Constitutionalism

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Abstract

Constitutionalism is the practice of regulating politics with a constitution. The means by which constitutions attempt to regulate politics are various, ranging from the design of political structures to the judicial enforcement of constitutional law. These constitutional features have given rise to robust literatures approaching the subject from both normative and empirical perspectives. Normative debates have focused on the purpose, content, methods, and authority of constitutionalism. Empirical investigations have taken into account both the development of particular constitutional institutions and practices within particular polities and broader questions of constitutional design

INTRODUCTION

Constitutionalism is the practice of regulating politics with a constitution. The idea of constitutionalism has deep roots, but is generally thought to have undergone something of a transformation in the Enlightenment period. A long tradition running from Aristotle through the William Blackstone emphasized the ubiquity of constitutions. Every state was organized somehow; every community pursued some idea of the political good. In every state, complaints that political actors are violating the constitution are understood to indicate that their actions were ill-advised and wrong. Revolutionary writers like Tom Paine helped shift the logic of constitutionalism from a description of a governmental structure and set of political precepts to a fundamental law. In modern terms, unconstitutional actions were invalid actions. Modern constitutionalism defined the boundaries of political authority (Sartori, 1962).

If constitutionalism is the regulation of politics by means of a constitution, there remains uncertainty about why and how constitutions might play that role. Government officials have their own authority to act, and they certainly have the resources with which to act. Strictly speaking, modern constitutions claim to be *the* source of authority for government officials, but as a practical matter political actors can appeal to other sources of support, from

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electoral mandates to public safety. The challenge for constitutionalists is to successfully cabin such autonomous action and bring government officials more fully within the constitutional framework, to "bond word and polity" (Harris, 1993).

FOUNDATIONAL RESEARCH

The Problem of Constitutional Purposes

Modern conceptions of constitutionalism have tended to emphasize somewhat different purposes for constitutionalism than did older conceptions. In particular, modern ideas about constitutionalism are closely allied with the liberal political tradition. Giovanni Sartori (1962, p. 855) insisted that constitutions "restrict arbitrary power and ensure a 'limited government.'" The goal of liberal constitutions is to tie the hands of government officials in order to protect individual rights. Historians have traced the long process by which the intermingled traditions of constitutionalism and liberalism have developed a robust idea of limited government and individual rights (Friedrich, 1941; Wormuth, 1949).

The specifics of those limits on government have long been debated. Over the course of the nineteenth century, rights were often framed in terms of property (Ely, 2007). Even when personal liberty was at stake, the metaphor of property often framed the discussion of what rights individuals possessed. Rights were never understood to be absolute, however. Common law distinctions carried over into the understanding of constitutional guarantees. Liberty was thought to be distinguishable from license, the abuse of liberty. Actions against the common good could not properly be regarded as liberty, for true liberty was compatible with the public good (Novak, 1996). The abuse of liberty can be known by the damage that it causes to others, and thereby appropriately restricted. Actions that caused no damage to others were to be protected from restraint.

In the twentieth century, rights were reconceptualized. Conflicts over industrial capitalism led in turn to struggles over how the government could regulate property and traditionally protected liberties. The old conceptual framework that emphasized property and the compatibility of rights and the public good was abandoned. In its place arose efforts to distinguish among rights, identifying some as more fundamental than others. Property itself was downgraded to the status of a lesser right that could be readily regulated as seemed useful. Rights designated as fundamental could be restricted only in exceptional circumstances. In the United States, the restriction of such rights has triggered judicial strict scrutiny, in which minimally necessary restrictions could be justified to advance only compelling governmental

interests, such as protecting life. In Europe, such restrictions are subject to proportionality review in which the effectiveness and necessity of the restriction and the importance of the governmental interest are evaluated (Alexy, 2002).

With the shift to fundamental rights analysis, the correct identification of whether a given action can be characterized as a protected right and if so how elevated such a right might be becomes crucial. Within American law, this has given rise to a concern over a constitutional double standard or two-tier system of rights, with some rights securing judicial protection against governmental infringement and others not (Mason, 1955; Funston, 1975). A more expansive notion of fundamental rights would necessarily invite more judicial review and restrict the scope of democratic decision making. For some, this suggested that the set of fundamental rights should be sharply confined (Hand, 1958). For others, this suggested that fundamental rights should be restricted to process-oriented rights, rights necessary to the smooth and fair functioning of democracy itself (Ely, 1980). For still others, precisely because of their moral importance, fundamental rights should be understood expansively (Dworkin, 1978), perhaps even including property rights (Barnett, 2003).

The liberal protection of individual rights is not the only possible purpose of a constitution. Constitutionalism might be understood as centrally concerned with facilitating the workings of democracy. Rather than viewing the purposes of constitutionalism as at odds with democratic power and decision making, constitutionalism might be seen as essential to the effective operation of popular government (Holmes, 1995). A constitution might promote more meaningful and effective democratic deliberation to enhance policy-making (Elkin, 2006; Tulis, 1987). A constitutional framework might be primarily concerned with marshaling the resources and authority needed by government officials to accomplish policy objectives (Edling, 2003).

The Problem of Constitutional Authority

Constitutionalism purports to restrict the discretion of government officials. More controversially, constitutions claim to limit the choices of democratic majorities. To that degree, constitutions appear to be intrinsically antidemocratic, aimed at subordinating democracy to other values—or perhaps simply subordinating popular majorities to the policy preferences of a smaller set of elite political actors.

The difficulty is determining by what authority constitutional dictates can trump democratic decisions (Marmor, 2007). The British constitutional tradition had long recognized the existence of legal rights against government officials, but accepted that Parliament could choose to alter those rights. The

scope of legally enforceable rights was to be determined by current political majorities. Although Thomas Jefferson (1854, p. 103) would not have gone so far as to embrace the Westminster system, he did conclude that the "earth belongs … to the living" and "one generation of men has [no] right to bind another." So by what right do constitutional drafters bind current electors and legislators?

The answers have been various. Perhaps the most classic answer would deemphasize the significance of constitutional drafters as such. If constitution makers simply interpret and articulate preexisting natural rights, then the issue is not whether one group of political actors or generation should be able to bind another but rather whether political actors generally should respect moral rights. Such an answer may be insufficient to explain why anyone should be faithful to all features of a constitution, however, or why one interpreter of moral rights (constitutional drafters) should be favored over others when such rights are uncertain or contested.

Other approaches would take greater account of the agency of constitutional drafters. Constitutional drafters might be imagined to be better positioned to deliberate carefully or well on what constitutional requirements should be, or they might have greater democratic authorization than normal legislators (Ackerman, 1991; Elster, 2000). We might simply think that the circumstances of constitutional founding demand some respect in order to maintain political stability across time (Weingast, 1997).

The Problem of Constitutional Enforcement

A final problem of constitutionalism is how best to enforce constitutional commitments. There is ultimately no position outside of politics from which to enforce constitutional requirements. Constitutions must therefore be "self-enforcing" to the extent that current political actors have sufficient incentives to adhere to, rather than deviate from, the terms of the constitutional order (Griffin, 1998; Ordeshook, 1992). Constitutions are not imposed from above, but sustained from within.

One approach to stabilizing and enforcing constitutional commitments is through the Madisonian mechanism of checks and balances. James Madison (1904, p. 272) was skeptical of the value of the "parchment barriers" contained in constitutional texts. More useful, he thought, would be an arrangement of political offices and incentives that would lead ambition to counteract ambition and connect the interest of the individual to the obligations of office (Madison, 1961). The framing of the structures of government and the processes of lawmaking have consequences for advancing or retarding various constitutional objectives (Lijphart, 1999).

A rather different approach is to rely on mechanisms of constitutional review to enforce constitutional fidelity. If, as the historian Charles McIlwain (1947, p. 11) noted, "any exercise of authority beyond [constitutional] limits by any government is an exercise of 'power without right,'" then courts might naturally have a duty to declare such efforts to exercise authority to be invalid (Hamburger, 2008). Parchment barriers might be strengthened if they were regarded as judicially enforceable, fundamental law. But courts do not stand outside of politics. Their interest in and power to effectuate constitutional guarantees is dependent on a favorable political environment (Whittington, 2007).

Another possibility is that constitutional commitments are interpreted and enforced within the political arena itself. Theories of "popular constitutionalism" in the United States and "political constitutionalism" in Great Britain emphasize the need for continual renewal of constitutional commitments and the ultimate dependence of constitutionalism on continued political support (Bellamy, 2007; Kramer, 2004). Rather than being isolated within courtrooms, constitutional controversies can be found throughout the political arena and are regularly settled through political action (Whittington, 1999). From a somewhat different perspective, Jeremy Waldron (1999) has argued that the content of constitutional values is inevitably contested within the political arena, and in such circumstances such disagreements are most appropriately resolved by democratic majorities. The liberal respect for the equality of all also entails that each voice be heard and equally respected in determining what the substantive requirements of liberalism actually are.

RECENT RESEARCH

Recent research has posed a number of questions for future scholarship. Some of those questions are quite new, but some simply continue old debates. Normative issues surrounding constitutionalism remain unsettled, including some that are more heated than they once were. A burgeoning empirical scholarship has both raised new questions and provided new approaches for answering those questions.

Most narrowly, the content of constitutional law is a continuing source of controversy. How judges should exercise the power of judicial review and what substantive limits on political action ought to be enforced is of ongoing interest. In the latter half of the twentieth century, scholars influenced by New Deal battles over judicial review, Progressive ideals of democratic supremacy, and controversial new judicial decisions argued over how best to justify the power of the courts and how that power ought to be used. Those controversies have receded somewhat, even if the core points of dispute were never

fully resolved. Judicial review as such is less politically contested and constitutional decisions have been somewhat more marginal to major political debates.

Even as the normative debate over how the courts should exercise the power of judicial review has been domesticated, a related normative debate over whether the courts should exercise the power of judicial review at all has become more intense. The type of challenges to constitutional practice put forward by Jeremy Waldron (1999), Richard Bellamy (2007), and Larry Kramer (2004) has put on the agenda basic questions of how constitutions can be and should be enforced and whether a commitment to limited government necessarily requires a commitment to legalized constitutional constraints.

Such arguments for legislative supremacy invite additional discussion of the authority of constitutions at all. The status of constitutions has come under question in part on philosophical grounds that push on the justifications that might be available for creating legally entrenched policies that are insulated from normal political processes. The U.S. Constitution has periodically been the subject of radical critique, and the particularities of specific constitutional arrangements have driven some recent calls for radical constitutional change (Levinson, 2012). Developments in Europe have driven a different set of concerns. While the inherited status of American constitutions has generated doubts about how they well they can be reconciled with ideas of democratic government, the growth of transnational institutions and politics has challenged received notion of national sovereignty and the kinds of democratic politics associated with national institutions (Dobner & Loughlin, 2010). The spread of constitutional institutions to newly democratizing states poses a distinct set of normative problems where institutional arrangements and political practices are not yet stable (Gargarella, 2013; Jacobsohn, 2010). The problems that economic and security crises pose for constitutional regimes have similarly become newly salient (Griffin, 2013; Matheson, 2009). The legitimacy and authority of constitutional regimes in a variety of circumstances are potentially fertile areas of exploration, linking constitutional studies to wider arguments in political theory and developing political events (Colon-Rios, 2012).

The writing of new constitutions and the increased appreciation for the effects of institutions on political outcomes have encouraged a growing empirical literature on constitutions and how they operate. Although there is much work to be done on the development and operation of particular constitutional arrangements within a given state, there has been a notable growth in studies focusing on questions of constitutional design. One set of issues revolve around the process by which constitutional institutions are put in place and the transition from one constitutional regime to another

(Erdos, 2010; Hirschl, 2004). Another involves the conditions for the stability and maintenance of constitutional orders (Elkins, Ginsburg, & Melton, 2009). Empirical work is also starting to shed light on the political consequences of different constitutional forms (Choudhry, 2008) and the relationship between constitutional structures and economic outcomes (Persson & Tabellini, 2003).

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