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The Structure of Social Contract in the United States of America: Representative Versus Unrepresentative

* Ahmed Ijaz Malik

† Tahir Ahmad

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Abstract: The constitutional system in the United States of America has maintained a systematic balance between its federal character, separation of powers and distribution of autonomy. The power of the Centre over component and subordinated institutions has been ensured through a combination of the constitutional system as well as a bipartite political system. Ironically, the bipartite system's one weakness is the limitation of choice for the electorates to two candidates. In addition, the growing influence of corporate elites' exercises influences the process of elections as well as the decision-making and legislation. This study critically examines these contradictions and presents an analysis of the transformation in the social contract.

Introduction

The Structure of Social Contract in the United States: An Overview

Constitutional arrangement in the US has established a balance between different government institutions in such a manner that limits at the same time these powers from arbitrary use against the rights and liberties of the individual (Stephens et al., 2014; Stephens & Scheb, 2011). This mechanism gives a particular identity to every branch with regard to political power divided vertically and horizontally. The former ensures the federal character of the government whereas the latter systematises the separation of powers among different institutions of the government - the Congress, the Executive and the Judiciary (Gerston, 2007). In vertical distribution, the autonomy of the states is protected whereas horizontal prevents the concentration of powers in one institution (Gwyn, 1986). Functionally, the exercise of powers is prevented from being tyrannically used by establishing a system of checks and balances, both on vertical and horizontal levels. The vertical checks and balances answer the question of the autonomy of the states from the

national government or the absolute control of the states by the national government (Gwyn, 1986). During the constitutional congress, the federalists argued in favour of a strong national government which the anti-federalists opposed (Gerston, 2007) that such government would undermine the autonomy of the states. In order to overcome the chances of a strong national government, a horizontal system of checks and balances was envisaged among the three organs of the national government. The horizontal checks and balances at the same time diminish the chances of complete separation and disagreement among institutions for example congress can influence the executive and vice versa, the executive can check the judiciary and vice versa, and the judiciary can check the congress and vice versa (Stephens et al., 2014; Stephens & Scheb, 2011).

Besides that representative character of the US political system is another significant element of the social contract. The rights enjoyed by the people to elect their representatives for state and federal governments reflect the participation of the people in the exercise of the state's power, and participation in policy-making (Still, 1981). Thus, considering the structure of social contract in the

* Assistant Professor, School of Politics and International Relations, Quaid-i-Azam University, Islamabad, Pakistan.

† PhD Scholar, School of Politics and International Relations, Quaid-i-Azam University, Islamabad, Pakistan/Lecture Department of International Relation, Abdul Wali Khan University Mardan, KP, Pakistan.

US constitutions, the relationship between the ruler and the ruled is characterised by the distribution and separation of political power and representation. This article attempts to explain the institutionalisation of the political system through the relationship between these two constituents. Institutionalisation is used to describe the characteristic of the government which makes the persons less relevant rather than securing public interests appears autonomous sphere. The model of representations and exercise of powers is not discussed, because the central theme of this article revolves around the participation of people and the people's power to hold the rulers accountable. The main argument is centred on those ways and means that provide the opportunities for representation to people in the exercise of the state power and share in the decision-making process. For this purpose, this article focuses on two aspects: political power and representation.

The Political Power: The Function of Separations of Powers and Checks and Balances

The political power is divided among the three branches of the US government, the legislative, executive and judiciary – according to the Articles I, II and III, of the constitution also known as the ‘distributive articles’ ([Stephens et al., 2014](#); [Stephens & Scheb, 2011](#)). Fundamentally, these three articles establish the separation of powers derived from Montesquieu’s “The Spirit of Laws” elaborates the purpose and objectives of this scheme. According to him the concentration of powers in one institution or person could result in tyranny, a form of government in which a particular group or one person can manipulate the state’s power for personal motives ([Baron de Montesquieu, 1748](#)). It implies that (i) one person should not be part of more than one of the three organs of the government, (ii) one branch of the government should not interfere with or control the exercise of powers and functions of the other branch or branches and (iii) one branch of the government should not exercise the powers and functions of the other organs ([Galapa, 2013](#)). This concentration of power has been also rejected by John Locke who argued that giving absolute power to a single person amounts to putting the entire society at the mercy of one person who can commit injury against all without being held

accountable ([Locke, 1689](#)). Therefore, here the institutionalisation of social contract has been defined along this principle. James Madison, influenced by the ideas of Montesquieu, voiced concern regarding the concentration of powers in a single entity during the Constitutional Convention and proposed the separation scheme. He argued:

"But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack" ([Madison, 1788](#)).

Thus, the three first articles of the constitution entrusted the legislative powers in Congress, the executive powers in the presidency and the judicial in the Supreme Court. However, this system was criticised on several grounds. It was argued that the separation of powers is likely to create deadlock among the three pillars of the government. Some people posited that the separation of powers had placed the organs of the government against each other. It was also argued that the separation had increased the inefficiency of the government, but Justice Louis Brandies contended that the separation of powers was not meant to increase efficiency but to prevent the rule of tyranny ([Beckett, 1988](#)). The purpose of this argument is to set a framework to raise a point as to how these three branches of government prevent each other from becoming too strong at the expense of each other.

The above discussion has highlighted two fundamental aspects of the social contract: Structuralist and Functionalist. In structuralism, the constituent elements of the government, as explained in the constitution, have been given a particular standpoint whereby each organ of the state performs its functions. These functions in terms of the exercise of power are subject to checks and balances. However, when the system of checks and balances is discussed the focus remains on those articles of the constitutions that prevent absolute separation. These articles provide certain powers to each branch of government which are used as checks on the corresponding

branches. One of such checks is the authority of veto vested in the office of the President.

Article 1, Section 7 of the US constitution authorises the president to veto legislation passed by Congress. The president is required to sign a bill within ten days excluding Sundays but if he disagrees with Congress on a bill he has the authority to return it to Congress with a veto message. At the same time, Congress can override the Presidential veto by passing the bill with a two-thirds majority from both houses. According to the constitutional procedures, there are two types of veto, the regular as mentioned earlier and the pocket veto ([US Government, 2021](#)). The term pocket veto applies when the president withholds his signature for ten days during which the Congress is adjourned ([US Government, 2021](#)).

The legislative history of Congress shows that Congress has rarely overridden Presidential Veto. Since 1789, out of 1,484 regular vetoes, only 106 have been overridden ([Sollenberger, 2004](#)). It is argued that the president by virtue of his veto power restrains congress from becoming powerful whereas the congressional procedure to override the veto is a balancing factor. Primarily the veto was designed to prevent the constitutional encroachment of the legislature by an executive or prevent unconstitutional enactments ([McCarty, 2009](#)). Charles M. Cameron identified various reasons which compel the US presidents to veto congressional legislation. Firstly, when the president faces the majority of the opposition, by using veto or threat of veto or message of veto to the congress, he may influence the legislation. Secondly, some policies are initiated by the agencies; any legislation regarding their interrogation is vetoed by the president. Thirdly, presidents may veto to coerce opponents at the end of their tenures. Important legislations are forwarded, which during the electoral campaigns are highlighted against the president and vice versa ([Cameron, 2011](#)). Besides this, the president sends messages to Congress for legislation which is normally considered by Congress. Article II, section 3, clause 1 authorises the president “shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.” This president's power is called the Annual Message or State of the Union Message. The address contains

the stance and the possible future reaction of the president ([Shogan, 2015](#)).

Secondly, the appointment of the judiciary by the president is considered a check on the judiciary as the president seeks to appoint those judges who the President considers probable proponents (Rutkus, 2010). Article II section 2 of the U.S. Constitution empowers the president to appoint judges of the Supreme Court, judges of the Circuit Courts of appeal and District Courts with the advice and consent of the Senate. These judges once appointed cannot be removed by the President but through a process of impeachment ([Wai-lam, 2000](#)). The advice and the consent of the senate make this process of selecting an example of the checks and balances. During the nomination period, the presidency conveys the names of the nominees to the senate which is examined by the senators. In the case of the lower judiciary, these nominations are shared with the senators of the concerned states. The senators may oppose or reject any such Presidential nominee ([Wai-lam, 2000](#)). Thus the Senate prevents the President from arbitrarily exercising his power of judicial appointments. Thirdly, Congress in several ways checks the presidency and the judiciary. The congressional check has been explained in the aforementioned paragraph regarding the presidential veto. The other areas that make congress control the arbitrary behaviour of the president are (a) the congressional oversight of the executive orders and proclamations, (b) the impeachment of the President, a process by which the President can be removed from office and (c) the ratification of treaties by the senate.

The constitution does not prescribe explicitly the powers of the president to issue executive orders and proclamations rather these are derived from Article II of the Constitution which states that "the president shall take care that the laws be faithfully executed" ([Contrubis, 1999](#)). However, the legality of these orders and proclamations depends upon the congressional statutes and judicial reviews. The reason to justify this judicial and congressional oversight according to a report prepared by House Government Operations Committee is that these orders affect private individuals. As such presidential actions that have been taken under authority not conferred by the constitution are not legally binding ([Contrubis, 1999](#)) therefore to justify the constitutional basis

and legality, congressional oversight and judicial oversight are necessary ([Contrubis, 1999](#)).

The other tool congress uses to control the executive is the power to impeach the President. This power is exercised by congress in cases concerning the removal of the judges as well. According to Article II, section 4, the president, vice president and all civil officers can be removed from office through the process of impeachment. The reasons for removal mentioned in this article are treason, bribery or other high crimes and misdemeanours ([Halstead, 2005](#)). Article I, sections 2 and 3, gives this power to Congress. The House of Representatives has the power to impeach whereas the senate has the power to try the cases of impeachment ([Halstead, 2005](#)). Here the distribution of responsibilities between the House of Representatives and the Senate prevents the misuse of the power to impeach ([Vicente, 1998](#)).

During the constitutional history of the US, fifteen individuals that include a president, twelve judges, a senator and a cabinet member, have been impeached by the House of Representatives. Of these, the Senate has convicted only seven ([Vicente, 1998](#)). From the above data, it can be deduced that whenever a President, a senator or a judge, oversteps his powers, congress can hold him accountable ([Vicente, 1998](#)). The congressional role and the senatorial courtesy in the selection process of the judges ([Wai-lam, 2000](#)) and the impeachment power to remove the judges, is a case in hand for the congressional checks on the judiciary. Lastly, the Senate controls the Presidential powers to sign the treaty as Article II of the US constitution makes it compulsory for the President to seek advice and consent of the senate which is done in the shape of the treaty. This power of the senate prevents the executive's unilateral actions that have international obligations for the entire nation. The share of power makes the signing of a treaty a representative decision ([Bradley, 2007](#)).

Finally, the judiciary keeps checks on both executive and the congress through judicial review. The case of executive orders has already been discussed, the following paragraph focuses on the congressional powers to legislate. In this regard, there are two areas where the judiciary asserts its role, firstly, the check on the executive which is run by several agencies under the President, and

secondly, the judicial checks on the congress ([Popper, 2005](#)). In this process, the judiciary decides or interprets the constitutionality of legislative statutes, executive actions and cases regarding conflicts between the state and federal statutes. These powers of the judiciary are derived from the supremacy clause, the oath clauses, and Article III. The supremacy clauses declare the constitution is the supreme law of the land. So when the people have decided on law and sent their representatives to legislatures and the executive, they are bound by the constitution and it is the duty of the judges to interpret the constitution. These powers of the judiciary are criticised on the ground that the majority is put at the mercy of judges who lack popular representation but the counter-argument claim that the written nature of the constitution is the agreement among the people and the government, and its violation is regarded as the violation of the constitution ([Prakash & Yoo, 2003](#)). If judicial review is abandoned then the question as to who will interpret the constitution will be left unanswered.

Explaining the oath clause, Justice Marshall concluded that the federal judges could not enforce the unconstitutional statutes. He said that the text of the oath suggests that the federal judges were understood to interpret and enforce the constitution ([Prakash & Yoo, 2003](#)). Lastly, the justification of the judicial review is derived from the functions as enumerated in Article III of the US constitution uses the words "cases and controversies" and "arising under this constitution". This function is explained in such a way that it is the responsibility of the judiciary to give primacy to the constitution in deciding cases and controversies. Justice Marshall endorsed this interpretation by stating that "it is emphatically the province and duty of the judicial department to say what the law is". His decision made the judiciary more assertive, a role used as a check on the arbitrary powers of other departments ([Prakash & Yoo, 2003](#)). It can be argued that political power in US constitutional system is insulated from being misused by one person or group of persons or a particular branch of government. The ways it has been done are the division of powers and a system of checks and balances, horizontally among the branches of the federal government and vertically between the federal and the state governments.

Controversies that have arisen in these two types of arrangements have been significantly resolved by the judiciary.

Thus the separation of powers in the first three articles establishes the structural standpoint for different organs of the government whereas the system of checks and balances provides a framework for different functions of these organs. The purpose is to avoid possible transgression or misuse of power by any organ or person in the government. However, the above discussion was based on the institutional arrangements of political power as enumerated in the constitution which constitutes one part of the social contract. The other part of the social contract is related to the people's participation and their power to hold rulers responsible. Therefore, in the next section, the representative character of the government is explained in terms of people's participation in the decisions making and their power to hold their rulers accountable.

The Issue of Representation: between Disenfranchisement and Corporate Elite

The Structuralist arrangement that provides a defined standpoint to people wherefrom they react towards or participates in the policy-making is relevant in the US as the constitution provides authority to form policies or oppose governmental policies by defining, redefining and advocating their priorities ([Steinmo, 1989](#)). Functionally, the policy priorities are expressed in the shape of the right to vote and protest. Although, there are other rights the constitution guarantees, the vehicle that is used by the people to express their will concerning their priorities and will, supporting or opposing a policy is the right to vote ([Coleman, 2015](#)) and the right to protest ([Stephens et al., 2014](#); [Stephens & Scheb, 2011](#)). In the former case, the government is replaced through the elections; whereas the latter is exercised during the unexpired tenures of the government. A personalised social contract enables the government to serve for an unlimited tenure without having any responsibility to the ruled, the institutionalized social contract fixes the succession problem by defining the term of office of the rulers. For example in the case of the United States, the federal, as well as state governments, have fixed tenures after which each branch of the government is popularly elected.

Presently, in the United States after the amended Voting Right Act 1965 ([Coleman, 2015](#)), the principle of universal suffrage has been established by virtue of which the U.S. system of government is called majoritarian. However, in electing the rulers, two things are important; the right to vote and voting one among the available options. In the former case, it is important to discuss who possesses the right to vote. It is therefore important to discuss suffrage here. Currently, there is universal adult suffrage in the United States; in the past, there had been practices of disenfranchisement along age, racial, gender, class and religious lines that had excluded Black Americans, Women, and others from electoral politics. For example, before the Civil war, only white male property owners 21 years of age were allowed to vote. In the 13th constitutional amendment, slavery was abolished and in the subsequent 1867 Reconstruction Act, the former confederate states were required to ensure the rights of all male adults to vote. The 14th amendment was designed to remove the literacy test and property ownership from the eligibility criteria to vote in the Southern states. It was argued that if all adults are denied representation then their representation should be reduced proportionally. In 1869, congress proposed the 15th constitutional amendment to the state legislatures.

This amendment protected the right to vote for all males without discriminating on the grounds of race, colour or previous condition of servitude ([Laney, 2003](#)). There were people who opposed this amendment; in most of the Southern States, they adopted mechanisms of disenfranchisement both constitutionally and administratively. Administratively, these states made an arrangement that forced the Black voters to travel great distances to their voting precincts. Also, the Black voters had to take a test before voting. By this method, they were excluded from suffrage ([Laney, 2003](#)).

Constitutionally, the Southern states adopted certain legislations that denied the black population their right to vote. The Mississippi constitution of 1890, introduced a law that required a prospective voter to be considered as a voter if he fulfilled these conditions, a six-month residency requirement for the voters, literacy tests, a property of three hundred dollars, annual poll tax

and criminal record. In 1894, Virginia made it compulsory that voters would produce registration and poll tax certificates at the polls. In 1898, in Louisiana, "the Grandfather Clause" according to which a person had the right to vote if his father and grandfather were qualified to vote on January 1, 1867 ([Laney, 2003](#)). To remove this discriminatory approach Congress in 1957 passed the Civil Rights Act under which the Attorney General was authorized to bring lawsuits in cases concerning the protection of voting rights of the Black people. As this act had some loopholes and was considered time-consuming, congress in the 1960s passed another Civil Rights Act which authorized federal referees to investigate complaints related to voting discrimination and registration. The act also authorized the district courts to issue registration orders to replace state registrars with federal authorities ([Laney, 2003](#)).

However, on the recommendation of the Commission on Civil Rights that the federal government should assume the responsibility to ban discrimination and due to violence in Birmingham, Alabama, Philadelphia and Mississippi, Congress passed the Civil Rights Act of 1964, which authorized the three-judge federal district court to hear cases related to disenfranchisement practices. But this too was not sufficient which compelled Congress to pass another legislation known as the voting Rights Act of 1965. This Act has been amended in 1970, 1975, 1982 and 1992. The act has removed discrimination and established the right to vote for Black Citizens ([Laney, 2003](#)). Similarly, women were denied the right to vote till 1920, when the women's right to vote was constitutionally recognized through the 19th constitutional amendment. It is noteworthy that before the ratification of this amendment, 29 states had recognized women's suffrage ([Miller, 2008](#)). As a principle now every U.S. citizen male or female of 18 years of age or above is entitled to vote, a practice known as a universal adult franchise ([Uggen & Manza, 2002](#)).

The second aspect of the right to vote is the availability of options before the voters. In this regard, the option is restricted to two by the two-party system in the U.S. David Knoke and Richard B. Felson in their work, ethnic stratification and political cleavage in the United States, 1952-68, explain the role of ethnic, religious, economic and

social factors in determining the association of people with political parties in the United States (Knoke & Felson, 1974). However, this aspect of the voter's choice is not focused on in the discussion as the main argument of this section suggests that whether it is ethnicity, class or religion, the choice is made by the majority. Therefore, the two-party system remains the focus of the argument. Explaining this system of parties, Scott Mainwaring claims that the presidential system lacks a mechanism to manage a coalition-based majority in Congress. Secondly, the two-party system remains simple and stable ([Mainwaring, 1990](#)). This argument is criticized by Lisa Jane Disch, that the two-party system restricts the choice of the people to only two options, where people are forced either to vote for the already established parties or to refrain from voting. If they vote for a third option their vote is going to be counted as wasted. According to him, such practice has led to the manipulation of opposition by the dominant parties. When people disagree with a policy of the government then in the next election their choice happens to be obvious, which is restricted only to the opposition party. This has reduced the political system to the tyranny of the two parties ([Disch, 2002](#)). The limited choice is further restricted by the winner take all basis, a principle according to which the winner takes all the votes. In the case of proportional representation, the winner and the loser both get something out of the contest. The recent decline in the turnout is due to this restricted bi-partisan option and the winner takes all principles. Surveys suggest that when the voter is sure about his defeat he refrains from voting ([Roberts, 2009](#)).

This argument can be countered that, besides the right to vote, US citizens have the right to protest as mentioned earlier which can cover the gap left by suffrage. The right to protest against a policy has an impact on the government policy but the government's reaction to the 'Occupy Movement' was repressive. The movement called for an evaluation of tax policy, labour issues, campaign finance reform, and the regulations of the Securities and Exchange Commission ([Popowski, 2012](#)). However, this does not suggest that the protests and demonstrations have little impact on government policy. The protest of the Black population for their rights and public

opinion during the Vietnam War ([Lorell et al., 1985](#)) are two such examples that led to drastic changes in government policies. However, another limitation of the US political system is that the corporate elite spends money on influencing the desired outcomes of the elections and making favourable legislation. There are other practices that suggest the role of lobbyists for a particular ideology or particular interest which reduces the chances of universal representativeness ([Bonica, 2016](#)). For example between the 2004 and 2010 election cycles, around 3.64 billion dollars were spent on federal elections whereas 7.5 billion dollars was spent on lobbying. There are numerous theories about the contribution of the corporate elite to elections versus legislative lobbies; these theories are more focused on the strategies of the corporate elite regarding legislation and election outcomes. These theories argue in support of the argument that corporate money has a role in election outcomes as well as legislation ([Bonica, 2016](#)). In the present election campaign, Democratic candidate Bernie Sanders and Republican Donald Trump termed the US political system as a rigged one. Bernie Sanders accused the presidential nominees gave speeches to Wall Street for millions of dollars ([Foran, 2016](#); [Peters & Martin, 2016](#)). This suggests there are principles that ensure the US political system is institutionalized but there are ways by which these are bypassed.

Conclusion

The structure of the social contract in the United States provides principles around which a division of labour along structuralism is possible where different organs of the structure provide opportunities that can help in preventing intuitions and personalities from tyrannically using the power of the state. There are numerous historical instances in which the three organs of the states have separately performed their functions and

have also put checks on each other's arbitrary behaviour. This aspect of the political system has been strengthened by the representative character of the institutions.

The issue of representation has been achieved through a historical struggle by the black population, the woman and other sections of the population. In the past, there were many practices that had resulted in disenfranchisement practices. There were several methods on administrative grounds as well as legal that prevented people from participating in the electoral process. However, the amended 'Voting Right Act' has to a great extent answered the question of representation. Nevertheless, there are other methods which have negative impacts on the representative characteristic of the U.S political system. This involves most significantly the role of the corporate elite and the bipartisan system.

It is argued that the bipartite system has limited the choice of the people whereas the role of corporate money influences the outcomes of the elections as well as the legislation. Furthermore, the right to protest can influence the legislation in favour of the people but there are instances that protests did not change the behaviour of the government yet it has played important role in the struggle for the rights of the black population. These practices show that the structure of the social contract in the U.S Constitution is institutionalized but the practices and strategies of different interests put a limitation on its practice making it unrepresentative.

United States of America (US) presents a model practising representative democracy, separation of power, rights and freedoms of individuals. However, the evolution of the US as the Commercial Republic, since the end of the Cold War, appears to have transformed the nature of the social contract and the idea of representation.

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