

Constitution Minute

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Threats to the Constitution, Big and Small

Could the United States slide into authoritarianism contrary to the U.S. Constitution? Does the Constitution guard against all authoritarian threats equally well?

A recent law review article looks at these questions and concludes that adequate constitutional safeguards against full-blown authoritarianism exist, but that the U.S. Constitution is vulnerable to smaller threats of democratic backsliding.

The authors distinguish between what they call “authoritarian reversion” and “constitutional retrogression”. Reversion refers to big events like a military coup or an executive declaration of emergency powers. Retrogression is more common around the world. It refers to institutional decay that moves a country toward a hybrid regime that mixes elements of authoritarianism in with democracy. The authors warn that the constitutional checks against such retrogression in the United States are “surprisingly weak”.

Retrogression comes about by the subtle erosion of democratic institutions. Types of retrogressions seen around the world include constitutional amendments to remove or negate term limits (Putin is the example here), the centralization of executive power (think Obama and his pen-and-a-phone executive orders), intimidation of the media and civil society, and weakening election integrity. The importance of voting can be reduced through systemic favoritism toward major political parties, restrictions on small parties, legislative gerrymandering, arrests of opposition activists, and collusion between an administration and a political party to commit voter fraud.

The U.S. Constitution does not protect well against a president acting against the Rule of Law in concert with a compliant Congress or political party. The courts could not really stand up to this were it to happen, the authors say. Other threats include a politicized Justice Department (think Eric Holder) and, as the authors

specifically mention, a politicized IRS that attacks an administration's political enemies. In the information sphere, the Constitution does not protect against an administration deliberately putting out misinformation or intimidating journalists. Also, the Constitution is of no help when an administration denies Freedom of Information Act requests, because FOIA requests are mere creatures of statute.

The authors say one answer to these lesser threats of democratic backsliding is citizen engagement insisting on democratic norms, suggesting that the work of the Tea Party will never be done.

The article is "How to Lose a Constitutional Democracy" by Aziz Huq and Tom Ginsburg, comparative constitutional law professors at the University of Chicago.

There was a preliminary blog post and it's well worth a read.

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