How to Save a Constitutional Democracy

TOM GINSBURG AND AZIZ Z. HUQ

The University of Chicago Press
Chicago and London

Uncorrected proofs for review only
Contents

Acknowledgments vii

Introduction 1
1 Liberal Constitutional Democracy and Its Alternatives 6
2 Two Pathways from Liberal Constitutional Democracy 35
3 When Democracies Collapse 49
4 When Democracies Decay 68
5 Will American Democracy Persist? 120
6 Making Democratic Constitutions that Endure 164
7 Saving Democracy, American Style 205
Conclusion: On Fighting Democratic Erosion 237

Notes 247
Index 287

Uncorrected proofs for review only
Introduction

How would you know your democracy is in peril? The question wracked many Americans—including us—both before and after the November 2016 presidential election. The campaign and assumption of presidential office by Donald J. Trump, a New York real-estate magnate new to political office, marked a significant rejection of both principal political parties and their elites, which he tarred as corrupt and out of touch. Among liberals, the question was not whether the Trump campaign was exceptional, but when he had breached the norms of democratic governance in a way that disqualified him as a democratic leader: Was it when he attacked a federal judge on the basis of his ethnicity? When he threatened to “lock up” his election opponent? When he declined to say whether he would recognize the result of a loss at the national polls? For some conservatives, the question was why liberals would even ask such questions at all. Even as they demurred to his more openly sexist, racist, and cruel remarks, many conservatives queried how exceptional Trump really was in a country where heated political debate, spilling over sometimes into ad hominem attacks and lies, has been a repeated feature of our history from the late 1790s onward.

The same debates replayed after the election. What, liberals were asking themselves, was the decisive turning point? What kind of democratically elected president falsely brags about his inauguration crowd size and then falsely alleges massive voter fraud to explain his (equally false) claim to have won the popular vote? What kind of president calls the news media the “enemy of the American people,” or calls his political opponents “enemies” because they fail to clap vigorously enough at his State of the Union speech? What kind of president fires the head of the Federal Bureau of Investigation, explains on national television that he did this to end an investigation into his
own campaign and family, and then repeatedly impugns the integrity of his
own Justice Department? What kind of president discerns a moral equiva-
lence between violent neo-Nazi protesters in paramilitary formation wielding
torches, assault rifles and clubs, and residents of a college town defending
the racial and ethnic diversity of their homes? In response, some conserva-
tives wondered when the liberal media and elites would allow the president
to catch a break? Weren't liberals the real threat, with their efforts to suppress
conservative speakers on campuses, their tolerance of social disorder, and
their reckless embrace of unchecked immigration?

This is a book provoked by the election of Donald Trump, but it is not
a book about Trump in any direct way. We share the grave concern held by
many about some of President Trump's words and deeds, but we also think it
is important, and even necessary, to step back from the current moment to
consider more structural forces at work casting shadows on the persistence of
liberal constitutional democracy. Perceptions of impending crisis are hardly
new. Using words that could be transposed forward some two hundred years
with only minor alterations, the British politician and novelist Benjamin
Disraeli once worried about the "disintegration of society into 'two nations;
between whom there is no intercourse and no sympathy..." An irrespon-
sible, self-aggrandizing aristocracy confronted by an exploited people led by
agitators with 'wild ambitions and sinister and selfish ends'. " A wider lens is
needed to place today's concerns in proper perspective.

As students of law and political institutions, we think it is especially im-
portant to think carefully about how laws, regulations, and especially con-
stitutional rules in place now can either facilitate democracy's derogation or,
instead, prevent it, under different socioeconomic and electoral conditions.
Because we are trained and work as scholars of constitutional law from both a
domestic (US) and comparative perspective, we think it is especially impor-
tant to ask questions about how our basic legal institutions—the ones mani-
fest in a nation's constitution and associated traditions—will respond to a
rising risk of democratic decline.

The question of how legal and constitutional design can facilitate (or de-
bilitate) democracy is hardly parochial in scope. Rather, many of the insti-
tutional and political dynamics apparent in the United States today can also
be traced in the recent history of other liberal democracies in Europe, South
America, and Asia. The interaction of political strategy and legal frameworks
may vary with local circumstances, but patterns can also be observed across
countries and continents. The forces at work in the United States are not so
much idiosyncratic local storms or tempests as they are durable weather sys-
tems that determine the possibilities for political action. They are the climatic
conditions of our political future. As such, they cry out for more general investigation.

By looking across the globe today, as well as at twentieth-century history, this book pursues that more general investigation. We ask whether there is indeed a threat to constitutional democracies broadly committed to liberal ideals today. Further, we consider whether law, and in particular the constitutional law that structures the basic institutions of government, can mitigate such risks—or whether it might even embolden the enemies of democratic survival. Our answers to these questions will be encouraging for some and disheartening for others. In brief, we argue that liberal democracies are indeed at some risk today—although the character of the risk is rather different from how it is commonly imagined. We also show that law can and should (although often does not) play a role in parrying that risk. And we imagine how constitutional design might respond better. That does not mean, however, either that law will play a facilitative role in democracy’s defense, or that law alone will be enough. In particular, when a political coalition bent on eroding democratic institutions and practices takes power, it is generally too late to tinker with institutional design. Then, it is only the determined mobilization of citizens, political party elites, and officials committed to the rule of law that can preserve those institutions and practices.

Our account begins by setting out some basic terms in chapter 1. Our central construct is something we call "liberal constitutional democracy." We use this term because it highlights the role of law in constructing and underpinning democratic competition. Our approach is fairly minimalist, but not entirely so. Some scholars have tried to reduce democracy to the mere fact of elections. While this approach is useful for some purposes, we think that the quality of elections depends on elements of the legal framework. Elections are not the be-all and end-all of democracy, and countries can still experience meaningful democratic decline even if they continue to hold them. In chapter 2, we distinguish two distinct pathways away from liberal constitutional democracy. These are, to put it simply, a fast road and a slow one. We call them democratic collapse and democratic erosion. Much of our political and constitutional imagination is focused on the speedy and complete collapse of democratic institutions. But recent history shows that the greater risk in our moment is of the slow route: the gradual degradation of democracy. While this path can sometimes lead to total democratic collapse, the more likely endpoint is a hybrid regime, where democratic institutions are compromised to some degree and political competition restricted. For us this is a disturbing enough prospect to motivate more tailored thinking about remedies and preventative steps.
Chapters 3 and 4, respectively, trace the mechanisms at work in the fast and slow paths, deploying examples from both the twentieth century and from our own contemporary moment. By looking at how democracy can collapse or erode, respectively, we start to assess the probabilities associated with different sorts of risks to constitutional liberal democracies.

We then turn to the heart of our analysis. Chapter 5 asks the key question for the United States: If forces arise that wish to take the United States down one or the other of these paths, could our Constitution save us? It is conventional wisdom that the checks and balances of the federal government, a robust civil society and media, as well as individual rights, such as those included within the First Amendment, will work as bulwarks against democratic backsliding. This book takes on this claim and finds it seriously wanting. To a greater extent than commonly realized, the Constitution’s text and the Supreme Court’s jurisprudence makes democratic erosion more, not less, likely.

Chapter 6 zooms out to ask how we—and the rest of the world—might do better. We ask, for the United States and for other countries, how laws and constitutional design play a more positive role in managing the risk of democratic decline. Drawing on political science and comparative law expertise, we explore the practical steps that can be taken to minimize its prospects. Our focus here is on law and constitutional design—by which we mean how the basic institutions and rights of a polity are specified in a constitution or similar norms. We caution that technocratic fixes are no panacea: to the contrary, in many instances, the only way to defend liberal democracy is to fight in elections against those who seek to erode it—and to win. In concluding, we confront the question of how we can “save” constitutional democracy, by which we mean minimizing the possibility that it decays beyond recognition within our lifetimes, leaving a set of governing arrangements for the next generation that is morally bankrupt. It is a question that can and should be answered both by immediate political tactics and also by institutional reform and legal change. Our topic here is this longer term reformist agenda.

By applying the same framework both to the United States and other countries, our approach necessarily rejects claims of American exceptionalism. Ever since the Puritan governor John Winthrop declared in 1630 that the new nation would be “a city upon a hill” that would serve as a light to the world, Americans have liked to think that they have a special position in the world. There is an implicit but powerful belief that America is immune from challenges and moral failings that beset other countries. Hence, the phrase “American exceptionalism” emerged in American Communist circles in the 1930s to explain the apparent immunity of the United States to proletarian
revolution. To those who endorse this exceptionalist perspective, American democracy, celebrated around the world at least since Alexis de Tocqueville, should be uniquely robust.

Of course, it is a truism that each country is unique in some way. But many challenges do not distinguish among nations. Pandemics, wars, and macroeconomic shocks often simultaneously affect multiple countries, sometimes even the entire globe. Since the invention of the electric telegram in 1846, political ideas, idioms, and tactics have spread almost instantaneously across borders. Starting with the revolutions of 1848 two years later, ours has been in some sense a single (if not singular) and enmeshed ideological universe. So in the study of democracy's rise and fall, it is a mistake to think that trends observed in the United States lack a parallel in other democracies. It is also a mistake to think that America is exceptional in the sense of standing aside from the current riptide of democratic backsliding.

Nevertheless, there is at least one way in which the United States is indeed exceptional. Our Constitution has been in continuous force since 1787. This is a remarkable achievement, with no parallel anywhere in the world. The roughly contemporaneous French and Polish constitutions died quickly. Although the adoption of our founding document in 1787 launched a global era of national constitution-making, and although it is venerated by many Americans as the key to our success as a nation, its very longevity poses a problem. Being old, and lacking an easy amendment mechanism, the US Constitution does not necessarily reflect the learning of subsequent years and decades. It instead calcifies the mistaken assumptions and prejudices of a long-dead generation. Although there is a natural inclination to hope that the US Constitution, which has underpinned two centuries of material growth and yielded global hegemony (for now), will insulate us from the global forces that are now buffeting democracies elsewhere, this may have things backward. It is the dearth of new learning in the Constitution's text that makes that threat all the more potent and all the more urgent to address.