

How to Save a Constitutional Democracy

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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

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own campaign and family, and then repeatedly impugns the integrity of his own Justice Department? What kind of president discerns a moral equivalence 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 conservatives 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 irresponsible, self-aggrandizing aristocracy confronted by an exploited people led by agitators with 'wild ambitions and sinister and selfish ends.'"¹ 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 important to think carefully about how laws, regulations, and especially constitutional 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 important to ask questions about how our basic legal institutions—the ones manifested 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 debilitate) democracy is hardly parochial in scope. Rather, many of the institutional 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 systems that determine the possibilities for political action. They are the climatic

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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.

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1 Chapters 3 and 4, respectively, trace the mechanisms at work in the fast
2 and slow paths, deploying examples from both the twentieth century and
3 from our own contemporary moment. By looking at how democracy can col-
4 lapse or erode, respectively, we start to assess the probabilities associated with
5 different sorts of risks to constitutional liberal democracies.

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

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

32 By applying the same framework both to the United States and other
33 countries, our approach necessarily rejects claims of American exceptional-
34 ism. Ever since the Puritan governor John Winthrop declared in 1630 that
35 the new nation would be “a city upon a hill” that would serve as a light to the
36 world, Americans have liked to think that they have a special position in the
37 world. There is an implicit but powerful belief that America is immune from
38 challenges and moral failings that beset other countries. Hence, the phrase
39 “American exceptionalism” emerged in American Communist circles in the
40 1930s to explain the apparent immunity of the United States to proletarian

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revolution.² 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.

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