1. Introduction

Is the United States sufficiently democratic? And does it provide sufficient protection for the thriving markets that have sustained American prosperity for generations? The answers are not obvious, and a problem arises because these two American values conflict.

The first value, democracy, is seen as a means to many desiderata, and many Americans today see democracy as one of the highest valued features of a state. Moreover, modern democratic theorists have come to identify democracy with elections, a means of citizen expression and the control of political officials. Constitutional features, such as the separation of powers and citizens economics rights – once seen as the centerpiece of liberal society – have been greatly downplayed in importance (Epstein 2014). When aid donors attempt to engineer stability in a war-torn developing country, establishing democracy qua elections is one of their principal goals.

Modern democratic theorists provide the rationale for democracy as elections. Many of these theorists see institutional constraints on the choices of elected officials as fetters on democracy. Dahl (2003), in his famous recent work, asked, "how democratic is the American
Constitution? Not very, he answered, because of a wide range of restrictions on the choices of elected officials. Dahl (2003, 15-20) lists a range of restrictions, including malapportionment in the Senate, the presidential elector system, judicial power (including the problem of “judicial legislation”), and various restrictions on the ability of Congress to legislate, such as the commerce clause. Historically, the Constitution also had numerous restrictions concerning slavery and suffrage. Seen from this normative perspective, the U.S. Constitution is highly undemocratic.

The second mainstream American value is the market economy and the values and freedoms necessary to sustain thriving markets – rule of law, strong property rights, enforcement of contracts, and the right to form organizations and to compete in almost any line of activity. These values and freedoms were once called economic liberty, though that label has been in retreat for some time. Economists now generally see these “property rights” as essential to an economy capable of producing long-term prosperity (Barzel 1997, North 1981).

How is the market, now widely agreed as the sole means of producing long-term prosperity, to be instituted and maintained? In particular, how are property rights enforced, justice assured, and economic agents to be protected from arbitrary exactions by the state? The evidence from most new democracies shows that elections alone are insufficient to provide these foundations of a market economy.

Thus, the two values conflict. Aspects of democracy and representation seem necessary to sustain markets and the rule of law over the long-run; the ability to “kick the rascals out” of office helps align if imperfectly the incentives of representatives with the interests of their constituents (Riker 1982). Moreover, no major country has sustained a market economy for
multiple generations without also being democratic. Nonetheless, sustaining markets requires constraints on the choices of elected officials. This perspective implies a tradeoff between the constraints necessary to sustain markets on the one hand and fewer fetters on democracy on the other.

The central task of this paper is to provide a framework to address the question of how best to make tradeoffs between these two values. This framework produces a new understanding of democracy and the rule of law, including the institutions necessary to sustain both thriving markets and democracy.

Democratic theorists who seek unfettered democracy take democratic stability for granted. Yet most democracies fail, and in short order. Only 25 percent of all countries have a government free of violent turnover for a generation (Cox, North, and Weingast 2015). Elkins, Ginsburg, and Melton (2009, table 6.1) show that on average a new democratic constitution lasts but 16 years. Despite the fact that today around 80 of the world’s 170 or so countries can be classified as democracies, the number of countries that have sustained democracy since 1950 is around two dozen. Sadly, most democracies that exist today are likely to succumb to a form of authoritarian government in the next generation.

These facts emphasize that democratic stability cannot be taken for granted. Stable democracy is rare, and those countries sustaining it for generations must meet certain conditions that elections alone cannot provide.

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2Many adduce China as a counterexample. The framework here predicts that China, as with South Korea and Taiwan, will either democratize in the future or face difficulties sustaining high growth rates. Although China has made exceptional strides in economic growth over the past 30 plus years, it has yet to achieve levels of GDP per capita of a middle income country let alone the levels at which Korea and Taiwan democratized.
Importantly, the issue of democracy stability raises a dynamic problem for democratic theorists; these theorists must confront a tradeoff that they have long ignored. Unfettered democracy is highly unstable and is not likely to last for generations; instead, it is likely an interlude that will end in authoritarian government. As I show, this form of democracy fails to provide the conditions of democratic stability.

The dynamic problem of stability over time has a normative implication for democratic theorists. Even someone who values unfettered democracy over all other political systems should nonetheless support constraints on democracy that make it more stable. Democracy cannot provide value to citizens when it fails.

The framework studied in this paper advances three conditions necessary for democratic stability. The first is the limit condition, the idea that all successful constitutions lower the stakes of politics. When people feel their lives or livelihoods are at stake, they are willing to support extra-constitutional actions to protect themselves, potentially supporting coups and civil wars. Lowering the stakes helps prevent this form of constitutional and democratic failure. Lower stakes means that Individuals and groups are less likely to feel threatened and hence to support extra-constitutional action. The second is the consensus condition. When citizens react in concert against potential transgressions of the constitution, they threaten the leader’s ability to remain in power. Leaders facing reactions in concert will refrain from violating the constitution or risk being deposed. Absent the ability to react in concert, however, leaders can transgress the rights of some citizens while retaining sufficient support to survive. Successful constitutions therefore

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3This discussion draws on my earlier work on stable constitutions: Alberts, Warshaw, and Weingast (2012), Mittal and Weingast (2013) and Weingast (1997).
create focal points around which citizens coordinate their responses to governmental action. The final condition of democratic stability is the *adaptation condition* (North 2005, 78; Mittal 2012). Successful constitutions must have the means of adapting the rules to changing circumstances. Sufficiently large shocks, for example, may reduce the value of cooperation; constitutional adjustments in these circumstances hold the possibility of realigning incentives to maintain cooperation.

An important feature of this paper’s framework is that it shows the value of appropriately tailored for countermajoritarian features of the constitution. A wide range of democratic theorists decry countermajoritarian provisions as undemocratic; and they are correct to observe that these features place fetters on democratic choice. In addition to Dahl (2003) already mentioned, a host of others fit here, including Ackerman (2010), Bickel (1962), Ely (1981) and Levinson (2008).

In contrast, I argue that appropriately designed countermajoritarian provisions serve two valuable roles. First, they often aid in the instantiation of democracy. When groups see themselves as potentially worse off under democracy, they are likely to resist democratization. The reality is that powerful – and sometimes inimical – groups often have the power to hold up democratization, such as slaveholders in the early American Republic, Whites in South Africa in the 1990s, the supporters of the authoritarian regime of Francisco Franco in Spain following the death of the dictator in 1975, the military dictatorship in Chile in the late 1980s and early 1990s, and the communist regime in Poland in 1989. In each of these cases, countermajoritarian provisions to protect powerful groups aided democratization and, eventually, the lightening of the relevant constraints. These provisions also become part of the limit condition once democracy has been initiated.
The second role of countermajoritarian institutions is, per the limit condition, to lower the stakes of politics as it plays out over time. A critical set of countermajoritarian provisions are those necessary to support the market, include the rule of law, protection of property rights, and enforcement of contracts and justice more generally.

I develop my argument as follows. The next section discusses the three conditions fostering democratic stability. Section 3 explains the role of countermajoritarian constitutional features designed at democracy’s initiation; while the following section applies those ideas to sustaining markets. Section 5 then applies the framework to analyzing the constraints imposed by the U.S. Constitution in 1789. My conclusions follow.

2. Conditions Fostering Democratic Stability

Before turning to the conditions of democratic stability, I first provide a more in-depth view of democracy stability. Cox, North, and Weingast (2015) study the frequency of violent regime turnover. They define regimes narrowly in the sense that a regime lasts in a given country as long as leadership turnover is peaceful; a regime ends when leadership changes as a result of violence, such as a coup or a civil war. The data cover the years 1840-2005, which encompass 697 regimes in 162 countries. Table 1 reveals the frequency of violence. In the poorest half of all countries, the median country experiences violence once every 7 years. Ten percent of these countries last only a year before another violent regime change occurs. And only 5 percent of these countries have 50 years of peaceful succession. The richest developing countries do modestly better than the poorest ones – they experience violent regime change once every 12.5 years. This means that 90 percent of countries cannot, on average, sustain democracy for a decade.
In contrast, the developed world experiences violent regime change only once every 60 years. Thus, the richest developing countries are more like the poor developing countries than they are likely the developed ones. Despite the fact that nearly half the countries today are democracies, most of these will lapse back into authoritarian regimes.

Table 1: Regime duration in years

<table>
<thead>
<tr>
<th>Percentile</th>
<th>All countries</th>
<th>Countries with below-median GDP per capita</th>
<th>Countries in the 75th-90th percentiles of GDP per capita</th>
<th>Countries in the top decile of GDP per capita</th>
</tr>
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<tbody>
<tr>
<td>10</td>
<td>1</td>
<td>1</td>
<td>2</td>
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<td>3</td>
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<td>7</td>
<td>12.5</td>
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<tr>
<td>75</td>
<td>24</td>
<td>17</td>
<td>45.5</td>
<td>88</td>
</tr>
<tr>
<td>90</td>
<td>50</td>
<td>34</td>
<td>71</td>
<td>131</td>
</tr>
</tbody>
</table>

Source: Cox, North, and Weingast (2015).

Because most democracies fail at both democracy and a market economy, we need to understand why a small number of countries are able to sustain both. I propose three conditions that foster democratic stability and distinguish the developed world from the developing one. These are the limit condition, the consensus condition, and the adaptation condition. I discuss these in turn.

(1) The limit condition. Although most people value democracy, we are too little attentive to its risks. Elected officials have the power to take property, impose taxes, regulate

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businesses, and jail citizens. Even when these powers are not abused, they can impose great costs on individuals and groups. Moreover, abuse of these powers is common in many democracies in the developing world, including discrimination against the opposition or against religious, ethnic, or linguistic minorities.

When people feel their lives or livelihoods are threatened, they will often support extra constitutional action to protect themselves. As an example, consider Chile in the early 1970s. Many in the democratically elected government of President Salvador Allende advocated major land reform. Although the government never proposed such a program, many landholders feared for their property and wealth. Many, therefore, supported the 1973 military in the coup led by Augusto Pinochet. The coup succeeded, and democracy failed. Similar events are common throughout the world, such as Spain 1936-39 and Kenya 2007-08.

Democracy involves high stakes, especially unfettered democracy. Because people are willing to protect themselves by non-democratic means, the higher the stakes, the less likely democracy will survive for long periods. Long-term democratic stability therefore requires that democracies limit the stakes of power. Although these limits necessarily become fetters on democracy, they serve a valuable democratic purpose in that they make democracy more likely to survive for extended periods. Put another way, this dynamic question about democratic stability implies a tradeoff between less fetters on democracy in the short-term but less long-term stability. As I discuss in the next section, all successful long-term democracies place significant

5 Of course, not just any limits will do; the relevant limits are likely to various across countries and, for any given country, across time. I return to this question in section 3.
constraints on democracy. Although these limits entail countermajoritarian constraints (Bickel 1962), they are necessary for democracy to survive.⁶

(2) The consensus condition. Scholars have long established that political leaders need support from the citizenry to survive in office (Haggard and Kaufman 1996). When they have too little support, they cannot survive. This observation has an important consequence for democracy. If citizens react in concert against potential violations of their rights, they withdraw support and threaten those in power. Given this reaction in concert, leaders will hesitate to violate citizen rights.

But how do citizens coordinate? This problem is especially difficult for two reasons. First, people’s positions and experiences differ sufficiently that they typically have major disagreements about the appropriate structure of rights and government process. Merchants differ from farmers, workers from capitalists, tenants from property-holders; and different ethnic beliefs may create further differences in beliefs. The many disagreements among different groups make it hard for citizens to coordinate absent some mechanism to help them do so. Second, the problem is even worse: leaders have incentives to divide and conquer – to favor some groups at the expense of others so that the favored groups acquiesce in the face of right violations of others, affording the leader sufficient support to survive. Moreover, leaders in the developing world have strong incentives to suppress the opposition’s ability to organize and mobilize against the government. This implies that, even when people agree on their rights and limits on

⁶ Cox and Weingast (2015) provide some empirical evidence for this perspective. They study the relationship between two different categories of constraints on government; namely, elections and constraints on executive choice. The evidence suggests that the latter are far more important for long-term economic growth and for democratic stability. Governments that constrain the executive are far more likely to grow and maintain democracy than those that rely solely on elections.
government, the government may use force to prevent them from gaining the means of expressing these beliefs.

In combination, these two problems generally mean that citizens lack the means to coordinate against governmental transgressions; the most likely outcome is therefore no citizen coordination. And, in the absence of coordination, leaders can transgress some citizens’ rights while maintaining sufficient support to survive.

The solution to the coordination problem is the construction of focal points, often proposed by a new leader in the moment of a crisis. Indeed, Elster (2000, ch 2), shows that most constitutions that survive for long periods were devised in moments of crisis. Such constitutions are pacts among contenting elites (Burton, Gunther, and Higley 1992, especially ch 1). To succeed, these pacts accomplish three objectives (Weingast 1997). First, they create the structure and process of the government. This typically includes specifying both a range of citizens rights and how laws are made. Second, all parties to the pact must see themselves better off under the pact than not. If this objective fails, at least one of the parties will fail to abide by the rules. Third, all parties must be willing to defend the pact against violations. This third objective follows from the second. When all parties to the pact believe they are better off, they have incentives to defend the pact because the alternative is worse.7

Pacts of this sort create focal points in both governmental structure and process that specify the rules by which the government must abide. Focal points guide citizens reactions and help them coordinate their reactions. They thus foster citizen coordination in the face of potential

7 Observe that this approach addresses a question for which the literature provides no answer: why do only some pacts succeed? The three conditions of self-enforcing pacts differentiate those that succeed from those that fail.
governmental transgressions. Examples of such pacts include the writing of the U.S. Constitution and its ratification in 1787-88; the English Glorious Revolution of 1688-89; the creation of the French Fifth Republic in 1958; the amnesty in ancient Athens following the defeat in the Peloponnesian War and subsequent civil war; the 1993-97 Constitutional revisions in South Africa; and the 1955 Colombian Pact.

A major institutional feature of constitutions that facilitate coordination are “brightlines,” provisions written so that it is clear when they have been violated. Brightlines facilitate mass, coordinated reaction against political leaders who are tempted to transgression the constitution. For this reaction in concert to work, citizens must act in concert in a decentralized manner; that is, they must all, simultaneously, come to the same judgement about events. Brightlines facilitate this coordination by making rules straightforward and easy to judge. The First Amendment in the U.S. Constitution says that the government shall pass no law abridging the freedom of speech, religion or assembly. Moreover, articulated rights such as free speech and freedom of assembly not only restrict government action, thus lowering the stakes, but also, by clearly articulating what constitutes a breach, they demarcate bright line mechanisms of coordination. Article I, section 10 holds that states cannot lay duties and other forms of trade barriers (except for the purposes of inspection). Similarly, the direct taxation clause requires that each state pay taxes in proportion to their population, so the national government’s taxes on property cannot be set higher for, say, the opposition than for those who support the government. The brightline defined by the direct taxation clause makes it easy for decentralized citizens to come to the same assessment about whether a proposed law fails to meet this criterion. The Third Amendment’s prohibition on the quartering of troops is another brightline. The Fourth Amendment today is
mostly relevant for criminal trials. Historically, it was highly important as a means of limiting political persecution of the opposition. Jailing the opposition without accusing them of a crime or of trumping up a crime and holding them indefinitely is as common in today’s authoritarian states as it was in early modern European states as they developed. In particular, this amendment prevents systematic political harassment, equivalent to Soviet Union’s show trials or Star chamber in the early 17th century England.

In addition to rights, the Constitution provides clear specification for the processes of multiple functions of government. Sovereign commands follow the separation of powers in Article I, section 7, including bicameralism, presentment, and the presidential veto. Article IV, section 1, defines the process by which the Union can expand by admitting new states. The supremacy clause of Article VI removes ambiguities about the conflict between a state law (including state constitutions) and a national law, with the latter taking legal precedence. As a final example, Article II, section 2 defines the process of making treaties.

(3) The adaptation condition. Every country faces new problems and crises (North 2005). Changing circumstances can reduce the benefits of cooperation and render institutions unstable. Endemic shocks mean that existing consensus condition becomes outdated. Maintaining the constitution requires that the political system somehow adapt/extend/revise existing focal points or create wholly new ones. To address this problem of change, constitutions must create conditions for "adaptive efficiency" (Hayek 1960, Mittal 2012, North 2005), institutions that allow citizens and political officials to adjust to changing circumstances and solve their dilemmas and crises. In the American Constitution, the amendment process provides a precise if sluggish form of adaptation. Historically, a more important form of adaptation has
been legislative pacts, which are enabled by the Constitution. Pacts constituted a central form of adaptation in the 19th century, including the four major compromises of 1820, 1833, 1850, and 1877, each addressing a different crisis. A third form of adaptation has emerged in the last century or so in the form of judicial review.

An important advantage of stable democracies is that they are better than non-democracies at getting rid of bad or failing ideas. Elections allow citizens to remove leaders and parties that have pursued policies that fail to resolve a major problem or crisis. Partisan competition, a feature of every developed democracy, is therefore central for adaptive efficiency. Opposition parties are especially relevant because they have strong incentives to devise new solutions to problems so as to gain power.\(^8\)

From the beginning of the Constitution, American institutions have fostered adaptation, and they are a principal reason underlying the Constitution's longevity.

For example, in the 19th century, various problems arose between the sections, North and South, involving slavery or race relations. Congress, reflecting public opinion across the nation, district by district, forged many compromises that were constitutional events even if they were not officially Constitution events (see Eskridge and Ferejohn 2001 on "super statutes"). The 1820 Missouri Compromise, for instance, extended the focal point of the balance rule in two ways; first, into the new territories; second, as a general agreement to maintain balance. The 1854

\(^8\) Myerson (2006) argues that federalism fosters adaptation as well, in part because it provides electoral homes for political officials, the best of whom often move up the hierarchy into the system of national politics.
Kansas-Nebraska Act violated this agreement and the northern electorate severely punished the Democratic Party for doing so.⁹

Similarly, when the Supreme Court attempted to regulate the sectional controversy in the 1857 *Dred Scott* decision, it failed miserably because the Court sought to protect slaveholders, a minority, rather than extend the existing focal points underlying the compromises between the sections. This case was so far off from Northern sentiment that, in the words of one of the major historian of the topic, "it threw oil on the flames" (Fehrenbacher 1978,3).

As the national government grew in importance for the economy and citizenry, the importance of adapting the constitutional powers of the national government rose. In parallel, so too did the Supreme Court's role in interpreting the Constitution, particularly with respect to national legislation.

In the 21st century, most Americans do not realize that honoring the Constitution was far from given at the time of founding. The threat of violence – from foreign countries, from sectional strife, and from rebellions – was the primary concern of Americans in 1787, as Riker (1987) emphasizes. The Federalist Papers address, above all else, how to overcome these threats of violence.¹⁰ Because the Constitution succeeded in entrenching the three conditions of stability, we now have the luxury of overlooking that once central problem.

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⁹Weingast (1998) provides some data on how the Kansas-Nebraska Act diminished the size of the Northern Democratic delegation to the House of Representatives.

¹⁰Because American security issues have long been solved, modern Americans focus on the structure and process portions of *Federalist Papers*. They tend to ignore the ever-present concern by the founders to security issues, both domestic and international. For example, after a brief introduction in *Federalist 1*, the next four papers – entitled, “Concerning Dangers from Foreign Force and Influence” – focused on the problem of international security. Although less relevant for our lives today and hence often neglected, it is no accident that the authors of the *Federalist Papers* addressed this issue before all others.
Implications

The success of the U.S. Constitution reflects the creation of a successful pact. The Constitution achieved stability over the long term – with some exceptions – so that now in 2015 we are barely aware of the mechanisms that provide for long-term stability and hence that suppress organized violence in America. But of course, the difficulty in creating constitutions that accomplish the same goals in Iraq, Afghanistan, Tunisia, Egypt, Russia, and other nations, demonstrates the ongoing relevance of the threat of violence, and the difficulties of overcoming it, let alone getting to the point where post-revolutionary or post-war states can take that stability for granted.

I close this section with an important observation. The first two conditions cannot exist independently. The limit condition calls for limits that lower the stakes of power. But, as Madison observed in *Federalist* 48, writing provisions on parchment is an insufficient basis to sustain these limits. To be sustained, citizens must value these provisions. Further, per the consensus condition, citizens must be willing to react in concert to defend potential transgressions. Put another way, sustaining the constitutions require that citizens must not only value these limits that lower the stakes, citizens must be able and willing to react in concert in the face of potential transgressions that would violate these conditions.

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11 In Madison’s words: “The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”
3. The Role of Countermajoritarian Provisions in Preserving the U.S. Constitution

The problem of instantiation of democracy affects ability of democracy to survive over the long-term. As the conditions for pacts above suggest, a set of groups working together to create a stable democracy must believe they are better off under democracy. This condition is not automatic, as people and groups in minorities are at risk of beyond worse off. In this section, I discuss another central feature of the limit condition.

Some limits on the government are universal in the sense that all individuals and groups value them – such as freedom of assembly. Others, however, take on a potentially more inimical, countermajoritarian role in that they are means to bias decisions in favor of certain groups. Limits of this type often arise in pacts as part of the means of obtaining agreement of important groups to the pact. Other groups who bear costs from these provisions often agree to countermajoritarian provisions for pragmatic reasons: for example, when failing to agree ruins the chances for initiating or maintaining democracy.

In the U.S. Constitution, the provisions in the Constitution that protect slavery against inference by the national government best illustrate these points. The founders built in a range of provisions protecting slavery, including:

- The 3/5s clause granting additional representation of the slaveholding South in proportion of three-fifths of their slaves.
- The fugitive slave clause, granting the national government the express authority to write legislation assuring the return of runaway slaves.
- The 20 year prohibition on any law restricting the slave trade, allowing slaveholders to import considerably more slaves and thus increasing the size of the South’s export economy and also its material interest in maintaining slavery.
• The balance rule: an informal agreement between the sections – North and South – allowing both sections a veto over policy through their hold on the House of Representatives (the North) through the Senate (the South). In particular, the Southern veto in the Senate assured Southerners that the national government would pass no legislation hostile to slavery (see Weingast 1998).

• A strong system of federalism and states’ rights which decentralized many of the most divisive issues. This system included almost all property rights, in particular, property rights in slaves.

These protections are all countermajoritarian provisions; they all constrain or bias majority decisionmaking by elected representatives. And yet they were also a necessary condition for slaveholders to participate in the Union. Northerners may have disliked slavery and the provisions protecting it, but they valued more a Union that included the South. As Potter (1976,45) explains in his magisterial Impending Conflict:

The problem for Americans who, in the age of Lincoln, wanted slaves to be free was not simply that Southerners wanted the opposite, but that they themselves cherished conflicting value: They wanted the Constitution, which protected slavery, to be honored, and the Union, which was a fellowship with slaveholders, to be preserved. Thus, they were committed to values that could not logically be reconciled.

The question for them was not a choice of alternatives – antislavery or proslavery – but a ranking of values. How far ought the harmony of the Union be sacrificed to the principle of freedom, how far ought their feeling against slavery to be restrained by their veneration for the Union? How much should morality yield to patriotism, or vice versa? The difference between "antislavery men" and "conciliationists" in the North was not a question of what they thought about slavery alone, but of how they ranked these priorities.

Absent the countermajoritarian provisions protecting slavery, the U.S. Constitution is unlikely to have succeeded, and America’s history would have been markedly different.

As another illustration of the importance of countermajoritarian constitutional features, consider post-Franco Spain. Countermajoritarian features helped the proponents of a new democratic constitution mollify the “continualists” – those seeking to continual the Franco
regime – by creating among other things an electoral system biased toward the rural population that had generally provided strong support for Franco. This bias reduced the probability that the left would dominate politics in the post-Franco era. Chile transition from the Pinochet dictatorship used this same mechanism, also in the context of a number of other highly constraining countermajoritarian institutions. And, of course, most of the modern long-term European democracies involved a long transition toward democracy almost always involving striking countermajoritarian provisions, many of which remain today.

Countermajoritarian provisions of this sort are widespread in long-term democracies. Portugal initiated democracy in 1976 with a constitution that gave the Council of the Revolution (predominated by the military, which headed the previous authoritarian regime) the power to pass their own laws and to judge the constitutionality of all laws passed by the legislature. In addition to the biased electoral system noted above, Spain's Constitution of 1978 guaranteed the special status of the Catholic Church and established a quasi-federal system. Poland’s 1989 elections to its new legislature (the Sejm) allowed only 35 percent of the seats to be filled through free contestation; the Communist military government appointed the remaining seats. Finally, South Africa's 1996 Constitution provided for proportional power sharing in the Cabinet for any party winning at least twenty seats in the legislature and a federal system that devolved important taxation and spending issues to regions, thus reducing redistributive costs for the white population. The South African constitution also requires a two-thirds majority in both houses of the legislature to amend the constitution (Inman and Rubinfeld 2007). Without these countermajoritarian features, the ruling white elite would not have agreed to democratization.
Implications

Democratic theorists are correct in observing that countermajoritarian features compromise democracy and majority rule; indeed, that is their purpose. Yet, as I observed above, these theorists ignore the pressing dynamic problem of maintaining democracy over extended periods. Many countermajoritarian provisions serve a useful purpose in limiting the stakes for groups with the power to prevent democratization or the power to set aside democracy once founded. Put simply, long-term democratic maintenance typically requires that constitutions protect those with the power to disrupt democracy. Moreover, the force of this section is that all successful long-term constitutions do so.

4. Implications for Markets and the Rule of law

In the context of democratic stability, a thriving market system has many advantages. Recall that a thriving market system requires the various components of economic liberty. This form of freedom includes a strong system of property rights, a system of justice that enforces contracts, and the protection from arbitrary power. Further, it includes the rule of law, namely that laws are general, impersonal, consistent, predictable, and stable general, impersonal, consistent, predictable, and stable (Fuller 1964; Hayek 1960). The rule of law’s dynamic characteristic of stability over time requires that today’s laws are also tomorrow’s. In this way, people can rely on the law.

Democratic theorists have generally failed to explain how their ideal of unfettered democracy provides for the market, rule of law, and hence long-term prosperity. The market

12 See, for example, Dahl (2003), Levinson (2008), and Lindblom (1980); see also Rawls (1971).
and economic growth foster democratic stability in several ways. Scholars have long shown that coups are less likely in countries with economic growth (e.g., Londregan and Poole 1990). Put simply, democratic regimes that experience economic growth are more likely to remain democracies. Providing for a market economy fosters democratic stability in another way. As I have observed, the constraints necessary to sustain markets – economic liberty, including the rule of law – require limits on the policy choices of elected officials that compromise unfettered democracy. Absent such limits today’s majorities may seek major changes in the law to benefit themselves; or majorities may exercise moral hazard to gain quick benefits at the expense of others (see Riker 1982 ch 1). Put in the context of section 3 above, the constraints on democracy that support markets necessarily entail countermajoritarian features. As with all forms of liberty, these constraints carve out a realm of private action protected from governmental interference. Absent such protection, investors are far less likely to make fixed investments that can be readily confiscated or held up once in place. A political system with the power to extract the value of investments ex post therefore has difficulty supporting markets.

An important feature of economic liberty is that its constraints on political choices become part of how a society satisfies the limit condition. By limiting political choices and protecting the market, these constraints lower the stakes of power. Property and investments are secure, contracts reliable, and democracy more stable.

This implication has several consequences. First, unfettered democracy is inconsistent with a thriving market system. Nothing about elections per se implies economic liberty (Riker 1982, ch 1). Second, democracies are far more likely to survive if they support markets. The reason is that the constraints necessary for economic liberty lower the stakes.
condition above, democracies that provide for economic liberty and create thriving markets have low political stakes. Further, thriving markets create complex forms of economic integration, which provide a primary constraint against violence by raising the costs of fighting (Cox, North, and Weingast 2015).

I close this section with an observation about the relationship between democracy and markets that follows from these consequences. For 60 years, students of democracy have puzzled about the relationship between democracy and markets (Lipset 1963, Lindblom 1980, Dahl 2003, Barro 1997, Przeworski and Limongi 1997, Acemoglu and Robinson 2009). The main hypothesis driving this work is Lipset’s, which proposes that a growing economy fosters democracy. Although hundreds of papers have studied this question, most – though not all – showing a strong correlation between democracy and markets (see Diamond 1992). The issue of causation remains elusive and subject to doubt.

The theory in this paper suggests that the association between economic growth and democracy is not causal as Lipset suggested. Thriving markets and economic growth do not produce democracy. Instead, both democracy and markets require the limit condition. Countries that have devised means to satisfy the limit condition can therefore sustain both democracy and the market. The two go together. Thriving markets are part of how countries get rich. To become rich, countries had to provide for the restrictions associated with economic liberty. These countries therefore have strong limits on the government and hence have strong limit conditions. Democracies with markets and economic liberty are therefore likely to be both rich and stable. Of course, we await further empirical work to assess these claims.
5. Applying the Framework: Explaining the U.S. Constitution’s Stability

The U.S. Constitution is the oldest national constitution. As I observed in section 2, the average democratic constitution lasts 16 years, which the U.S. Constitution attained in 1805. Most of the other long-term stable democracies are much younger.

This section applies the theoretical framework developed above to the United States with two aims. First, it explains how constitutional stability was initially achieved. Second, it briefly discusses some of the difficult periods and crises that nearly destroyed the Constitution and how Americans resolved these problems, often through countermajoritarian agreements.

The Articles of Confederation

American constitutionalism arose with the English colonial heritage and the American Revolution (see, e.g., Bailyn 1967, Greene 1986, Reid 1995, and Wood. 1969). From the English Glorious Revolution in 1689 through the early 1760s, both sides of the British Atlantic gained from the empire: in the presence of the French threat, the American colonies and the metropole needed each other for security. Following the decisive French defeat in the Seven Years’ War, diminished problems of security altered the incentives facing the two parts of the British empire.

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 too weak, allowing a series of common pool

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13 This section draws on my previous research in Jacobi, Mittal and Weingast (2015) and Mittal and Weingast (2013).
14 This discussion draws on Rakove, Rutten and Weingast (2005).
problems to cripple the national government’s ability to provide essential public goods. Three problems were critical. First, the Articles prevented the national government from raising its own taxes for such important issues as national defense, instead depending on the states to contribute authorized funds, and many withheld them (Kaplanoff 1991, Middlekauff 1982). As the Federalists wrote in *Federalist* nos. 2 - 5, the United States’ inability to defend itself represented the critical failing of the Articles (Riker 1987). Second, the national government lacked the ability to enforce a common market, and trade barriers and trade wars among the states had become a problem. Third, Americans lacked a common currency under the Articles, and the national government had neither the authority nor the means to control the states conflicting policies on this dimension. Several states took advantage of this power, threatening monetary stability, notably Rhode Island.

The Federalists believed the solution was clear. On at least three occasions, they sought to strengthen the national government by adding powers so that this government could provide the much needed public goods (Kaplanoff 1991, Morgan 1977, ch 9). The Antifederalists blocked these attempts (Middlekauff 1982, ch 23). This group did not deny the problems; rather, they feared the solutions (Rakove 1996, ch 6). Although endowing the national government with greater powers would in principle allow it to the three important public goods, more power also granted that government the ability to destroy citizens’ liberty in the same way that the British had. The Antifederalists’ fears were reasonable in the sense that none of the three federalist proposals attended to either the limit condition or the consensus condition. The Federalists proposals therefore failed to create the means of limiting potential abuses of the proposed powers.
Forming a Stable Constitution

Having failed in their first attempts to alter the constitution, the Federalists in 1787 relied on a different approach in Philadelphia. Politically, the Federalists’ problem was to gain support of sufficient moderate Antifederalists so as to assure approval their constitutional changes. The Federalist sought to address some of the Antifederalists’ objections by embedding a more powerful national government in an institutional context that set limits on its powers.

A range of structural and procedural mechanisms – all countermajoritarian provisions – limited the power of the new national government, and here I list five. First, the horizontal system of separation of powers sought to check “ambition with ambition” by creating multiple veto points, as Madison famously argued in Federalist 46. Multiple veto points limited the range of likely agreement among national officials, making national legislation 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 denied the national government authority over many of the most controversial issues dividing Americans. 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’ 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 (Weingast 1998).

The theory developed above helps explain in part the success of the new Constitutional mechanisms. Consistent with the limit condition, the Constitution’s structural and procedural limits significantly lowered the stakes of national policymaking. 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. Put another way, the requirement for action in the separation of powers system provided considerable protection to minorities.

The Constitution and the Bill of Rights also placed a series of substantive restrictions on the national government, creating economic liberty by reducing the scope of that government’s reach, defining a series of citizens rights under that government. Similarly, the federal structure combined with the national government limited to enumerated powers to prevent the national government from legislating on a variety of issues.

In short, the five structural and procedural limits on the national government listed above combined with others to reduce the ability of the national government to alter the status quo. Lower stakes, in turn, reduced the likelihood that the national government’s actions would invoke the rationality of fear mechanism, inducing a group of citizens to resort to extra-constitutional means. The Constitution’s structural and procedural limits therefore make democracy more likely to survive.
Consistent with the theory’s second principle, a critical aspect of this structure and process is that it created a series of brightline focal points defining for citizens what was appropriate use of governmental power and what would constitute a transgression. Federalism, for example, implied that critical issues in people’s daily lives – such as property rights, religious freedom, social regulation, and almost all local economic regulation – remained the purview of the states and not the national government. As the Federalists argued, attempts by the national government to invade such areas would readily signal an abuse of powers, allowing citizens and, per the consensus condition, their representatives in the states to react against the national government. Madison put it this way in Federalist 46,

But ambitious encroachments of the federal government, on the authority of the State government, would not excite the opportunity of a single state, or a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.

Madison’s words parallel the consensus condition as the solution to the citizen coordination problem, allowing the people to protect themselves against government transgressions by coordinate against the government. This, in turn, requires that citizens agree on the appropriate authority of the government so that abuses of authority will trigger a response.

The Constitution’s 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 cancelling an upcoming election or setting aside the results of that election (as Jefferson sometimes feared about Adams in the late 1790s) would also signal the need for coordinated reaction (see Fearon 2011 on elections).
Consistent with our discussion of countermajoritarian institutions in section 3, various countermajoritarian features were necessary to gain sufficient support of the Antifederalists to ratify the Constitution. Given the existing rules, this group had consistently been able to defeat the Federalist’s proposals. Had the Federalists failed to attend to the Antifederalists’ interests through countermajoritarian features, there would have been no Constitution.

Until 1787, the Federalist consistently proposed new national powers without simultaneously addressing the problem of how to limit the abuse of these powers. The Federalists' attempts to increase national power under the Articles of Confederation failed to address the limit condition. The Antifederalists were rationally concerned that the national government would abuse its powers and that insufficient numbers of citizens would protest. The Federalists’ initial attempts at constitutional reform thus failed to address the rationality of fear mechanism and the need to lower the stakes of national politics.

The Federalists’ adapted to their failures to gain approval to strengthen the Articles by developing a new Constitution that addressed both constitutional problems simultaneously: it granted the new national government sufficient powers to provide much needed public goods, but also limited the stakes of national politics by providing structural and procedural limits on that government’s powers. In combination with a new set of focal solution defining transgressions, the Constitution’s new structure and process limited the stakes of power and helped create a self-enforcing Constitution.
6. Conclusions

Americans today take political and constitutional stability for granted. Further, they tend to read that stability back into history beginning with the ratification of the Constitution. This view is simply wrong. Not only did American democracy fail in the Civil War, but it came close to failing during numerous other crises. I include here: 1798-1800, 1819-20, 1833, 1846-50, 1876-77, and 1933-37 during the Great Depression.

The force of this paper is to demonstrate the value of appropriately chosen countermajoritarian provisions in the constitution that constrain democracy. This view contrasts with the arguments of modern democratic theory which values unfettered democracy. This type of democracy raises a range of problems. It lacks stability and is likely to end in authoritarian rule. And unfettered democracy alone fails to support the market economy necessary for long-term prosperity. Democratic theorists ignore the dynamic problem of democratic stability over time. Most of these theorists simply assume that American democracy is stable and that they can rewrite constitutional provisions freely.

In this paper, I advance a framework for understanding democratic stability, including three necessary conditions. These are the limit condition, which enhances democracy’s survival by lowering the stakes of politics and preventing coups; the consensus condition which supports citizens coordination to defend against possible transgressions; and the adaptation condition, which holds that successful constitutions must have the ability to adapt the constitution to shocks and problems as they arise.

To survive over time, successful constitutions rely on countermajoritarian provisions. Although widely seen as anti-democratic, these provisions are often necessary to foster the
instantiation of democracy (protecting interests reluctant to support democratization or a constitution without such protection); and to maintain democracy once created by lowering the stakes and fostering citizen coordinate against transgression.

In the context of the United States, this framework helps explain a range of important provisions. Many limit the stakes of politics, per the limit condition; and others foster the consensus condition, for example, by providing brightlines that foster citizen coordination. Moreover, I argued above that, without countermajoritarian features, the Constitution would never have gained sufficient support among the moderate Antifederalists.

The dynamic problem of democratic stability over time implies that democratic theorists face a tradeoff that they have ignored. They value fewer restrictions on democracy, and yet fewer restrictions makes democracy less likely to survive over the long-term. Democratic theorists who value unfettered democracy should therefore value countermajoritarian constraints that hold the promise of keeping democracy stable and free from threats of disruption.

References


