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Author

Weingast, Barry

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Barry R. Weingast

Note to the Participants in the law and economics seminar: This is a very preliminary draft and needs considerable work. I look forward to your comments.

Abstract

Most studies of constitutions are either normative in character or study the effects of particular provisions. This paper falls into a third and much smaller tradition which attempts to study what makes some constitutions more likely to survive. This paper develops a theory of self-enforcing constitutions and then applies it to the early United States. I argue that, but for the issue of slavery, constitutional democracy in the United States was self-enforcing by about 1800. Nonetheless, crises over slavery threatened the nation on numerous occasions. The Civil War decisively ended slavery as a source of political division, allowing self-enforcing democracy (for white males) to emerge following the Compromise of 1877.

Self-Enforcing Constitutions: With an Application to American Democratic Stability

Barry R. Weingast*

1. Introduction

Why have some countries sustained stable democratic constitutions for decades while others have failed? In September 1973, the Chilean military stormed the presidential palace, removing President Salvador Allende and installing a military Junta. Variations on this theme occurred in this era in many of the other major Latin American states, including Argentina and Brazil. Similarly, in post-colonial Africa, many of the newly independent states born of great hope to democracy, fell to authoritarians, including Ghana, Kenya, and Nigeria. In contrast, Great Britain and the United States have maintained stable democracies for over a century, as have most of western Europe and Japan since World War II.

To address this question, I develop a perspective that draws on recent work at the interstices between economics and political science. I show that the problem of constitutional stability is in large part one of incentives: do political officials have the appropriate incentives to honor the constitution?

* The author is Senior Fellow, Hoover Institution, and Ward C. Krebs Family Professor, Department of Political Science, Stanford University.

To help focus the question, I ask a more specific one: when do political officials have the incentives to honor the rights of citizens and the rules associated with democracy? Although the discussion will often focus on democracy, I will show that it applies to the more general questions of the constitution and the rule of law.

To see the importance of incentives for our question, notice that stable democracy requires two conditions: first, electoral losers must have incentives to step down; and second, those out of power must be willing to eschew force as a means of taking control of the government (Przeworski 1991). If either of these conditions fail, democracy is clearly unstable.

Drawing on the recent literature on self-enforcing democracy (Fearon 2000, Przeworski 1991, 2001, Weingast 1997, 2000) and self-enforcing constitutions (Gibbons and Rutten 1996, Hardin 1989, Milgrom, North and Weingast 1990, Ordeshook and Svetsova 1997), I provide three principles relevant for constitutional stability. The first shows that an important part of the answer to our fundamental question concerns whether citizens have the ability to act in concert against political leaders who violate democracy. This ability to coordinate provides a powerful deterrent: leaders are likely to adhere to the rules when they fear being forced from office when a transgression causes citizens withdrawal political support. But what determines when citizens have this ability? The answer is in part that constitutions create focal solutions to citizen coordination problems so that citizens can react in concert when the regime threatens a transgression (Hardin 1989, Ordeshook 1992, and Weingast 1997).

Political leaders who terminate democracy – for example, by failing to abide by an election or through a coup – do so in part because the country’s citizens fail to coordinate against such transgressions. Leaders who act against democracy do so because they expect the support of a sufficient group of citizens to keep them in power despite their transgressions against democracy. In

contrast, when citizens have the ability to coordinate against leaders who attempt to terminate democracy, these leaders cannot expect support and will be deterred.

The second principle concerns the “rationality of fear” model (de Figueiredo and Weingast 1997). The model holds that when the stakes are very high, people take actions to defend themselves against risk of loss. The larger the stakes, the lower the probability threshold of the risk triggering action. For very large stakes, the probability triggering action can be quite low. The relevance for democratic constitutions is that, when a group of citizens feels threatened by the regime, many are willing to support extra constitutional action, such as a coup, in order to protect themselves.

The third principle also concerns the stakes. As Przeworski (1991, ch2) observes, all successful constitutions reduce the stakes of politics. The importance of this principle is twofold. First, constitutions reduce the stakes through structural and procedural limits on political action. Second, lowering the stakes reduces the rationality of fear mechanism: when constitutions protect what citizens hold most dear, they are less likely to support extra constitutional action to protect themselves. The rationality of fear model explains why constitutions that lower the stakes are more likely to survive.

In most countries, the onset of democracy began with compromises called “pacts,” agreements among contending – and often previously warring – elites that end hostilities.¹ For example, in Great Britain critical pacts include the Revolution Settlement following the Glorious Revolution of 1689 and the various reform acts in the nineteenth century; in the United States, the Articles of Confederation, the Constitution, and the Compromises of 1820, 1833, 1850, and 1877; in Spain, the

¹ A large literature on pacts exists in political science. See, e.g., Higley and Gunther (1991), Diamond (1999), and O’Donnell and Schmitter (1986).

various pacts surrounding democratization in 1975-78; in France creation of the third, fourth, and fifth republics; and in the European Union, the various treaties creating new, pan-European institutions.

In addition to creating democratic institutions, pacts have two further effects. First, they typically create additional political institutions in the form of structural and procedural limits on the government. Second, they create focal solutions to citizen coordination problems, again through structure and process. Pacts are thus critical for aligning the incentives of political elites.

I apply the theory to the troubled course of democracy in early United States. The discussion shows how the Constitution came to be nearly self-enforcing by 1800, the exception being the one issue that held the power to destroy the nation, slavery. As is well known, the Constitution provided both structural and procedural restrictions on the federal government, such as the horizontal separation of powers, the vertical separation of powers in the form of federalism, a series of substantive citizen rights, and a national government of enumerated powers.

These provisions lowered the stakes in two ways. First, they restricted the types of potential decisions by the national government; second, they created focal solutions to help citizens police transgressions by the national government. Lowering the stakes, in turn, lowered the appeal to the rationality of fear mechanism, helping to make democracy stable to an important degree in America's first century.

Yet the issue of slavery persistently strained American democracy. The enormous magnitude of the value of slaves in the southern economy implied that the probability triggering the rationality of fear was quite low. For three generations, Americans weathered their sectional crises through a series of pacts. Pacts ended sectional crises and threats to the Union in 1820, 1833, and 1850. These crises show that American democracy was not self-enforcing during this era: at least one side was

willing to destroy the Union were the crisis not solved, so the principal condition for democratic stability failed. The Civil War dramatically underscores this conclusion.

The Civil War decisively removed the issue of slavery from the national agenda, and with it the threat of this issue posed to democratic stability. I argue that permanently self-enforcing democracy – for white males at any rate – emerged at the time of the final American nineteenth century pact, the Compromise of 1877.

This paper proceeds as follows. Section 2 develops a theory of democratic stability. Section 3 then applies the approach to the United States. My conclusions follow.

2. A Theory of Self-Enforcing Constitutions

To understand the survival of democratic constitutions, we begin with what students of democracy call *democratic consolidation*. According to Larry Diamond (1999,66):

For a democracy to be consolidated, elites, organizations, and the mass public must all believe that the political system they actually have in their country is worth obeying and defending.

More generally, Linz and Stepan (1996,5) argue that consolidation occurs when democracy is the “only game in town.” Citizens and politicians “become habituated to the fact that political conflict will be resolved according to the established norms and that violations of these norms are likely to be both ineffective and costly.”

Reflecting these notions, I provide a tripartite definition of democratic consolidation (Weingast 1997, 2000). First, no significant group of citizens or parties out of power are willing to

attempt to subvert power or secede.² Second, those in power follow the constitutional rules (e.g., they obey election results and eschew transgressing the rights of their opponents). Third, citizens are willing to defend democracy, even when they are the potential beneficiaries of violations. In times of crisis, for example, citizens must reject appeals to extra-constitutional means of resolving the crisis.

Defined in this manner, consolidation requires that democracy is “self-enforcing”: that is, it must be in the interest of all actors to adhere to the constitutional rules. All three parts of the definition are about incentives: First, actors out of power must have incentives to pursue their goals within the system. Second, political officials must have incentives to honor the rules, including election results. Third, citizens must be willing to defend democracy against transgressions by political leaders. If any of these incentive conditions fail, democracy is not consolidated and is likely to fail.

The relevance of this approach is demonstrated by considering what I call the "Przeworski moment" after Adam Przeworski's famous book, *Democracy and the Market* (Przeworski 1991, ch 2). In the Przeworski moment, a party in power has just lost an election but retains power until the date of legal transition: Why would it ever give up power? Many democracies fail at such moments. Przeworski provides the answer in the abstract: it must be in the interests of those in power to give it up. To make use of this claim, we must derive conditions under which Przeworski's answer holds.

Our approach begins with citizens, who are assumed to have preferences and values about their own fundamental rights and the appropriate limits on the state. These notions, in turn, define a transgression by the government – a violation of a fundamental right or limit on the state. Because citizen's social and economic situations vary significantly, however, they are unlikely to agree about the form of rights or bounds on the state. Farmers disagree with merchants; landlords with tenants;

² To study the incentive problems surrounding consolidation, I draw on recent work studying the conditions under which democracy is self-enforcing: Fearon (2000), Przeworski (1991,2001), and Weingast (1997,2000).

workers with capitalists; and urbanites with those from the country. The manifold divisions in society imply that there is no natural consensus about the nature of the citizens rights, the bounds on the state, and generally, the constitution.

These citizen differences imply an important role for the economy in democratic and constitutional stability: Differences in people's positions within the economies system of specialization and exchange imply different views about politics and the appropriate role of government.

Three principles of constitutional stability

In what follows, I provide three principles relevant for the question of constitutional stability. The first principle draws on the third part of the definition of consolidation, which holds that sustaining democracy requires that citizens be willing to defend democracy against transgressions by political leaders. Leaders attempt coups in part based on the expectation that a sufficient portion of the population will support them.³ Similarly, democratically elected leaders attempt to set aside constitutional rules when, despite doing so, they expect sufficient constituency support to retain power.

The third component of the definition provides the incentives for the other two parts of the definition. When citizens are willing to defend democracy, leaders cannot expect citizen support for extra-constitutional action; rather than risk failure, leaders are deterred from violating the rules by adverse citizen reaction.⁴

³ A host of authors note that coups take place in democracies only when coup leaders expect considerable support. See, e.g., Alexander (2000, ch 1) and O'Donnell and Schmitter (1986, **).

⁴ As Diamond (1999, 70) suggests, "Only when [citizen] commitment to police the behavior of the state is powerfully credible ... does a ruling party, president, or sovereign, develop a self-interest in adhering to the rules of the game, which makes those constitutional rules self-enforcing."

Thus the central question for democratic consolidation becomes, what are the conditions under which citizens act in concert to defend the rules? Citizen coordination is problematic since citizen disagreement implies that they have no obvious way to coordinate. As noted, differences in citizens economic and social situations imply that they disagree about the nature of their rights and the appropriate form of the state. This implies that they disagree about what constitutes a governmental transgression. These disagreements also imply that citizens have no natural means by which to coordinate their reactions to government transgressions. Solving this coordination problem in a decentralized manner is virtually impossible for a diverse group of citizens.

The second principle of constitutional stability concerns what de Figueiredo and I (1997) call the “rationality of fear.” The rationality of fear model is based on the premise that, when citizens or groups are threatened, they take steps to defend themselves. The rationality of fear has two important implications. First, suppose that citizens believe that a threat has a certain probability, p , of being realized. The model shows that, given citizens preferences and the magnitude of the threat, there exists a critical probability threshold, p^* , such that if the probability of the threat is below this threshold, citizens will not act to protect themselves against the threat. If, however, the probability is at or above the threshold, they will act to defend themselves. Second, the model yields an important comparative statics result: the larger the relative magnitude of the threat, the lower the threshold probability triggering defensive action. For very large threats – for example, those concerning people’s lives and livelihoods – the probability triggering defensive reaction can be quite low, such as one in ten.

The importance of the rationality of fear is that, for threats with very large consequences, citizens will support defensive action even when threats are not very likely. The reason is that citizens are not historians – they are not trying to determine whether the threat is more likely or not; they are trying to maximize their expected value. For very large threats, even a small probability yields large

expected consequences. In the face of very large threats, citizens rationally act to defend themselves even when the probability is small.

The rationality of fear also implies discontinuous political change. In the context of democracy, citizens will support extra-constitutional action, such as a coup, when they find government policies sufficiently threatening. The rationality of fear holds that when citizens' perception of a threat is just below the threshold probability, p^* , they continue to honor the rules. But if an event occurs that increases the probability of the threat so that the probability rises above the threshold, the threatened citizens are suddenly willing to defect from the regime and support a coup to protect themselves.

This second principle has dozens of applications. For example, in Chile during the early 1970s, many on the political right felt their economic rights threatened by President Salvador Allende's government, leading them to support the military coup (Valenzuela 1978). Similarly, during the Second Republic in Spain (1931-39), many agrarian landholders, in the Church, and industrialists felt threatened by the democratically elected regime, leading them to support General Francisco Franco in the Civil War against the regime (Agüero 1995, Alexander 2000). In the early nineteenth century, large numbers of Southerners in the United States felt their property in slaves threatened by the newly elected Republicans in 1860, leading to secession and Civil War (Weingast 1998). In each case, a sufficiently large group of citizens felt threatened by a legitimately elected regime and supported extra constitutional action (such as a civil war or coup) to defend themselves.

The third principle follows an observation of Przeworski (1991, ch2), namely, that all successful constitutions limit the stakes of politics. This principle follows from the rationality of fear model. When a constitution credibly limits the stakes of politics in ways valued by most citizens, political officials are far less likely to take actions that threaten citizens in ways that invoke the rationality of fear mechanism. Constitutions that limit the stakes of power imply that citizens are far

less likely to resort to extra-constitutional means to defend themselves. Democracies that limit the stakes of political competition are therefore more likely to survive.

Solving the coordination dilemma and creating credible limits on the state

The three principles of constitutional stability are characteristics of a self-enforcing constitutional equilibrium. The widespread failure of new constitutions demonstrates that self-enforcing constitutions are not self-implementing.

In this subsection, I explain how they are achieved. There are two parts: Citizens must have a means of coordinating their reactions against governmental transgressions; and constitutions must lower the stakes of politics. When these hold, they reduce the likelihood that the rationality of fear mechanism will be invoked, destroying constitutional democracy.

Consider the third principle: appropriately designed constitutional institutions help lower the stakes of politics by creating self-enforcing limits on politics. But how do they do so? In two ways.

The first way constitutions place limits on government concerns structure and process (McNollgast 1989). Procedural limits specify how particular governmental activities take place. For example, legislation requires a majority in both legislative chambers and signed by the president (or, if not signed by the president, then with a two-thirds vote in each chamber to override the veto). Structural limits concern specific powers and prohibitions. The United States government had no authority over a range of policies, such as religion. Moreover, its authority was subject to a series of substantive limits, such as the 5th amendment's requirement that taking property requires just compensation. Similarly, constitutions that credibly guarantee private property rights limits the ability of governments to confiscate citizen wealth and thus reduce the likelihood of invoking the rationality of fear.

Democratic stability in the United States in the early nineteenth century illustrates this conclusion. Southerners were constantly anxious about the security of their slave property. A necessary condition for them to remain in the Union was that Northerners provide a credible commitment to honor Southern rights in slaves (see Weingast 1998). In the nineteenth century, Southerners required an additional limit not specified in the Constitution. Both North and South agreed to the principle of sectional balance, which granted both sections equal representation in the United States Senate, affording each a veto over national policymaking. Southerners could thus protect themselves by vetoing Northern attempts to use the national government against slavery. In combination with the Constitution, sectional balance made democracy in the United States self-enforcing, at least until the Kansas-Nebraska Act of 1854, which initiated the crisis leading to the Civil War.

The second way that constitutions create credible limits on the national government is by helping citizens solve their coordination problems (Hardin 1989). Recall that disagreements among citizens plague their coordinated reaction against political officials, allowing the latter sometimes to transgress the rights of some citizens.

The critical ingredient in solving coordination problems is the creation of a focal point (Schelling, 1960). Focal points help solve coordination problems by creating common expectations among citizens about what others will do in a given situation. In the face of multiple ways to coordinate, the existence of a focal point changes citizen incentives. While many and perhaps most would prefer to coordinate in any number of other ways, the fact that they value coordination means that, when others coordinate around a given focal point, they are better off doing so as well.

In the context of constitutions, focal points define the appropriate bounds on governments and rights of citizens. These in turn, define transgressions so that citizens can react in concert. When

citizens agree on what constitutes governmental transgressions, they can coordinate their reactions against them. Thus, citizens may disagree about what rights the constitution ought to include. But once the constitution specifies a set of rights but become self-enforcing under one condition: these focal points not only create a compromise among these differing views about rights, but, when citizens believe themselves better off with these rights than without them, the focal points also provide citizens with the incentives to defend the rights. Thus, the set of rights specified in the constitution cannot be arbitrary, but must be, as a set valued by citizens.

Constitutional creation of these focal solutions can be seen in the context of *pacts*, agreements among opposing sides that modify or specify the rules of the political decisionmaking (Higley and Gunther 1991 and O'Donnell and Schmitter 1986). To succeed, pacts must be self-enforcing; that is, they must provide the parties to the pact with incentives to abide by the pact's provisions.

I provide four conditions for self-enforcing pacts (Weingast 1997,2000). First, the pact must create (or be imbedded in a context that has already created) structure and process – citizens rights and a set of rules governing public decisionmaking – defining a series of limits on the state. Second, the parties agreeing to the pact must believe that they are better off under the pact than without it. If this condition fails for one of the parties, that party will be better off without the pact, so the pact will fail. In particular, they must believe that the structural and procedural limits on average lead the government to make them better off. Third, each party agrees to change its behavior in exchange for the others simultaneously doing so. Fourth, the parties to the pact must be willing to defend it against transgressions by political leaders. In particular, they must be willing to defend the parts of the pact benefitting themselves, but also, the parts benefitting the others against transgressions by political leaders. This fourth condition occurs when each party anticipates that its rights will be defended by the others: that each party is better off under the agreement than not; and that if ever one party fails to

protect the rights of others, the others will fail to come to its rescue. Put another way, the pact becomes self-enforcing when all parties are better off under the pact and when all realize that unilateral defection implies that the others will also defect, destroying the pact.

Pacts thus accomplish several goals at once. First, they are agreements to adhere to new structure and process, often including democracy. Second, they alter the parties incentives, again in part through structure and process. Third, they help solve the critical citizen coordination problem that plague non-democratic states. By creating focal procedural and substantive limits, pacts help citizens act in concert to violations of the rules.

Summary

Because there is no external authority to police constitutional rules, these rules must be self-enforcing. One of the principle mechanisms helping police governmental adherence to the rules is the threat of a concerted reaction by citizens against government that violate these rules. Yet massive impediments make this coordination difficulty. There is no natural way for citizens to coordinate against adverse government decisions. Hence most societies cannot sustain democracy and constitutions: those in power can violate democratic or constitutional rules by retaining the support of some citizens.

To survive, democratic constitutions require a set of structure and process that creates incentives for political officials to abide by the rules. This structure and process must reduce the stakes of politics, helping to avoid the rationality of fear mechanism. As we have seen, this is accomplished through constitutions and pacts that limit the stakes of power and that create solutions to the citizens coordination problem, allowing them to react in concert against potential constitutional and democratic violations.

3. Self-Enforcing and Self-Destructing Democracy in the Antebellum United States

Democracy seems so stable in the modern United States that Americans rarely enquire about the sources of this stability. Moreover, there is a tendency to read this stability back through America's history beginning with the United States Constitution of 1789. Yet, for the America's first century, democracy remained problematic. Crises threatened disunion in 1818-19, 1833, 1846-50; and the crisis beginning in 1854 ultimately led eleven states to secede and fight a devastating Civil War. The deadlocked presidential election of 1876 initiated the last sectional crisis threatening the American system. In this section, I apply the above theory to issues of constitutional and democratic stability in America's first century.

The Revolution

The English colonial heritage and the American Revolution provide the background for American constitutionalism (see, e.g., Bailyn 1967, Greene 1986, Reid 1995, and Wood. 1969). To set the stage for our discussion of the self-enforcing Constitution, I draw on Rakove, Rutten and Weingast (2002) to provide some background in the Revolution.

From the English Glorious Revolution in 1689 through the early 1760s, both sides of the Atlantic gained from the empire: in the presence of the French threat, the American colonies and the British needed each other for security. Both sides were willing to endure costs to maintain their relationship. The French, then, provided part of the political glue that held together the empire.

During the previous century, the empire had evolved a federal structure, though the term federal was not used explicitly: the British retained control over the system-wide public goods of security and trade; the Americans retained control over all domestic policies affecting themselves: property rights, contracts, social regulation, religious freedom, and slavery (Greene 1986, Rakove, Rutten and Weingast 2002).

The French threat ended with the close of the Seven Years' War (1756-63), which changed the opportunities and interests of both sides of the Atlantic. In addition, the British obtained a far more massive global empire, including the hostile French Canada. Controlling the empire demanded a new system of governance, though how to do this was not obvious (cites). Policy changes were nonetheless inevitable. Moreover, Great Britain ended the war with a massive debt. Many in Britain believed that, since the Americans were major beneficiaries of their efforts, that they should pay their share of the war's expenses. To this end, the British imposed new domestic taxes. As is well-known, Americans reacted negatively to these taxes, though the reaction was not uniform, and the widespread negative reaction was not at first inevitable. The age old question of this era remains, why did the Americans get so upset over such a trivial set of taxes? Part of the answer is given by the theory above.

The American radicals loudly reacted to the initial tax, arguing what we might term, "this is the end of the world as we know it." Their argument was clever, if not persuasive. They said it was dangerous to think of the new British policy as simply a trivial tax. Drawing on ideas from the seventeenth century British Whigs, the radicals argued that institutional practices that had evolved over generations became enshrined with constitutional status (Green, Reid 1995). Because the federal structure of the empire had evolved over a century, they argued, it was constitutional. Central to their argument was the notion that Americans held constitutional policy authority of domestic matters.

This view had significant implications for the new British policies. By virtue of imposing any tax at all, the Britain were setting a new precedent that once achieved would allow them to control all of domestic policy. For this reason, the radicals argued that the new tax represented the destruction of American liberty. In the parlance of the era, one meaning of the destruction of liberty was the destruction of their legislatures, the colonial assemblies.

The argument was quite creative: by tying their argument against the tax to constitutional argument about liberty, they sought the support those who did not directly pay the tax. The latter's freedom and liberty was also at stake. Because the colonial assemblies set all domestic policies – including property rights, religious freedom, and slavery – the new British precedent threatened everyone, not just those paying the tax. Of course, for most Americans to become concerned about British invasion of their liberty, they had to believe that the British would use these powers; that is, that the British had become, to a degree, malevolent.

The radicals' argument attempts to raise the rationality of fear: the stakes are high, so even low probabilities should trigger a reaction.

The argument nonetheless failed. Most Americans could not swallow the idea that the British had suddenly turned malevolent. They simply had insufficient evidence that the world had changed in so massive a way. For a century, the British had governed the empire and the colonies in a relatively benign way.

In terms of the rationality of fear model, the probability that the radicals were correct was simply too low to force Americans into action. The radicals argued that everyone would see.

British colonial policy see-sawed, sometimes imposing harsh new measures, sometimes relenting. For our purposes, two critical events concern the British attempts to punish Americans. In 1766, New York refused to follow British instructions to provide for the quartering of British troops.

The British reacted by suspending the New York Colonial Assembly, including all its laws. Similarly, in 1773, when the British sought to punish the Americans for dumping tea in the Boston Harbor as protest for the new duties, the British reaction was even stronger. They responded with what became known in America as the intolerable acts, annulling the Massachusetts colonial charter, closing the Boston harbor, disbanding the colonial assembly, and suspending all of Massachusetts law.⁵

In short order, the British had confirmed the radical's predictions: the British threat to the heart of American liberty, the colonial assemblies, had become a reality. These events did not prove that the British were malevolent, intent on squeezing all they could out of the Americans. Nevertheless, they did prove that Americans could no longer afford the luxury of assuming the British were benign.

In terms of the rationality of fear model, the evidence of the British direct assaults on American legislatures raised the probability that the radicals' thesis about the British was correct. These events raised the probability sufficiently so that the moderates became sufficiently alarmed to support armed reaction (see Rakove, Rutten, and Weingast 2002).

The Articles of Confederation

The political struggles over the United States's first constitution, the Articles of Confederation, set the stage for the creation of the new Constitution. As is well-known, the Federalists argued that the national government was so weak that a series of debilitating common pool problems were rampant. Three were critical. First, the inability of the national government to raise its own taxes meant it depended on the states for its funds, and many withheld them even for such important issues as national defense (Kaplanoff 1991, Middlekauff 1982). As *Federalists* nos. 2 - 5 attest, the United States'

⁵ Morgan (1977, ch **).

inability to defend itself was a problem (see Riker 1987). Second, the center lacked the ability to enforce a common market, and trade barriers and trade wars among the states had become a problem. Third, there was no common currency, and national government had no control over the states. Several states took advantage of this power, threatening monetary stability (cites).

To the Federalists, the remedy was obvious: strengthen the powers of the national government (Kaplanoff 1991, Morgan 1977, ch 9). The Antifederalists blocked these attempts (Middlekauff 1982, ch 23), not because they denied the problems but because they feared the solutions (Rakove 1996, ch 6). Granting the national government more power may, in principle, grant it the means to solve these problems. But it also granted the national government the ability to destroy citizens liberty in the same way that the British had. The Federalists advanced this type of proposal on three occasions, failing each time.

The theory above suggests that the Antifederalists' fears were rational. The Federalists proposals were not self-enforcing: they did not create any means of limiting potential abuses of the proposed powers. The Antifederalists

Formation of the a self-enforcing constitution

In 1787, the Federalists tried a different approach. Politically, the problem was to gain support of sufficient moderate Antifederalists so as to gain approval the constitutional changes. Having failed with the direct assault, the Federalists sought to address some of the Antifederalists' objections by embedding a more powerful national government in an institutional context that set limit on its powers.

A range of structural and procedural mechanisms limited the power of the new national government. I list five. First, the horizontal system of separation of powers sought to check "ambition with ambition" by creating multiple veto points (Madison, *Federalist* 46). Multiple veto points limited

the range of likely agreement among national officials, making action less likely. Second, the Constitution also created a strong system of vertical separation of powers in the form of federalism. By decentralizing a wide range of policy issues, the Constitution removed many of the most controversial issues dividing Americans from the national realm.⁶ Third, the national government was a government of enumerated powers, with its powers concentrated largely on issues that were truly national public goods, such as foreign affairs and international security, the common market, and a sound currency. Fourth, the Constitution combined with the Bill of Rights to place a series of substantive restrictions on the national government, such as the Constitution's contract and commerce clauses and the Bill of Rights's takings clause. These clauses limited the authority of the national government and provided a range of protections for citizens. Fifth, the Constitution created a rough parity between the sections, implying the each section could limit inimical national decisions (Robinson 1971, 177-205). Rough parity, which became sectional equality in the nineteenth century, limited the ability of one section to capture the government and use it in ways inimical to the other.

The theory developed above helps explain in part the success of these mechanisms. First, a critical aspect of this structure and process is that it created a series of focal points defining for citizens what was appropriate use of governmental power and what would constitute a transgression. Federalism, for example, implies that critical issues in people's daily lives, such as property rights, religious freedom, social regulation, and all local economic regulation remained the purview of the states. Attempts by the national government to invade such areas would signal an abuse of powers.

Recall the citizen coordination game: to protect themselves against government transgressions, citizens must have the ability to coordinate against the government. This, in turn, requires that citizens

⁶ Bednar, Eskridge, and Ferejohn (2001) and de Figueiredo and Weingast (2001) study self-enforcing aspects of early American federalism.

agree what is appropriate authority of the government so that abuses of authority will trigger a response.

The Federalists attempts to increase national power under the Articles of Confederation failed to address this problem. The Antifederalists were rationally concerned that the national government would abuse its powers and that insufficient numbers of citizens would protest.

Federalists dealt with these concerns by creating procedural and substantive restrictions on the proposed national government. The procedural restrictions sought to limit national action to cases where far more than a majority of Americans favored the policy goals – otherwise the legislation simply could not pass Congress and gain the support of the president. The substantive limits helped define the national government's abuses of authority, thus signaling the need for citizens to act in concert against their government. Further, abuse of the procedural limits – such as the president declaring himself president for life (as Jefferson sometimes feared about Adams in the late 1790s) would also signal the need for coordinated reaction.

Second, per the theory, the Constitution's structural and procedural limits lowered the stakes of national policymaking. The theory emphasizes that successful constitutions must lower the stakes of national politics. Low stakes reduced the rationality of fear mechanism where particular groups of citizens feel the need to resort to extra constitutional means. The Constitution's structural and procedural limits therefore make democracy more likely to survive.

A final factor in establishing the self-enforcing nature of the United States Constitution concerns a point made by Gordon Wood (1992). He argues that although the Antifederalists lost the constitutional battle, they did not disappear. As part of the opposition under Jefferson, they became alarmed at many Federalist policies, particularly under President Adams. Wood's argument suggests that the Constitution did not become self-enforcing until the former Antifederalists, now under

Jefferson's leadership, came to see that they could not only win elections but sustain their hold on power.

Subject to the one qualification to which we now turn, the Jeffersonians acceptance of the Constitution combined with the support of the Federalists to satisfy the consensus condition necessary for the Constitution to begin to work,

Weathering the Antebellum Crises

America's first century was characterized by manifold political, economic, and social divisions. One of the most important differences concerned slavery, which divided North and South. On the eve of the Civil War, the outstanding value of slaves totaled on the order of the entire United States GDP, a phenomenal figure generating considerable anxiety among Southerners over national policies that might affect slavery.⁷

From the beginning of the republic, Southerners were concerned about the security of their slaves (Finkelman 1996, Robinson 1971, Knupfer 1991, Rakove 1996). A necessary condition for their participation in the United States was that Northerners, through American political institutions, provide a credible commitment to protect rights in slaves.

Several aspects of the Constitution's structure and process helped protect slaves. The three-fifths clause increased Southern representation in the House of Representatives to 46.5 percent of all representatives, in contrast to the South's 38 percent in the Congress under the Articles or 41 percent were representation based solely on the free white population. Similarly, the Constitution's federal

⁷ The horror of slavery is that people were treated as property. Nonetheless, analyzing this system requires considering how southerners thought about this property. Standard sources about the economics of slavery include David et al (19**), Fogel (1989), Fogel and Engerman (1974a), Ransom (1989), and Wright (1978). Ransom and Sutch (1988) provide estimates of the total value of slaves by year, from 1804-1860.

structure decentralized concerns about property rights, leaving the issue of slavery up to the states. The advantage was that northern states could abolish slavery in a way that did not threaten Southerners who maintained this peculiar institution.⁸

Although widely celebrated, the Constitution itself was insufficient to protect slavery and hence to make early American democracy stable. An additional structural constraint was necessary, called *sectional balance*. Sectional balance held that both sections, North and South, would have the same number of states, affording each a veto over national policymaking through the United States Senate (Weingast 1998). Americans recognized sectional balance from the beginning (e.g., in the projection of an equal number of new free and slave states in the territories in the 1780s). Balance was quickly achieved in 1796 and maintained for the next five decades.⁹

Sectional balance provided a static security for Southerners and their property in slaves. As long as Southerners held half the states, they could veto legislation they found offensive. Yet sectional balance was not dynamically stable. In a growing country, maintaining sectional balance required that the two sections grow in relatively equal proportions.

The difficulty of engineering balanced growth set the stage for the major controversies of the antebellum era. Maintaining balance required that each side grow in parallel. This implied that, whenever one section stood on the threshold of gaining a decisive and potentially permanent advantage, the other section created a crisis.

⁸ Of course, as Fogel and Engerman (1974b) observe, it was far easier for northern states to abolish slavery in the late eighteenth century and early nineteenth century than it would have been for the Southern states in the mid-nineteenth century. The reason is that northerners could, in 1800, sell their slaves to the South, so northerners could emancipate slaves without bearing the costs of losing their capital. In contrast, were Southerners to contemplate emancipation in, say, 1850, they could not have sold their slaves to any one and would thus have had to absorb the capital losses involved with emancipation.

⁹ Carpenter (1930) provides the most systematic discussion of sectional balance, known to contemporaries as “sectional equilibrium.”

Indeed, most of the era's major crises were about the status (free or slave) of the territories. In 1819, a crisis emerged over the territory west of the Mississippi River, which had yet to be designated as free or slave. In that year, Southerners sought to break balance in their favor with the admission of a slave state, Missouri, without a free state to balance it. Northerners reacted not simply by blocking this proposal, but by doing so in a way that attacked slavery. In the House of Representatives where they had a majority, Northerners agreed to admit Missouri, but with two amendments forcing the gradual abolition of slavery in that state. Southerners blocked Missouri's admission under these conditions using their Senate veto, and a crisis ensued that threatened the nation. The crisis was resolved in the famous Missouri Compromise of 1820, a pact that admitted Maine to balance Missouri, divided the remaining territory between free and slave, and made sectional balance explicit. For the next three decades, states were admitted in pairs: in 1836-1837, the admission of Arkansas balanced the admission of Michigan; and in 1845-48, Florida and Texas balanced Iowa and Wisconsin, giving each section 15 states.

The Compromise of 1820 met the four characteristics noted above for a successful pact: first, it made more explicit the principle of sectional balance; second, both sections were better off remaining in a Union than destroying the Union; third, both sections moved simultaneously; and fourth, the pact provided for its own enforcement in part through creating incentives for each of the parties to the pact to help defend those provisions benefitting the other section. As I discuss at length elsewhere, balance rule dramatically changed the nature of northern incentives (Weingast 1998). The southern veto meant that antislavery initiatives could not succeed. Because any northern attempt to expand without a parallel southern expansion would produce a crisis, a pivotal portion of Northerners sought to cooperate with Southerners to expand slavery within the confines of the Union. Although not

without its troubled moments, this arrangement worked tolerably well until 1854 with the start of the third great territorial crisis. But this gets ahead of our story.

The second great territorial crisis arose in the early 1840s, when Southerners had run out of territory in which to expand. They sought the admission of Texas (then a separate republic of Americans who had immigrated to this area when it was part of Mexico and then broken free) and an invasion of Mexico (1846-48) to obtain more territory for slavery. Again, Northerners reacted by attacking slavery, passing legislation in the House of Representatives that prevented the admission of any new slave territories in the land obtained from Mexico. Again, Southerners used their veto in the Senate to prevent the legislation from becoming law. The resulting controversy from 1846-50 again threatened to break apart the Union; it was resolved in a pact known as the Compromise of 1850 (see Freehling 1994, Holt 1978, 2001, McPherson 1988, Potter 1976, and Theriault and Weingast 2001).

In the Compromise, Northerners gave up their insistence that the new territories be exclusively free and passed the first new fugitive slave law in three generations. In return, California was admitted as a free state without a slave state to balance it. Most important from our perspective is that the compromise created an imperative for its final engineers, the Democratic party, which made a credible promise to attempt to reinstate balance at the first available opportunity. The Democratic party's imperative reflected the incompleteness of the compromise, which failed to settle the underlying problem of sectional balance: doing so required that the Democratic party make good on their promise to admit future slave states.

This imperative was to destroy the Union. Although the Compromise of 1850 organized vast areas of new territory to allow slavery, slavery was not economically viable there. To maintain sectional balance, slavery would have to expand elsewhere. Because Northerners rejected Southern

proposals to expand into the Caribbean and Latin America,¹⁰ Southerners sought the right to move into territories previously designated as free by the historic Missouri Compromise. The Democrats proposed to do so with the organization of the Kansas territory in the Kansas-Nebraska Act of 1854 (Holt 1978, McPherson 1988, Potter 1976).

The controversy over this act proved disastrous. A small but electorally pivotal portion of Northerners, believing that the Democrats' repeal of the Missouri Compromise illegitimate, deserted their party.¹¹ The Democrats lost their hegemonic electoral position and inadvertently helped create a new Republican party dedicated to halting the expansion of slavery. Although there were many attempts to resolve this crisis, none succeeded. The Democrats attempts to restore balance not only failed, but dissolved the country follow the election of Republican Abraham Lincoln in 1860.

Our approach to the consolidation of democracy helps illuminate this history of early democracy in America. The lack of consensus about rights in slaves implied potential conflict. The magnitude of the stakes invoked the rationality of fear mechanism. Southerners were rationally paranoid in the sense that the very high stakes implied a very low probability threshold triggering defensive reaction.

The sectional conflict was contained for three generations through a series of institutions, notably, the Constitution's structure and process in combination with the principle of sectional balance. Many of the early crises of the century were settled through pacts, all of which had the elements noted above. Sectional balance, with its implied veto, provided adequate protection for

¹⁰ See May (1973, 10)'s discussion of Southern dreams of expansion into the Caribbean. He suggests the motivation for these dreams, "For the South to maintain sectional balance of power, new slave territory would have to be acquired to counterbalance free states regularly being admitted to the union. New slave states, and new slave-state congressman, would enable the South to protect the institution of slavery and 'Southern rights.'"

¹¹ Historians also emphasize the importance of "nativism" and anti-immigrant bias in the changing partisan fortunes of the 1850s (see Holt 1978, Silbey 1985).

Southerners and their peculiar institutions, so that, in the short run, democracy was self-enforcing. Yet over the long run, democracy was unstable. Sectional balance required that the two sections grow in concert, which proved difficult to engineer.

The inability to extend sectional balance in the 1850s combined with the increasing hostility of many Northerners to engage the rationality of fear. For southerners, the stakes in slavery were huge. Even small changes in rights governing slaves would have major economic and social impacts on the South. Per the rationality of fear, Southerners were rationally paranoid about Northerners.

In the end, a compromise over the crisis begun in 1854 proved illusory, resulting in the Civil War and hence the failure of American democracy.

Compromise of 1877 and the Establishment of Permanently Stable Constitution and Democracy

The resilience of American institutions is revealed by the remarkable fact that, a generation after a disastrous Civil War, the losers had reentered the political system on roughly the same terms on which they left. In the history of civil wars, this is rare.

The Compromise of 1877 was the last of the great American pacts. It had several effects, some intended, some not. Most immediately, the compromise solved the crisis over the deadlocked presidential election of 1876 by giving the Rutherford B. Hayes, the Republican, the presidency instead of Samuel J. Tilden, the Democrat. It also ended Reconstruction, as the North withdrew from its attempts to influence politics in the South, particularly the attempt to establish Republicans.¹²

¹² Standard histories of the Compromise of 1877 include: Gillette (1979), Hoogenboom (1988), Peskin (1973), Polakoff (1973), and Woodward's (1951) classic.

More subtly, the Compromise of 1877 had three effects. The first was to reestablish the American system of federalism. The national government's withdrawal from managing the South marked the re-emergence of the strong system of American federalism.

Second, an important consequence of the new arrangement was the North's acquiescence in the establishment of the Jim Crow South. This included the infamous 1896 Supreme Court case, *Plessy v. Ferguson*, upholding the constitutionality of the southern "separate but equal" doctrine.

Third, this pact also had the four characteristics of self-enforcing pacts noted by the theory. In particular, the arrangement became self-enforcing in part because of the structure of divided government. In 1874, the Democrats, then dominated by southerners, took the House of Representatives for the first time since prior to the Civil War. The Democrats again captured the House in 1876, suggesting that this was not an aberration, but a new feature of the post-bellum environment. From 1874-1896, the Democrats held the House in all but two Congresses.

Historians have under-emphasized the importance of divided government in the post-bellum era as a critical part re-establishing the stability of the Constitution, American federalism, and democracy. In the era of united government, from 1861-76, Republicans could pass partisan measures benefitting themselves and the North; Southerners and Democrats had little recourse. The era of divided government changed this. Democratic control of the House effectively granted Southerners a veto over national policymaking. The end of reconstruction was inevitable, regardless of whether it was part of the Compromise of 1877. More importantly, so too was end of the larger reach of the national government. Southerners simply would not support this, so it could not be sustained by legislation or appropriations. Short of fighting another Civil War, Northern acquiescence was inevitable: the North had no choice but to accept Jim Crow. The result was the re-emergence of a stable, self-enforcing federalism defined by the Constitution.

Finally, the Civil War decisively settled the issue of slavery. No longer did the issue of rights in slaves divide the nation. Moreover, because the North acquiesced in the creation of the Jim Crow South, white Southerners received what they perceived as necessary on the issue of race relations.

The main implication is that divided government and the new federalism removed from national politics the issues that had divided Americans prior to the Civil War and that created a series of crises threatening American democracy. The result was a stable, self-enforcing Constitution, federalism, and democracy.

The theory in this paper dates the creation of stable democracy in the United States – at least for white males – as of the 1877 pact. The crises that had threatened the nation were over. Of course, it would take another three decades before white women could vote and almost a century before southern blacks were enfranchised.

4. Conclusions

This paper advances an approach to the problem of self-enforcing democratic constitutions. To be sustained, constitutions must provide political officials with the incentives to abide by the constitutions provisions. A particular constitutional provision, such as democratic elections, holds only if political officials abide by it. The literature on democracy and constitutions has accorded these questions too little attention.

Following the literature on democratic stability, the approach accords a critical role for pacts. Pacts are agreements among contending elites that help bring on democracy and other constitutional rules. Missing from the literature is an answer to the question of why some pacts work and others fail.

The answer in this paper is that successful pacts must be self-enforcing. The theory provides conditions under pacts become self-enforcing, namely, when all parties are better off under the pact and when all realize that unilateral defection implies that the others will also defect, destroying the pact.

More generally, the paper advances three principles of self-enforcing constitutions. First, constitutions must solve the citizen coordination problem so that citizens hold the ability to act in concert against potential constitutional violations. Second, the rationality of fear mechanism represents a major motive for extra-constitutional action. Third, constitutions must lower the stakes of political action. In doing so, they limit the circumstances under which the rationality of fear operates, making the constitution more likely to survive.

The paper applies this perspective to the evolution of democracy in the early United States. The Constitution provided a series of structural and procedural constraints on the national government, lowering the stakes of national politics. Moreover, the revolutionary and constitutional periods helped shape a strong consensus on a large number of issues, helping to solve citizens coordination problems. Except for the issue of slavery, the constitution was self-enforcing as of the turn of the nineteenth century.

The issue of slavery plagued the nation for three generations, with a series of crises threatening the nation and the constitution. Hence the constitution was not fully self-enforcing during this period. The secession of the Confederate States formally dissolved American democracy.

Yet American democracy reemerged after the Civil War, with the principal divisive issue of the era, slavery, decisively removed from national politics. The result was a final national pact in the Compromise of 1877, ending Reconstruction, recreating American federalism, and allowing the

creation of the Jim Crow South. The result was consolidated, self-enforcing democracy for white males.

This perspective may usefully be applied outside the American case. Elsewhere, I apply it to several other contexts including the rise self-enforcing representative democracy in late seventeenth century England, the instability of Spanish democracy in the 1930s and its reemergence in the late 1970s, becoming self-enforcing by the early 1980s; and 1973 Chilean coup followed by the reemergence of democracy in the late 1980s and early 1990s (see Weingast 1997, 2000).

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