CHAPTER 8

# CONSTITUTIONS AND CONSTITUTIONALISM

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## I. Introduction

Democratic theory conventionally defines a constitution as a 'higher law' that cannot be changed through normal lawmaking procedures in a popularly elected assembly.[1] Exceptional legal entrenchment is said to insulate constitutional rules from the majoritarian controls that purportedly govern ordinary legislation. In this way, a constitutional text strives to make fast the form of government (a presidential or parliamentary, a unitary or federal republic), the limits of government (inviolable rights and immunities), and the goals for which the

[1] Stephen Holmes, 'Precommitment and the Paradox of Democracy' in *Passions and Constraint: On the Theory of Liberal Democracy* (1995), 134–77.

government is empowered to act (to ensure domestic tranquility, provide for the common defense, and promote the general welfare).

With this rough understanding of a democratic constitution in mind, constitutional theorists routinely plunge into a heated debate over the counter-majoritarian dilemma, namely the question: Why would constantly renewed generations of voters remain committed to an inherited arrangement that was intentionally crafted to be difficult to change?[2]

The so-called counter-majoritarian dilemma, however, is both politically fraught and analytically confused. American liberals, for example, have an incurably schizophrenic attitude toward counter-majoritarian institutions. On the one hand, they favor rigid restraints on racially bigoted majorities but, on the other hand, they oppose rigid restraints on economically redistributive majorities. American conservatives are no more consistent. A theoretically coherent and nonpartisan approach to counter-majoritarian institutions is nowhere to be found.

The very idea of counter-majoritarianism suffers from a deeper flaw, moreover. The *lex majoris partis* is one of those decision rules that allow a population of human beings to make collective decisions for the first time. It may be a rational rule, but it is nevertheless a rule that is presupposed by, not produced by, collective choice, and that includes the choices attributed to an imaginary popular sovereign. Unless such a constitutive rule is already in place, the nation or the people cannot hammer out the kind of 'constitutive will' that could subsequently be thwarted or betrayed.

This consideration reveals the flaw in Jon Elster's much-discussed but abortive attempt to explain, by drawing an analogy between constitutional conventions and Ulysses ordering himself to be bound to the mast of his ship, how a democratic people could impose a constitution on itself.[3] That this eye-catching parable does little to illuminate the origins, survival, and function of democratic constitutions (by which democratic peoples purportedly bind themselves) is by now widely acknowledged, even by Elster himself.[4] The main defect of the analogy is that Ulysses operated as a coherent decision-maker, capable of issuing authoritative commands and being duly obeyed, prior to ordering his sailors to lash him to the mast. Only the acknowledged captain of a deferential crew, not a politically amorphous population operating without pre-established decision rules or a clearly demarcated boundary between members and nonmembers, could play such a constitutive role.

Unlike hundreds of thousands of independent villagers and subsistence farmers strewn across a lengthy Atlantic coastline, compact political elites have a pre-constitutional capacity to create, amend, interpret, and enforce constitutional rules that favor their real or imagined interests. But this does not necessarily mean that 'constitutionalization', as neo-progressives continue to urge, is 'driven primarily by political interests to insulate certain policy preferences from popular pressures'.[5]

Political, social, and economic elites have reasons to bind themselves that are related only incidentally to parrying majoritarian demands. This issue has been muddled in US historiography because the Contracts Clause was obviously inserted in the Constitution by creditors and their allies to resist the demands of debtors and tax delinquents.[6] But governments

[2] Lawrence Tribe, *American Constitutional Law* (2nd edn, 1988), 10.

[3] Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (1984), 93–5.

[4] Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (2000), 88–174.

[5] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004), 213.

[6] Woody Holton, *Unruly Americans and the Origins of the Constitution* (2007).

routinely commit to repaying loans not only to resist the Sirens' songs of tax relief and paper money but also in a bid to become a Siren. By making credible commitments to pay back loans, a government can entice money, at relatively low interest rates, from the pockets of money-lenders in a way that unbound borrowers cannot easily do. The unlocking of foreign and domestic credit by governments that have established a reputation for creditworthiness is a good example of elite self-binding for the elite's own advantage. It suggests that the powerful can have a strong incentive to make their behavior predictable even in the absence of popular pressures. But this is only one example among many.

Historically, political, social, and economic elites have proved themselves willing to impose grueling discipline on their own membership, including years devoted to arduously honing uncommon physical, intellectual, and technical skills, to maintain their group's superior status over time. They have also accepted binding rules that facilitate the nonviolent resolution of intra-elite conflicts that, if not rapidly patched up, might risk opening the door to domestic insurrection or foreign conquest. And they have willingly offloaded time-consuming responsibilities in order to specialize on more lucrative tasks as well as to insulate themselves from annoying clientalistic demands.

But for constitutional theory, starting with ancient writings on the mixed regime, the most 'democratic' reason why elites have proved willing to impose limits on themselves is that such limits help to mobilize the voluntary cooperation of non-elites in the pursuit of the elite's most highly prized objectives, especially revenue extraction and victory in war, but also information gathering and the timely correction of potentially fatal errors of judgment. Even John Locke, that liberal saint, invoked *raison d'état* in his defense of constitutional restraints on power:

> that Prince, who shall be so wise and godlike as by established laws of liberty to secure protection and incouragement to the honest industry of Mankind, against the oppression of power and narrownesse of Party will quickly be too hard for his neighbours.[7]

No power-wielder is so powerful that he never requires voluntary cooperation from members of society weaker than himself. To obtain a sufficient 'supply' of men and money, enthroned kings once convened prominent taxpayers in parliaments and listened to their grievances. Today, even governments elected by universal suffrage spend more resources protecting the rights of citizens whose cooperation is essential to governance, such as investment-bank presidents, than they spend protecting the rights of citizens whose cooperation is worth little or nothing, such as homeless veterans. Full-fledged democracy has always been and will always remain more an aspiration than a reality; but genuinely democratic episodes occur when powerful actors discover, as they sometimes do, a palpable advantage in popular participation, government transparency, protections for minorities, and uncensored debate.

## II. Realism and Idealism in Constitutional Theory

Those who disparage democratic constitutionalism as a well-meaning ideology do not mean to deny that constitutions are an observable reality. Polities have always been 'constituted' in the etymological sense of organized for collective defense and hierarchical domination. As

[7] John Locke, 'Second Treatise on Civil Government' in Peter Laslett (ed), *Two Treatises of Government* ([1689] 1965), sec 42, 340.

already suggested, dominant social groups have occasionally agreed to impose regularized restraints on their members in order to sustain, with a minimum of force, their group's privileges over time and to mobilize the cooperation of lower-status adult males for the sake of collective endeavors, especially war. Constitutionalism, by contrast, emerged only in the age of democratic revolutions, during the last three decades of the eighteenth century. It involved not any possible organization of political life but an ideal form of organization that subordinated political incumbents to a higher law that they were forbidden, in principle, unilaterally to change. Especially novel in the new conceptualization was the fiction that a republican constitution should not be revised by ordinary lawmaking procedures because it embodied the 'reflection and choice'[8] of the nation or the people.[9]

No constitution has ever lived up to the promise of democratic constitutionalism, aligning the interests of the rulers with the interests of the ruled. Nor has any constitution ever protected all citizens equally, without regard to the robust or tattered social networks within which different citizens were variously embedded. Idealists who imagine that really-existing constitutions could perform miracles of this sort have to explain how such morally just arrangements could possibly have emerged historically and why they would have survived. After all, powerless individuals with few allies are those who, by definition, are unable to impose their will on others, while the capacity to amass privileges and shift burdens onto others is exactly what characterizes social elites who are plugged into strong social networks.

Realism suggests that constitutional checks on political power emerged and survived, whenever they did, because they served, or appeared to serve, the interests of individuals associated with well-organized social forces. One of the best organized of all social forces, of course, is the government itself. If we want to examine constitutional limits with fresh eyes, therefore, a good place to start is with the advantages that governing elites might reap from accepting legal restraints on their freedom of action. The sustainability of constitutional restraints is difficult to understand if their primary purpose is to benefit the weak by disabling the strong.[10] On the other hand, if constitutions, for example, make it possible for powerful actors to cast off unprofitable or risk-laden or self-defeating forms of power and thereby make it easier for them to achieve their principal aims, the authority of constitutions, at least to those who inhabit and control the commanding heights of political power, is much easier to understand.

Some general remarks about rules will also prove helpful before we explore this theme in greater detail. What is true for renowned constitutional principles such as freedom of speech and the press is true for rules generally, namely that they can be enabling as well as disabling. A moment's thought about the rules of grammar will make this clear. The rules of grammar do not hinder but rather facilitate the ability to communicate, and that includes the ability to communicate surprising, unnerving, rude, unpopular, and even anti-constitutional ideas. It would obviously be inaccurate, therefore, to conceptualize such rules merely as don'ts, prohibitions, barriers, injunctions, no-trespass signs, or purely negative limitations on permissible behavior. True, the rules of grammar introduce certain rigidities into ordinary language. But rigidities, for a variety of reasons, can be prodigiously enabling.

Dissolving all rigidities would decrease rather than increase available options. For example, if human beings had no bones, they would be unable to walk. My initial, somewhat but not

[8] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Clinton Rossiter ed, 1999) no 1, 27.

[9] See Chapter 20.

[10] As claimed by Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56(4) *American Political Science Review* 853.

entirely frivolous proposal, therefore, is that we analogize constitutional rules not to the incapacitating rope with which Ulysses had himself tightly bound to the mast to prevent him from yielding to an uncontrollable impulse, but to the facilitating grammar that enables human communication, to rules of a game that make it possible for players to compete, or perhaps even to the skeletons that facilitate nimble locomotion in vertebrates. But analogies with grammatical rules and animal skeletons are but the vaguest of gestures. Decision-making procedures, such as majority rule, bring us closer to where we want to be. They reveal how binding rules, rather than rendering fatal impulses inoperative in the manner of Ulysses' shackles, can facilitate cooperative action, provide access to hitherto unavailable possibilities, and even make an assemblage of individuals capable for the first time of collective choice.

We misunderstand the appeal of constitutional rigidities if we focus solely on the flexibilities they prevent while ignoring the flexibilities they simultaneously create. I want to begin, therefore, by looking at the emergence and institutionalization of enabling constraints in pre-democratic and pre-liberal societies where socio-economic hierarchy was embraced without embarrassment by ruling groups. This is not a detour. To explore the origins, survival, and function of 'primitive constitutions'[11] in societies where the rights of the weak were routinely trampled and their voices unheard, will help us to bring into focus the value of constitutional restraints from the viewpoint of ruling groups in liberal and democratic societies as well.

## III. A Preliminary Example

Even when the ruled are too busy feeding their families to try to impose constitutional restraints upon their rulers, these rulers have found reasons of their own voluntarily to accept selective restraints on their power. Among modern monarchies, Machiavelli singles out France, where none of the kings who are 'born under such constitutions' (*nascono sotto tali constituzioni*) can 'break the brake that can correct him' (*rompere quel freno che gli può correggere*).[12] This is an extraordinarily interesting formulation. To concretize what Machiavelli means by a constitutional *freno* (brake) that can rectify the prince's mistakes and prevent him from making new ones, we should study Machiavelli's French disciple, Jean Bodin, arguably the greatest theorist of non-democratic constitutional restraints, that is, of constitutional restraints freely adopted by a powerful monarch with the aim of enhancing his power.

A work well known to the American Framers, *The Six Books of the Republic* (1576) contains a fascinating discussion of how constitutional restraints can help solve the principal–agent problem. The French king, Bodin observes, has an extremely difficult time learning what his provincial agents are doing in his name. He cannot easily solve this monitoring or oversight deficit bureaucratically, by assigning a second set of officials to keep tabs on the first. The solution chosen, observes Bodin, is parliamentary immunity, that is, an absolute limit to the king's discretionary power. Representatives in the Estates General have the right to complain loudly about the behavior of any of the king's agents, and to do so without any fear of punishment. Legally exempt from any liability for accusations leveled in the Estates General, representatives provide the king with information vital to his rule but which he would otherwise have no way of obtaining. Here is what occurs in the assembly, to whose members, while the body is in session, the royal power to punish does not extend:

[11] *The Federalist Papers* (n 8), no 18, 121.

[12] Niccolò Machiavelli, *Discourses on Livy* (Harvey Mansfield and Nathan Tarcov trans, 1996), 1.58, 116.

> there are heard and understood the just complaints and grievances of the poor subjects, which never otherwise come unto the prince's ears; there are discovered and laid open the robberies and extortions committed in the prince's name, whereof he knoweth nothing.[13]

A grant of immunity to those who lodge complaints against royal officials was expressly devised, in Bodin's account, to allow the principal to monitor his agents. Because the assembly's members could not be penalized for speaking freely, they could provide the king with vital intelligence about his own operatives that would otherwise remain hidden from him. A formally unlimited monarch embraced a proto separation-of-powers system in order to solve his principal–agent problem, that is, to unlock information he needed to enforce his will effectively. This institutional structure, while serving as a *freno* on the king's discretion in one sense, helped to correct his misapprehensions in another sense, allowing him to control his agents and ensuring that they operated in his interests rather than in their own interests while invoking his name.

Already in 1576, in other words, and in a monarchical system commonly (although inaccurately) called 'absolute', parliamentary immunity was described as a core principle of constitutional government, crafted explicitly to serve the interests of the powerful. It was a restraint on a powerful individual engineered to enhance his disposable power, by allowing the king to keep an eye on his agents and make sure that they were carrying out his instructions even when they operated in remote localities. A king allowed himself to be bound by this rule, or tied to this mast, because the exposés loosed by his self-limitation were palpably useful to his exercise of power. If he had insisted childishly on the crown's unconstrained prerogative to censure political speech, by contrast, the monarch would have been inadvertently helping his subordinates conceal secrets from himself.

This preliminary example, drawn from a pre-democratic constitution, suggests the political utility to the powerful of credible restraints on their own power. Bodin's explanation of parliamentary immunity (a narrowly tailored precursor to universal freedom of speech) implies that political elites can be brought to accept restrictions on their natural impulse to choke off irritating speech for the sake of expected benefits to themselves, even when there is no 'popular sovereign' to set the terms of the constitution or enforce its restrictions with the threat of insurrection. This example, therefore, provides anecdotal evidence for the hypothesis that constitutional restraints emerge and survive when they serve the interests not of all citizens equally but of those individuals whose lives are woven into a community's dominant social networks.

## IV. Drill and Discipline

The original meaning of 'to constitute' is neither to constrain political power for the sake of individual liberty nor to force government to obey universal moral norms. What 'to constitute' signifies, in the first instance, is *to set up*. The word 'constitution', according to Diderot's *Encyclopédie*, 'signifie en general établissement de quelque chose'.[14] For the Latin writers of the classical age, to constitute (*constituere*) a republic meant to found and organize it for duration, prosperity, mutual assistance, common defense, and territorial aggrandizement. When he

[13] Jean Bodin, *The Six Books of a Commonweal* (Robert Knolles trans, 1962), bk 3, ch 7, 384.
[14] *Encyclopédie ou dictionnaire raisonné des sciences, des arts et des métiers* (1794), vol 4, 62.

referred to the republican *constitutio*,[15] Cicero meant the morphological structure and operating code of Rome's republican government, the system of major and minor magistracies, the scheduling and organization of elections and judicial trials, the citizens' right to appeal to a popular tribunal against penalties meted out by magistrates in peacetime, the interweaving of Senatorial deliberation, popular approval, and consular action, the legendary power-sharing agreement between the few and the many, and the policy of granting citizenship rights to conquered cities in exchange for military service. McIlwain identified Cicero's *haec constitutio* as the first recorded use of the word 'constitution' in the sense of a frame of government.[16] The Latin *constitutio* also implied an array of other connotations that remain pertinent to constitutional theory today. These include: making a pact or agreeing to act in concert, strengthening defenses in preparation for an enemy attack, fixing a future date for a group meeting, arranging to pay or repay an amount due, appointing someone to a position, and preparing a legal case or lodging an accusation before a tribunal.[17]

As these connotations suggest, *constitutio* broadly referred to an ordering that serves a purpose. Cicero brought this point home when he discussed the constitution of the human body, postulating that nature constituted human beings to walk upright so that they could see the sky and thereby have a chance to know the gods.[18] Rome itself was constituted, more by historical accident than by deliberate design, for military expansion and domination.

Another book well-known to the American Framers, Polybius's *Histories*, argues that Rome's military and political successes were due to its political institutions, that is, to 'the form of the state's constitution [*politeia*]'.[19] The entire Mediterranean world fell under Rome's sway because Rome was politically organized for domination. Polybius's association of constitutionalism with military success seems surprising to readers today only because we tend to think of a constitution as an instrument for controlling overbearing and self-dealing elites, not as an instrument for creating, consolidating, and increasing the power of a collectivity and enhancing the glory of its military commanders.[20] But the liberal-democratic view of constitutions is of recent coinage and provides little help in understanding why constitutions first emerged and historically endured.

The primary function of the ancient constitutions was not to limit preexisting power but to create power out of powerlessness. The legendary constitution-makers or Great Legislators of antiquity were worshipped as religious figures not because they protected minority rights but

[15] For Cicero's explicit reference to the *constitutio rei publicae*, see *De re publica*, in Cicero, *De re publica and De Legibus* (Clinton Walker Keyes trans, 1928), 2.21.37, 144–5; see also *De re publica*, 1.45.69, 104–5; 2.31.53, 162–3; 1.46.70, 104–7; and *De legibus*, 2.16.23, 398–9; 3.18.42, 508–9.

[16] Charles Howard McIlwain, *Constitutionalism Ancient and Modern* (1947), 25; see also Graham Maddox, 'A Note on the Meaning of "Constitution"' (1982) 76(4) *American Political Science Review* 805–9.

[17] Lewis and Short, *A Latin Dictionary* (1975), 437–8.

[18] Cicero, *De natura deorum* (H. Rackham trans, 1933), 2.56.140, 256–7. An analogy between anatomical constitutions and political constitutions was taken for granted in antiquity; even though a good constitution can prolong and improve the life of a community, the analogy implied, no constitution, however excellent, can prevent the ultimate onset of political decomposition any more than the healthiest regimen of exercise and diet can make a well-disciplined individual immortal.

[19] Polybius, *The Rise of the Roman Empire* (1979), I.1 41; VI.2, 302–3.

[20] According to Andrew Lintott,

> Polybius' association of Rome's phenomenal military success with the excellence of her constitution may surprise twentieth-century readers, but it was almost self-evident for a Greek intellectual from within the governing class of the period.

Andrew Lintott, *The Constitution of the Roman Republic* (1999), 1.

because they organized their communities for military defense and conquest. In its most primitive form, the challenge facing any perilously besieged collection of human beings was to turn a disorganized rabble into a fighting machine. Part of the answer, obvious to any student of ancient Rome's stunningly rapid imperial expansion, was relentless discipline and drill. Military hierarchies, alternative combat formations or orders of battle, principles of engagement and so forth include rules and roles of a primitive military constitution. One of the meanings associated with the Latin *constitutio*, in fact, was the way troops were deployed, stationed, drawn up, or set in battle formation. For example, 'Caesar stationed the legion' is 'Legionem Caesar...constituit'.[21] Machiavelli continued to use *constituire* in this sense.[22] A closely related usage survived into America's Founding period in references, for example, to the small professional army that the new federal government needed to repress insurrections and fight the Indians as 'a force *constituted* differently than the militia'.[23] The constitution of a fighting force included instructions for each soldier to maintain his place in the ranks as well as directives, drilled into troops to the point of automaticity, about how to reassemble quickly and reform a defensive perimeter after a line was broken and a massed formation was dispersed chaotically by a surprise attack.

Situated in an international environment inhabited by armed enemies and dubious allies, entire political communities had to be intelligently organized, or constituted, if they were to stay viable and flourish. Darwinian selection guaranteed that the early societies that managed to survive in the midst of marauding predators were those that had successfully subjected young males to rigorous military discipline. But it makes little sense to describe this discipline simply as a restriction on the freedom of those being subjected to its rigors. If they had not accepted the drill and discipline, as they presumably well knew, the inhabitants of such early societies would not have been free but, on the contrary, enslaved or dead. Loosed from all such restraints, early political societies would have quickly disintegrated under the hooves of better organized enemy forces.

The ancestors of the American Framers, the first settlers in the New World, understood this implicitly. They survived and flourished collectively, not individually. To them, individual freedom from all community obligations in the extreme libertarian sense would have meant the 'freedom' of the defenseless straggler to be scalped on the frontier. Later, after Independence, it would have meant the 'freedom' of the commercial seaman to be dragooned at musket-point into the Royal Navy. The hard experience of organizing collective self-defense in an unforgiving environment, therefore, predisposed eighteenth-century Americans to sympathize with the ancient idea of a constitution. The constitutions they created after 1776, including the federal Constitution of 1787, had many functions. But they were all meant to help struggling communities to maintain their boundaries, coherence, and resilience in a dangerous world.

The American Framers undoubtedly wished to design their new commonwealth for territorial expansion and annexation. The amply documented influence of Machiavelli's praise of Rome on their thinking should therefore also be reconsidered in this context. Machiavelli used *constituzione* exactly as Cicero had used *constitutio*, that is, to describe the institutional

[21] Caesar, *The Gallic War* (H.J. Edwards trans, 1917), 1.43, 68.

[22] Machiavelli (n 12), 1.14, 42.

[23] *The Federalist Papers* (n 8), no 28, 175, emphasis added; for an important 'constitutive' document in this sense, see *Baron von Steuben's Revolutionary War Drill Manual* (1985). This is a facsimile reprint of the 1794 edition.

set-up of a republic that was frequently at war. He compared and contrasted the constitutions (*constituzioni*) or forms of government of Athens, Sparta, and Rome, for example, to evaluate their relative military strengths and weaknesses.[24]

But Machiavelli's central contribution to the constitution-making project of the American Framers involved his own unrealizable or at least unrealized project for constitution-making in Italy. The constitutional solution that Machiavelli proposed for that humiliated land, where foreign superpowers conducted proxy wars, was basically a league among the Italian republics to fend off military domination of the peninsula by two great foreign monarchies, Spain and France. If the Italian city-republics did not successfully band together into a Union, Machiavelli reasoned, then those outsized neighboring monarchies would exploit conflicts among the Italian republics and thereby impose their will on the disunited and therefore defenseless mini-states. Only a robust Union among the republics, based on a sense of common destiny, could lead the Italian republics to pool their efforts and counteract the foreign superpowers' predictable strategy of divide and rule. The required sense of common nationhood could not thrive under a prince, he argued, but only if all Italy was organized as a republic—indeed as a republic of republics.

Machiavelli's proposed United Republics of Italy was ill-starred because Italy was not protected from the great European monarchies of his day by the Atlantic moat; and the various Italian republics were not drawn together by the alluring prospect of jointly seizing an immense and fertile continent from its essentially defenseless aboriginal occupants. Hamilton's and Madison's proposed Union was more luckily situated. All innovations duly noted, however, the United States was designed on Machiavelli's model to solve Machiavelli's problem, namely to prevent European monarchies of vastly superior power from using salami tactics to pick disunited republics off one at a time.

This Machiavellian perspective reminds us why so much of the *Federalist* is devoted to 'the safety of the people of America against dangers from FOREIGN force'.[25] As the revolutionary break with Great Britain drew near, the Continental Congress urged the colonies to enact written constitutions in order better to organize the coming military confrontation with British forces.[26] The drive for Union, a decade later, was led by the Framers and their allies in large part because they believed that 'weakness and divisions at home would invite dangers from abroad'.[27] Historically, the shortest-lived federations were those, such as the members of the Amphytonic league who, even in wartime, 'never acted in concert'.[28] Unless the states struggling to defend themselves under the loose federation designed by the Articles would accept a tighter Union, they would be unable, Madison warned, to escape 'the chains of Macedon'.[29] The semi-sovereign states must renounce a degree of autonomy for mutual assistance, to avoid being played off against each other and to create common front against foreigners. If they united their forces, in fact, the American republics might eventually 'soar to a dangerous greatness'.[30]

The authors of the *Federalist* chose to rally support for the proposed Constitution by emphasizing that a 'combination and union of wills, of arms and of resources' could provide the states with 'a formidable state of defense against foreign enemies'.[31] The sales pitch seems to have been persuasive. Common enemies dictate a common or collaborative defense, which implied,

[24] Machiavelli (n 12), 1.2, 13.
[25] *The Federalist Papers* (n 8), no 4, 40.
[26] Willi Paul Adams, *The First American Constitutions* (new edn, 2001), 47–60.
[27] *The Federalist Papers* (n 8), no 5, 45.
[28] Ibid no 18, 119.
[29] Ibid no 18, 120.
[30] Ibid no 11, 80.
[31] Ibid no 5, 47.

at the time, that the state militias had to be placed 'under one plan of discipline'.[32] It is a small leap to consider the proposed Constitution itself as, among other things, a unified *plan of discipline* for coordinating otherwise militarily unimpressive states. For political elites within the states, the benefits of defensive and annexationist power apparently provided sufficient compensation for the cost of becoming small fish in a big pond.

## V. The Paradox of Limited Power

The organization of political systems for military defense and offence has always been, and remains today, a major purpose of constitutional organization. But constitutions serve many other goals that are equally appealing to society's dominant forces without any particular regard to democracy or the rights of the weak.

The paradox that limited power can be more powerful than unlimited power probably provides the best explanation for why elites have sometimes, if not invariably, submitted themselves to constitutional restraints even when no popular movement or deadly urban riot has been looming on the horizon. The surprising contribution of self-restraint to the augmentation of power is what accounts, alongside the need for concert and cooperation in war, for the most notable successes that constitutions have enjoyed for more than two millennia. If limited power never produced greater power, constitutions would never have played the important role that they have so obviously played and continue to play in political life.

Social elites impose restraints upon themselves, when they do, to gain something they want, such as more security, more wealth, more territory, more cooperation, or more power. To pursue purposes of this sort, well-organized social groups can intentionally choose to impose new limits upon themselves, including limits that are subjectively experienced by individual group members as irritating fetters or burdens. This, for instance, is one way to make sense of the willingness of occupants of supreme executive power to submit periodically to the will of the electorate, that is, to a public tournament that they might possibly lose.[33]

Why would a powerful incumbent accept periodic elections rather than insisting upon life tenure? One reason is that life tenure gives the rivals of the incumbent, who want to remove him from office, a strong incentive to remove him from life. The brutally terminal methods that were used to impose term limits on several generations of 'life-tenured' Roman Emperors brings this point home. Periodic elections mitigate the frustration of the Outs by offering the hope that they will eventually join the Ins. The prospect (or certainty when constitutions limit elected leaders to one term only) of a potential end-point to the current ruler's incumbency reduces the felt need to eliminate him by violence; it will suffice to wait. The periodic chance to throw the rascals out may also allow for the periodic venting of popular discontent, protecting the dominant classes from a revolutionary explosion where elite heads are indiscriminately wedged onto the pointed ends of sticks.

Celebrated athletes, musicians, inventors, and other popular idols have invariably subjected themselves year after year to relentless physical and mental discipline to hone their skills and achieve a professional excellence unattainable by anyone who lounges about hedonistically, living day to day. In a fascinating passage on oligarchic constitutions,[34] Aristotle explains how

[32] Ibid no 4, 42. [33] See Chapter 25.

[34] I borrow this illuminating example from Elster (n 4, 93–4), who nevertheless insists that 'In politics, people never try to bind themselves, only to bind others' (ix).

political elites can impose similarly self-toughening and survival-enhancing regulations on themselves:

> The devices adopted in [these oligarchic] constitutions (*ἐν ταις πολιτείας*) for fobbing the masses off with sham rights are five in number. They relate to the assembly; the magistracies; the law courts; the possession of arms; and the practice of athletics. As regards the assembly, all alike are allowed to attend; but fines for non-attendance are either imposed on the rich alone, or imposed on the rich at a far higher rate. As regards the magistracies, those who possess a property qualification are not allowed to decline office on oath, but the poor are allowed to do so. As regards the law courts, the rich are fined for non-attendance, but the poor may absent themselves with impunity; or, alternatively, the rich are heavily fined and the poor are only fined lightly.

To sustain their caste's superiority over time, that is to say, the upper-caste framers of such rules impose a personally unpleasant but politically strengthening discipline on their own caste members while dispensing individually irresistible but collectively weakening exemptions to the lower classes. And Aristotle continues:

> In some states a different device is adopted in regard to attendance at the assembly and the law courts. All who have registered themselves may attend; those who fail to attend after registration are heavily fined. Here the attention is to stop men from registering, through fear of the fines that they may thus incur, and ultimately to stop them from attending the courts and assembly as a result of their failure to register. Similar measures are also employed in regard to the possession of arms and the practice of athletics. The poor are allowed not to have any arms, and the rich are fined for not having them. The poor are not fined if they absent themselves from physical training: the rich are; and so while the latter are induced to attend by the sanction of a fine, the former are left free to abstain in the absence of any deterrent.[35]

Rational members of an oligarchy can impose burdens (including hefty fines) on themselves while granting exemptions and immunities to commoners in order to maintain the dominance of their social caste over time. For the oligarchy in a Greek polis to think up and implement such a system, it must already be organized as a tight-knit corporate entity where obedience to leaders and the emotional-moral identification of caste members with each other can be taken for granted. Individuals within the oligarchic caste must willingly accept personal burdens in the present for the sake of future benefits that will accrue, in the future, to the oligarchic order understood as an entity that endures across generations. For their part, poorly organized commoners, unable to act in concert for temporally remote purposes, will accept the offered exemptions because the immediate benefits to individual commoners seem more salient than the long-term weakening of their already weak-knit group.

Aristotle disapproved of such one-sidedly oligarchic constitutions for various reasons, including the likelihood that commoners will not fight passionately for their city if the constitution gives them no political voice or honorable status in the city's life. This brings us back to what I previously called the most 'democratic' reason why elites have willingly imposed limits on themselves, namely to mobilize the cooperation of non-elites in the accomplishment of the elite's most pressing goals. With the military function of constitutions in mind, Aristotle therefore recommended the following: 'we must both pay the poor for attendance and fine the rich for non-attendance. On this plan, all would share in a common constitution.' Guaranteed a stake in the system, the urban poor will willingly fight against hostile cities, something they may not do if 'the constitution belongs to one side only'.[36]

[35] *The Politics of Aristotle* (Ernest Barker trans, 1968), 1297a, 186–7.
[36] Ibid 187.

The idea that a 'balanced' constitution of this sort could help social elites to manage dangerous class conflict by giving non-elites a palpable stake in the regime's successes was transmitted to modern constitution-makers by ancient theorists of the mixed constitution. Cicero, for example, argued that a constitution should grant 'freedom to the people in such a way as to ensure that the aristocracy shall have great influence and the opportunity to use it',[37] thereby denying that there was a zero-sum relation between popular rights and elite power. In response to the typical aristocratic complaint that the Tribunes of the Plebs have been granted too much power, Cicero responded that 'the power of the people... is sometimes milder in practice because there is a leader to control it'.[38] Viewed superficially, the Tribunes were hostile to Roman elites; but they also provided these elites with recognizable negotiating partners able to make and keep bargains between the rich and the poor. The Senatorial class was wise enough to restrain its own natural impulse to monopolize power, Cicero went on to argue, and, instead, acceded to the creation of the Tribunate, thereby sharing a modicum of power with the Plebs. By such remarkable self-restraint Rome's elite gained much more than it lost:

> consider the wisdom of our ancestors in this matter. When the Senate had granted this power to the plebeians, conflict ceased, rebellion was at an end, and a measure of compromise was discovered which made the more humble believe that they were accorded equality with the nobility; and such a compromise was the only salvation of the State.[39]

The classical idea of a mixed constitution provides an important clue to the origins and fate of constitutional democracy. In specific historical contexts, large numbers of citizens are granted participatory rights because their voluntary cooperation seems essential to achieving the strategic goals of ruling elites. If political dominant groups can see far enough ahead to impose burdens on their members for the sake of maintaining their privileges, they can also (with improved foresight) see the advantage of sharing power with commoners for the sake of gaining the cooperation they need in order to defend themselves as well as their privileges against the threat posed by hostile cities.

## VI. Monarchical Constitutions

In non-republican systems, strategic constitutionalism will lead to forms of elite self-discipline entailing few participatory rights for non-elites. This brings us to Thomas Hobbes, who was neither a liberal nor a republican and who railed consistently against 'mixarchy', his denigrating term for a mixed constitution.[40] When he wrote of the 'constitution of sovereign power'[41] Hobbes meant, among other things, the way in which monarchies could and should be organized to enforce unquestioning obedience from a politically passive population. A brief look at monarchical constitutions, therefore, will bring us back to the thesis that constitutional restraints can be embraced by power-wielders for purposes of their own without any serious pressure from the people who, throughout most of history, have been in no position to threaten to withdraw cooperation needed by ruling elites.

A credible succession formula is an essential element in any monarchical constitution. This was already true for the medieval kingships from which Europe's early-modern monarchies emerged. The most important element in monarchical constitutions, commonly called the fundamental laws of the realm, was the order of succession, clarifying sequence and eligibility

[37] Cicero, *De legibus* (n 15), 3.17.38, 502–3. [38] Ibid 3.10.23, 484–5.
[39] Ibid 3.10.24, 487. [40] Thomas Hobbes, *Behemoth* (1990), 116.
[41] Thomas Hobbes, *Leviathan* (C.B. Macpherson ed, 1968), ch 18, 234.

of heirs to the throne and, ideally, specifying uniquely who will become king when the incumbent monarch expires. These rules of succession could privilege either sons or brothers (think of *Hamlet*), could exclude or include female heirs (think of *la loi Salique*), and so forth. That monarchical rules of succession were incomplete, not covering all cases—such as exhaustion of the male line—as well as ambiguous enough to embolden pretenders to the throne, goes without saying.

So why were such orders of succession widely viewed as binding, even in monarchical regimes where the king often claimed to be *legibus solutus*? The answer, which involves the shared desire of all powerful political forces to avoid a power vacuum or violent factional struggle for the throne (which might also expose the state to foreign invasion), tells us something important about voluntarily accepted constitutional constraints in modern democracies as well.

Orders of succession confirm the idea that every constitution is, in part, an emergency constitution.[42] The unexpected death of the king inevitably delivers a profound shock to the political system. It creates a crisis or emergency, throwing into question the political pecking order among courtiers and royal kinsmen that prevailed when the now-deceased monarch was still alive, thereby enflaming the ambitions of blood rivals.

Such an emergency can be managed most effectively by 'if-then' rules elaborated in advance and stockpiled in reserve, allowing the surviving courtiers, when the time comes, to 'discover' the dead king's true successor. These rules constitute the king's supernatural body, representing the 'perpetuity of the sovereign rights of the whole body politic'.[43] The king's 'immortal' body, codified in the order of succession, was engineered even to survive assassination and to help a deceased king's entourage to coordinate quickly on an heir to the throne. This will happen if the otherwise quarreling courtiers and blood relations share a desire to avoid settling the succession question by a resort to violence, which might expose the entire system to civil war and, as a consequence, to an external attack potentially devastating to all. Precomittment to specific rules of succession was meant not to guard an individual from weakness of the will, or uncontrollable impulse, but to guard a group against *the absence of any coherent will* and thus against deadlock, paralysis, regime meltdown, and a resort to perhaps spiraling violence to settle on an heir.[44]

A credible succession formula is not a restriction on the power of the head of state. It is eminently 'constitutional' but cannot be accurately described as a 'limitation on government by law'.[45] Rather, it is an outstanding example of strategic constitutionalism. It is an instrument by which political elites can coordinate quickly to install a new head of state before the last one's body grows cold. Such provisions are certainly not restrictions imposed on the powerful to protect the weak. Instead, they are scripts to help the powerful coordinate quickly on a pathway out of a crisis that they know will eventually come even though they cannot be sure when.

Containing a monarchical residue, presidential systems share with monarchies some of the challenges of avoiding chaos or maintaining continuity of government during an interregnum—challenges that parliamentary systems handle in a different way.[46] The Twenty-Fifth

[42] See Chapter 21.

[43] Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957), 383.

[44] The utility of constitutional restraints for keeping elite conflicts within bounds supports Jeremy Waldron's criticism of the Ulysses analogy, namely that constitutionalism assumes not agreement but disagreement among the political decision-makers. Jeremy Waldron, *Law and Disagreement* (1999), 271.

[45] McIlwain (n 16), 22.

[46] See further Chapter 29 on presidentialism and Chapter 30 on parliamentarism.

Amendment to the US Constitution, in fact, can be understood as the US President's supernatural body, made not of flesh and blood but of protocols and rules. Introduced in 1965, in the wake of the Kennedy assassination (and ratified in 1967), the Twenty-Fifth Amendment was crafted to avoid a prolonged succession crisis, or power vacuum, in case the President, after an assassination attack or perhaps a stroke, survived in a vegetative state. The scenario by which a Vice President could step into the role of a disabled President was evidently not spelled out in the original Constitution with enough specificity to guide uncertain actors in an inherently stressful situation. By 1965, it had become clear that such a state of affairs could no longer be tolerated, not in the atomic age where split-second executive decision-making might be necessary at any time.

Section 4 of the Twenty-Fifth Amendment is an emergency protocol, detailing what to do and how to do it. It is definitely not a mere prohibition of undesirable action. It is not a restriction imposed on the powerful to protect the weak. Indeed, it is not any sort of manacle, check, barrier, or limit. Exactly like the succession formulas embedded in the Golden Bull of 1356 and other pre-democratic 'constitutions',[47] it is a script to help power-wielders coordinate quickly in a crisis.

If we think of constitutional rules as scripts, rather than ropes (and the US Constitution provides many other examples[48]), it is easier to understand why powerful actors, looking for protocols to facilitate rapid coordination, might be willing to incorporate them into their motivations as obligatory principles of conduct. They are not incapacitating but capacitating. They are not shackles making unwanted action impossible, but guidelines making wanted action feasible. Seen in this way, their 'binding power' becomes more commonsensical than mysterious.

## VII. Cognitive Constitutionalism

One of the American Founders' basic assumptions was that the executive branch will, on balance, perform better if compelled to provide both Congress and the courts with plausible reasons for its actions. If a government stops being compelled to provide plausible reasons for its actions, it is very likely, in the relatively short term, to stop having plausible reasons for its actions. Liberating policy makers from the discipline of justification before independent tribunals routinely generates incoherent and self-defeating policies. This is just as true in oligarchies as in democracies.

Viewed from this perspective, America's eighteenth-century Constitution is based on three still-valid principles: all people, including political elites, are prone to error; all people, especially political elites, dislike admitting their blunders; and all people, especially political elites who are currently in opposition, relish disclosing the miscalculations and missteps of their bureaucratic or political rivals. The Constitution attempts to operationalize these principles, roughly speaking, by assigning the power to make mistakes to one branch and the power to correct these mistakes to the other two branches and to the public and the press. Its structural provisions, when combined with certain basic rights (such as freedom to examine the government and freedom of political dissent), set forth a series of second-order rules, that is, rules

[47] James Bryce, 'The German Constitution' in *The Holy Roman Empire* (1950), 225–47; *Encyclopédie ou dictionnaire raisonné des sciences, des arts et des métiers*, vol 4, 63.

[48] Provisions for filling vacancies in Congress, for executive vetoes and Congressional overrides, for admitting new states, for impeaching judges, for electing the President and Vice President if the Electoral College system fails and so forth.

specifying the process by which concrete decisions and first-order rules are to be made and revised. If America's eighteenth-century Constitution remains helpful in dealing with twenty-first-century problems it is largely because its second-order rules embody a distrust of false certainty and a commitment to procedures that facilitate the correction of mistakes and the improvement of performance over time.

Constitutions help to organize the process of decision-making to disfavor the unconsidered or impulsive judgments of incumbent politicians. If the constitution forces decision-makers to submit to an adversarial process of some sort, then their natural impetuosity, false certainty, tunnel vision, and rank prejudice can 'speedily give place to better information, and more deliberate reflection'.[49] We know in advance that 'the legislature will not be infallible' and that 'impressions of the moment may sometimes hurry it into measures which itself, on mature reflection, would condemn'.[50] One solution to this problem is to make sure that various institutionally independent members of the political elite examine the question being discussed from a variety of angles: 'The oftener the measure is brought under examination, the greater the diversity of the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation.'[51]

That political power is a magnet for disinformation is also worth remembering. Shadowy groups with private agendas regularly feed lies and half-truths to power-wielders in the hopes of manipulating them into acting contrary to the interests of the rulers themselves. Judicial independence emerged and survived in part because professional judges, trained to sift truth from error, were valued for their ability to shield powerful politicians from manipulative disinformation. For this and other reasons, to be discussed in the next section, independent courts provide another illustration of strategic constitutionalism.[52] Insulated from the confirmation bias of executive officials keen on action, independent judges can strengthen the executive function by filtering out witness malice and other misleading falsehoods. That at least is Montesquieu's thesis. He argued that a king who acted as a judge, and thereby violated the constitutional separation of executive and judicial power, would easily become a plaything of malicious witnesses and other parties trying to steer public power into serving illicit private or factional purposes:

> The laws are the eye of the prince; by them he sees what would otherwise escape his observation. Should he attempt the function of a judge, he would not then labour for himself, but for impostors, whose aim is to deceive him.[53]

The echo here of Bodin's theory of parliamentary immunity is unmistakable. Confronted by no organized body capable of exercising critical judgment, free from fear of reprisal, unconstrained or unilateral power is much more likely to be duped by disinformation than a power that is compelled to submit to independent monitoring. The great literary mise-en-scène of this elementary constitutional truth is Shakespeare's *Othello*. When Othello was accused by Desdemona's father of seducing her with drugs, the false accusation was tested before an independent tribunal, the Council of Venice, which told the father that 'to vouch this is no proof';[54]

[49] *The Federalist Papers* (n 8), no 78, 468. [50] Ibid no 73, 442. [51] Ibid.

[52] See Chapter 39 on judicial independence as a constitutional virtue.

[53] Charles Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans, 1975), vol I, bk 6, ch 5, 79.

[54] To vouch this is no proof,
Without more wider and more overt test
Than these thin habits and poor likelihoods
Of modern seeming do prefer against him.
*Othello*, Act I, scene 3, lines 107–9.

eventually dismissing the charges after allowing Othello and Desdemona to tell their side of the story. But later, when Iago, speaking untruth to power, persuades Othello of Desdemona's infidelity, Othello does not say 'to vouch this is no proof'. He does not allow Desdemona to tell her side of the story, nor does he submit the case to an independent tribunal. He haughtily plays both *le juge et la partie*. As a result, Othello loses rather than gains autonomy. His refusal to submit himself to an institutional mechanism for the correction of errors, far from making him free, renders him completely rudderless. Othello's wrongful murder of his innocent wife is therefore a standing reminder of the vulnerability of political elites, when their powers are unilateral and unchecked, to manipulation by malicious purveyors of false information. Admittedly, being publicly corrected can sting the vanity of power-wielders. But such mighty individuals are likely to drive off cliffs if they disable the brakes that can correct them.

## VIII. Insulation through Abdication

If we assume that the powerful never feel that they have enough power and that they are ceaselessly laboring to accumulate more, then voluntary abdications of power seem genuinely incomprehensible. But the mystery is dispelled, at least to some extent, if we start from the premise that power is not homogeneous and that some forms are much less attractive than others. No one is surprised that today's White House and Congress pay no attention to a child custody case, nor does anyone ask why politicians would 'cede power to judges' in such a context. Politicians cede this power because they do not want it and they do not want it because they have better things to do. Any sensible political ruler will want to delegate the donkey work. He will 'get off my case', that is to say, he will, once again, support the independence of the judiciary.

Abdications of judicial power can empower the government by insulating it not only from manipulative disinformation but from all manner of unwelcome chores and pressures. Delegations of power can be shrewdly strategic if they prevent organized interests from hounding officials into furthering factional ends. Shedding power is an appealing technique for fending off annoying supplicants and time-consuming petitions for redress of grievances. Focusing on their understudied deflecting or protective function can help us see constitutional 'limits' on power in a different light.

If the ruler pulls strings behind the curtains, people will notice where ultimate decision-making power lies, and, according to Montesquieu, the steps of the ruler's palace will resound 'with the litigious clamours of the several parties' hoping to influence upcoming decisions of the royal court. Keeping the judicial power in his own hands would reduce the king's power, on balance, because 'the courtiers by their importunity would always be able to extort his decisions'.[55] To avoid these pressures, a shrewd prince will respect the independence of judges from executive power, one of the keystones of any moderate constitution.[56] In a republic, too, the legislature can insulate itself from supplicants seeking favorable verdicts by genuinely renouncing all power to influence judges.[57]

The powerful, moreover, can often be persuaded to jettison powers that are likely to excite lasting hatred and resentment. To exercise judicial power is to create winners and losers. Winners may or may not feel appreciative; but losers almost certainly feel aggrieved. It is dangerous to wield judicial power because the powerful are eye-catching targets for the vengeance of those whom court decisions have really or supposedly harmed.

[55] Montesquieu (n 53), bk 6, ch 5, 78.
[56] Ibid 77.
[57] *The Federalist Papers* (n 8), no 48, 307.

While a shrewd prince will forfeit powers that are resented, such as punishment, he will simultaneously retain powers that engender gratitude, such as the power to pardon. Montesquieu recognized the political benefits of separating the power to pardon from the power to condemn or acquit,[58] as did Machiavelli before him: 'Princes must make others responsible for imposing burdens, while handing out gracious gifts themselves.'[59] Loyalty and political support are excited by gifts that are totally undeserved, not by 'just' outcomes that seem legally compelled. The far-seeing ruler, for this reason too, will create a genuinely autonomous judicial body for whose actions the political branches receive neither credit nor blame. Independent tribunals will specialize in punishing malefactors and dispensing justice, while he, the prince, will retain for himself the discretionary power to issue pardons and confer other unjustifiable benefits, which presumably stir gratitude in, and secure political support from, the lucky beneficiaries who understand that they are receiving more than they rightly deserve.

And just as princes can empty their In Boxes and increase their most valuable capacities by deferring to independent courts, legislatures can protect themselves from a military coup by deferring to a semi-independent executive. Montesquieu justified the legislature's delegation of power to the executive on just these grounds: 'When once an army is established', he wrote, 'it ought not to depend immediately on the legislative, but on the executive, power.' One reason is that 'its business consist[s] more in action than in deliberation'. But that was not the most urgent consideration, from a republican point of view. Montesquieu's principal argument, instead, concerned the way in which civilian control of the military itself could be fatally weakened if the legislature tried to retain managerial control of the army:

> It is natural for mankind to set a higher value upon courage than timidity, on activity than prudence, on strength than counsel. Hence the army will ever despise a senate, and respect their own officers. They will naturally slight the orders sent them by a body of men whom they look upon as cowards, and therefore unworthy to command them. So that as soon as the troops depend entirely on the legislative body, it becomes a military government.[60]

Soldiers are naturally contemptuous of 'talking chambers'. Therefore, to help the legislature to avoid a military coup, a liberal constitution will place operational control of the army in the hands of someone whom military men are likely to salute and obey. This should be a single commander-in-chief who will nevertheless still operate under the eye of, and within guidelines set by, the legislature. The impeachment power should remain 'a bridle in the hands of the legislative body upon the executive servants of the government'.[61] But the chief executive must possess enough independent presence and prestige to command the respect of the troops. Not only the legislature's power, but its very survival as an independent political actor hinges on its willingness to abdicate power in this specific respect. Or so argues the most famous strategist (not only the most famous theorist) of the constitutional separation of powers.

## IX. Joint Agency and Corruption

When Madison wrote that a good constitution should oblige the government 'to control itself',[62] he meant that it should prevent individual incumbents from yielding to the temptation to prefer their private interests to the interests of the government and thereby 'to betray

[58] Montesquieu (n 53), bk 6, ch 21, 92–3.
[59] Niccolò Machiavelli, *The Prince* (Harvey Mansfield trans, 1998), ch 19, 75.
[60] Montesquieu (n 53), bk 11, ch 6, 161.
[61] *The Federalist Papers* (n 8), no 65, 396.
[62] Ibid no 51, 319.

the solemn trust committed to them'.[63] This happened whenever office holders passed laws, created policies, or delivered judicial decisions in exchange for private payments from interested parties. The importance of this problem to the Framers is clear from the reference to 'bribery' in the Constitution's Impeachment Clause. Making bribery into an impeachable (as well as a prosecutable) offense was one way of discouraging incumbents from betraying their colleagues, if not their country, for a consideration.

Given the political context of the late eighteenth century, the greatest threat of bribery came from 'foreign gold'[64] or 'the desire in foreign powers to gain an improper ascendant in our councils'.[65] Hamilton, for example, explicitly contemplated the possibility that 'a few leading individuals in the Senate' could 'have prostituted their influence in that body as the mercenary instruments of foreign corruption'.[66] Serious precautions had to be taken because 'One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption.'[67]

The constitutional requirement that the President obtain the Senate's consent to treaties is meant to make it more difficult and costly for foreign powers to purchase treaties biased against US interests.[68] It eliminates the convenience of one-stop shopping for foreign purchasers of America's willing collaborators. Both Hamilton and Madison saw the anti-hijacking function of 'partial agency'[69] as essential to maintaining American autonomy in foreign affairs. They returned repeatedly to 'The security essentially intended by the Constitution against corruption and treachery in the formation of treaties'.[70] For instance, 'The JOINT AGENCY of the Chief Magistrate of the Union, and of two thirds of the members of a body selected by the collective wisdom of the legislatures of the several States, is designed to be the pledge for the fidelity of the national councils in this particular.'[71] The requirement of 'concurrent agency'[72] in treaty-making also obstructs bribery by making more difficult the air-tight secrecy that it requires.[73]

Members of the ruling elite normally exhibit an ingrained loyalty to the prominent network that provides them favors and protection. There is nevertheless 'a degree of depravity in mankind which requires a certain degree of circumspection and distrust',[74] and gives constitution-makers reason enough to anticipate worst-case scenarios.[75] These include defections from ruling circles and collusion between disgruntled and alienated members of the elite, on the one hand, and European diplomats and undercover agents, on the other. An 'ambitious' and 'avaricious' member of the political elite will occasionally 'make his own aggrandizement by the aid of a foreign power'.[76] When detailing 'many mortifying examples of the prevalency of foreign corruption in republican governments' and explaining how often enemy gold 'contributed to the ruin of the ancient commonwealths', Hamilton made clear that this threat had by no means disappeared, citing Holland as a recent example.[77]

Hamilton's insistence that the separation of powers can provide some protection against foreign corruption confirms once again the American Framers' commitment to strategic constitutionalism. Constitutional structures can be embraced by political elites, even in the absence of popular pressure, simply to protect the interests of the elite itself, in this case from rogue officials who might willingly betray their fellow office holders for that perennially irresistible piece of silver.[78]

[63] Ibid no 55, 341. [64] Ibid no 55, 342. [65] Ibid no 68, 411.
[66] Ibid no 66, 404. [67] Ibid no 22, 145. [68] Ibid no 75, 449–50.
[69] Ibid no 47, 299. [70] Ibid no 66, 404. [71] Ibid no 66, 404.
[72] Ibid no 67, 409. [73] Ibid no 22, 145. [74] Ibid no 55, 343.
[75] Ibid no 75, 450. [76] Ibid no 75, 450. [77] Ibid no 22, 145. [78] Ibid no 22, 145.

## X. Constitutionalism and Democracy

To argue that constitutions, as they function in practice, reflect and perpetuate asymmetries of power in society is not to obliterate all distinctions between autocratic and democratic political systems.[79] On the contrary, it is to say that constitutions are more or less democratic to the extent that power in the underlying society is distributed more or less widely and evenly. The way power is distributed in society can, in turn, be influenced at the margins by political institutions but, short of totalitarianism, will be shaped mostly by demographic, technological, cultural, economic, and other developments that operate relatively unconstrained by constitutional politics. In any case, when broad swaths of the population can credibly threaten to withdraw the voluntary cooperation indispensable to political and economic elites, the democratic implications of a constitution will wax. When, on the contrary, elites manage to liberate themselves from any need for the cooperation of most citizens (in oil-extraction economies, for instance, or when mass armies have been replaced by small volunteer professional forces operating push-button weapons), the democratic implications of the constitution under which they jointly live will wane. Historical inquiry strongly supports the hypothesis that the democratic effects of a single constitutional text will expand and contract in tandem with the extra-constitutional leverage of the citizens at large.

For a brief period at the end of the eighteenth century, the word 'constitution' shook off its association with the status quo and become a rallying cry for revolutionaries. Thomas Paine, for example, wrote at the time that 'The constitution of a country is not the act of its government, but of the people constituting its government.' It followed for Paine that 'A constitution is a thing antecedent to a government, and a government is only the creature of a constitution.'[80] The same distinction between the constituting people and the constituted government, implying against immemorial tradition that leaders in palaces would henceforth defer to subjects in cottages, was elaborated in France, around the same time, by the Abbé Sieyès. He described the government as a delegated authority or *le pouvoir constitué*, with no right to revise the rules of the game under which it was elected, and the people or the nation as *le pouvoir constituant* who promulgated those rules which the government had no right either to disobey or unilaterally to revise.[81]

True, even traditional theorists like William Blackstone admitted that political incumbents could be constitutionally punished for unconstitutional actions. For instance, Parliament had the right and duty to impeach the king's ministers whenever his 'prerogative is exerted in an unconstitutional manner'.[82] What Blackstone emphatically denied, however, was that an Act of Parliament itself could be either unconstitutional or constitutionally overturned. He could not accept, or perhaps even understand, what the revolutionary generation that followed him was zealously to allege, that there was a lawmaking authority *legally* higher than the lawmaking authority of the duly constituted legislature. In 1785, Blackstone's position was aggressively defended against the revolutionary constitutionalists of that decade by the British progressive, William Paley, who argued that 'An act of parliament in England can never be unconstitutional, in the strict and proper acceptation of the term.'[83]

[79] On democracy more generally, see Chapter 11.
[80] Thomas Paine, *Rights of Man* (1979), 93.
[81] Abbé Sieyès, *Qu'est-ce que le tiers état* (1982), 67.
[82] William Blackstone, *Commentaries on the Laws of England* (1979), vol I, ch 7, 244.
[83] William Paley, *The Principles of Moral and Political Philosophy* (1867), 219–20.

The contrary and revolutionary concept, that legislative acts can be unconstitutional, has obscure origins, but one of its most important sources is Bolingbroke's *Dissertation upon Parties* (1733–34) which defined 'constitution' as a system for promoting the public good under which the community has voluntarily agreed to be governed.[84] The political authority of the people, for Bolingbroke, trumps the political authority of the government:

> constitution is the rule by which our princes ought to govern at all times; government is that by which they actually do govern at any particular time. One may remain immutable; the other may, and as human nature is constituted, must vary. One is the criterion by which we are to try the other; for surely we have a right to do so, since if we are to live in subjection to the government of our Kings, our Kings are to govern in subjection to the constitution; and the conformity or nonconformity of their government to it, prescribes the measure of our submission to them, according to the principles of the Revolution, and of our present settlement.[85]

If the government violates the constitution under which its subjects have agreed to be governed, then these subjects may legitimately withdraw their obedience and submission.

Most shocking was Bolingbroke's claim that statutes legally enacted by Parliament can sometimes be unconstitutional. He focused particular attention on the Septennial Act of 1716, by which the Parliament elected in 1715 unilaterally extended its term until 1722. This Act was unconstitutional in an elemental sense, according to Bolingbroke, because the Triennial Act of 1694, far from being just another statute, was a codification of the revolutionary settlement of 1688–89. Paine and other members of the revolutionary generation were to echo Bolingbroke's point here, singling out the unconstitutionality of the Septennial Act[86] when arguing for the superiority of revolutionary settlements over ordinary legislation. And of course they uniformly took issue with Blackstone, who had stubbornly argued that Parliament 'can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections.'[87]

This debate provides an essential backdrop for *Federalist* 53 where Madison famously explained American exceptionalism as rooted in the unique thinking about constitutions that developed in the colonies as they broke away from British control:

> The important distinction so well understood in America between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country.[88]

A constitution unalterable by the government is a historically unprecedented departure, according to Madison, because previously: 'Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of government.' And he continues:

> Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable as well with regard to the Constitution as the ordinary objects of legislative provision.[89]

[84] Henry St John Bolingbroke, 'A Dissertation upon Parties' in David Armitage (ed), *Political Writings* (1997), letter 10, 88.

[85] Ibid.

[86] Thomas Paine, *Rights of Man* (1979), 95.

[87] Blackstone (n 82), vol I, ch 2, 156.

[88] *The Federalist Papers* (n 8), no 53, 328.

[89] Ibid.

To illustrate the principal difference between the traditional British and the new revolutionary concept of a constitution, in other words, Madison again invokes the Septennial Act of 1716, exactly like Bolingbroke decades before and Paine shortly thereafter.

Bolingbroke used the Septennial Act to exemplify unconstitutionality not because it violated private rights but because it overrode the right of the electorate to purge the House of Commons of those members who had succumbed to the allure of place, privilege, favoritism, and money handed out by the crown in exchange for legislative servility. Madison, like the other members of the revolutionary generation, was an heir to this outrage. Echoing the centrality which Bolingbroke attributed to 'the frequent returns of new elections',[90] Madison identified 'the restraint of frequent elections'[91] as the core institution of constitutional government: 'A dependence on the people is, no doubt, the primary control on the government.'[92] Indeed, Madison consistently wrote about 'free government, of which frequency of elections is the cornerstone',[93] placing the essence of constitutionalism not in the separation of powers but in fixed-calendar elections which political incumbents cannot safely, without risking ouster or overthrow, delay or suspend. Rulers who are 'created by our choice, dependent on our will'[94] have a strong incentive to act in the interest of the 'the great body of the people of the United States'.[95] That was the idea, or at least the hope.

Speaking of unrealistic hopes, the democratic constitutionalism of the revolutionary era aimed, by means of regular elections, to prevent 'the elevation of the few on the ruins of the many'.[96] With hindsight, of course, we can see that the success of democratic constitutionalism in this regard was occasional and erratic at best. What remains significant for constitutional theory is that the limited effectiveness of the restraint of frequent elections did not go unnoticed at the time. Even when arguing most forcefully that periodic elections, entrenched in the Constitution, could align the interests of legislators with the interests of citizens, Madison indirectly revealed his underlying doubts:

> the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.[97]

Feelings of dependency on the people, elicited by periodic elections, can be effaced by the mere exercise of power! As Hamilton put the point, 'It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust.'[98] Political experience had taught both Hamilton and Madison the inherent weakness

[90] Bolingbroke (n 84), letter 13, 125.

[91] *The Federalist Papers* (n 8), no 57, 350.

[92] Ibid no 51, 319.

[93] Ibid no 53, 329; the British have no 'Constitution', according to Madison, because Parliament, at the time, had the legal right to perpetuate itself beyond the term for which it was elected:

> The important distinction so well understood in America between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country [outside the American states].

[94] Ibid no 25, 162.

[95] Ibid no 57, 349.

[96] Ibid no 57, 348.

[97] Ibid no 57, 350.

[98] Ibid no 62, 376–7.

of the electoral mechanism. But they learned the same lesson from their reading of Locke. Even when raised to high office by periodic elections, Locke had famously explained, public officials will 'come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government'.[99] This is an arresting claim, and a central one to the entire liberal tradition.

Following Locke's suggestion, Madison agreed that holding power, however it was achieved, affects not only a person's opportunities but also his motivations. This political alchemy guarantees that the dominant or driving motives of power-wielders, even if elected and facing re-election, will deviate substantially from the leading motives of the rest of society. Even under the restraint of frequent elections, Hamilton would add, 'the representatives of the people' will be tempted to view themselves as 'superior to the people themselves'.[100]

Without contesting the republican principle that government must be based on the consent of the people,[101] Madison expressed strong doubts about the 'input' side of democracy. He understood perfectly well 'the vicious arts by which elections are too often carried'.[102] He also wrote about how men of factious tempers could 'obtain the suffrages' by 'intrigue' and 'corruption' or by playing on 'local prejudice'.[103] The American Framers knew nothing of political marketing or the application of advertising techniques to political campaigns. But they were perfectly aware that the will of the people does not always develop autonomously but is frequently shaped and manipulated by the dissemination of false rumors and other species of strategic disinformation. The chimerical accountability of the rulers to the ruled, moreover, even when frequent elections are constitutionally required, depends on the electorate's willingness and ability to gather information about the rival candidates and pay close attention. No constitution, however, can do much about the 'supineness' and 'ignorance' afflicting 'unwary and uninterested' voters.[104]

Asymmetry of information makes it difficult, if not impossible, for citizens to control politicians. If elected officials, once in office, can use administrative and other resources to misinform voters and keep them in the dark, then they, the incumbents, can successfully liberate themselves from the restraint of frequent elections, even without resort to vote-rigging and other more blatantly anti-democratic methods. The most common technique by which office holders have traditionally eluded accountability is probably the simplest: shameless lying. Because incumbents know things that the voters need to but do not know, periodic elections alone do not, as it turns out, allow citizens to hold politicians to account.

To supply this gaping defect in the electoral mechanism, as is well known, Madison offered a variety of 'auxiliary precautions',[105] all of which involve multiple delegates who will supposedly keep an eye on each other. To prevent office holders from misusing their delegated powers in secret and thereby escaping electoral reprisal, the constitution should give them the capacity and the motivation for mutual whistle-blowing as well as the capacity and motivation for mutual cooperation. These officials must play no role in each others' appointments or remuneration, but each must have an incentive to warn the electorate, between elections, when they spot rival politicians betraying the public trust.

As these passages suggest, the Framers advertised checks and balances as a republican version of *divide et impera*, this time designed to discourage corrupt self-dealing by public officials. Plural agency would ideally allow the electorate, which cannot make politics into a full-time job, to play various elected officials off against each other. Occupants of the various

[99] Locke (n 7), sec 143, 410.
[100] *The Federalist Papers* (n 8), no 78, 466.
[101] Ibid no 22, 148.
[102] Ibid no 10, 77.
[103] Ibid no 10, 78.
[104] Ibid no 64, 389.
[105] Ibid no 51, 319.

departments of government, including magistrates elected at the state level, could be constitutionally incentivized 'to sound the alarm to the people'[106] in case the occupants of rival branches begin to treat public resources as private assets. In such a system, periodic accountability to the electorate would be supplemented between elections by a form of peer review by rival delegates of the electorate.

It all sounds promising. But, at this point, the Framers' strategic constitutionalism met its Waterloo. Madison's constitutional engineering did not succeed in supplying the defect of periodic elections. His checks and balances proved unable, in the end, to align the interests of the government with the interests of the governed. The separation of powers could not even prevent 'a mercenary and perfidious combination of the several members of government'.[107] Members of formally separated branches had little trouble colluding in cloakrooms. Some democratic theorists argue that it was the rise of political majorities, able to dominate the legislative and executive branches simultaneously, that made the doctrine of checks and balances 'anachronistic' to the point that it 'just makes no sense'.[108] But, writing before the emergence of modern political parties, Madison was already fully conscious that 'the dispensation of appointments' could serve as a 'fund of corruption' providing the executive with a power of 'subduing the virtue' of Congress.[109] Such a purchase of legislative support by executive largesse, in fact, was exactly what Bolingbroke had had in mind when he spoke of the 'unconstitutional dependency'[110] of the House of Commons on royal patronage. Such theoretically disallowed but practically ubiquitous collusion was to make a mockery of the plural agency on which the dividing and ruling of the inattentive electorate were supposed to depend.

It is worth noting here that American Progressives, hostile to the anti-reform bias they ascribed to the US Constitution, were especially critical of the separation of powers. Not only did it insulate the rulers from the legitimate demands of the ruled, they argued. It also promoted rather than prevented corruption. They assumed, writing in an age of dizzying economic growth, that

> the Constitution, with its elaborate barriers to the exercise of effective governmental power, suited very well the aim of that group of flourishing big-business men who where to dominate politics in the latter part of the nineteenth century, giving to it the character of the age of the tycoon.[111]

Checks and balances, they argued, introduced so many easily captured veto points into the system that a status quo bias, beneficial to the rich, was inevitable. This diagnosis is ironic, given Madison's hope that the separation of powers would render corruption and state capture more difficult if not impossible. Contradictory as they are, both theories illustrate strategic constitutionalism. Madison valued the separation of powers as an instrument for discouraging corruption. The Progressives disparaged the separation of powers as a pliant tool of the corrupt. The latter analysis seems to have been vindicated by history. And it was not the only time that constitutional provisions introduced in a spirit of reform were turned inside out to serve the organized interests that they were meant to discipline and control.

[106] Ibid no 26, 168. [107] Ibid no 55, 342.
[108] Adam Przeworski, *Democracy and the Limits of Self-Government* (2010), 137.
[109] *The Federalist Papers* (n 8), no 55, 342.
[110] Bolingbroke (n 84), letter 13, 124–5.
[111] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1998), 290.

## XI. Judicial Review

Blackstone employed the adjective 'unconstitutional' to refer to egregious transgressions of the public trust. Some transgressions could be so egregious, he admitted, that they justified a revolutionary response. But he did not dream of codifying this revolutionary response in a fundamental and paramount legal text. Much less did he suggest that laws passed by Parliament could be declared null and void by judges citing the higher law inscribed in such a super-text. Judicial review of legislation would have been wholly anomalous in the British context, 'for that were to set the judicial power above that of the legislature, which would be subversive of all government'.[112]

For reasons that remain somewhat obscure, prominent members of the revolutionary generation, at least in America, quickly became convinced that effective governance would be possible even if judges occasionally overturned the decisions of elected assemblymen. According to Hamilton, writing in 1788, 'whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former'.[113] He did not invent the idea of judicial review out of whole cloth, needless to say. Already in 1783, for example, James Iredell, who would later become an Associate Justice on the Supreme Court, had written of 'a Republic where the Law is superior to any or all the individuals, and the Constitution superior even to the Legislature, and of which the Judges are the guardians and protectors.'[114] And earlier precedents of contested relevance can also be exhumed from the archives. In any case, only a few years after the Constitution was ratified, Justice Marshall immortalized the claim that judicial remedies are available in the case of an unconstitutional act of the elected legislature. In a shrewd stroke of strategic constitutionalism, he overturned a law (the Judiciary Act of 1789) that had granted the Supreme Court a power that the Court did not want and could not safely wield.[115]

But what can we learn about constitutions and constitutionalism from the history of judicial review in the presumed land of its birth?

First, the vast majority of laws overturned by the US Supreme Court throughout its history have been state laws. This suggests that judicial review has advanced the purposes of the federal government more often than it has obstructed them. Really-existing judicial review, like the really-existing constitution to which it belongs, is perfectly capable of enhancing the power of the powerful. When evaluating the trompe l'oeil image of the Supreme Court as an adversary rather than ally of the powerful, as a result, the tactical uses of deception should therefore be kept in mind.

And which rights have the US Supreme Court more consistently protected: the rights of the weak or the rights of the strong? Before trying to answer this wholly rhetorical question, we need to examine, at a higher level of generality, the 'rights' that the Supreme Court is allegedly devoted to defending. Focused on strengthening the government, the American Framers famously considered and rejected the proposal to add a Bill of Rights to the Constitution.[116] They eventually agreed to do so only to head off anti-Federalist demands to reduce the powers

[112] Blackstone (n 82), vol I, ch 3, 90–1.

[113] *The Federalist Papers* (n 8), no 78, 467.

[114] James Iredell, 'Instructions to Chowan County Representatives' in Don Higginbotham (ed), *The Papers of James Iredell* ([September 1783] 1976), vol 2, 449; cf *Commonwealth v Caton* (1782), 8 Virginia (4 Call), 5; cf Hamilton's description five years later of federal judges as the 'guardians of the Constitution' (*The Federalist Papers* (n 8), no 78, 469).

[115] *Marbury v Madison* (1803), in John Marshall, *Writings* (2010), 229–52.

[116] Max Ferrand (ed), *The Records of the Federal Convention of 1787* (1966), vol 2, 588.

vested in the federal government by the proposed Constitution. Their initial reluctance is revealing.

Hamilton argued in *Federalist* 78 that it was the duty of federal courts to declare null and void all legislative acts contrary to the manifest tenor of the Constitution. He was no doubt thinking primarily of state laws, expecting that the federal bench would side with the other federal branches against what supporters of a strong national government viewed as the contumacy of the states.[117] But he did not imagine that the Supreme Court would overturn statutes, state or federal, based on the Justices' interpretation of airy moral platitudes. Indeed, he mocked the kind of splendid generalities later inscribed in the Bill of Rights as 'aphorisms' which 'would sound much better in a treatise of ethics than in a constitution of government' for the simple reason that they 'leave the utmost latitude for evasion', altogether depending for their binding power 'on public opinion' and 'on the general spirit of the people and of the government'. These latter forces, he wrote, provide 'the only solid basis of all our rights'.[118]

The formal enactment and informal nullification of the Fourteenth Amendment, in the decades after the Civil War, illustrate nicely the primacy of partisanship and power over ideal justice in constitution-making and especially in the constitutional interpretation of grand libertarian generalities. Power includes not only the power of social and economic elites, it should be said, but also the power of public opinion, now called popular constitutionalism, when enflamed by racism or revenge. When adopted, the Fourteenth Amendment was seen in the South as a blatant expression of victor's constitutionalism. The result of violent conquest, it soon became the legal face of military occupation.

No one can dispute the core of truth in this bitter perspective of the defeated South:

> What was politically essential was that the North's victory in the Civil War be rendered permanent, and the principles for which the war had been fought rendered secure so that the South, upon readmission to full participation in the Union, could not undo them.[119]

But the broad and expansive language of the Amendment opened up, as times changed, wide avenues for opportunistic reinterpretation. The 'amorphous, moralistic, rhetorical categories of liberty and equality' and 'the hazy "privileges and immunities" language'[120] of the Amendment invited judicial interpretations in line with shifting public and especially elite opinion.

After the withdrawal of Northern troops from the South in 1877, even half-hearted attempts to protect blacks from denigration, subjugation, and physical cruelty were effectively abandoned.[121] Finally, in *Plessy v Ferguson*,[122] the Supreme Court effectively nullified the Fourteenth Amendment as a higher law meant to protect black Americans. Revealing just how 'justice' can be constantly redefined in line with partisan politics and the interests of the powerful, this episode is typical not exceptional. Equal rights for black Americans in the South, to the extent that they were enforced, were enforced by Northern soldiers. When the troops withdrew, these rights were not worth the paper on which the Fourteenth Amendment had been printed. After the Northerners had grown weary and bored of punishing the South, the real Supremacy Clause of the post-Civil War Constitution reasserted itself, namely White Supremacy.

[117] *The Federalist Papers* (n 8), no 80, 474–5. [118] Ibid no 84, 514.

[119] William E. Nelson, *The Fourteenth Amendment* (1988), 61. [120] Ibid 52, 57.

[121] In *United States v Cruikshank* 92 US 542 (1876), the Court had already given a green light to KKK massacres of black Americans presumably because the public officials who organized the killings were not acting in their official capacity and were not dressed as state actors.

[122] *Plessy v Ferguson* 163 US 537 (1896).

In 1952, law clerk William Rehnquist wrote a defense of *Plessy*, arguing that 'in the long run it is the majority who will determine what the constitutional rights of the minority are'.[123] His motives may have been unsavory but his observation was essentially Hamiltonian. The only solid basis for the rights of black Americans resides in the general spirit of the people and the government. If this spirit is rotten with racial bigotry and *libido dominandi*, these rights will be violated with impunity.

As interpreted and applied, constitutions are never impartial. They never treat the powerful and the powerless in the same way. Nothing out of the ordinary happened, therefore, when, twisting the original meaning of the Fourteenth Amendment, 'the Court turned its back on the claims of blacks and opened its arms to those of corporations'.[124] Equal protection gave way to Corporate Supremacy alongside White Supremacy. Crudely speaking, the late nineteenth-century Supreme Court granted ample discretion to state legislatures whenever they hurt blacks but little discretion when they threatened to hurt businesses.

Through the history of the Supreme Court, it should be remembered, Justices have always been appointed by politically partisan Presidents and confirmed by politically partisan Senators. Why would judges who came to the Court by such a route be inclined to interpret vague libertarian generalities in a wholly non-partisan way? In the period under discussion, the amorphous right to 'liberty' guaranteed in the Fourteenth Amendment was opportunistically seized upon by American corporations and their allies to fight state attempts to regulate labor contracts in a way favorable to workers. The Supreme Court concurred, interpreting Fourteenth Amendment 'liberty' selectively to mean economic liberty, especially freedom of contract between consenting adults beyond the reach of state legislatures.[125] The Court thereby replaced the legislatures' judgment of what was reasonable with its own judgment of what was reasonable, which, in turn, happened to correspond to the economic interests of the Captains of Industry whom the Justices may or may not have admired.

## XII. Conclusion

When studying *Plessy*, *Lochner*, and related cases, we should recall Aristotle's claim that 'the part of a state which wishes a constitution to continue must be stronger than the part which does not'.[126] Power in every known society is distributed unequally. Law, including constitutional law, necessarily reflects these asymmetries of power. When these asymmetries of power shift and rearrange themselves over time, laws, including constitutional laws, are amended or reinterpreted or enforced selectively in new ways. Far from being neutral and impartial, law is soaked through with partiality and favoritism.[127] This is just as true of constitutional law as of statutory law.

Constitutions emerge and survive because, with a little help from their judicial friends, they serve the perceived interests of the best organized and therefore most powerful social forces. When the powerful discover the advantages they can reap from making their own behavior predictable, they voluntarily submit to constitutional constraints. When non-elites gain leverage, one way or another, elites respond opportunistically by granting legal protections and

[123] Cass Sunstein, 'From Law Clerk to Chief Justice, He Has Slighted Rights: Rehnquist's 1952 Memo Sheds Light on Today's Court', *Los Angeles Times*, May 17, 2004.

[124] Peter Irons, *A People's History of the Supreme Court* (1999), 209.

[125] *Lochner v New York* 198 US 45 (1905).

[126] *The Politics of Aristotle* (n 35), 1296b, 185.

[127] Jean-Jacques Rousseau, 'Émile' in Jean-Jacques Rousseau, *Oeuvres complètes* (1969), vol IV, 524.

participatory rights in exchange for cooperation indispensable to elite projects. What we think of as democratic constitutions, as a result, emerge and survive as long as the best organized and therefore most powerful social forces find that they can promote their own interests most effectively by simultaneously promoting the interests of, and sharing political influence with, less powerful but not utterly powerless swaths of the population. That is the lesson taught by the ancient theorists of the mixed constitution. Their hypothesis was that constitutional restraints wax and wane, among other reasons, when non-elites gain and lose leverage over their social superiors. This ground-up approach to constitutionalism is superior to top-down normative approaches because it explains, as normative theorists cannot, why voters gradually lose the ability to control politicians when technological change, economic globalization and other dramatic developments reduce the observable dependency of the rich on the poor and the powerful on the weak.

Constitutional norms are 'binding' only when supported by organized interests. This is not a cynical observation. It is rather an instruction. If you wish a constitutional norm to govern the way politicians behave, you need to organize politically to give ruling groups an incentive to pay attention and accept restraints on their own discretion for their benefit and yours. No strategic constitutionalist would delegate such a daunting task to nine Justices presiding loftily in a marble hall.

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