Introduction

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Ten chapters, most of them published here for the first time, make up the bulk of this book. In addition, the editors commissioned an epilogue from Cass Sunstein, to bring out more clearly implicit agreements and disagreements among the contributors, and to engage in a discussion with them. The present introduction has a more limited purpose. It attempts to map some of the main problems raised by the contributors and to bring out their relation to one another. I shall emphasize three issues. First, I shall argue that the tension between constitutionalism and democracy is only, as it were, the two-dimensional projection of a three-dimensional issue. The third dimension which provides depth to that tension is the goal of efficient decision-making, unencumbered, if necessary, both by popular participation and by constitutional constraints. Next, I attempt to survey some of the proposed answers to what is perhaps the central question in the volume: why would a society want to limit its own sovereign power? Why would a democratic society tolerate what might appear to be a dictatorship of the past over the present? Finally, I shall explore some of the multiple links, discussed in the chapters below, between democracy, constitutionalism and private property. Is constitutionalism only a tool deployed in the self-interest of the property-holding class? Or are constitutional guarantees for property in the interest of everybody?

I A three-cornered dilemma

Democracy I shall understand as simple majority rule, based on the principle “One person one vote.” For the present purpose it is useful to construe the notion quite broadly, so as to include regimes in which,
for instance, slaves, foreigners, women, the propertyless or minors are excluded from the electorate. Even when the electorate is narrow, the tension between untrammeled majority rule and the need for constitutional constraints can arise. I discuss this in some detail below with reference to fourteenth-century Florentine politics. One may say, of course, that restriction of the electorate is a constraint on democracy, but it is not a constitutional constraint, as I shall use that term, since the excluded individuals almost invariably are not allowed to vote in the decision to exclude them.⁴

Similarly it is useful to include direct as well as representative democracy within the scope of our inquiry. The direct form of democracy practiced in classical Athens had self-imposed constraints which correspond to the spirit of constitutionalism. New legislation was subject to control by the nomothetai, a group of individuals chosen by the Assembly with the authority to approve or reject laws passed by the assembly.⁵ Another institution with a similar purpose was the graphe paranomon, whereby an individual might be punished for having proposed an illegal law in the Assembly, even if it had already been passed.⁶ Indeed, one might argue that direct democracy has a special need for such constraints, to prevent demagoguery and restrain the passions of the moment.

Constitutionalism refers to limits on majority decisions; more specifically, to limits that are in some sense self-imposed. The limits can take a variety of forms. They can be procedural or substantive; they can block or merely slow down the process of legislative change. Many countries have a written constitution which, among other things, prescribes complicated procedures for changing the constitution itself, including delays, qualified majorities and the like. Lower-level clauses can be either procedural or substantive. They include detailed regulations of the electoral process and of assembly voting, as well as guarantees for various individual rights, civil as well as political.

The central rights-protecting element in modern constitutions is the “principle of legality”: to be punishable, an act must be explicitly

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⁴ An exception is the referendum on lowering the voting age in Denmark in 1953. Here the individuals whose enfranchisement was contemplated were allowed to vote.
Forbidden by a law which was in force at the time it was committed. The effect of the principle of legality is to exclude arbitrary punishment and, very importantly retroactive legislation. It should not be confused with the requirement, sometimes referred to as “the rule of law,”⁴ that laws should be (relatively) stable and predictable. The principle of legality blocks the present from legislating for the past, whereas the rule of law allows it to legislate for the future. Both are important to ensure the security and peace of mind without which no well-functioning society is possible, but the former is the more fundamental condition.

Not all regulations are properly thought of as limits to majority rule. Many of them are better thought of as forms without which majority rule could not exist. There must be rules which determine when elections are to be held; electoral districts must be drawn; mechanisms for transforming votes into winners must be chosen. These forms of majority rule can also, however, be chosen with a view to being limits on majority rule. For instance, majority rule is constrained by a system of rigidly periodic elections, which prevent the government emanating from the majority from picking the moment at which its chances of being reelected are most propitious. Another example is provided by the periodically arising need, due to demographic changes, to redraw the boundaries between electoral districts. Notoriously this gives rise to strategic manipulation, often with the result that the districts are drawn up so as to favour the majority party. To avoid this, the constitution might lay down that the redrawing of electoral districts shall happen automatically whenever a certain inequality is attained, and that the new boundaries shall be drawn at random from a set of boundaries satisfying the condition of equipopulousness as well as certain topological conditions of connectedness and the like. This would be a constraint on majority rule.⁵

As described in this volume, constitutions serve two (overlapping) functions: they protect individual rights, and they form an obstacle to certain political changes which would have been carried out had the majority had its way. The latter function is served in several ways: by declaring certain changes unconstitutional; by making the process of change so complicated and demanding that few proposals will be able

⁴ See for instance the discussion by Sejersted below, pp. 131–52.
⁵ For a discussion of electoral boundaries, see also Holmes below.
to clear the hurdles;\textsuperscript{6} or by irreversibly delegating certain tasks to independent institutions like the Federal Reserve Board.\textsuperscript{7} Of these various tasks, only the two last-mentioned can be carried out mechanically and without recourse to interception. The others usually require judgment and interpretation, and so for obvious reasons are placed outside the political system proper. If the majority could interpret the statutes limiting its authority, the temptation to bend the interpretation its way could be overwhelming. Whenever mechanical processes (including randomization) are unavailable, judicial review becomes essential. It is no accident that constitutionalism is closely associated with the Supreme Court, although it should be emphasized that limits on majority rule go beyond judicial review.

Very broadly speaking, and with the qualification just stated, we may associate democracy with the elected assembly and constitutionalism with the Supreme Court (or its equivalent, like the French conseil constitutionnel). The third branch of the political system is the executive. The assembly embodies popular participation; the Supreme Court embodies constitutional constraints; and the executive embodies the need for action. At times, the executive may feel that its action is encumbered or hindered by each of the other branches. This shows itself most clearly, perhaps, in warfare. Toqueville argued that in war an aristocratic or monarchic leadership would deploy a given amount of resources better than a democratic government could do, although he was careful to add that in the long run a democracy will create more resources than an aristocracy.\textsuperscript{8} Similarly, when war breaks out or is impending the government may decide that constitutionally guaranteed civil liberties must be suspended.\textsuperscript{9} Carl Schmitt argued that the power of the state to declare a state of emergency shows that it is at bottom a Machtstaat rather than a Rechtsstaat.\textsuperscript{10} In his opinion, the essence of the state is revealed at moments of crisis, not through its day-to-day operations. Although this view is farfetched, the government’s desire to be as unconstrained as possible is a constant fact of politics.

Any government wants to be free, to have wide discretionary

\textsuperscript{6} In this volume this is stressed especially by Ackerman.
\textsuperscript{7} In this volume this is stressed especially in Sejersted’s first contribution (chapter 5).
\textsuperscript{8} See my discussion below, pp. 81–102.
\textsuperscript{9} See the discussion below in Sejersted, pp. 275–302.
\textsuperscript{10} See the discussion in Slagstad below, pp. 103–30.
powers of action. Against this there are several reasons why it needs to be restrained. Most obviously, there is the risk that it may use its powers for particularistic purposes; that it will violate the rights of some individuals simply to promote the interest of other individuals. The lettres de cachet of the pre-revolutionary French regime have come to epitomize this danger. In modern democratic societies, other risks loom larger. In its effort to promote economic growth, military success or whatever other goal it has been mandated to achieve, the government may decide that civil and political liberties ought not to stand in its way, because it is really acting for the general good.11 What, indeed, is the right of a few against the good of all? The argument rests on a fallacy of composition. From the fact that in any of a large number of cases the general good is promoted by violating individual rights one cannot conclude that a regular habit of rights-violation whenever the general good seems to require it will have the same effect. (In addition the premise of the argument is frequently shaky, since governments tend to overestimate the certainty that their policies will yield the desired results.12)

Economic planning exhibits the same problem in a somewhat different form. Discretionary use of the state’s economic powers may detract from the stability and predictability which is a condition for long-term economic growth.13 To this proposition14 we should add another, which is that predictable discretionary behaviour may also yield undesirable results.15 Consider a plain which is regularly inundated with many houses destroyed each time. After any given flood, the best policy from the point of view of the government may be to subsidize the house-owners to rebuild their dwellings. In a long-term perspective, however, it may be better if the government declares that

11 An example is the Pentagon Papers case, as discussed in G. Calabresi and P. Bobbitt, Tragic Choices (New York, Norton, 1978), pp. 39–40. See also the case of requisition of housing, discussed by Sejersted, pp. 275–302 below.
12 On this point, see B. Ackerman, Private Property and the Constitution (New Haven, Yale University Press, 1977), pp. 51ff.
13 Of these desiderata, predictability is the more fundamental. In the legislative realm, it may be difficult to conceive of a predictability not based on stability, but in, say, monetary policy a predictable, non-zero rate of inflation may serve as well as no inflation at all. On this point, see J. Buchanan, “Predictability: the criterion of monetary constitutions,” in L. B. Yeager (ed.), In Search of a Monetary Constitution (Cambridge, Mass., Harvard University Press, 1962), pp. 155–81.
14 Explored by Sejersted in chapter 5 below.
it will under no circumstance offer such subsidies, since then people will have an incentive to locate themselves elsewhere.

These remarks reflect the familiar theme of act-utilitarianism versus rule-utilitarianism. The natural tendency of governments to act on a case-by-case basis must be countered by rules which take account of the cumulative effect of many individual acts. Many defenders of constitutional constraints would, of course, put their case differently. Rather than admitting that rights are an output of the utilitarian calculus, they insist that rights are independently given constraints on that calculus. Some of them might perhaps be prepared to accept the utilitarian defense of property rights, but not accept that the protection of privacy or the freedom of religion are similarly dependent on the argument from utility. In the history of constitutional thought the utilitarian argument and the pure rights-based argument for constraints have been constantly intertwined and not infrequently confused.\footnote{In the present volume this is brought out in the chapters by Sejersted and Nedelisky.}

Whichever side one takes in this controversy, one side of constitutionalism can certainly be summed up as “rules versus discretion.” This is the face that constitutionalism bears in its struggle with the day-to-day wielders of power, whether these be embodied in a monarchy or in a government emanating from a majority party. Another side can be summed up as “reason versus passion” or as “politique politisante versus politique politisée.” Constitutionalism then stands for the rare moments in a nation’s history when deep, principled discussion transcends the logrolling and horse-trading of everyday majority politics, the object of these debates being the principles which are to constrain future majority decisions.\footnote{In the present volume this opposition is especially emphasized by Ackerman and in Sejersted’s first contribution.} Needless to say, it must not be possible to undo these principles by simple majority decision if they are to serve their function of constraining the majority. Nor would they be seen as binding were it possible to adopt them by simple majority decision. The general problem which haunts constitutionalism – why should any generation be bound by the decisions of its predecessors? – would be exacerbated if 51% of one generation could bind the next generation to principles which could be undone only by a two-thirds majority or even by unanimity.\footnote{See my discussion below, pp. 81–102.}
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Constitutionalism, then, fights a two-front war: against the executive and against the legislative branches of government. In addition, there is a constant tension between these two branches. Any government wants to receive its mandate in a general form that allows for efficient use of discretionary judgment, whereas any assembly wants to specify as much as possible how the mandate is to be carried out. To guard against the abuse of governmental power the assembly may, however, decide to use the tools of democracy rather than those of constitutionalism. The procedural principles of openness and of participation in administrative decisions by those most deeply affected by them are democratic values, not derived from constitutional thought.

A similar point can be made with respect to John Ely’s reinterpretation of constitutional theory. Ely insists that the purpose of judicial review is to protect democratic procedures from bias and distortion, and that the laying-down of substantive principles of justice is the task of the legislature, not of the courts. The task of the Supreme Court is to protect the political rights of the citizens, not their civil rights, since by exercising their (suitably protected) political rights they can define and protect their civil rights themselves. If this view is accepted, should we say that these procedural values serve as a constraint on democracy – or that they are simply part of what we mean by democracy?

The general conclusion suggested by the last two paragraphs is that both the wars fought by constitutionalism, as traditionally conceived, may be becoming less important. Constitutional constraints on governmental action are to some extent being replaced by democratic checks and controls. Similarly, the substantive constitutional constraints on majority rule are, or should arguably be, replaced by (or reinterpreted as) procedural controls. It is not my task here to argue for or against this view. I want only to suggest that this shift toward procedural justice may be the logical continuation of some lines of


20 See the discussions below by Nedelsky, pp. 240–74 and Sejersted, pp. 275–302.

argument developed in the chapters below. If laws are promulgated by a properly elected assembly and administered by proper participatory procedures, the need for constitutional constraints may appear less urgent.

II Self-binding

Why would a political assembly want to abdicate from the full sovereignty which in principle it possesses, and sets limits on its own future actions? In an intergenerational perspective, the question is what right one generation has to limit the freedom of action of its successors, and why the latter should feel bound by constraints laid down by their ancestors. A natural (although possibly misleading) point of departure is to consider individual analogies. Why, for instance, would two individuals want to form a legal marriage instead of simply cohabiting? What possible advantages could they derive from limiting their future freedom of action and by making it more difficult to separate should they form the wish to do so? One obvious answer is that they want to protect themselves against their own tendency to act rashly, in the heat of passion. By raising the costs of separation and imposing legal delays, marriage makes it less likely that the spouses will give way to strong but temporary impulses to separate. By increasing the expected duration of the relationship, legal marriage also enhances the incentive to have children, to invest in housing and make other long-term decisions. These decisions, in turn create bonds between the spouses and reinforce the marriage.

These answers have partial analogues in the constitutional domain. It is a truism that constitutional constraints make it more difficult for the assembly or the society to change its mind on important questions. Groups no less than individuals (although not in quite the same sense as individuals) are subject to fits of passion, self-deception and hysteria which may create a temporary majority for decisions which will later be regretted. But then, one may ask, why could the members

\[22\] For the distinction between these two ways of asking the question see Holmes below, pp. 195–240.


\[24\] The marriage analogy is used below by Ackerman, pp. 153–94 and by Holmes, pp. 195–240.
of the assembly not simply undo the decisions if and when they come to regret them? The presumption must be, after all, that the assembly knows what it is doing, not that it needs to be protected against itself.

Part of the answer to this question is suggested by the marriage analogy. The expected stability and duration of political institutions is an important value in itself, since they allow for long-term planning. Conversely, if all institutions are up for grabs all the time, individuals in power will be tempted to milk their positions for private purposes, and those outside power will hesitate to form projects which take time to bear fruit. Moreover, if nothing could ever be taken for granted, there would be large deadweight losses arising from bargaining and factionalism.25

Another part of the answer is that not all unwise decisions can be undone. Imagine that a majority untrammeled by constitutional constraints decides that an external or internal threat justifies a suspension of civil liberties, or that retroactive legislation should be enacted against “enemies of the people.” In the first place, such measures have victims whom one cannot always compensate at later times. Examples abound: the internment of the American Japanese during the Second World War, the excesses during the Chinese Cultural Revolution, the Berufsvorbot against Communists in several countries. When society again comes to its senses, the victims may be dead or their lives destroyed. In the second place, the temporary suspension of rights easily leads to the permanent abolition of majority rule itself and to its replacement by dictatorship. It suffices to cite the years 1794 and 1933. This is possibly the central argument for constitutional constraints on democracy: without such constraints democracy itself becomes weaker, not stronger.26

To flesh out some of these general considerations I shall consider fourteenth-century Florentine politics, as an example of a democratic society in search of, or at least in need of, constitutional constraints.27 The development of the Florentine electoral system in this period could be summarized, perhaps, as the transformation of “instant politics,” in which no institutions could ever be taken for granted, into

25 See the discussion by Holmes, pp. 19–58 below, of the similar problems that would arise if the constitution were to be periodically remade from scratch.
26 See the concluding remarks in Holmes’s second contribution, pp. 195–240 below.
27 The following draws upon J. M. Najemy, Corporatism and Consensus in Florentine Electoral Politics 1280–1400 (Chapel Hill, University of North Carolina Press, 1982).
(or at least towards) a regime capable of commanding durable assent. To understand the tensions which the political process was supposed to resolve, we can first note that Florentine society in this period was divided both vertically and horizontally. The vertical divisions were, first, between the aristocratic oligarchy and the guildsmen, and, secondly, between various groups of guildsmen. The horizontal divisions were factions within the oligarchy, similar to if less violent than those between the Guelfs and the Ghibellines in the preceding century. Many of the electoral struggles in the period concerned the modalities of guild representation in city politics. Although corporatism, a political system based directly on the guilds, was regularly proposed and occasionally realized, the general tendency was toward a regime based on loyalty to the city and its political regime rather than to one’s profession.

The object of the electoral politics was the election of members to the city government (the Signoria) and to various committees. Every two months these bodies were appointed anew, by a process which in general included four stages. First, candidates had to be nominated; then the nominated candidates had to be scrutinized for approval; then among the approved candidates a certain number had to be selected; and finally among the selected candidates those who were rejected who did not satisfy various conditions of eligibility, the main ones being that neither the candidates themselves nor their close relatives should recently have held office. Each of these stages was, naturally, the focus of controversy, since the formal rules for nomination, scrutiny, selection and rejection shape and bias substantive outcomes. Before we consider the process more closely, we should observe the very short time of office, constant throughout the period. The Florentines, presumably, did not trust anyone to hold power for long. In this they may well have acted wisely, but on the other hand it is clear that the high turn-over rate invites problems of stability, continuity and legitimacy. Their ingenious solution to these problems will occupy us in a moment.

Before we consider the solutions to the two specific problems of guild representation and high turn-over rates, the ground rules for proposing solutions and getting them accepted must be explained. The legislative assembly chose the mode of election of the government. In

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28 On this point see also Przeworski below, pp. 59–80.