about the trade-offs inherent in institutional design and the advantages of CMIs abound. Scholars have analyzed the stabilizing effects of CMIs in various contexts. For example, conservative parties naturally oppose mass democratic competition (Ziblatt 2017; Hacker and Pierson 2020). Their core constituency is economic elites who prefer low taxes. By contrast, poorer citizens who comprise a population majority prefer social programs that redistribute wealth. Consequently, elite-based parties have trouble winning elections under democratic competition (Meltzer and Richard 1981; Acemoglu and Robinson 2006). CMIs provide a cushion that help to alleviate this dilemma by providing conservative parties with an electoral boost, thus giving them a stake in the system. Other contexts in which CMIs can promote democratic buy-in include constitutions that bias toward the party of outgoing authoritarian elites (O'Donnell and Schmitter 1986; Albertus and Menaldo 2018; Riedl et al. 2020), consociational arrangements in ethnically divided societies (Lijphart 1977), and balancing northern and southern interests in the antebellum United States (Weingast 1997, 2016; Mittal and Weingast 2011; North, Summerhill, and Weingast 1999).

Concepts. To flesh out these arguments, we propose several conceptual distinctions. We refer to institutions that limit the current majority's power as *governance* CMIs. Examples include bicameral legislatures, judicial review, and supermajority procedures for amending a constitution. Governance CMIs can stabilize democracy by lowering the stakes of winning. It is less costly to temporarily be the minority party if certain provisions are restrictively difficult to change.² Other CMIs tilt the electoral playing field toward a particular entity, such as small territorial units or members of specific ethnic groups. We refer to these as *electoral* CMIs. Electoral CMIs can stabilize democracy by favoring particular factions who otherwise might expect to permanently be in the minority.

A second conceptual distinction involves the extent to which the bias created by the CMI is hardwired into a constitution. The U.S. Senate inherently and explicitly builds in the malapportionment bias towards small states. Thus, we refer to this as a hardwired provision. Yet many CMIs emerge from the *absence* of constitutional provisions to govern a specific democratic

² In their empirical survey of democracies from 1975 to 2015, Graham et al. (2017) find that constraining power-sharing institutions (which relate closely to our conceptualization of governance CMIs) are positively correlated with democratic survival. Other posited benefits of governance CMIs are that they help to stabilize policies over time. Even if the winning and losing factions alternate frequently in power, neither can immediately overturn all preceding policies. Such safeguards also help to prevent politicians from adopting policies that reflect the “impulse[s] of sudden and violent passions” (Federalist 62), that is, policies that their supporters will later regret.

procedure. Such omissions provide an opening for politicians to seize upon loopholes to create countermajoritarian rules. Practices like gerrymandering and the filibuster are examples of *malleable* CMIs. In Figure 1, we categorize various provisions in the United States along these two dimensions.

Figure 1. Typology of U.S. CMIs

	HARDWIRED	MALLEABLE
ELECTORAL CMIs	2 Senators per state # of electors per state No explicitly racial/gender voting restrictions	House districting How a state allocates electors Voter ID laws
GOVERNANCE CMIs	Bicameralism Bill initiation/ presidential vetoes Amendment threshold	Senate filibuster Scope of judicial review Interpretation of protections under 14 th amendment

The third, and for our purposes, most theoretically relevant distinction revolves around the beneficiaries of CMIs. CMIs apply universally when they equally protect different out-of-power groups (e.g., civil and political liberties), or set up independent institutions that limit government regardless of which party is in power (e.g., independent constitutional courts). By contrast, CMIs are partisan-tilted when they are either explicitly created to benefit one group over another, or when they are uniquely susceptible to capture by a particular party ³.

When CMIs are universal, they help make democracy self-enforcing insofar as all relevant parties remain sufficiently uncertain about their electoral futures. In this case, CMIs contribute to

³ For a discussion of this distinction, see (Alberts, Warshaw, and Weingast, 2012)

democratic stability for the reasons described above: limiting the losses of today's losers and encouraging moderation by today's winners.

By contrast, partisan-tilted CMI help to stabilize democracy only under a specific circumstance: one side is asymmetrically advantaged at subverting the constitutional order by violent means. As discussed, this condition has been met in various historical circumstances. Furthermore, as the Right's outside options for democratic subversion decline, some argue that the most authoritarian CMIs will be reformed and democracy will further consolidate. 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.

However, in the contemporary United States, none of the optimistic accounts about partisan CMIs are compelling. Violent rebellions and military coups—notwithstanding the January 6th attack on the U.S. Capitol—are not viable ways to gain power. And many of the core CMIs in the U.S. Constitution are effectively impossible to change, contrary to the Chilean path. Thus, to the extent that once-universalist CMIs become partisan enclaves, they end up threatening democratic stability, not shoring it up.

The Social Bases of Partisan Capture: Sorting and Spillover

Whenever CMIs transform from universalist to partisan, then the teleology of CMIs and their effects on democratic consolidation become reversed. In a mirror image of the logic developed by the democratic transitions literature, 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 holds a temporary majority. Now imagine a shock to the system such that an important CMI no longer affects both parties equally. The CMI thus transforms from a universal limit on majority rule or a partisan-neutral electoral distortion into a partisan enclave. This section focuses on how partisan sorting combines with the system of the checks and balances to trigger and amplify the problem of partisan CMI capture in the contemporary United States.

Sorting. Political parties did not exist when the U.S. Constitution was written. Instead, the many CMIs contained within the founding document originated for other reasons. Various governance CMIs were intended as universalist limits on federal power for whichever electoral majority would hold power. Other, electoral CMIs, sought buy-in from actors such as slaveowners and individuals from small states. These origins distinguish the U.S. Constitution from many others, where CMIs were explicitly designed to favor a particular party or corporate interest (e.g., the military). However, in the current millennium, intense sorting by different demographic groups into voting

blocs for the two major parties is creating a growing bias toward the Republican Party. Once universalist counter-majoritarian provisions are becoming increasingly partisan-tilted.

Consider again the electoral rules that determine the composition of the Senate, an electoral CMI. Census data back to the 1790s shows that about half of the U.S. population has been represented by only one-fifth of the Senate. 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 one-third of the Senate.⁴ Making some votes worth more than others, is problematic for normative reasons because it undermines political equality (Dahl 2003).

Yet malapportionment creates partisan distortions only if political inequality among voters causes one party to gain an advantage over the other. As of 2022, Democrats comprised a slim majority in the Senate, which clearly makes it premature to suggest that Republicans have “captured” permanent control of the U.S. Senate. Majority control of the Senate has switched between Democrats and Republicans far more over the past four decades than during most of the early and mid-twentieth century (Lee 2016, 25-26).

However, the evidence is unambiguous that the Senate is biased toward Republicans—and that bias is growing over time. A key feature of contemporary American politics is the extreme sorting of urban, racially diverse liberals into the Democratic Party and of rural, largely white conservatives into the Republican Party. This pattern emerged with the Democratic New Deal coalition in the 1930s (Schickler 2016), hardened with the erosion of the Solid South in the 1960s, and has accelerated in recent decades with deepening urban-rural polarization (Rodden 2019). According to partisan bias measures developed by The Cook Political Report, the widest gap between the national presidential result and the median Senate seat in American history occurred in 2016. 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 Left is increasingly disadvantaged in attempts to control the Senate. Democrats must win overwhelming margins nationally simply to be competitive in winning the median Senate seat.

Spillover. Worse yet, the constitutional system the founders devised works to *amplify* partisan capture, not tamp it down. In theory, the division of powers among different branches of the U.S. federal government should help to mitigate the advantages enjoyed by one party in a particular institution. A prominent justification in the *Federalist Papers* for dividing power across multiple institutions is that persistent majorities over time are needed to change policies. Conversely, a minority faction should *never* be able to unilaterally impose their will. The complex system of

⁴ Philip Bump. “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/>

structural safeguards includes bicameralism, the separation of powers, an independent judiciary, federalism, and the electoral college. These checks should act to correct distortions that emerge in any one branch (Bednar 2009; 2021). In practice, however, bias in one institution spills over to create or reinforce bias in others. CMI designed to prevent tyranny of the majority are instead serving to consolidate tyranny of the minority.

The spillover effects of the pro-Republican bias in the Senate underscore this basic logic. Here is how: because each state's allocation in the electoral college equals their total congressional representation, the malapportioned Senate creates bonus electoral votes for smaller states. This creates a pro-Republican bias that can tip the electoral college in close elections.⁵ Senate bias can also spill over to affect governance CMIs. Passing federal legislation requires the concurrence of the House and Senate. Republicans can leverage their advantage in the Senate to block popularly supported legislation, with the filibuster amplifying this veto power. The Senate is also responsible for confirming presidential appointments to the federal courts. Thus, the pro-Republican bias in the Senate gives them undue power over the composition of the courts.

[add figure??]

Formal Institutions and Informal Norms: The Erosion of Mutual Forbearance

To this point, we have focused on advantages from hardwired CMIs, which, because of partisan sorting, increasingly accrue mechanically and asymmetrically to the GOP. Per our previous conceptualization, however, several CMIs in the U.S. Constitution are inherently malleable. That is, they are left as open possibilities or opportunities to be pursued by party leaders, rather than hard and fast rules of the game. In recognition of this flexibility, scholars have thus pointed to the role of so-called master norms of democracy, such as mutual toleration and forbearance, in determining the extent to which politicians opt to forego such opportunities or not (Levitsky and Ziblatt, 2018). Seen from a strategic perspective, politicians who thus decide to exploit such opportunities by playing constitutional "hardball" raise basic questions about the underlying logic of forbearance, as well as the forces that break it down. We explain how partisan CMIs create incentives for the favored party to initiate a spiral of constitutional hardball actions.

Overall, politicians confront countervailing incentives to capitalize on malleable CMIs. Although politicians want to tilt the rules to favor themselves, they do not necessarily want to trigger a democratic death spiral. Indeed, U.S. history shows that malleable CMIs are not activated all times and places, nor uniformly across parties. For example, between the 1970s and 2000s, Congressional districting maps were largely partisan neutral (Ansolabehere and Snyder 2008; Stephanopoulos and McGhee 2015); and the overwhelming trend within both parties was toward

⁵ This bias was pivotal in 2000, although not in 2016. These are the only empirical instances of electoral inversions in the electoral college since the nineteenth century.

the piecemeal expansion of voting rights, including permitting voter registration at DMVs, the spread of mail-in voting, and relaxations on voting restrictions for ex-felons (Keyssar 2000).

However, amid redistricting following the 2010 census, Republican-controlled state legislatures aggressively began to gerrymander districts to create a stark pro-GOP advantage in the House. Republican-controlled legislatures also increasingly passed photo voter ID laws and often sought to impede mail-in balloting during the 2020 election amid a pandemic (Grumbach 2021; Helmke, Kroeger and Paine 2022). This sort of constitutional hardball has thus not only become more common in twenty-first century American politics, it has also become more asymmetric. Why?

One answer, provided by Helmke, Kroeger and Paine (2022), is that forbearance depends crucially on both parties enjoying relatively symmetric constitutional opportunities for action and retaliation. The last line defense against anti-democratic transgressions via malleable CMI is the anticipation that the other party will punish bad behavior—either playing destructive tit-for-tat, or introducing new laws to circumscribe anti-democratic actions. However, if the legal opportunities to tilt (or correct) the playing field begin to advantage one party more than another, then this sort of deterrence breaks down. One party is emboldened to push the rules, while the other party is circumscribed in their legal ability to punish them. Thus, to the extent that one party stands to gain a sufficiently larger advantage in terms of pushing constitutional scope to privilege its voters, hardball not only emerges, but when it emerges it is inherently asymmetric.

Take the case of hardball over gerrymandering. The U.S. Constitution specifies the number of House representatives per state, but it does not specify how to allocate those seats within each state. Supreme Court rulings from the 1960s established that all districts must be equal-sized, but politicians nonetheless retain significant leeway to draw lines in an unfair manner. Here, too, a latent constitutional advantage has been triggered by the demographics of partisan sorting, which has translated into a sizable pro-Republican bias in elections for the U.S. House since the 2010s. Simply put, because Democrats' main constituents are increasingly concentrated in urban areas, they are easier to pack inefficiently into congressional districts than are Republican voters, who tend to be rural (Rodden 2019). In a typical state with numerous districts, Republican map-drawers can create highly skewed maps given the chance, whereas Democratic map-drawers face greater impediments.⁶ Consequently, from a strategic perspective, Democrats face severe impediments to

⁶ It is straightforward to pack urban residents into a small number of overwhelmingly Democratic districts, hence leaving more Republican voters to spread across the state's remaining districts. By contrast, it is difficult to spread urban voters across multiple districts to facilitate a strongly pro-Democratic advantage. Democrats' disadvantage at the state level is exacerbated by Republican advantages in controlling statehouses in competitive states, which arise in part because of partisan gerrymandering of state congressional districts.

playing tit-for-tat against Republican gerrymandering, even when Democrats make a concerted effort to do so.⁷

The disadvantage bestowed by political geography at the state level is further amplified by the capture of hardwired institutions at the federal level. Rather than play tit-for-tat with their own anti-democratic gerrymandering schemes, Democrats could instead use what Pozen (2018) calls “anti-hardball” tactics and simply try to create a level national playing field. Such efforts, however, again show how the systems of checks and balances amplifies rather than ameliorates the problem of partisan capture. For example, in 2019 and again in 2021, Democratic-controlled Houses passed a version of a bill (HR1) that would mandate independent districting commissions for every state. Yet, despite broad public support for ending gerrymandering, the bill failed to advance in the GOP-tilted Senate.

And, of course, even had Democrats managed to pass a version of HR1, they would have confronted the prospect of judicial review by a Supreme Court, which is now overseen by a Republican supermajority that has itself been facilitated by precisely the array inter-connected CMI that we have already highlighted. These include the electoral college that in 2016 selected the Republican candidate for president against the majority will, the malapportioned Senate that facilitated a Republican majority from 2015 to 2020 despite representing states constituting less than half the country’s population, and Senate Republicans’ unilateral violation of the well-established norm to put qualified presidential Court nominees up for a vote. Thus, the mechanical spillover effects of captured hardwired CMI leeches into malleable CMI, further breaking down incentives for inter-party forbearance across a range of norms and institutions.

Indeed, the lesson that checks and balances can be hijacked to support minoritarian rule across multiple institutional arenas has only further incentivized the use of hardball to pack the courts. In the case of federal court nominations, the U.S. Constitution merely requires the President to seek the “Advice and Consent” of the Senate when making nominations to federal courts. However, the document does not specify the exact procedure by which the Senate evaluates presidential nominees (e.g., a specific voting threshold), nor does it explicitly *require* the Senate to provide their “Advice and Consent” upon request. In the past decade, Republicans and Democrats alike have seized upon ambiguous procedures. Democrats in 2013 unilaterally eliminated the Senate filibuster for federal court nominees below the Supreme Court level, and in 2017 Republicans eliminated the supermajority requirement for Supreme Court nominees. However, in 2016, the Republican-controlled Senate broke all precedent by refusing to hold a vote for a Democratic-appointed

⁷ In post-2020 districting, Democrats have made a more concerted attempt to gerrymander House districts in states they control. However, legal challenges combined with the natural packing of urban constituents has created difficulties for Democrats to achieve a fair map nationwide. See <https://www.theguardian.com/us-news/2022/apr/29/democrats-midterms-new-york-election-maps-court>.

Supreme Court nominee—and then in 2020 violated their new rule when an opening on the Court arose during a Republican administration.

Conclusion

This essay contends that countermajoritarian institutions (CMIs) contribute to democratic backsliding, but not for the reason most critics assumed. CMIs do cut against basic principles of political equality, but from the standpoint of regime instability they also challenge the foundations of democracy by eroding fundamental norms of forbearance. In the case of the United States, changing demographic patterns of partisan support have activated latent asymmetries across a range of both hardwired and malleable CMIs. Checks and balances designed to correct for such problems are instead serving to exacerbate such problems.

We encourage future research to consider at least two additional considerations. First, another perverse consequence of biases favoring a single party is that supporters of the other party may become disillusioned with the constitutional order. Although the U.S. Constitution is generally revered by Americans, there is growing evidence that Democratic voters are turning against institutions that are biased toward Republicans. For example, only 17% of self-proclaimed Liberals support the electoral college,⁸ and only 8% of Liberals supported the Supreme Court's controversial decision in 2022 to overturn protections for abortion rights previously enshrined in *Roe v. Wade*.⁹

Second, in this paper, we treat the degree of partisan sorting as an independent explanatory factor and examine how it interacts with the institutional structure. However, CMIs would also seem to affect strategic decisions that determine the degree of sorting. By privileging rural voters, U.S. CMIs create incentives for Republican officials to play up cultural divisions (e.g., “culture war” policies) because rural voters are more socially than economically conservative. Thus, there might also be an interaction between the institutional and behavioral pathologies in contemporary American politics.

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⁸ <https://www.pewresearch.org/fact-tank/2021/01/27/majority-of-americans-continue-to-favor-moving-away-from-electoral-college/>

⁹ <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/>

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