

Manipulating the rules of politics: The origin and development of an organic political institutional system in the United States of America

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Introduction

The Founding Fathers that assembled at the Constitutional Convention in Philadelphia in 1787 knew the importance of rules. The constitution they were about to create would determine which social groups would have an advantage in the coming political struggles and which groups would be at a disadvantage (Dahl 1956, 137). The Founding Fathers also realized that the rules of ratification would determine if the Constitution would be ratified or rejected. So the Founding Fathers did an *avant la lettre* venue change (Schattschneider 1975): they ensured that their new constitution would be voted on in more favorable circumstances. They called for constitutional conventions in each state instead of having the state legislatures vote on the new constitution. These conventions would be more inclined to ratify the new constitution than the state legislatures. They also ensured that the states that were expected to vote in favor of the new constitution were scheduled to vote first (Dahl 1972, 5). A series of votes in favor would create the perception that ratification was unavoidable. The Founding Fathers also ensured that the discussions at the Constitutional Convention were done in secret. This kept opponents of the Constitution in the dark regarding some of the intentions of the new Constitution and the different options that had been discussed (Dahl 1972, 7). Manipulating the rules eventually paid off. After a lot of effort and two years, the constitution was eventually ratified by nine states and became the supreme law of the land.

That the political institutions, “the humanly devised constraints that structure human interaction” (North 1990, 97), which govern the political process are important is not lost upon politicians. Politicians in many countries have manipulated the political rules to entrench their position or policies. However, attitudes towards the manipulation of the political rules are not the same everywhere. In the United States, and especially on the state level, politicians regularly alter political institutions for partisan reasons. Since the close presidential election of 2000 attention for the rules, who makes the rules and who controls that the rules are respected has increased substantially. The ‘Shelby County, Alabama v. Holder’ ruling by the Supreme Court where parts of the Voting Rights Act were immobilizing also furthered the manipulation of institutional structures. Since the ruling in 2013 320, and counting, laws have been introduced by state and local governments that affect the voting rights of citizens¹. This raises the question: why do American legislators treat the political structure differently and find partisan manipulation of the political system acceptable or even appropriate? This question is important for several reasons. First of all, there is the concerning possibility that the manipulation of the rules governing the political process can undermine

¹ ‘Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder’ a study done by the Thurgood Marshall Institute at LDF, part of the NAACP.

the democratic process. If some groups have access to the political system, both through the ballot and as an advocate for a specific interest, and others do not this creates inequality in the political playing field. Why the manipulation of institutional structures happens so often in the United States is also important because such manipulation can lead to a political system where one group, which could even be a minority, is continuously in power. A political system where one group is continuously in power and others are excluded, even if this is accomplished using the legitimate political process, is undemocratic (Lijphart 1977, 48). One party rule also almost always leads to government corruption and inefficiency (Reichley 2000, 30). One group entrenching its position and policies can make it impossible for a healthy democratic system, where the opposition can offer alternative policies and rotate into government, to develop.

How to stop politicians from abusing the power that society vested in them is arguably the cornerstone of American political theory. The originator of this theory is John Locke (1690) who long ago raised the question as to how a government could be created that is strong enough to regulate society but not strong enough to oppress society. Many American political thinkers have reformulated that question. Publius (Hamilton, Madison, and Jay 1987) asked in Federalist Paper no. 51 how it was possible to “enable the government to control the governed; and in the next place oblige it to control itself.” Calhoun (1851, 8) questioned if it was possible to create a system where those “who have been invested with the powers of government be prevented from employing them, as the means of aggrandizing themselves, instead of using them to protect and preserve society?” Subsequent political thinkers have formulated three different checks on politicians (Dahl 1956, 36; Epstein 1984, 90): norms, democracy and constitutions. Norms are the internalized restraints on the behavior of individuals through socialization. Democracy is the control over and of political behavior by social forces. Constitutions are the rules that govern the political process and constrain political behavior. The functioning, or shortcomings, of these three checks on the behavior of American politicians is the focus of this paper and leads to the following research question: Why have norms, democracy and constitutional constraints failed to provide an adequate check on American politicians reshaping the political institutional structure for partisan reasons.

The research question is answered through a careful reading of some of the most important and thoughtful works on the origin of the American political tradition, the history of the American political system and the current functioning of the American political system. First, the concept of institutional manipulation is conceptualized and the social and scientific relevance is explained. Then the historical origin of the American political system and political ideology are traced to their roots in an effort to unearth a different set of norms towards political institutions and the partisan manipulation of these

institutions. After this the Constitutional constraints on the behavior of American politicians are analyzed and why these are insufficient to stop politicians from manipulating the rules. Finally, the roles of democracy in constraining American politicians is studied and why popular sovereignty can be both a cause of manipulations of the political rules and at the same time is vulnerable to these same manipulations.

Chapter 1: Institutional manipulation and its social and scientific relevance

1.1 Changing the rules of politics

The creation, alteration or abolishment of government institutions is one of the most fundamental natural rights of humans in the Lockean tradition (Mace 1979, 12). In order to escape the state of nature humans have the right to come together and agree upon the creation of a collective government that will ensure order and stability. This makes the right to create a government the “gateway” right to the protection of all other rights. That the American colonists had the right to create their own government structure is stated unequivocal in the Declaration of Independence: “That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” (Jefferson 1776). The notion that men could devise their government was a novelty at that time. Until then the government structure had been considered as a natural or a divine condition. According to historian David Ramsay the creation of a new constitution was so important because “We [Americans] are the first people in the world who have had in their power to choose their own form of government”. Until the American Revolution, constitutions were forced on all other nations, or formed by accident, caprice or prevailing practices” (quoted in Fritz 2007, 16). Therefore, the intentional designing of a constitution by the American colonists was an important development in political philosophy and theory.

That American citizens have the right to create a government to their liking is unmistakable. At the same time it is not clear how this right got transferred to politicians. One option is that the people did delegate this right to their representatives. Akhil Reed Amar (2005, 299) thinks that the people did indeed delegate some of these rights, but certainly not all of them. He divides the right (or power) to alter government in two categories: constitutional alterations that are of utmost importance and require the consent of the people and less important changes of the rules that can be enacted with normal laws which are in the hands of the representatives of the people. However, Amar recognizes that this division is far from perfect because some of the provisions in the Constitution are so fundamental that it is questionable if even the people should be able to change these. Because the constitution is silent on many important issues, a lot of important rules governing the political system are normal laws and not constitutional provisions, and thus in the hands of the representatives of the people. In other words, the people did transfer some rights to alter the government structure to their representatives, but these turned out to be more powerful than expected. Politicians have just pushed their powers to the constitutional limits.

The questions how the right to alter the political institutions ended up in the hands of the politicians and if politicians should have the power to change the rules of the political system at all are important issues, but are left for another time. With regard to this paper the question is why have norms, democracy and constitutional constraints failed to provide an adequate check on the political majority reshaping of political institutional structure for partisan reasons.

American politicians have been vigorously using their power to reshape the political institutional structure to manipulate the “rules of the political game” and create advantageous circumstances. It sometimes seems that whenever possible they try to enact a “venue change”. If the outcome of a process is not favorable under a set of rules, they try to move the process to a different setting with more favorable rules. One of the best known examples of this is the almost constant stream of new proposals to limit the access to the ballot box. For instance, the former literacy tests, i.e. tests of moral character or even grandfather tests, have been replaced by methods as voter ID laws, limited voting hours in certain regions, too few voting places in some regions, and vote roll purges based on faulty lists of citizens who committed a felony. Such measures can make it harder or even impossible to vote for specific demographics, like the poor, the city dwellers or ex-felons, and weaken the party that relies on their votes. Strategic redistricting, also called gerrymandering, is also one of the most known examples of institutional manipulation. Every ten years after the census, sometimes even in between, politicians try to redraw the boundaries of the districts as beneficial as possible for them. But the political system is also reshaped with more subtle alterations. Politicians can choose to remove “pesky” boards and commissions that gather information which the public can use to evaluate the current administration. For instance, without a Legislative Auditing Bureau it becomes unclear if government policies are a success or failure². Politicians can also opt to remove the government accountability board³ or the ethics commission⁴, reducing the inquiries into the relationship between politicians and interest groups. Politicians have also tried to control the flow of information by restricting the access of journalists⁵ or even by trying to enact legislation that would exempt all communication in the legislature from open record laws⁶. Such measures reduce the amount

² Wisconsin Republicans propose to abolish the legislative auditing bureau, article by Madison.com (last accessed on 08-06-2015).

³ Wisconsin Republicans vote to dissolve the government accountability board, article by Fox6now.com (last accessed on 07-11-2015).

⁴ North Dakota lawmakers decide on the ethic commission, article by Washington Times (last accessed on 12-03-2015).

⁵ Virginia lawmakers bar reporters from State Senate floor, article by Huffingtonpost (last accessed on 14-01-2016).

⁶ Wisconsin Republicans propose and then withdraw law making all legislative communication exempt from the open record laws, article by Huffingtonpost (last accessed on 4-07-2015).

of information that the public has at its disposal and increase the probability of politicians not being questioned by citizens or interests groups. There have also been cases where politicians made it harder for citizens to come into action by removing special prosecutors who investigate suspicious government activities. Without such special prosecutors the burden of starting litigation against government officials or institutions is transferred to individual citizens or groups⁷. Starting litigation against your government is a big step that costs a lot of time and money. Suing your government also is a risk. It creates the possibility of retribution and the benefits of winning a lawsuit will often take many years to materialize. The result is that people are often cautious of taking legal steps against their government. And politicians are aware of this and have used this to their advantage.

1.2 Social relevance

Democracy in the United States can best be regarded as an arena where opposing factions fight over control of the government apparatus (Dahl 1972, 4). The essence of this depiction is competition. Social groups compete over elected government positions and influence on government policies. With this definition of politics in mind the problem with manipulation of the government rules in order to give one group an advantage over another group is rather obvious: it undermines the competition. The negative consequences of an uncompetitive system are corruption, inefficiency, underrepresentation, democratic deficit and reduced accountability (Hague and Harrop 2010, 216-220)⁸.

Politicians manipulate the political institutional structure to gain advantages over their opposition. Through manipulation they can entrench the position of a political party, politicians or policies. This often results in inefficiency (Reichley 2000, 30). Entrenched policies are not replaced even if they are not working optimally anymore. Politicians and political parties can become less receptive of wishes of their constituency or pressure from interests groups if their position is entrenched, leading to policies that society does not really want. The same goes for corruption. Once a politician or political party entrenches itself, interests groups will try to pursue them to enact policies using different methods. When it is guaranteed that a politician or political party will remain in power for a long time, this leads to an environment where corruption flourishes. The reign of almost fifty years of the Italian Christian Democratic Party is a good example of how one-party-dominance can lead to corruption.

⁷ Scott Walker restricts future investigations into government affairs, article by [Daily Kos](#) on 09-02-2015.

⁸ These consequences are off a Dominant Party System, this is a party system where one political party rules continuously. While this is not exactly the same as the entrenchment of a party by manipulation of the political institutional system it does lead to the same result, a political party or group of politicians being in control and a limited competition.

When a political or political party entrenches its position by manipulating the rules it also undermines the functioning of the democracy. In a democracy “the people” have to be represented by their representatives in government and all have a voice in the creation of new laws. This ideal becomes unattainable by restricting the access of certain groups. This implies that some groups get more influence at the cost of other groups, undermining the ideal of “one man, one vote”. A political system where some groups are structurally excluded, even if the legitimate political process is used for this, is not democratic (Lijphart 1977, 48). Moreover, the limited influence of some groups can also lead to a general distrust in politics. People perceive, rightfully sometimes, that politicians are not responsive to the people. This can lead to groups abandoning the political process altogether (Lijphart 1977, 27). To keep have some influence such groups could opt to use unconventional methods, including violence. A political party that has entrenched itself also runs the risk of becoming unaccountable to the public. And the responsiveness of American politicians to the public is very low today according to a study conducted by two Princeton political scientists (Gilens and Page 2014). Politicians are more receptive to the needs to donors and party insiders than their constituency. The heavily gerrymandered districts in the US are one of the causes of unresponsive politician (Owen and Grofman 1988). A significant American representatives are so safe in their districts that it becomes almost impossible to vote them out of office in the general election. This reduces the need to response to wished of the electorate and diminishes the overall accountability of the politician in question. Consequently such a politician often has more freedom of action than is good for his or her district.

In general it is safe to conclude that the entrenchment of a political party or individual politician is not fruitful for the democratic process and, thus, should be avoided when possible. Therefore, knowing more about how and why institutional manipulation does occur is valuable know-how.

1.3 Scientific relevance

The importance of the rules that govern politicians is recognized by both politicians themselves and the scholars that study the political process in the various fields of science. Several of these fields have experienced a historical institutional revival. How the political institutions, “the humanly devised constraints that structure human interaction” (North 1990, 97) shape and guide behavior has become an important explanatory variable. The starting point for historical institutionalism are the observations of Arthur (1989) and David (1985) addressing innovation theory. They describe how under certain conditions particular technologies can gain decisive advantages over competing technologies. Beginning from a seemingly neutral starting point specific sequences of events create stable institutional patterns. The

stability of these patterns depends on casual processes that lock-in or reproduce the pattern. In this process events taking place in the early stages shape the path. Further into the process the path is already determined and inertia sets in. The process of reproduction keeps it on track and continues towards its outcome (Mahoney 2000, 510-511). According to Arthur (1989, 112), this continuity was due to the large fixed costs, learning effects, coordination effects and adaptive expectations involved in the process of technological development.

Many political and public administration scholars recognized that the findings of Arthur and David could also be applied to political settings. This is because the increasing return mechanism used in economics is not about technology itself, but about the interaction of the characteristics of certain technologies with related social activities (Pierson 2000, 256). The mechanism of increasing returns can be translated to a political setting, because the features as described are all directly related to the social context of the process. It was Paul Pierson in 2000 who formulated a coherent approach to historical institutionalism in a political setting. He recognized that the high density of institutions, the asymmetries of political power and the complexity and opacity of politics create a social context that leads to increasing returns (Pierson 2000, 257). Also, the short time horizon of politicians and the natural status-quo bias build into political institutions results in a path dependency, that is, arguably, even more intense in politics than in economics (Pierson 2000, 261-262).

Especially in political science and public administration the influence of institutionalism has been felt throughout the field. The Historical Institutional approach has been used to explain policy outcomes as welfare spending (Steinmo and Tolbert 1998), redistribution (e.g. Huber and Stephens 2001), the continuation of certain welfare programs and the termination of others (Skocpol 1992), and even the long-term economic development of a country (Acemoglu and Robinson 2013). All these studies apply the development of path dependency, because political behavior is dictated by the prominence of collective action problems, high institutional density of political systems, a general opacity of politics, and asymmetrical political authority and power (Pierson 2000, 257), in some combination or another.

However, in the political setting Historical Institutionalism functions slightly different than in economics, in which science field the historical institutional theory was originally developed. In the political setting the institutional structure is a political construction and the level of the collective action problem, the asymmetries of political power and the opacity of politics are endogenous variables. These variables can be manipulated by politicians themselves and are thus not always the same. Politicians can exacerbate the collective action problem by creating barriers that make it harder to politically organize and

represent a particular interest group. Limiting the available information regarding the effectiveness of government policies can make the already opaque decision making process even more unclear. One of the most manipulated dimensions is the power relations. Politicians can create advantages for friendly social groups and disadvantages for groups that oppose their policies by altering how social power is translated into political power. The political institutional system offers ample opportunity for “creative” politicians to manipulate the institutional system and gain an advantage over their opposition. American politicians, especially on the state level, can and have in many cases (see the examples used earlier) used manipulations of the political system to increase its status quo bias and entrench their own position and policies. The possibility of manipulation of the political institutional structure is difficult to prevent as any political system must have a certain degree of flexibility. Every political system needs to be able to change if the circumstances demand it. As Huntington said “a political system that cannot adjust, is destined to perish” (Huntington 1968, 26). However, there is a difference between adjusting to society and altering political institutions for partisan purposes. The former happens everywhere, the latter is rare in Western democracies, except in the USA as described.

Historical Institutionalism usually considers the political institutional structure, which leads to a status-quo bias, as a static variable. The origin of the institutional structure is also exogenous and, therefore, very little consideration is given to the possibility of politicians changing the institutional structure. In reality politicians have been manipulating the institutional structure vigorously. The manipulation of the political institutional structure, however, does not undermine the strength of the Historical Institutional approach. In some way it even reinforces it. By manipulating the institutional structure politicians can make the political environment even more status-quo biased than it already was. Hence, flexibility at the micro level, the institutional structure, can increase the stability at the macro level, the entrenchment of policies, political parties or politicians. Studies which use path dependencies’ theories would be enriched by a better understanding of the questions:

- Why is institutional manipulation done
- When is the political institutional structure changeable
- Why it is acceptable to manipulate the institutional structure in some cases and not in others
- How do the traditional restraints on the behavior of politicians, norms, democracy and constitutional constraints, function in regard to institutional manipulation

Chapter 2: History of the American political system and the resulting behavioral norms

Of the three different kind of checks on the behavior of politicians, norms, democracy and constitutions, norms have been around the longest. Throughout history, norms, that is, the collectively accepted notions of what is acceptable and what is not, have been considered an important source of guidance for human behavior. Humans have always been fundamentally social beings that act in accordance with the values and world-views of their environment (March and Olsen 2013). Their behavior depends on how norms frame the way in which people experience their surroundings *and* understand social reality. Norms are also the reciprocated typifications or interpretation of experiences that influence what objects people want to achieve (Meyer and Rowan 1977, 341). Based on these shared experiences humans construct norms which lead to a 'logic of appropriateness' (March and Olsen 2013). This approach doesn't consider humans rational actors asking themselves the question "what can be gained", but regards humans as social creatures that ask themselves "what should I do" (Steinmo 2008, 163).

The causal mechanism driving human behavior in norm-based approaches is the desire by humans to harmonize their behavior with the institutional context of their behavior. Which values and world-views are accepted in a respective society is not the result of humans intentionally designing norms, but the result of the coming together of many different historical experiences. Eventually norms institutionalize when a consensus on these shared experiences is reached. This process often takes years, sometimes even decades, wherein different ideas are layered or grafted upon each other (Steinmo 2008, 168). Sometimes norms even developed without any human agency (Scott 2001, 74-75).

The existing norm in the United States that it is acceptable, maybe even appropriate, to alter the political institutional structure is the result of developments in the American society over many years. In this chapter the origin of the American political tradition and the early development are reviewed. The purpose is to find out if certain conditions were present that could explain the development of the norm that manipulation of political institutional structure is acceptable.

2.1 Origin of the American political tradition

Politicians altering the political institutions governing themselves has always been a part of the American political system. Even before the United States was formed, the American colonists contemplated different plans of a new, large union of American colonies, the Albany Plan of Union being the most extensive one (LaCroix 2010, 22). The control over and functioning of political institutions was also always

a fierce struggle between the different factions: British loyalist and American colonists, rural and city dwellers, political insiders and outsiders. Each group tried to rewrite the rules and gain an advantage over their opposition (Bailyn 1967, 76).

Traces of the origin of the pliable political institutional structure can be found in the British political system that immigrants took with them to the new colonies. The political system that took root in the American colonies, named the Tudor system by Huntington (Huntington 1968, 96), is a mix of the medieval political systems and the “new” modern political systems that were on the rise in Europe. It is a modern system as it built on the notion that the state is supreme over the church, has a significant centralization of power and binds people using a national (or state) identity and consciousness. In Europe these state developments would continue and eventually lead to the centralized state backed by a strong nationalistic ideology. The system imported to the American colonies also had features of the medieval political systems: its organic relationship between political institutions and society, harmony amongst government authorities, mixed legal and political realms, subordination of government to fundamental laws, a balance of power between the crown and parliament, the people being represented in multiple bodies and the prominence of local government (Huntington 1968, 96). Especially the mix of multiple bodies representing the people in an organic political system where the different parts keep one another in check, creates a pliable political structure. Multiple authorities in government can claim to be “speaking for the people” and strive to improve their relative position by adjusting the system to realize their objectives.

The dispersion of authority over many government bodies, each having its own separate popular legitimacy, while sharing functions (Bailyn 1967, 24), results, inevitably, in a battle for control over political institutions. Having control over political institutions, either through their budget or by appointing the officials or by setting the rules governing it, has historically been a fierce struggle (Bailyn 1967, 76). Early on it was a tug of war between the King and his governors, and between the different councils and colonial parliaments, for control over political institutions and functions (Tully 1994, 51). After the Revolution the struggle continued. The struggle for control just shifted to the Congress versus the President/Governor and between the federal and state level institutions.

The so called Tudor political system with its pliable structure also evolved in the American colonies. The pliability of the political structure was increased and given legitimacy by prominent ideas in the American colonies, like the artificiality of political structures, the fear of arbitrary power and the democratic ideals. The evolution in political thought is most aptly represented by the declaration of independence. Here, Thomas Jefferson (1776) states “That to secure these rights, Governments are instituted among Men,

deriving their just powers from the consent of the governed." The notion that governments are instituted by men clearly indicates that government structures are artificial. Men made structures do not only require a rational reason for being there, these structures can also be changed if men believe this to be appropriate or necessary. Thus, political structures are by definition pliable. This notion is a remarkable outcome if one keeps in mind that in those days the notion of fundamental laws existing outside of men (Huntington 1968, 96) was still dominant. Americans were able to combine the idea of external fundamental laws with the artificial and pliable political structures, because fundamental laws formed a restraint on the actions of government in relation to the people (Huntington 1968, 96), not on how politicians behaved in regard to the political structure itself. The only exception is the fundamental rights of self-government of the people. As long as the people could give their consent to government policies and politicians were accountable to the people, the political structures could be altered in any way a politician deemed appropriate.

The notion that all government power must come from and be accountable to the people is also a development in political theory that was very prominent in the American colonies and subsequently in the United States. That the government, especially the 'new' federal government after 1789, had substantial powers was only accepted because it was accountable to the people in multiple ways and with short intervals (Skowronek 1982, 21). The close link between government bodies and the people was seen as the most important safeguard against arbitrary rule and the loss of freedom (Bailey 1967, 22). However, because all government power had to flow from the people, independent government bodies were mistrusted. This resulted in the situation that any government power not responsive to the people became a potential threat. While in Europe power was centralized and functions subsequently delegated to semi-autonomous bodies with administrative, legal, judicial and military competencies, the United States experienced the opposite development. In the US, government bodies were put under direct control of Congress or the executive. As a consequence, the American political institutional structure became more pliable, while, appositionally, the European institutional structure became harder to adjust and operated sometimes without parliament or the executive having any meaningful control over it (Huntington 1968, 109). In the United States such autonomous bodies would be regarded as a dangerous, arbitrary power, while in Europe they were seen as important non-partisan checks on the power of the often merged parliament and executive.

The only body in the American political system that managed to have authority without being accountable to the people is Judicial. Because of the development of constitutional review the Supreme Court in the

United States even has a semi-legislative power. This appears to contradict the fear of and absence of autonomous bodies. However, if the writing of Madison and Hamilton represents the thinking of the Founding Fathers, because of the legislative supremacy the Supreme Court could be independent without being a threat to the other powers or the republican character of the system (Hamilton, Madison, and Jay 1987, 401-403 (No. 78)). The Supreme Court would have to uphold the laws that Congress makes and the President approves of. *If* the Supreme Court were to go against the wishes of the people, then Congress and the President could always make new laws to correct the behavior of the Supreme Court. The Supreme Court does not have the means to dominate over the other powers without the power to initiate and pass legislative or control over the executive power. Madison was so convinced of the harmlessness of the Supreme Court that he proposed a much stronger role for it (Wills 1981, 151). Madison proposed a system where the Supreme Court and the Executive power would join forces in a “revisionary council” to review, and if needed veto legislation. In this plan the Supreme Court would have a say in the passing of all legislation, not just constitutional matters, and before a law would be approved, now the Supreme Court can only review laws that have been made. This plan however never materialized, however hard Madison advocated for it.

The republican ideals of popular sovereignty and public virtue did not stop the American democracy from developing into a direction that is at odds with republicanism. Instead of government being a public sphere where disinterested gentlemen advocated for the public good, politics soon “devolved” into a raw power struggle between different interests (Wood 1991, 269). The generation of the Founding Fathers still had many democratic ideals. The generations that followed were less motivated by ideas and more by interests and the struggle for power. In the eighteen twenties (1820-1830) the Jacksonian democracy started to develop and its followers had different ideas about democracy (Aldrich 1995, 99). They argued that because nobody could separate himself from his earthly interests, it was considered as more honest to openly advocate for the interests of a group or even personal interest than to claim objectivity and advocate on behalf of a common good. Politics was considered as an arena where coalitions of interests fought against each other and the wishes of the winners were written into law. Claiming disinterest switch from being a virtue to a scheme used by those that considered themselves better than the rest to disguise their own interests using lofty language (Wood 1991, 257). Nobody knew better what the public or common good was than anyone else, so everyone’s opinion was just as valuable. The promotion of all these individual perceptions of what entailed the public good was in fact what American democracy ought to be about. Everyone should be able to advocate for his interests through the ballot

box and the majority would eventually decide which view of the public good would prevail (Wood 1991, 258).

Today the notion of politics an arena with different interests trying to gain control over the government is an accepted views of politics, together with the view of politics as a marketplace. Whereas such a perception of politics was a whole new way of looking at politics in the 18th century. The result of the power struggle between interests groups is a divided system where every group tries to captures a part of the government and use this as a basis to advocate for its interest (Bailyn 1967, 64). Given the lack of regulation regarding how political institutions were to be structured and the control politicians had over institutions, it is not surprising that interest groups started to adjust the structure to serve their needs. Any edge over the competition was welcome and there was nobody to stop them from doing so.

2.2 Favorable circumstances

The custom of a pliable American political structure is not only the result of an organic political structure in which popular interests compete openly for control – as long as political institutions are under control of the representatives of the people. The circumstances in the American colonies were also favorable for these political customs to flourish.

One of the most important favorable circumstances for the custom of pliable political institutions to arise is the situation existing for most of the American continent: the white settlers held it to be empty. As previously shown the American political tradition is beholden to the English political tradition. But the American colonist still had to create their own political institutions from the grass roots. For most of the settlers this literally meant from nothing. There were no structures and rules when they came. So when Jefferson stated that “Governments are instituted among Men”, he wasn’t just talking about the abstract notion of artificial government structures used in political theory, but also the very common and tangible experience of settlers who instituted a government amongst themselves. The American political institutions are truly instituted by men and because of this the rules governing politics are experienced as political choices.

The political structures that the American colonists created were also made in a rare state of freedom. Friedrich Hegel (2001, 102) noted around 1840 that the American colonists were conducting a massive experiment: thousands of new communities were created that were governed with locally determined political institutions. The American colonists were free to do so because of the absence of a restricting balance of power between states. The new communities, states and federation, didn’t need centralized

political institutions with strong capabilities as was the case in Europe (Tilly 1990). The American colonists could create failing or weak government structures without experiencing serious consequences of this as a country. Settlers in the West might sometimes be left to fend for themselves, and pay the ultimate price for this, but such "discomforts" never put the nation at risk. The political institutions created during and after the American Revolution were also consciously created as a political structure for, by, and with the people. The creation of their own political institutions was one of the most important parts of the Revolution. It gave the people a stake in their government and signaled that this, the Revolution, was a serious undertaking. As John Adams stated: "the creation of political institutions is independence" (Quoted in Wood 1969, 131-132).

The American colonist were also free to create their own political institutional structures because there was little internal pressure. This pressure on the political system was low because the early American colonies were quite homogeneous. Differences between individuals and groups were not as big as in Europe. In a divided society, pliable political institutions would have given one group the opportunity to entrench their power into the political institutional structure and, from there, dominate society (Huntington 1968, 124). The homogenous nature of the emerging American society removed this danger for the most part. However, when there were conflicts, as between the white and black population in the South, the pliability of the political structure did become an issue. The group in power, whites in this case, could without a problem manipulate who was allowed to vote, how the votes were converted into seats won, who kept an eye on the elections and which groups were allowed to organize and advocate for their interests. The political system offered very little to those in opposition of the peculiar way of life in the South. The only alternative left were the unconventional methods of political participation.

Another favorable circumstance for the custom of pliable political institutions to arise in the American colonies was the structure of the other important institution in the lives of the American colonists: the Church. The churches in the American colonies were not structured as in Europe. There was no independent institution with its own power base, centralized control and standardized operation. Churches in the American colonies were an integral parts of the community, depended on the community and were regulated by their community. Churches, just as the political institutions governing them, were created by the people and changed if the majority of the people wanted to do so. The American tradition resembled somewhat the European protestant tradition, but the relationship between individuals and their church was more liberal in America. The reasons for this were, again, the lack of formal institutions that forced people to create their own rules, the absence of the influential Catholic Church, and a clear

separation between politics and church. The government was not to promote or help one form of religion, and churches had no formal place in the government structures. How people believed in the American colonies was also a matter of local self-government.

2.3 Tradition and institutional change

The colonist came to an unsettled land while facing little pressure from outside or inside to form their political institutions in a certain way. So the Americans got to work creating political institutions that fulfilled their needs and could be different depending on the circumstances. The bottom-up nature of this process, people coming together to decide how to govern themselves, was imprinted in the institutions they created. Any political authority exercised had to flow from the people (Wood 1991, 213). Who of the people were eventually in control of the political power was in part decided by the makeup of the political institutions. Given their importance it is not surprising that the creation of these institutions became a political struggle between groups. Early on in the Republic the boundaries between states were unclear and people moved in large numbers. This gave politicians the opportunity to adjust the political structure in their favor. Not only were districts redrawn, but if needed entirely new districts were created (Bailey 1967, 109). For example, when the governor of Pennsylvania faced political opposition to his policies he created three new districts. That the new districts were on land partly claimed by Maryland was of no consideration. The argument was that citizens of Pennsylvania had settled there, so they should be part of Pennsylvania. The representatives of these new districts happened to support the Governor. That the land fees for the landowners in these districts was lowered was also coincidence (Tully 1994, 332). In South Carolina the powerful slaveholding planters managed to adjust the political system by aggressively redistricting in 1794 (Wood 1991, 268). Inspired by the "rotten boroughs" in England they created districts that overrepresented rural areas in their parliament by a fair margin. Obviously, without clear rules regarding how voters were to be converted into seats in parliament the power relations within a community or state could shift very quickly.

Ambiguities in the early state constitutions – or charters – were also often used for partisan purposes. In, again, Pennsylvania, the Pennsylvania Fundamental Constitution had been drafted in such a way that the lower house, the main representative house of the people, was much weaker than in other states (Tully 1994, 30). The wealthier population benefited from this as they were represented in the more powerful higher house. In the early 18th century the Governor and both the houses fought many battles over who had the right to appoint, and thus control, the judges, who were in charge of the military, the control over land and in general every administrative function (Tully 1994, 51). Although in New York the outline of the

provincial government was fairly clear, who had control over political institutions was not. An endless tug of war was the result. Of the political institutions the judiciary was probably the most important one to control, and thus many fights took place about the control of the judges. One of the main points of contention between the American colonists and the British motherland was over those judges. The English Crown wanted more control over the judges and attempted to achieve this by making the judges financially dependent on the Crown. The Crown was going to pay their salaries. The colonial parliaments recognized the danger that such a change would bring about and insisted on the continuation of payment of the salaries of judges by their parliaments (Bailyn 1967, 105-107). Both groups recognized that 'he who pays the piper calls the tune' and were unwilling to give up influence over the judiciary.

The custom that political institutions are adaptable for partisan reasons is part of the American political history. Such behavior is restrained by fundamental laws regarding the actions of the government in regard to its citizens. Fundamental laws, however, have little to say about *how* the political structure should be organized. As long as governmental power is based on popular control it is legitimate. However, when different government bodies claim to be speaking for the people a struggle for control over the political institutions can be the result. This organic system did not only survive, but flourish in the "new world". Without the external pressure to create a strong centralized government with one sovereign power, the American colonists were able to experiment with dispersed, weak political structures. Political structures that each society could institute as it saw fit and change when required. This gave politicians the license to alter the political system for their ideological, personal or party benefits. Especially early on, politicians aggressively and creatively targeted the political institutions that regulate how the influence of society was converted into political power. Districts were made up, redistricted and discarded when this was beneficial. Adjusting who was allowed to vote has also been a popular choice by ambitious politicians to create a more favorable political structure.

The lack of respect for the rules of the political game was so ingrained into the political culture that it could have thrown the United States off its democratic trajectory. Especially early on, when the constitution was not yet fully accepted and democracy still had to prove itself, politicians were already manipulating the rules to such an extent that the whole democratic experiment could have failed. Rights like the freedom of speech, guaranteed by the first amendment, were valued when it came to their own side, but the opposition did not always have the same rights (Lipset 1963, 43). The Alien and Sedition Act is a good example of how the ruling politicians – it is unclear if at this time there was a ruling party – tried to limit the freedom of speech of their political foes. Criticism on government officials or policies were

regarded as licentious and atrocious statements and punishable by law (Lipset 1963, 40). This seriously restricted the actions that opposition could take against the administration.

2.4 Norms as constraints?

The political system and traditions that the Americans inherited have never favored norms as constraints on politicians manipulating the political system. The system had always been organic, with different factions pushing against each other and winning or losing control over parts of the government. The fragmented voice of the people gave each of the different powers the legitimacy to restructure government. As time progressed the alteration of government structures, both those needed and the manipulation for partisan reasons, became more and more acceptable. Restructuring the government was no longer a revolutionary deed, but a constitutional principle that the people, and their representatives, had the right to create, abolish or alter government structures (Fritz 2007, 25). Politicians were aware that the rules would determine which faction was to be given handicaps or advantages in the political struggle (Dahl 1956, 137), but this did not stop them altering the rules. It could even be the reason for altering the rules. Just as that every interests was as good as any other, doing away with the republican ideal of disinterests, every rule was as good as another. The rules governing American politics were by definition rules that favored one party over another: they favored land owners over city dwellers, East over West, white over black, man over women (Dahl 1956, 139). There were no neutral rules in politics. And once this is accepted morality cannot be used anymore as an argument against a new set of rules. It is not surprising that Publius wrote that “that neither moral nor religious motives can be relied on as an adequate control.” (Hamilton, Madison, and Jay 1987, 45-46 (No. 10)) If put in a position of power people would try to abuse this for their own good, neither loss of states, respect, friendship, religion or any moral argument would be sufficient to keep politicians in check (Dahl 1956, 21). The people and the constitution would have to do so.

Chapter 3: Democracy as safeguard

The notion of normative constraints on the behavior of politicians has not really developed in the American environment of transactional and interest driven politics. It once was there, the republican public virtues advocated by some of the Founding Fathers, but once confronted with the raw nature of American politics it soon melted away. Controlling and putting a check on politicians was left to constitutional rules (which is explained in the next chapter) and the people (the population).

3.1 Primacy of people's power

One of the most important developments in political theory that John Locke states in the *Two Treatises of Government* (1690) is the sovereignty of the people. In earlier works, most important in *Leviathan*, written by Thomas Hobbes in 1651 (1994), the explanation for the creation of a collective government was a functional one. The people accepted an absolute and sovereign governmental power above them because this offered them a way out of the state of nature and increased the prospect of a decent life. In Locke's work there is also a government formed to escape the state of nature, but the people are the source of all government power. Some of their power the people delegate by consent, and most importantly they keep the right to overthrow a government when the government does not function as intended anymore. This makes the people the ultimate counterforce to a tyrannical government (Mace 1979, 21). The idea that the people are the source of all government power was widely accepted by the Founding Fathers and has played a prominent role in American political thought ever since (Fritz 2007, 31). The will of the people was so important that no procedure, not even the Constitution, could bound them indefinitely. The creation of the constitution required the consent of the people and the people had the power to alter the constitution – or at least their representatives could do so.

The Lockean notion of popular sovereignty is found in the writings of many of the Founding Fathers. So was John Adams convinced that the "source of all Authority and Power" were the people, even if representatives made most of the decisions for them (Quoted in Fritz 2007, 34). For example, the constitution of 1787 required the consent of the people, which demonstrated the primacy of the people. The Federalist Paper is also clear when it comes to where the sovereign power lies. In Federalist No. 51 Publius wrote that "all authority in it [the federal republic of the United States] will be derived from, and dependent on the society" (Hamilton, Madison, and Jay 1987, 379 (No. 51)). And in Federalist No. 28 Publius made it clear that to secure the rights and privileges of the people it is essential that "the whole power of the proposed government is to be in the hands of the representatives of the people" (Hamilton, Madison, and Jay 1987, 138 (No. 28)). In Federalist No. 46 Publius also made it clear that there was no

shared sovereignty possible or a kind of semi-sovereign people: the people were either sovereign or not. "Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not." (Hamilton, Madison, and Jay 1987, 248 (No. 46)) The powers of the government could be shared by different levels of government, but sovereignty itself had to be undivided in the hands of the people.

Several decades later a Frenchman would travel through the new nation and marvel at both the power of the people and their active participation in government. Everywhere where Alexis de Tocqueville went he noticed that the local governments were based on the principle that the people were the best judge of what was the public good and they were the best advocate for their interests. So it made sense that "all the magistrates to be chosen were either chosen by or at least from amidst the local citizens." (Tocqueville 2003, 61) This principle was so profound that Tocqueville thought that "it [society] may almost be said to govern itself, .. , so little do the authorities forget their popular origin and the power from which they emanate." (Tocqueville 2003, 124) People were also not "just" electing their own representatives in government, they were also interested in government and participating in unexpected high numbers (Tocqueville 2003, 136). The participation of the people was not everywhere the same. In the townships in New England the people were very active. As Tocqueville traveled to the South he noticed less involvement and less interest of the people in the governmental tasks.

Tocqueville was, however, not blind to the negative side of popular sovereignty. The people might be able to constrain the government if its actions go against the will of the people, but the people could also be wrong in their choice of policy. And when they were wrong nothing could prevent them from accomplishing their wishes with celerity because "in America the authority of the legislative body is supreme" (Tocqueville 2003, 203). "In a nation where democratic institutions exist, organized like those of the United States", Tocqueville feared that nothing could stop the majority because "there is but one sole authority, one single element of strength and of success, with nothing beyond it." (Tocqueville 2003, 209). It implied that nothing could function as a counterforce to the numerical majority of the people – except for the judiciary as mentioned earlier, but even the judiciary eventually had to bow to the wishes of the majority. Tyranny of the majority could, and according to Tocqueville would, be just as dangerous as the tyranny of one or a few.

In America the majority, either directly or through their representatives, has the power to decide what the interpretation of the common good is and which laws to enact to realize the common good. This includes the power to determine the nature of government and civil society. Once people have given their

consent to be absorbed into a political community – as Lockean as it can get – the majority can determine the rules of that community (Mace 1979, 17). While this appears to respect the liberties of every citizen, reality can be quite different. Because of the primacy of popular sovereignty, the majority of the people could alter the rules in any way they please, including taking away the right of the minority to vote or express their opinion. This brings us back to the issue if the majority has the right to take away the right of people to create, abolish or alter the government. And if they do not have that right, are the people truly sovereign? (Amar 2005, 291) In his later years Madison addressed this questions in several of the letters he wrote. Madison expressed that the people, and their representatives at times, must have the right to alter their government (Fritz 2007, 29). He, however, sidestepped the theoretical question if the people could be sovereign if they didn't have the right to take away the right to alter the government. Madison was more interested in the practical issues. The people should have the right to alter government to avoid a discrepancy between the will of the people and the political system. Without this right government would demise. Madison has a surprisingly positive perception of the people in these letters: the power to make alterations were necessary to keep on improving the political system. Here he disregards the notion that the right to alter government could also be used to move government into a direction which would not necessarily be in accordance with his notions of how government should function.

The right of the power to reshape government is also at odds with the general fear the Founding Fathers had for the opinion of the masses. The people might be the sole source of authority and power, but they certainly were not meant to rule sovereign (Fritz 2007, 39). Hamilton stated that it was “an unhappy truth that people in general do not know their own happiness”. And if power was truly bested in the collective body of the people “error, confusion and instability” were to be expected (Quoted in Fritz 2007, 40). Such fears are clearly present in some of the Constitution's most important articles: both the Senate and the Presidency were to be elected indirectly. The masses were trusted to elect smart representatives, and the representatives were supposed to be wise enough to elect the best men for the highest positions.

3.2 Pluralism as a constraint on popular sovereignty

To protect the people from the role of the mob, also said the “tyranny of the majority”, is no easy task. Simply holding elections and creating a parliament would not be a sufficient solution. If the people are sovereign and the majority in parliament speaks for the people, than the majority can and probably will infringe on the rights of the minority. A body of men would be just as bad a judge of their own cases as individuals (Epstein 1984, 82). In fact, tyranny of the majority seems unavoidable in a republic. Madison

was, however, convinced that he found the solution for the risk of a tyrannical majority. How to avoid this is explained by Publius in the famous Federalist Paper No. 10. In this paper Publius first comes to the conclusion that the emergence of different factions are unavoidable in a republic (Hamilton, Madison, and Jay 1987, 43 (No. 10)). Removing factions could only be done by ensuring that all the people have the same interests or that nobody has the liberty to act on behalf of his or her interests. Both of these remedies are worse than the disease and discarded by Publius. Having concluded that factions are “thus sown in the nature of man”, the only viable option is to control for its effects.

The solution Publius proposes next to control for the effects of factions were a novelty. Publius argues that in large republics, like the United States, the number of factions will be numerous and relatively weak. In small democracies the factions can consolidate their strength and the strongest faction can rule over the weaker factions. In the United States there would be so many factions that there would be no faction strong enough to dominate over all the other factions. Factions might be able to dominate their community, or even their state, but never the entire nation. The American society would not be divided into one majority and one minority as long as the multiplicity of economic, geographic, social, sectional and religious interests would keep a check on each other. In the theoretical case that the United States would become divided into two factions, Publius feared that the divide between those two factions would be property: one faction with property and the other faction without property.

Publius presents a line of thought we now know as pluralism in Federalist Paper No. 10. He explains the theory that society is divided into many different interests and that power is not cumulative. To demonstrate how this would work Publius uses the example of economic interests that have opposite interests. If creditors will want certain laws to help them, debtors will organize in opposition to them. And if domestic manufacturers want restrictions on the import of foreign manufacturers then tradesman making their money by selling foreign goods will organize in opposition. (Hamilton, Madison, and Jay 1987, 44 (No. 10)). Thus Publius regards society as a multitude of (mainly economic) interests that will organize and form factions when their interests are being threatened by the actions of another faction. By doing so they automatically create counterbalance for each other. The reason for factions to organize is naked self-interest: “Every shilling with which they over-burden the inferior number is a shilling saved to their own pockets.” (Hamilton, Madison, and Jay 1987, 44 (No. 10)) The majority will enact legislation that is good for themselves, and make sure opposing factions pay the price for the legislation.

With this new and rather straightforward argument Publius turned many years of political theory on its head. Until then it had been conventional thought that a republic could only survive in a small republic

with a homogenous society. Publius argued completely the opposite with its reliance on size and the variety of interests as safeguards for stability and justice. On top of the size and variety of interests argument Publius also touted the advantages of representative democracy. In a large republic like the United States there would be more suitable characters than in a small republic. The size of the country had another advantage according to Publius: the effect of the size of the United States would be to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens,” and because these representatives could discern the true public good, they would “be least likely to sacrifice it to temporary or partial considerations.” (Hamilton, Madison, and Jay 1987, 46 (No. 10)). This is based on the idea that representatives could be more impartial being further away from the local interests. Representatives would be expected to be disinterested arbiters in the struggles between different interests. Size and numbers would not only create a multitude of interests that create a check on each other but also create an impartial arbiter – the federal government – that could act in the interests of the whole of the people.

Thus, pluralism and not norms was considered the first line of defense against the tyranny of the majority. The different interests would act as counterforces against each other and keep each other in check. Publius, and the Founding Fathers in general, did, however, not anticipate the development of parties in American politics and how this would influence the developed ideas about the working of pluralism.

3.3 Political parties

In today's Western democracies political parties, being “a team seeking to control the governing apparatus by gaining office in a duly constituted election” (Downs 1957), are regarded as an essential part of a properly functioning democracy. Schattschneider said in 1942 that “political parties creates democracy and modern democracy is unthinkable balanced and protected in terms of the parties” (1942, 1). Political parties have, however, not always had such an important position in representative democracies and for a long time were regarded as a negative factor. Under the Articles of Confederacy, at the Constitutional convention at Philadelphia and in the early years under the new Constitution, politicians cooperated in loose organizations that Peter Mair has qualified as “Cadre parties” (Mair 2002). Cadre parties might be called parties, nevertheless these type of organizations did not resemble the modern political party at all. In Cadre parties, politicians in parliament cooperated and organized themselves around specific issues. The coalitions were temporarily and changed from issue to issue. The party structure was also absent. The absence of structure can lead to pluralism – in parliament at least – in its purest form. While all of the Founding Fathers were part of such a Cadre party, they feared the

negative consequences if “real” parties were to develop. Washington, Jefferson, Adams and Madison all feared that those real parties would lead to a “mischiefs of faction” (Aldrich 1995, 5; Reichley 2000, 17).

The parties that developed as follow-up of the Cadre party were indeed much more structured and powerful. They eventually became political entities on itself. Parties provided its members with a social place to enjoy themselves, grow as a politician and work more effectively together on common goals (Reichley 2000, 90). The political parties also performed many important tasks for democracy. Nevertheless, there are also negative sides to the political parties that developed in the United States. That parties would become the instruments of ambitious politicians and serve certain societal interests (Aldrich 1995, 4), as discussed earlier, was expected. Politicians were to advocate for specific interests and parties would become a tool in doing this as effective as possible. However, the negative side of parties is more extensive than this. The American Two-party system that developed, the roles politicians were going to play in the political arena and the functions parties would start fulfilling in the society all provided signals of the phenomenon of political parties tending to manipulate the rules.

The party system, the number of parties and the degree of fragmentation of the political parties (Sartori 1990) in the United States present one of the few stable Two-Party systems in the world. Two major parties, the Democratic Party and the Republican Party today, dominate the political system and win most of the elected offices. The reason for this is the electoral system that is used throughout the United States. Almost all elections are first-past-the-post or majoritarian. In the former the candidate with the most votes wins, in the latter the candidate that has an absolute majority wins. Plurality electoral systems put pressure on the number of political factions to consolidate. This most times leads to a Two-party system, which has been named the *Law of Duverge* (1954) in honor of the French political scientist Maurice Duverge, who first wrote about it. Duverge argues that plurality systems lead to two parties because of two effects it has on elections. The mechanical effect rewards the party that manages to consolidate its support behind one candidate. A party can have two candidates that both get thirty percent of the vote, which means a majority of the people support that party. But such a party could still lose if another candidate gets more than thirty percent of the vote. Consolidation is the key to victory. A Two-party system is also likely to form because of the psychological effect of people wanting to vote for a candidate that can win. Even if another candidate is more preferred. Both effects push the party system towards fewer parties until a Two-party system is realized.

The institutional manipulation found in the United States is not caused by having a Two-party system. Actually, manipulation of the rules is not linked to the number of parties in a party system at all. It is linked

to one party having an absolute majority, which is one of the characteristics of a Two-party system – at least per parliament or elected office. Once a party gains the absolute majority it can become beneficial for that party to manipulate the institutional structure to entrench its position. Manipulating the rules becomes a lot harder to realize in a multi-party system where multiple parties have to form a coalition to govern. In this situation, all the parties in the coalition would have to agree upon the manipulation. They need to perceive the manipulation as beneficial for them as for the other parties in the coalition and be guaranteed a future position where they can all benefit from the institutional manipulation. Especially the last condition is almost impossible to fulfill in a parliamentary system with coalition governments. No party has guaranteed its position in the government, unless it has a majority, in which case there is no need for a coalition government. Thus, having one party in power is a pre-condition for institutional manipulation for partisan reasons to occur. It is, however, not a sufficient condition. A Two-party system like the British gives the party in power ample opportunity to manipulate the rules and entrench its position. Even more so than in the United States. Yet, there is no institutional manipulation observed in the British system. This could arguable be the result of a different political cultural tradition. It is conceivable that in the British environment “norms” might prohibit members of the majority party in parliament to manipulate the rules and gain a partisan advantage.

A Two-party system also leads to a different attitude of parties towards each other and a different understanding of the role of the parties in maintaining a stable democracy. In general the understanding is that multiparty systems with coalition government are more consensus based and a majoritarian system more adversarial (Lijphart 1977, 25). The multiparty systems often are the result of a plural, divided society, in which the different parties represent the different groups in society. Each group knows that it is a minority and cannot rule alone. To govern the different groups have no other option than to find common ground and govern together. To avoid that the groups who are not part of the ruling coalition leave the political game completely, it is customary in Consociational systems to give the opposition a voice in the policy formation process (Lijphart 1977, 27). Sometimes each group even has an informal veto to stop any government policy that would go against its fundamental believes. This ensures the protection of all minority groups, which all groups actually are In the majoritarian systems the approach to governing is more zero-sum (Lijphart 1977, 27). Any gain by one group is a loss for the other group. This leads to an adversarial approach to politics. Such adversarial behavior is often possible because the society is homogeneous, or at least those in power are homogeneous. Lord Balfour once said that when the people are “fundamentally at one, they can safely afford to bicker.” (Quoted in Lijphart 1977, 28) The

homogenous nature of the US society meant that the adversarial nature of its politics was not a direct danger to the stability of society (Lijphart 1977, 29).

The adversarial, zero-sum approach to politics often has an economical underpinning. Like Publius said: "Every shilling with which they over-burden the inferior number, is a shilling saved to their own pockets." (Hamilton, Madison, and Jay 1987, 44 (No. 10)) The majority will be tempted to shift benefits to members of its group and costs to the members of the opposition. This same logic can also be applied to the institutional structure. Instead of transferring shillings by making beneficial legislation, the majority can manipulate the rules to gain relatively more votes or give interest groups advocating for its interests a bigger say in the political arena. In a Consociational system such behavior would be regarded as dangerous. The rules of the political game are there to protect each of the minority groups from the infringement of other groups. Once a group starts to manipulate the rules this could lead to uncontrollable centrifugal forces and a political system in ruins. Whereas in the adversarial system the rules are just a barrier against being able to optimally advocate for the interests of your minority group.

The adversarial approach in a Two-party system does not mean that the two parties can never find common ground and work together. When it comes to the political institutional system there are enough rules that benefit both the major parties, often at the expense of the smaller parties. The American electoral system itself with its plurality elections is one of the best example of how the political institutional structure benefits both major parties. Both parties would probably defend plurality elections tooth and nail as it shields them from competition. The financing of the parties and the threshold for participation in election debates has also favored the two major parties. In the campaign finance reforms of 1971 and 1974 the Democratic Party and Republican Party decided together what the rules for financial support for political parties were going to be. Rules that, unsurprisingly, benefited both the Democratic and Republican Party (Reichley 2000, 33).

This does not mean that political parties only play a negative role in democracies. The opposite is also true. Political parties create a shadow of the future which compels politicians to be true to their campaign promises. Parties are also useful for instituting mechanisms to solve the collective action problems, which individual politicians would have a hard time to overcome. This makes the formation of majorities easier. Political parties can also play a role in the Madisonian model. Political parties can help to activate social groups whose interests are being jeopardized. They can aggregate the opinions of the different social groups and explain to social groups why the government has chosen to take a certain action. Political parties have also been the gateway for individuals from the different groups to learn how to behave in a

political setting and be effective. Many political parties also have research departments that study government policies and alternative policy options. The political parties also assign the government if they win the election or manage to obtain a position in government through coalition negotiations (Reichley 2000, 2).

During the twentieth century the nature of political parties started to change and many of the benefits that political parties provided to democracy started to disappear. Parties transitioned from bottom up advocates of specific societal interests to professionalized machines with just one goal: to win elections. Peter Mair has described the later state of the parties as “ruling the void” (2008): political parties still form the government and govern while their roots in society have evaporated. The “new” political party is not concerned anymore with aggregating interests or doing research, but getting people to vote for them and to continue being in power. Ideologies and interests of social groups have become tools of the parties to reach their own goals (Reichley 2000, 8-9). Because the parties lost their footing in society they are now more than ever relying on the government, both financially and for legitimacy. Governing, or the possibility of governing, justifies the financial contribution they get from the state *and* from donors. The reliance of parties on being in government has enticed political parties to win regardless of the costs. Not being part of government will cost a lot of the people in the party their job, breaks careers and diminishes the chances of personal success in the future. The distance to society and the reliance on being in government could be another reason for the increase in institutional manipulation. If the rules of the game are within the reach of the majority and could decide the outcome of the next election or the passing of a new and important piece of legislation, it would make sense to try and adjust the rules. After all, it is for the good of the party.

Another possible reason for the escalation of institutional manipulation is the polarization of the American political system. Some polarization is inherent to democracy, the factions need to oppose each other on some of the issues. Nevertheless, for a long period in history “Down’s Median Voter Theorem” seemed to be working in the United States. The centripetal forces of the plurality electoral system pushed the political parties to the center and resulted in the election of moderate politicians. For this reason the two parties were said to be mostly the same (Hartz 1955, 5). Apart from some minor differences, both represented American Liberalism (Hartz 1955, 3-32). However, in recent decades the parties have started to drift apart. The causes and consequences of the polarization of the American political system has been studied by many scholars (Bafumi and Herron 2010; King 2003; Layman, Carsey, and Horowitz 2006; Poole

2008). At the same time the American public has also polarized⁹. Or, more accurately said, the American public has become ideologically more coherent. Where people used to have a mix of liberal and conservative values, they now more and more have either liberal or conservative values. Just as in politics, the mid field has gradually disappeared.

The increased coherence of both the politicians in parliament and the electorate has opened up new possibilities for institutional manipulation. Furthermore, it is much harder to exclude groups from the political system when the different politicians in the same party depend on a different electorate, ideological issues or interests groups. Manipulating the rules would result in benefits for some politicians, while their colleagues would have to pay the price. The more coherent a party and their electorate is, the easier it is to benefit from excluding groups from political participation. In today's American political environment the Democrats and Republicans rely on rather distinct voters, issues and interests groups. In the 2012 election, 93% of the African Americans, 73% of the Asians and 71% of the Hispanics voted for Barack Obama¹⁰ of the Democratic Party. This means that it will be beneficial for Republicans to create barriers for such groups to vote. The same argument can be made for interest groups and issues. Because unions support the Democratic Party in general more than the Republican Party, it is beneficial for the Republicans to make it harder for unions to organize and be active in the political arena¹¹, while for Democrats it is beneficial to go after conservative organizations¹². For instance, a moratorium on gun related accidents and deaths helps the Republican Party. The more distinct the social forces behind the parties are, the more effective and appealing it becomes to manipulate the rules. And if winning is all that matters, it is not surprising that the rules are not safe anymore.

3.4 Institutional Manipulation and the Madisonian model

The Madisonian model of competing factions and interests groups all competing for influence on government policies is the cornerstone of any modern democracy. A democracy cannot function without the competition between the different groups in society. How a diversity of interests would lead to counterbalancing forces and protection of the rights of everyone, was one of the most important insights

⁹ PewResearch rapport on the polarization of the American public. <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> (last accessed 12-08)

¹⁰ Breakdown of voting patterns per demography. <http://ropercenter.cornell.edu/polls/us-elections/how-groups-voted/how-groups-voted-2012/> (Last accessed 12-08)

¹¹ The rise of "right to work" laws in Republican states. <http://www.economist.com/news/united-states/21645857-wisconsin-may-become-25th-right-work-state-republicans-v-unions> (last accessed 12-08)

¹² The IRS targeting scandal. <http://www.washingtontimes.com/news/2015/oct/25/irs-tea-party-targeting-accusations-legal-issues-p/> (last accessed 12-08)

Madison had to offer (Mace 1979, 112). In the Madisonian model, the government “would be a driving ship on an ocean of different interests and opinions”. It goes where most of the current goes, i.e where the majority of people want it to go. And no single current alone could control the ship.

One of the requirements of the Madisonian model is that the different factions actually experience a threat to their interests and subsequently organize themselves to influence government policy. This is comparable to the example used by Publius of the manufacturers and the merchants (Hamilton, Madison, and Jay 1987, 44 (No. 10)). If a new government policy proposes to increase the import duties on foreign goods, some of the merchants will lose business while the domestic manufacturers will increase their business. So they both organize and try to pursue the government to do “the right thing”. Different factions combine again when the next issue comes up to advocate for their interests, leading to an ever changing majority. This process is disrupted by having two parties that advocate for opposing interests. When the parties become an integral part of government and lose their footing in society they become less responsive to the factions, and reduce the functioning of pluralism further.

The examples used by Publius are about social interests, mostly economic interests. If and how the Madisonian model would function when the issue at hand is the institutional structure is neglected in the Federalist Papers. Which indicates that Publius did not regard alterations to the political institutional structure as a separate category. The Madisonian model would also function here. However, when it comes to manipulation of the political institutional structure the argument can be made that the Madisonian model will not function properly at all. Changes to the institutional structure are important, but are not something a faction will perceive as a direct threat to its interests. An institutional alteration will not cost them business – or as Publius says a shilling. Therefore, the process of rising counterforces will not function when the interests of social groups are directly threatened.

Even more problematic for the Madisonian model is that institutional manipulations can go to the core of the functioning of the Madisonian model. When politicians manipulate the institutional structure and make it harder for some factions to influence the political process – either by manipulating power relations, information or the collective action problem – they are undermining the functioning of the Madisonian model. Factions that have a hard time to organize and influence the political process will not be counterforces to other factions. The people, factions, cannot be the check on government when their access to the political process is limited. The people could be a good check on government if everyone had the right to vote, has full access to relevant information and could organize themselves to influence government policies. But if this is the case, then there is not really a check on institutional manipulation

needed. And when the popular check on institutional manipulation is needed, it is possible that this check has been weakened or even disabled because of the institutional manipulation. If this logic is taken to its extreme then the point becomes very clear: if the people do not have a right to vote anymore, no access to information regarding what the government is doing and are prohibited from organizing as a faction, then it becomes impossible for the people to be a check on the government. However, this situation has never happened in the United States. Still, to expect the people to be the check on government manipulation of the rules means that the cure for the evil of government is that which is being corrupted. Therefore, we can conclude that democracy, being arguably the most important check on government action, cannot always be a reliable check on government action.

Chapter 4: Constitutional constraints

The American political system is well known for its “checks and balances”. While the constitutional constraints are important, and are an essential part of the constitution, the Founding Fathers did not have a complete faith in constitutional rules as a constraint. In real Lockean fashion they believed above all in the people as a counterforce (Mace 1979, 21). Constitutional rules not so much. Rules were perceived as useful to structure the political process, but rules themselves cannot be a counterforce. The reason for the lack of faith in the rules is the structure-agency relationship between politicians and the political institutional structure. On the one hand the rules are an important factor in guiding the behavior of politicians in several manners. They determine the options available to politicians and the distribution of pay-offs. The rules create the environment in which the actors make their cost-benefit analysis and choose the most optimal option – in theory at least. At the same time the agents, politicians, can alter the structure in many different ways. They can alter how power relations develop, which information is available and how open the system is to interests groups. They can do so because they are the representatives of the people and the people are sovereign. As mentioned earlier, there is no power beyond the people, including the rules. Even the Constitution can be amended. It is not an easy process with its quadruple, supermajority requirement, but it can be done. So the rules are subordinate to the will of the people. The only way to counter this would be by creating a will in government independent of society. This would be unwise because “a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party,” said Publius, “and may possibly be turned against both parties.” (Hamilton, Madison, and Jay 1987, 270 (No.51)) A power independent of the people could just as well do harm to society as be beneficial. Because of the primacy of the people the rules can never be a perfect check on the behavior of politicians.

The constitutional rules that the Founding Fathers did put into place mirrored their thinking about society to a large extent. The notion that as long as society is broken up into a multitude of different interests, is also implemented in government. The American government is broken up so many times that its power is fragmented to the extent that forceful political agency becomes almost impossible. For this the Founding Fathers relies on both horizontal and vertical divisions of power. In true American political tradition this division of powers is not edged in stone. The division of powers over the different bodies is organic and has changed over time. Nevertheless the different bodies keep each other in place and have been a check on each other.

Checks and Balances

The American political system is a first in several different manners. It was the first governmental structure intentionally designed by humans. Until the American experiment constitutions had been forced on nations, or had been formed over time (Fritz 2007, 16). The Constitution also marked a new thinking about how society was to be represented in government. Until then a 'mixed government' meant the representation of the different classes in government. The King as representative of the royalties, the Upper House representing the nobility and the Lower House as representative of the many. The Constitution implemented a divided government which had a very different logic. There were no different classes to represent, there was only 'the people'. The will of the people was, however, channeled in several ways by having different kind of elections on different levels (Mace 1979, 105). As a consequence the will of the people is fragmented even further. Different interests are placed in opposition to each other both horizontal and vertically. The result is a system of checks and balances that has made it rather difficult for one interests to dominate government or even become a permanent majority.

The cornerstone of the horizontal system of checks and balances is to split the will of the people up even further and then force the different powers to work together. The will of the people is fragmented by having representatives serving different geographical electorates and elected at different moments in time. The federal system has representatives in the House elected in districts, the Senate elected state wide (since the 17th Amendment) and the President by the whole country. Consequently it is very unlikely that one faction will be able to control all branches of government and impose its will on the whole of society. The different powers are then forced to work together by vesting functions, the power to act, in each of the different bodies, the House, Senate, Presidency and Judicial, and having the bodies share powers. If a power is shared it requires the consent of several bodies before it can be activated. This forces the bodies to look for a consensus.

The most important power that is shared by different bodies is the legislative power. The power to make legislation was considered the most important power and most dangerous power of them all (Hamilton, Madison, and Jay 1987, 268 (No. 51)). If one branch would have sole control over the creation of legislation it could subjugate the other branches. To avoid this the legislative power is shared horizontally by the Legislature, the Executive and the Judicial. The Executive and Judicial do not have full legislative powers, they cannot initiate legislation, but they can stop legislation with a veto or render legislation unconstitutional. This forces each branch to cooperate with the other branches and leads to a balance between the branches.

The balance between the branches would also be disrupted if one of the branches would gain control over the selecting of the members of the other branches (Hamilton, Madison, and Jay 1987, 269 (No. 51)). If the House, for example, would determine who would become the President it would have control over the Presidency. Too much power would then be concentrated in the hands of the House. To avoid this the selection of the members of each branch is done mostly independent of the other branches. Except for the appointment of Supreme Court Justices and the members of the President his administration. However, the selection of members of the Supreme Court does not give a President complete control over the Judiciary because Supreme Court justices serve for life and a president for several four year terms. Presidents can influence the balance on the Supreme Court, but not determine the entire Supreme Court. The influence of the Senate on the administration is also a minor issue. The Senate could make life miserable for the President by rejecting all his proposed members of his administration, but President could still operate independently from the Senate.

The powers are expected to act as a check upon each other because of the zero sum nature of political power. Any change in how much power a branch or body has will influence the standing of the other parts of government. If one of the branches or bodies gains a new power (function) this increases its relative power in comparison with the other parts of government. The transfer of a power from one body to an other – like the power to start a war for example (Schlesinger 1973) – will directly influence the power of both bodies. Consequently every branch and body of government will be skeptical about the creation of new powers or the transfer of a power to another body. The ambition of each governmental body is a check on the ambitions of other parts of government.

The horizontal system of checks and balances is reinforced by a vertical system of checks and balances. The vertical relationship between different levels of the government was not completely new to the new American state. The legal notion of “legislative multiplicity” had been part of the British Empire for a long time (LaCroix 2010, 33). Different legislations on different levels of the government could work in tandem with each other. Matters that were more effectively solved on the local level could then be concluded by locals and matters of the state, or empire, on a higher level. In addition to the efficiency argument legislative multiplicity also added a second security against the usurpation of rights of the people. By creating multiple levels of government, each with, again, shared and distinct powers, power was set to oppose power. “The different governments will control each other” Publius said, and “at the same time each will be controlled by itself.” (Hamilton, Madison, and Jay 1987, 270 (No. 51)) The same argument used for the horizontal division of power applies again: the ambition of the politicians on the different levels

will form a check on the ambitions of other levels. Each level will guard its power and try to prevent other levels from encroaching on its powers.

The vertical system of checks and balances does have a 'natural' deficiency: the different government bodies on the same level can be each other equals, strong bicameralism for example. In the vertical relationship in the United States this is not the case. The legal standing of the federal state is superior to that of the states (Epstein 1984, 54). Formally the federal laws are the supreme laws of the land and states are supposed to adhere to this principle. However, because the states have to implement most of the laws they are in a position to resist the federal government to a certain extent by dragging their feet or intentionally implement a law slightly different than as intended by the federal government. Publius was even convinced that the states would be in a position of power. He was convinced that "It has been already proved, that the members of the federal will be more dependent on the members of the state governments, than the latter will be on the former." (Hamilton, Madison, and Jay 1987, 244 (No. 46)) The system of vertical checks and balances ensures, just as the horizontal, that government on each of the levels has to seek the cooperation of the other levels and is also subject to the pressures from the other branches. Ambition is again made to counter ambition.

How constitutional checks are undermined and sometimes do function

The horizontal and vertical system of checks and balances created by the Constitution relies not only on formal institutions. It also relies, heavily, on the sociological structure of the American society. To properly function the American society has to be pluralistic. If every citizen would have the same constant interest it could be channeled in many different ways and fragmented an unlimited number of times, but the end product would still be the same one interest. This deficiency does not play a role when it comes to social groups trying to influence government policies. There are enough different interests in the large American society to ensure some approximation of pluralism. However, when it comes to the rules of the political institutional structure there is no resemblances of pluralism to be found. The fragmentation of government has partly been undone by the formation of political parties. The rise of two distinct interests has to a large extent diminished the effectiveness of the collective action problem caused by a fragmented political system. Having two parties has also aligned the interests of the different branches and levels on many occasions, especially in regards to the political institutional structure. If a party can increase its control over one branch of government by changing the rules this can be in the interest of members of the same party in other branches and on other levels of government. Such a manipulation does also not

affect the relative power of another branch or level of government. Instead of ambition countering ambition, institutional manipulation often leads to ambition furthering the ambition of other branches.

The system of checks and balances also relies on a zero-sum political environment. If ambition is to counter ambition the gains of one party have to be felt, even if it's only relative, by other parties. When one government body tries to usurp a power other bodies will resist this. However, when a body manipulates the rules the injured party is not another government body, but the minority in that body – or the minority in another body. The inter government bodies power relations are not affected, the intra body power relations are. Consequently there will be little or no pushback from other bodies unless the minority that is being harmed in one body is related to the majority in another body. This happens when there is a divided government. But if one party is in control of multiple bodies the interests of the majorities will align and they will approve of the manipulation. If a majority in the State House proposes to redistrict or alter the voting laws intended on gaining an advantage, the party members of that majority in the Senate and the Governor have very little reason to push back. The institutional manipulation will probably make their life easier.

The weaknesses in the system of checks and balances do not mean that it never works. Sometimes institutional manipulations are being opposed by other bodies or other levels. This can happen even the majorities in both bodies are members of the same political party. The manipulation of the electoral process by state congresses has been going on for a long time. Since the gutting of the Voting Rights Act in 2013 there has, however, been an upswing in the amount of laws affecting the electoral process. The courts have historically been hesitant to intervene in the electoral process. If the courts would determine how politicians are elected it would violate one of the core values of separation of power: the selection of members of another power. Nevertheless the Supreme Court felt it was obliged to intervene in 1962 to ensure that everyone's vote was being counted. In the case *Baker v. Carr* the Supreme Court declared that everyone's vote should have the same weight and that districts should have roughly the same amount of citizens. This became the "one-person one-vote doctrine" and put an end to the *rotten boroughs*. Today the courts are also pushing back against the manipulation of districts and the right to vote. In Florida the Supreme Court ruled it unconstitutional to gerrymander prisons into one district¹³, in North Carolina the courts declared the racial gerrymandering by the state Congress unconstitutional¹⁴ and in Wisconsin,

¹³ <https://thinkprogress.org/breaking-federal-court-rules-prison-gerrymandering-unconstitutional-25d6bc6eba16#.zc1rv7pfa> (Last accessed 12-08)

¹⁴ http://www.slate.com/blogs/the_slatest/2016/08/11/federal_court_strikes_down_north_carolina_gerrymander.html (Last accessed 12-08)

Texas and Michigan the courts declared that new voter ID laws violate the Constitution¹⁵. The courts are pushing back, but there are hundreds of new laws that manipulate the political institutional structure. The courts cannot hold them all back.

Politicians themselves also sometimes push back against the manipulation of the rules by other politicians. In recent years there have been several plans proposed by Republicans in states like Ohio, Pennsylvania and Virginia to award the electors of the Electoral College on a different basis¹⁶. Now most states, except Nebraska and Main, use a first-past-the-post winner takes all system. In the elections of 2008 and 2012 this resulted in the Democratic candidate for president winning all the electoral votes of these states. By changing the law and awarding the electoral votes proportional or per U.S. House district the Republican candidate would have picked up several of the electoral votes. With advantageous districts the Republican candidate could even have won a majority of the electoral votes while losing the state-wide vote. The national Republican Party would benefit from such a change in the rules. These changes have, however, not materialized because the local Republican politicians fear that this will bring unwanted attention to their districts. They fear that the Democratic Party will pour more money into their district to win it in the Presidential election¹⁷. This will make their own election more challenging. So local Republicans have rejected such proposals. Their ambition to be elected to office has made them oppose the manipulation of the rules to further the ambitions of the national Republican Party.

The renowned American system of checks and balances is effective at keeping the powers of government under control. By fragmenting the will of the people even further and placing every government body in opposition to the other bodies, ambition is made to counter ambition. As long as the members of a government body value their ambitions higher than the ambitions of the members of another body they will resist the increase in power of a rival government body. However, this system is not that effective when it comes to the political institutional structure. When a body manipulates its institutional structure there are no powers usurped from other bodies or from society. "Just" the relationship between the majority and the minority is affected. A chance that can be in the interests of the majority in other government bodies.

¹⁵ http://www.slate.com/blogs/the_slatest/2016/07/21/michigan_judge_strikes_down_straight_party_voting_ban.html (last accessed 12-08)

¹⁶ <http://www.theatlantic.com/politics/archive/2013/01/the-gop-plan-to-take-the-electoral-vote-rigging-scheme-national/272523/> (Last accessed 12-08)

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http://www.slate.com/articles/news_and_politics/politics/2013/01/republican_plans_for_electoral_college_reform_democrats_shouldn_t_worry.html (Last accessed 12-08)

Conclusion

Many years ago Alexis de Tocqueville wrote that “The great advantage of the Americans is that they have arrived at a state of democracy without having to endure a democratic revolution; and that they are born equal, instead of becoming so” (2003, 467). A consequence of the natural equality of men in the United States is that Americans never had to create a government strong enough to break the old bonds of Feudal and Canon laws. Instead Americans have been more concerned with the dangers of a strong, overreaching state. Still today politicians often appeal to this fear with a cry for a “small or limited government”. The fear for government overreach is an ever present element of the American political discourse.

The literature on the dangers of government has focused predominantly on how to prevent one faction from taking control of government and to impose its will on the rest of society. The institutional structure is regarded as a positive influence: it channels social interests in such a manner that the power of factions is fragmented and always opposed by competing interests. That the institutional structure is vulnerable to manipulation and can be abused by a faction is almost completely disregarded. A remarkable omission given the distrustful opinion of the Founding Father on the human nature. According to Publius “If men were angels, no government would be necessary” (Hamilton, Madison, and Jay 1987, 267 (No. 51)) and John Adams wrote that the new republic needed a “government of laws and not of men.” (Adams 1775, 106) Humans were motivated by self-interests and would always abuse their position of power to advance their own interests. Naturally this includes alterations to the rules of the political game. Even more so, because of the importance of the rules of the political game these will often be the first casualties of abuses of governmental power.

The tendency of American politicians to manipulate the institutional structure is rarely discussed in the literature on the American political history or political theory. This thesis has attempted to fill this gap. By delving into why norms, democracy and constitutional constraints have failed to provide an adequate check on American politicians reshaping the political institutional structure for partisan reasons an attempt has been made to elucidate a weakness in the literature on American political theory.

Norms, the collectively accepted notions of what is acceptable and what is not, have historically been an important constrain on the behavior of rulers. Even the few and the mighty feared the judgment of a god and, at times, tried to live in harmony with their beliefs. It is unclear why exactly, but the Founding Fathers did not have much faith in norms as constraints. Publius stated unequivocal that “neither moral nor religious motives can be relied on as an adequate control.” (Hamilton, Madison, and Jay 1987, 45-46 (No.

10)) It was believed that neither loss of status, respect, friendship, religion or any moral argument would be sufficient to keep politicians in check.

The reason for the lack of faith in norms as constraint on politicians manipulating the political institutional structure is rather clear: there seems to be a complete absence of the belief that manipulation of institutional structures is inherently wrong. As a matter of fact the opposite of such a belief can be discerned: the political institutional structure can be altered because it is an artifact by definition. The rules are the product of the interests of those in power and never neutral or objective. This perspective on the rules is the result of the history of the American political system. The political institutional structure that the Americans inherited from their British motherland, the so called Tudor system, is a semi-modern system with a differentiated and sovereign state. It was, however, also still as fragmented and organic as the medieval state structures. Powers in government pushed against each other and the rules were not much more than the wishes of the most powerful fraction. The Americans also settled in a world where there were no institutional structures before they arrived. They had to build everything from scratch. The institutional structures that were erected were evidently the product of those in power. Because every institutional structure was artificial and the product of the wishes of those in power there was no illusion of objective or neutral institutional structures. Every institutional structures served the interests of a faction, thus there was no moral argument possible against changing the rules.

Consequently the Americans forfeited the whole notion of norms as a constraint on behavior. Any set of rules is as good as another set of rules. And anyone making a claim based on moral superiority was just trying to disguise his personal interests as a moral right. Having renounced the practicality of norms as constraints on behavior did not cause institutional manipulation, but it certainly did create the conditions it needed to flourish.

The relationship between politicians and the political institutional structure is a true structure-agency relationship. The agents, politicians, alter the structure wherever they can. They can do so because many important parts of the institutional structure are not protected by the Constitution. At the same time the Constitution guides the behavior of politicians in several manners. The most important check on the behavior of politicians is the result of the elaborate system of checks and balances. This system ensures that the different powers, for the most part, do not have too much power over selecting members of the other branches. Such a power would make that branch the master over branches. The system of checks and balances also ensured that the different branches would be a check upon each other by vesting certain powers in each branch and have them share in the most important power: the legislative power.

The legislative power was considered to be the most important, and most dangerous, power of them all. If one branch would have sole control over the creation of legislation it could subjugate the other branches. So this power is shared horizontally by the legislative, the executive and the judicial branch. Formally the federal laws are the supreme laws of the land and states have to follow suit. However, because the states have to implement most of the laws they are in a position to resist the federal government to a certain extent. This system of horizontal and vertical checks and balances ensures that each of the branches has to seek the cooperation of the other branches and is also subject to the pressures from the other branches. Ambition is made to counter ambition.

The result of the system of checks and balances is that the 'will of the people' is fragmented and converted into governmental power in different ways. Representatives serving different geographical electorates and elected at different moments in time have to come to an agreement. Consequently it is very unlikely that one faction will be able to control all branches of government and impose its will on the whole of society. The fragmentation of government has, however, partly been undone by the formation of political parties. The rise of two distinct interests has to a large extent diminished the effectiveness of the collective action problem caused by a fragmented political system. Having two parties has also aligned the interests of the different branches and levels on many occasions, especially in regards to the political institutional structure. If a party can increase its control over one branch of government by changing the rules this can be in the interest of members of the same party in other branches and on other levels of government. Such a manipulation does also not affect the relative power of another branch or level of government. Instead of ambition countering ambition, institutional manipulation often leads to ambition furthering the ambition of other branches.

The primacy of the people as the sole source of governmental power is one of the recurring themes of American political thought. The will of the people both constrains *and* enables the actions of the majority. The people constrain the behavior of those in power through political participation. Both at the ballot box and through demands on government from the civil society. In a pluralistic society the multitude of different interests will compete for influence on government policies and form counterbalancing forces if their interests are being threatened. As a consequence of the multitude of interests in society a majority will be hard to constitute and even harder to maintain. Tyranny of the majority will be obviated as long as different majorities develop.

The Madisonian model is, however, not as effective in reality as in theory. Pluralism relies on a bottom up coming together of factions with none-cumulative power that organically organize to become a majority.

Today's politics stands far away from this ideal. Political parties have detached from their social basis and have attached themselves to government. The rise of a stable Two-party system has also led to two distinct interests. Majorities can now form that are no longer beholden to a multitude of different social interests and also have their own distinct interests. The Madisonian model of pluralism is also less effective when it comes to institutional manipulation. A proposal to alter the institutional structure often does not directly threaten the interests of a social faction. It changes the structure of government, not how people make their living.

The most fundamental problem with the people as a constraint against institutional manipulation is, however, the corrupting influence institutional manipulation can have on the voice of the people in government. By changing the rules of the political game the members of one group might all of a sudden find it hard to vote or organize. If the flow of information is controlled by government some groups might not even know their interests are being harmed. Government is no longer a neutral arbiter between the multitude of different factions once politicians start to manipulate the political institutional structures. Instead it has become an interested faction itself. With interests that might be different than those of the people they serve.

The people being a check on government is an important element of any democracy. At the same time is the notion that the people are sovereign and that there is no power beyond that of the people a dangerous one. American politicians can manipulate the political institutional structure because they speak for the people. They are above any rule, even the Constitution, and norms. They set the rules. And without a norm that instructs politicians that some forms of institutional manipulation are undesirable or rules that limit what politicians can do the voice of the people can be manipulated. The existence of such limitations on the actions of the people, or their representatives, would go against the notion that the people are indeed sovereign. The people can either decide and are sovereign or they are not. There is no middle way.

The institutional manipulation that is rampant on some levels of the American government and in some regions of the country is the result of many factors. A lot of factors make it possible: an organic political system, the belief that rules are always biased, a Two-party system, political parties that are detached from society and the belief that if every faction pushes as hard as it can just government policies will emanate. The crucial factor, however, seems to be the absolute belief in the sovereignty of the people and that the people will keep government in check. Without norms and constitutional constraints as checks on the behavior of politicians the will of the people is vulnerable to the will of the people – or those claiming to speak for the will of the people.

There are three solutions to protect how the will of the people is converted into political power from the will of the people. The first, and most improbable and dangerous, solution is to ensure that all people agree that the will of *all* people is equally important. Which would come down to one of the “solutions” listed by Publius in the Federalist No. 10. : giving all people the same interests. This would abolish liberty. A second solution would be to cultivate the norm that politicians should respect – and improve – the institutional structure that channels the voice of the people. There are some politicians who already have this belief. One of the great American political thinkers, Senator Sanders, stated that “I consider it a grotesque act of political cowardness to make it harder for people to vote”¹⁸. In a free country people will disagree. Nevertheless Sanders believes that it is wrong to manipulate the system to ensure that his ideas will prevail. While this would be a solution, it is also rather impracticable. A normative framework takes many years to develop and it is unclear if we can really intentionally design norms. It could not work or even backfire. The last solution would be to rely on constitutional constraints. The rules should protect the people from their own wishes. As Jean-Jacque Rousseau said many years ago “This means nothing less than that he will be forced to be free” (Rousseau 2003). The freedom of the people would be limited by institutional constraints to ensure that they can stay free. Although Publius meant it differently, he did hint at the importance of protecting the different fractions: “The protection of these faculties, is the first object of government.” (Hamilton, Madison, and Jay 1987, 43 (No. 10)) Publius mean here the protection of the interests, property, of each faction. Differences between men that would lead to differences in opinion. Nevertheless, to really protect each faction in society from the other factions, it is not enough to only protect their property. Their rights to equal participate in the political system is arguably be even more important. A right that can only be guaranteed if the people do not have the right to take this away. The Constitution, and its guardian the Supreme Court, should guarantee this or at least make it arduous to take this away. Without such a protection, which is unlikely to be created in the near future, the manipulation of the political institutions will continue.

¹⁸ Bernie Sanders stump speech on the importance of democracy in Tuscon (09-10-2015). <https://www.youtube.com/watch?v=c4U1hEBqMgl> (last accessed on 12-08-2015).

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