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Parables of Restraint

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Preface

At an early point in his career, elaborating on the work of Tom Schelling and others, Jon Elster drew an analogy between constitutional conventions and Ulysses ordering himself to be bound to the mast of his ship.¹ That this colorful parallel 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.² As Jeremy Waldron has written, “there is something spectacularly inappropriate about using the unequivocal precommitment of an individual as a model for constitutional constraint.”³ One problem with 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. Collectivities, by contrast, cannot make binding decisions until a variety of “pre-decisions” have been made concerning, for example, who is a member of the community, which subset of members can vote, and (most importantly for present purposes) what decision-making procedure, such as majority rule, will be used. A decision-making procedure such as majority rule constitutes the community, for the first time, as a community able to make decisions collectively. Its effect on the behavior of the community may be restrictive in some sense, but the prior and paramount function of an agreed-upon decision-making procedure is to make the community capable of deliberate choice. It is a constitutive and enabling not a restrictive and disabling rule. Formulated differently, to the extent that a large collectivity can be said to rule itself (obviously open to debate), it can do so only *through* enduring institutional structures such as, for example, fixed-calendar elections where the rules specifying who can and cannot vote and run for office are known before the voting begins. Nothing even vaguely resembling the collective self-government of large populations is possible without resort to pre-established and relatively stable institutional mechanisms, channels, and procedures.

Although misleading for this and other reasons, the Ulysses analogy, when it was originally introduced, proved a powerful stimulus to theoretical debate. The present paper is a modest attempt to replicate that effect by introducing not one but, instead, several analogies (or parables) of *voluntarily accepted or self-imposed constraints* to help clarify the origins and functions of seemingly binding constitutional norms, rules, and procedures in democratic political systems. My decision to introduce and elaborate several analogies, five in all, reflects a conviction that “constitutional restraint” is an umbrella concept, grouping together a variety of logics each of which deserves a focused treatment.

My aim is to tease out these distinct logics and to explain why constitutional constraints of various kinds can be willingly embraced and adhered to over time. I put aside for the reasons just stated the evocative but ultimately unintelligible idea

¹ Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge University Press, 1984).

² Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press, 2000).

³ Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999). p. 271.

that “the people,” in their collective capacity, can bind themselves. The idea of “popular sovereignty” may have significant cultural resonance and political importance. But as an empirical matter, the wider public in a large nation-state can act politically only as a *pouvoir constitué* never as a *pouvoir constituant*, that is to say, only through institutions and on the basis of pre-established rules specifying who can vote and so forth, never as the primitive, unshackled and unorganized organizer of the entire legal order.⁴ This is not to deny that urban crowds can fill city squares and burn down government buildings. It is only say that no community can either govern itself or create the legal framework within which it attempts to govern itself by spontaneous or even well-organized public celebrations and riots.

“How can the people bind themselves?” is *une question mal posée*. I will therefore ask and try to answer a more down-to-earth question, Why have some ruling groups learned to live with constitutional restrictions on their freedom of action? I assume, for the sake of argument, that ruling groups, like Ulysses, have some pre-constitutional or extra-constitutional capacity for making reasoned choices and imposing them on subordinates and that they, being ambitious, are normally impatient with roadblocks, burdens, and uncomfortable yokes. Why would these powerful individuals and groups, supported by informal social networks, submit to constitutional restraints on their conduct?

Perhaps they are forced to do so by the threat of deadly urban riots which, although unsuitable as vehicles for self-rule, are quite sufficient for deposing a hated ruler and his entourage. For far-seeing rulers, the thought of hanging from a lamppost may detract from the charm of abandoning all restraint. That is a central tenet of Machiavelli’s immensely influential constitutional theory, as we will see. But fear of violent rebellion or assassination, although it provides one memorable motive for the self-restraint of enlightened ruling groups, is not the only or even the most important motive. Yes, fear of popular rebellion can be an incentive for political self-restraint. But when we ascend to a higher level of generality, this example confirms a suggestion implicit in the Ulysses analogy when applied not to the people but to their rulers. The idea is this: Constitutional constraints are freely adopted and maintained, when they are, not for the sake of those who would suffer were the powerful to be legally unbound, but rather for the benefit of the powerful themselves as they conceive it.⁵

⁴ Historians of ideas debate the issue, but there is something to be said for the genealogical derivation of the concept of “popular sovereignty” from the conceit of “royal sovereignty” which was, in turn, a this-worldly imitation of God’s unlimited sovereignty over the world. The advantage of this genealogy is that it clarifies the lack of realism in the concept of popular sovereignty, because a this-worldly *pouvoir constituant*, being subject to the frailties that afflict all things human, cannot possibly have the same relation to its *pouvoirs constitués* as an omnipotent God has to His created world. Unlike “the people,” for instance, God does not need institutions and procedures to give coherence to His will.

⁵ Needless to say, “the powerful” (who can see and seize the benefits of self-restraint) is an ideal type that needs unpacking. How do ruling groups, for example, maintain their inner coherence and manage to keep potentially disastrous elite conflict under control? The contribution of constitutionalism and especially periodic elections to stabilizing pacts among rival centers of power is the subject of §5.

The first step toward understanding why power wielders would voluntarily abdicate power is to recognize that power is not homogeneous. Some forms of unilateral power, in particular, are much less advantageous to seize and exercise than others. Power can be a poisoned gift. It can be a liability rather than an asset. That power-seekers and power-wielders would willingly forswear thankless powers or refuse responsibilities for achieving goals that they have concluded to be unreachable is not surprising. Power-wielders, moreover, do not invariably desire a unilateral power to make irreversible decisions on the basis of ephemeral impulses. (That is a still-valid insight underlying the Ulysses analogy.) They do not crave unilateral powers over trivial matters that will clutter their In-Boxes, absorbing enormous quantities of scarce time, effort and resources for little palpable advantage. Nor do they want a unilateral power to make decisions that reduces overall compliance with the decisions they want obeyed and enforced. They are not always greedy for powers that, when wielded, spawn more resentful enemies than grateful friends. They do not necessarily want to make a public show of wielding a lethal power that could, in the next round, be invoked as a precedent and used against themselves. They do not want a unilateral power that turns them into highly visible magnets for conniving interest groups trying by fair means and foul to manipulate them for the sake of private agendas not their own. A dominant group may not want a unilateral power to push through measures in their immediate interest if such strong-arm tactics, over the medium term, can cause a breakdown of otherwise useful working relations with less powerful groups whose voluntary cooperation in the projects of the powerful is indispensable. Understanding the pernicious consequences of false certainty and other cognitive biases, decision makers can voluntarily relinquish the power to decide unilaterally and, instead, create decision-making structures in which their own factual assumptions are tested by adverse controversy. And so forth.

To examine closely these and other reasons for abandoning unrewarding and potentially self-destructive power is to understand something essential about the origins and stability of constitutional restraints. A closer look at a variety of constitutional mechanisms will help us resolve the perennial “mystery” of why those who otherwise seem entirely focused on augmenting their political power would, some of the time,⁶ voluntarily curtail their own freedom of action, sharing power with others and reliably adhering to relatively rigid rules.

⁶ My argument is not that voluntarily accepted restraints are the sole method for stabilizing and augmenting the power of ruling groups. Stalin and Hitler created and sustained their considerable power in a wholly different way. Rather, I am arguing that voluntarily accepted constraints are one historically remarkable and immensely successful method for stabilizing and augmenting the power of ruling groups, and that constitutional restraints have been adopted and adhered to because some (perhaps luckily situated) ruling groups understood fairly well, or perhaps intuitively, that such restraints would have this, to them, beneficial effect.

Introduction: Positive versus Negative Constitutionalism

Those who think that constitutional checks are meant to protect the weak from the strong have to explain how any such an arrangement could possibly have emerged historically and why it would have survived. After all, the weak are those who, by definition, are unable to impose their will on others, while this capacity to amass privileges and dominate others is exactly what makes the strong strong. It seems more realistic to assume that constitutional checks on political power emerged because they served, or appeared to serve, the interests of well-organized social forces. One of the best organized of all social forces, of course, is the government itself. And therefore a good place to start, if we want to understand constitutional limits, is with the advantages that governments might reap from accepting legal restraints on their freedom of action. If constitutions 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.⁷

What is true for basic constitutional rules such as freedom of speech and the press is true for rules in general, namely that they can be enabling as well as disabling. That, indeed, is a trivial truth, as a moment's thought about the rules of grammar makes 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-democratic 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 entirely frivolous proposal, therefore, is that we analogize constitutional rules not to the rope with which Ulysses had himself tightly bound to prevent him from yielding to an uncontrollable impulse, but to grammatical rules that enable human beings to communicate, to rules of the 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's shackles, can facilitate cooperative action and make accessible hitherto unavailable possibilities.

The centrality of decision making procedures to the theory of positive constitutionalism will occupy us below. But I want to begin at an even more basic

⁷ Once again, this is obviously a stylized account, in no way intended to deny that there are many other factors that explain why constitutions are adopted and maintained, with gradual or abrupt revisions, over time.

level, looking, in the first two sections, at the emergence and institutionalization of enabling constraints in pre-democratic and pre-liberal societies where socio-economic hierarchy was lovingly embraced by ruling groups. This is not a detour. To explore the origins, survival, and function of “primitive constitutions”⁸ in societies where the rights of the weak were routinely trampled and their voices were rarely heard, will help us bring into focus the value of constitutional restraints from the viewpoint of ruling groups in liberal and democratic societies as well.

Liberal mythology presents constitutions as devices for dividing and thereby limiting power for the sake of individual liberty or civil society or private property. But the historical record does not corroborate this conception. It strongly suggests, on the contrary, that constitutions have historical roots in the desire to enhance and perpetuate rather than shrink and restrict power.

Relinquishing power along one dimension can augment available capacity to achieve desired objectives along another dimension. According to perhaps the most frequently cited example, the self-binding of governments can be understood not as a strategy to resist the Sirens’ song, but rather as a strategy to become a Siren. By making iron-clad and 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 governments cannot easily do. The unlocking of foreign and domestic credit by governments that have established a reputation for credit-worthiness is a good example of self-binding for subsequent advantage. It illustrates clearly that the powerful sometimes have a strong incentive to make their own behavior predictable. But it is only one example among many.

The contribution of constitutionalism to the increase and effective use of military power is an even more important illustration of the inherent appeal of enabling constraints. It is the subject of §1 below. The way constitutionalism helps ruling groups successfully navigate succession crises will be discussed in §2. The need to develop an effective defense against potentially hostile neighbors is shared by all societies, democratic and non-democratic alike. The same can be said about the need to reestablish a credible replacement leadership when the previous leader suddenly expires.

Long before those being ruled had the organizational capacity to impose proto-constitutional restraints upon their rulers and ruling groups, the latter (in some historically documented cases) voluntarily accepted such restraints on their power those who governed them. A preliminary example of the value that pre-liberal rulers can find in constitutional restraints can be found in Jean Bodin, a disciple of Machiavelli and 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. *The Six Books of the Republic* (1576), a work well-known to the American Framers, 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

⁸ *Federalist*, #18.

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:

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.⁹

A failure to get the facts straight is seriously disabling for wielders of power. 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 be hidden from him. Formulated differently, the "constitutionally protected" assembly functioned as a watchdog or whistle blower or information-gathering-and-conveying machine. A proto separation-of-powers system was apparently embraced by a formally unlimited monarch in order to solve the monitoring problem or the principal-agent problem, that is, to provide the king with information he needs to enforce his will effectively. This institutional structure, while limiting the king's discretion in one sense, increased his power 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 the powerful designed to enhance their disposable power, by allowing the king to keep an eye on his agents and make sure that they are carrying out his instructions when they operate in remote localities. A king will allow himself to remain bound by this rule, or tied to this mast, because the exposés his self-limitation generates are palpably useful to his exercise of power. If he insisted on the crown's prerogative to censure political speech, by contrast, the monarch might be inadvertently helping his subordinates keep secrets from himself.

Examples of "constitutionalism" drawn from pre-liberal and pre-democratic societies help illustrate the palpable utility to the powerful of restraints on their own power. Bodin's explanation of parliamentary immunity (a narrowly tailored precursor to universal freedom of speech) suggests that political elites can be brought to accept restrictions on their natural impulse to censure irritating speech for the sake of expected benefits to themselves, whether or not the "popular

⁹ Jean Bodin, *The Six Books of a Commonweal*, trams. by Robert Knolles (Harvard University Press, 1962), Book III, Chapter 7, p. 384; cf. Jefferson's annotated copy of Bodin's *Six Books*.

sovereign,” who has allegedly set the terms of the constitution, has the capacity to impose or enforce such restrictions. To explore this line of argument more fully, I will now turn to my tentative survey of constitutional parables: military discipline, emergency scripts, insulation by abdication, fact-finding procedures, and exposure to electoral defeat as political protection. These “logics” overlap to some extent, and the concrete examples I provide sometimes illustrate more than one kind of enabling constraint. Nonetheless, my five analogies, if I manage (in future drafts) to draw out their implications, should provide a fruitful introduction to distinct ways in which constitutions serve power and can be embraced, for that very reason, by the powerful themselves.

§ 1: Plans of Discipline: the Pooling of Capacity in the Fiscal-Military State

Polybius begins his *Histories*, another book well-known to the American Framers, by formulating the puzzle to which, in his opinion, the Roman constitution provides the answer: “There can surely be nobody so petty or so apathetic in his outlook that he has no desire to discover by what means and under what system of government the Romans succeeded in less than fifty-three years in bringing under their rule almost the whole of the inhabited world, an achievement which is without parallel in human history.”¹⁰ Rome’s military and political success was due, according to Polybius, to its political institutions, that is, to “the form of the state’s constitution [*politeia*].”¹¹ The entire Mediterranean world fell under Rome’s sway, that is Polybius’s claim, because of its constitution.

Polybius’s association of constitutionalism with military success seems surprising to us only because, misled by a pervasive libertarianism, we tend to think of a constitution as an instrument for preventing tyranny and protecting rights, not as an instrument for creating, consolidating, and increasing the power of a collectivity.¹² But this negative view of the Constitution (paradigmatically illustrated by Supreme Court decisions denying powers to the federal government in the name of individual liberties) is of relatively recent coinage and provides little help in understanding why constitutions have emerged and endured historically.

A significant section of Book VI of Polybius’s *Histories* is devoted to the Roman military system, including a riveting description of the standardized format, or constitution, of a Roman military camp.¹³ The implication of his analysis is that the entire organization of the Roman Republic, including its system of power sharing between rich and poor, was responsible for classical Rome’s astonishing military power. Polybius was a Greek writing in Greek. But it is suggestive in this context that the word “constitutio,” in classical Latin, refers explicitly to the way troops are deployed, stationed, drawn up, or set in battle formation.¹⁴ Such a usage survives into America’s Founding period in references, for example, to the small professional army that the new federal government will need to repress insurrections and fight the Indians as “a force *constituted* differently than the militia.”¹⁵ This may simply be an etymological curiosity. But it is also a clue. It suggests that there may be something deeply wrong about the idea that, when a constitutional democracy goes to war, it needs temporarily to cast off all constitutional restraints on power. In the context described by Polybius, it would make no sense to abandon the constitutional order in wartime because the

¹⁰ Polybius, *The Rise of the Roman Empire* I.1 (Penguin, 1979), p. 41; cf. Gilbert Chinard, “Polybius and the American Constitution.” In *The American Enlightenment*, ed. Frank Shuffelton, 217-37. Library of the History of Ideas. Vol. 11. New York: University of Rochester Press, 1993.

¹¹ Polybius, *The Rise of the Roman Empire* VI.2, pp. 302-303.

¹² 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” (Lintott, *The Constitution of the Roman Republic* [Oxford, 1999], p. 1).

¹³ Polybius, *The Rise of the Roman Empire*, pp. 318-338.

¹⁴ For example, “Caesar stationed the legion” is “Legionem Caesar . . . constituit” (Caesar, *The Gallic War*, I.43 [Loeb Library, 1917], p. 68).

¹⁵ *Federalist* #28, my emphasis.

“constitutional” ordering of the legions and the Republic as a whole, including its liberal policy of granting citizenship rights in exchange for military service, is exactly what made Rome so immensely successful at defensive and offensive war.

Unsurprisingly, therefore, in Machiavelli’s writings on republican government—writings which both owed much to Polybius and exerted an immense influence on the American Framers—the word “constitution” (*costituzione*) refers explicitly to the ordering of a human collectivity for military offense and defense. The quintessential liberal question of how to limit preexisting power cannot even be asked until a prior problem has been solved, namely how to create power out of powerlessness. One version of this primary problem is how 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, is 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. The constitution of a fighting force includes 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 is broken and a massed formation is dispersed chaotically by a surprise attack.¹⁶

The original impulse for the creation of organized political societies, according to the stylized account that Machiavelli borrowed from Polybius and bequeathed to the Founders, was the threat posed by violent predatory bands. Scattered villagers made collective security agreements or formed defensive leagues to fend off marauders. The terms of these defensive alliances were proto-constitutions. Because the threat was omnipresent, the drill-and-discipline that constituted the combatant forces pervaded the entire structure of social existence, transforming the first political societies into what were essentially armed camps, with sentries posted upon defensive walls and so forth.

So what can be learned from this proposed genealogical derivation of political constitutions from the drill and discipline that turns a disorganized and therefore easily overrun rabble into an agile, hard-hitting, rapidly reassembling, and effective fighting machine?

This linkage, first of all, cuts against a prevailing emphasis on *negative constitutionalism*, according to which the principal purpose of a constitution is prevent tyranny and protect rights. The analogy with military discipline lends support, by contrast, to *positive constitutionalism*, a theoretical approach that emphasizes the way a constitution establishes a “particular structure of government”¹⁷ and assigns to its various agencies powers to cooperate in achieving purposes shared by the society’s most influential groups. Positive constitutionalism does not deny the importance of the Constitution’s “shall not” clauses, such as “Congress shall make no law” prohibiting the slave trade until 1808, or “No Bill of Attainder or ex post facto Law shall be passed” (Art. I, Sec 9). It simply places more

¹⁶ already a hint that all constitutions are “emergency constitutions” (Ackerman), to be somehow echoed below.

¹⁷ *Federalist*, #41.

emphasis than do conventional libertarians and limited-government advocates on the many “Congress shall have Power to . . .” and “The President shall have power to . . .” clauses. Not incidentally but centrally, the Constitution creates “one general government vested with sufficient powers for all general and national purposes.”¹⁸ This is vital because “the safety of the whole is the interest of the whole, and cannot be provided without government.”¹⁹ For the sake of common defense and other shared purposes, the Constitution *vests power* in the federal executive, Congress, the courts, and the electorate. If institutionalized rules and roles serve a positive function, by amplifying and consolidating military power, for example, their voluntary acceptance by the powerful is easy to comprehend.²⁰ The ostensible enigma of constitutional self-binding, in other words, is to some extent the product of an uncritical acceptance of negative constitutionalism.

The drill-and-discipline analogy also helps us focus attention on an essential problem of all political systems, namely, how to create enough coherence out of incoherence so that the subunits, once they are all operating from the same playbook, can share in the gains of cooperation, and that means first of all the gains of common defense.

The problem of creating coherence out of incoherence is a perennial not merely primitive one, plaguing classical and modern democracies as well as hierarchical and autocratic societies, not to mention the earliest human settlements as imagined by Polybius and Machiavelli. Aristotle, for example, observed that there is more knowledge in the many than in the few.²¹ Unfortunately, in its unprocessed form, this popular wisdom is a cacophony of clashing perspectives, opinions, revulsions, aspirations, antagonisms, affections, fears, hopes, and so forth. The question is how to organize collective decision making in order to extract the many dissonant fragments of wisdom dispersed in the population at large and to combine them into a coherent set of decisions and policies. To distill democratic coherence out of democratic incoherence, in a way to be discussed, is arguably one of the principal functions of democratic constitutions. But creating coherence out of incoherence is one of the principal functions of all constitutions, democratic or not.

The second preliminary insight to be gleaned from the drill-and-discipline analogy concerns the centrality of armed enmity and military conflict to the evolution of constitutionalism. As one historian of liberal constitutionalism correctly remarks:

War has not been incidental to the development of liberal democracy; the requirements of surviving in a world with other states that were armed and dangerous shaped constitutional liberalism from the start, and the pressures

¹⁸ *Federalist*, #3.

¹⁹ *Federalist*, #2.

²⁰ From this perspective, the law-of-war prohibition on the intentional killing of noncombatants is accepted and promulgated by commanders not because it protects the weak and vulnerable but because it helps discipline their troops, discouraging hedonistic pillaging, and keeping soldiers focused on their dangerous combat mission.

²¹ Aristotle, *Politics*, III.11.

of war have repeatedly provided the stimulus for the expansion of democratic citizenship.²²

Early societies managed to defend themselves against savage predators only by subjecting themselves to 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 discipline, as they presumably knew well, the inhabitants of such political societies would not have been freed but, on the contrary, enslaved or dead. They accepted the restraints of military discipline because these restraints enabled them to remain physically alive and at liberty in the sense of not-yet-enslaved.

For the classical writers who shaped the political understanding of the American framers, “freedom from the state” was an incoherent idea. For one thing, individuals deprived of membership in a militarily well-prepared community could be easily sold into slavery. Perceptions in Colonial America, despite resentment at British “tyranny,” were not much different. Individual freedom from all community obligations in the extreme libertarian sense would have boiled down to the “freedom” of the defenseless straggler to be scalped on the frontier or the “freedom” of the commercial seaman to be dragooned at gun-point into the Royal Navy.

The idea that constitutions create power out of powerlessness or transform incoherence into coherence is foreign to negative constitutionalism, that is, once again, the claim that constitutions serve primarily to prevent tyranny and protect rights, especially the rights of the weak. This venerable approach, in my opinion, reflects an unconscious and highly unrealistic notion that political societies exist on an otherwise uninhabited planet. Positive constitutionalism, by contrast, starts from the more realistic premise that political societies emerge, evolve, and eventually falter and crumble in a hostile international environment. A principal function of constitutionalism, it follows, is to help political society maintain its boundaries, coherence, and resilience in the face of a changing and threatening environment. Loosed from all constitutional restraints, political societies would soon disintegrate under the hooves of better organized enemy forces.

This Machiavellian perspective reminds us, for example, why so much of the *Federalist* is devoted to “the safety of the people of America against dangers from FOREIGN force.”²³ The drive for Union, led by the Framers and their allies, was motivated in large part by the perception that “weakness and divisions at home would invite dangers from abroad.”²⁴ If the existing federation broke up into two or three separate confederacies, foreign intrigue would be sure to increase.²⁵ The United States had to be constituted, they thought, in such a way that it can survive in an unforgiving environment full of hostile and predatory powers.

Historically, the weakest federations were those, such as the members of the Amphictyonic league who, even in wartime, “never acted in concert.”²⁶ The weaker

²² Paul Starr, *Freedom's Power: The History and Promise of Liberalism* (New York: Basic Books, 2007), p. 5.

²³ *Federalist* #4.

²⁴ *Federalist* #5.

²⁵ *Federalist*, #85.

²⁶ *Federalist*, #18.

the union, the more exposed the territorial subunits to foreign aggression, which includes the dashing of hopes for future prosperity as well as the destruction of all currently existing rights to private property. Libertarianism would never enter the mind of any student of classical political theory, where individual property rights are described as self-evidently meaningless without collectively organized military defense.²⁷ If the states choose not to pool their efforts by a constitutionally reinforced Union, says Madison,

we shall discover that the rivalships of the parts would make them checks upon each other, and would frustrate all the tempting advantages which nature has kindly placed within our reach. In a state so insignificant our commerce would be a prey to the wanton intermeddlings of all nations at war with each other; who, having nothing to fear from us, would with little scruple or remorse, supply their wants by depredations on our property as often as it fell in their way.²⁸

Striking about such reasoning about the importance of concert and coordination in a hostile international environment is the echo it finds in passages explicitly devoted to military matters. In justifying the Article I, Section 8 clause granting Congress the power “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress,” Hamilton writes:

It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.²⁹

In general, the authors of the *Federalist* tried 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.”³⁰ Common enemies dictate a common or collaborative defense, which means, among other things, that the state militias must be placed “under one

²⁷ Cf. “The highest glory is in those men who excel in military glory. For all things which are in the empire and in the constitution of the state, are supposed to be defended and strengthened by them. There is also the greatest usefulness in them, since it is by their wisdom and their danger that we can enjoy both the republic and *also our own private possessions*” (Cicero, “The Oration of M.T. Cicero in Defense of L. Murena, Prosecuted for Bribery,” *Cicero’s Orations*, p. 341, my emphasis).

²⁸ *Federalist*, #11.

²⁹ *Federalist*, # 29.

³⁰ *Federalist* #5.

plan of discipline.”³¹ It is a small leap to consider the proposed constitution itself as a unified *plan of discipline* for coordinating otherwise militarily vulnerable states:

The territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in different degrees, is therefore common. And the means of guarding against it ought, in like manner, to be the objects of common councils and of a common treasury.³²

The purpose of establishing a strong national legislature with substantial powers to collect revenue is to “provide for the common Defense.”³³ The power to borrow money at reasonable rates in wartime, alluded to above, presupposes a constitutional grant to the government of a formidable taxing power.³⁴ There would be nothing more absurd, says Hamilton, than “a nation incapacitated by its Constitution to prepare for defense.”³⁵ A constitution must not be incapacitating but capacitating. It must create and sustain the nation’s capacity to survive and flourish in a hostile international system. It must increase the power of the central government to overcome “the want of concert, arising from the want of a general authority.”³⁶ The semi-sovereign states can be persuaded to give up some of their sovereignty for the sake of common defense. That is one of the most persuasive rationales for Union. The states struggling to defend themselves under the loose federation designed by the Articles, should accept a tighter Union because it will help them to escape “the chains of Macedon.”³⁷ The semi-sovereign states can be induced to renounce a degree of autonomy for mutual assistance, to avoid being played off against each other and to create common front against foreigners. A stronger Union will benefit the states by enforcing a fairer sharing of burdens, permitting fewer causes of war, and obtaining better terms of peace. By making it more difficult for smugglers to evade import duties by circuitous routes, moreover, a stronger Union will increase the tax revenues needed to wage war successfully against European superpowers and Indian tribes.³⁸

The authors of the *Federalist* also praised the proposed constitution for its promise to discourage covert payments made by foreign agents to American officials. Madison makes the same point when explaining the Article IV guarantee of each state’s republican form of government. One of the principal purposes of this clause, he wrote, was to guard against “the intrigues and influence of foreign

³¹ *Federalist* #4.

³² *Federalist* #25.

³³ Art. I, Sec. 8.

³⁴ Indeed, one of the emergency powers that the Constitution grants not to the executive but to Congress is the power “to borrow money on the credit of the United States” (Art. I, Sec. 8), something that was thought to be virtually inevitable in wartime. According to Hamilton, interestingly, the United States will not have much credit on the basis of which it can borrow money at non-extortionate rates unless Congress has an “unlimited” power to tax (which can be conceived as a kind of emergency power) to reassure reluctant creditors when a war breaks out (*Federalist*, #30).

³⁵ *Federalist* #25.

³⁶ *Federalist*, #22.

³⁷ *Federalist*, #18.

³⁸ *Federalist*, #12.

powers,”³⁹ that might find it cheaper to bribe a single autocrat in one of the states than a multi-member popular legislature. This is not to say that republicanism itself suffices to ward off such threats. On the contrary, “history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments.”⁴⁰ A necessary if not sufficient condition for republicanism to provide a defense against foreign intrigue is a strongly entrenched commitment to decision making by simple majority. Any requirement above a majority would place the decision in the hands of a minority and would, as a result, lower the price of a favorable decision for interested buyers (think of the filibuster). Supermajoritarianism is strongly disfavored constitutionally because, among other things, it “gives greater scope to foreign corruption.”⁴¹

Admittedly, the Framers’ preoccupation with the country’s weak international position arose from their experience of political impotence under the Articles. A principal failing or “vice” of the Confederation and the constitution on which it was based was weakness abroad, especial in the face of European powers. For one thing, “Our ambassadors abroad are the mere pageants of mimic sovereignty.”⁴² More seriously, the Americans could not get the British to turn over the Western forts as the latter had promised in the Treaty of Paris. The Spanish prevented the Americans from getting access to the Mississippi. Nor could they retaliate to aggression or do anything about it when the Brits discriminated against American shipping, and so forth.

They found a guide to help them understand this particular constitutional vice in Machiavelli’s *Discourses*. The importance of this work for the American Framers lies in its description of the purpose of constitution-making. For Machiavelli, to repeat, a constitution was fundamentally a system for creating power out of powerlessness or distilling coherence out of incoherence to better reap palpable gains of cooperation, especially in matters of defense. The constitutional solution he proposed for Italy 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 these monarchies would exploit conflicts among the Italian republics and thereby impose their will on the disunited minor states. Only a robust Union among the republics, based 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. This 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. If Machiavelli’s hope had been realized, the resulting confederation could have been called the United Republics of Italy.

³⁹ *Federalist* #43.

⁴⁰ *Federalist* #22.

⁴¹ *Federalist* #22.

⁴² *Federalist* #15.

Machiavelli conceived his ill-starred Union⁴³ as a cure for myopia in a very special sense. If the individual republics remained disunited, then foreign powers would use salami tactics to pick them off one at a time. Those who are not being attacked at the moment would delude themselves into thinking their turn will never come. They would be wrong.

This was Hamilton's reasoning exactly. The looseness of the existing confederacy encourages not only indifference to, but also diminished awareness of, perils that confront neighboring states. If the Union has the superintending power, by contrast, "there will be no danger of a supine and listless inattention to the dangers of a neighbor till its near approach had superadded the incitements of self-preservation to the too feeble impulses of duty and sympathy."⁴⁴ In a weak confederacy, the attack of a foreign power on a coastal state will seem to the political rulers of an interior state to threaten local liberty only remotely. If the states are fastened together in a powerful Union, by contrast, interior states will react immediately to a coastal raid, correctly interpreting such an attack as a precursor to an attack on themselves. This is how the constitutional unification of the states, just like the constitutional separation of powers, makes up not only for the defect of better motives but also for the defect of better foresight.

The purpose of Union is to counteract mankind's chronic myopia and thus to facilitate a pooling of defensive resources, to apply the resources of the whole to the defense of every single part, and to prevent foreign powers from playing the states off against each other.

Leave America divided into thirteen or, if you please, into three or four independent governments--what armies could they raise and pay--what fleets could they ever hope to have? If one was attacked, would the others fly to its succor, and spend their blood and money in its defense? Would there be no danger of their being flattered into neutrality by its specious promises, or seduced by a too great fondness for peace to decline hazarding their tranquillity and present safety for the sake of neighbors, of whom perhaps they have been jealous, and whose importance they are content to see diminished? Although such conduct would not be wise, it would, nevertheless, be natural.⁴⁵

(The Founder's project to forge a militarily capable Union out of semi-independent political units brings us back to the conceptual flaw in the Ulysses analogy. To act on self-interest, a "self" has to be coherent before it can try to achieve its objectives given its current situation and on the basis of its available assets. In the American case, "the popular sovereign" [on the national level] was a political construct, the product not the precondition of the constitution-making process, and therefore in no position, at the outset, to command that restraints be placed upon its whims and will.)

⁴³ Ill-starred because Italy was not protected from the great European monarchies of Machiavelli's day by the Atlantic moat, and the various Italian republics were not held together by the alluring prospect of jointly seizing an immense and fertile continent from its aboriginal occupants.

⁴⁴ *Federalist* #29.

⁴⁵ *Federalist* #4.

Rivalry short of war with the European powers, especially commercial rivalry, was another crucial aspect of the international environment to which the proposed constitution was designed to respond. A weak confederation would make it impossible to bargain effectively for favorable terms of trade. By contrast, if the states could form a cohesive cartel, they would be able to drive a hard bargain with the Europeans, denying them access to the lucrative consumer demand of all the states jointly unless European markets were opened to Americans and trans-Atlantic commerce was permitted on American ships.

The attempt to restrict the American states to “a passive commerce,” using European vessels, was based on the Europeans’ correct understanding that “an ACTIVE COMMERCE in our own bottoms” would allow the Americans to seek out the highest price for their goods. Moreover, the “carrying trade” is the support of “naval strength” because it is the “nursery of seamen” and because commercial ship-building can easily become the basis for “a powerful marine.” This is yet another reason why America’s European rivals are constantly sowing internal divisions among the states. Their aim is to clip “the wings by which we might soar to a dangerous greatness.”⁴⁶ The Constitution must counter those European efforts at divide-and-rule, directing and concentrating national energies, via a unifying plan of discipline, toward formidable naval power.

This plan was the U.S. Constitution. It was a form of drill-and-discipline writ large.

⁴⁶ *Federalist* #11.

§ 2: Emergency Scripts: Rules of Succession when Executive Discretion is not an Option

A credible succession formula is an important measure of state strength. A different but equally important precursor of modern democratic constitutions can therefore be found in the fundamental laws of the realm characteristic of late medieval and early modern monarchies. The most important element in such fundamental laws was, in fact, the order of succession, clarifying sequence and eligibility of heirs to the throne and, ideally, specifying uniquely who will become king when the incumbent monarch dies. 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 a king could claim 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), can help us understand something important about voluntarily accepted constitutional constraints in general.

Orders of succession confirm one of the most important lessons of the analogy between political constitutions and plans of discipline, namely the idea that every constitution is, in part, an emergency constitution or a national-security constitution. The unexpected death of the chief executive 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, moreover, cannot be managed by transferring amplified discretionary power to the chief executive because the chief executive, being dead, is no longer capable of exercising discretion, inflated or diminished. Such an emergency, in fact, 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.”⁴⁷ The king’s “immortal” body, codified in the order of succession, was engineered to survive even assassination and to help a deceased king’s entourage coordinate quickly on an heir to the throne.

In the U.S. today, ordinary legal rules governing private inheritance cannot be adequately described as “limits” on the power to bequeath. On the contrary, such rules *create* the power to transfer property, upon one’s death, to an heir. They are not prohibitions or don’ts but “conditional programs” or if-then rules. Without probate courts to settle disputes over inheritance (and without legislation governing the decisions of such courts), the living could not rely upon their will

⁴⁷ Ernst Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 1957), p. 383.

being done after death. Such rules and institutions prolong the efficacy of will across the border separating the living from the dead. They are instruments of will, rather than merely restraints on will. As a result, such rules can be and are voluntarily adhered to by people who wish to consolidate and extend their power, almost supernaturally, beyond the grave.

The king's second and ostensibly immortal body serves the same function for the kingdom or its leading families. The contrast between the king's earthly and supernatural bodies derives from medieval theology, but is also supremely practical, drawing attention to an institutional structure (dynastic kingship) that outlasts the lifetime of its current incumbent. Described in less mythical terms, the most important political actors in the former king's court may well have conflicting ideas about the succession.⁴⁸ But lower-order disagreement among rival political forces about the most appropriate heir can nevertheless yield to higher-order agreement on an order of succession. This will happen if the otherwise quarreling courtiers and blood relations share a desire to avoid settling the succession question by resort to violence, which may expose the entire system to civil war and, as a consequence, to an external attack potentially devastating to all.

Ulysses had himself bound to the mast so that he could listen to the sirens' song while resisting a temptation that would lead to shipwreck. He had himself bound against what he knew would be his own weakness of the will.

Rules of succession present a superficially similar but ultimately quite different story. The main political forces in the deceased king's entourage commit themselves to the preexisting order of succession to avoid self-defeating factional strife. Reflecting on painful historical experience, they prepare for the storm while the sea is calm. Precommitment 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. It is easy to anticipate that a violent factional struggle over the throne would increase shared vulnerability to a foreign attack.

The last point reprises another central point of the idea that a political constitution shares some of the functions of a plan of regimental discipline. Foreign threats have a chastening and disciplining effect. They drive home and contribute substantially, in ways to be explored, to the voluntarily accepted authority of constitutional constraints. The "fundamental laws of the realm" took on a quasi-sacred character because they are widely understood to facilitate rapid coordination of all important domestic actors in a potentially destabilizing crisis.

Such rules are "binding" in an empirical sense not because of reverence for tradition (even though habit provides important psychological support for the continued acceptance of rules which people are used to following), but because current actors understand the current utility of an agreed-upon conflict-resolving system as a mechanism for avoiding self-defeating violence. If such rules, over time,

⁴⁸ The utility of constitutional restraints for keeping elite conflicts within bounds, to be taken up again in §5, also underlies Waldron's criticism of the Ulysses analogy on the grounds that we need to assume not agreement but disagreement among the political decision-makers.

did not continue to prove their utility as a method for managing dangerous crises, they would be abandoned. For similar reasons, when new problems arise that the old rules fail to address, old rules are commonly revised or discarded.

Take the 25th amendment, now an important part of America's "emergency constitution." (I adapt the phrase from Bruce Ackerman, using it to refer not to a chimerical proposal, however, but to functioning aspects of the U.S. Constitution.) Presidential systems, containing a monarchical residue, share with monarchies some of the challenges of avoiding chaos during an "interregnum"⁴⁹ or maintaining continuity of government that Parliamentary systems handle in a different way. The 25th amendment can therefore be understood as the 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 25th amendment is crafted to avoid a prolonged succession crisis, or power vacuum, in case the President, after an assassination attack or perhaps a stroke, survives in a vegetative state. In such an improbable but nonetheless possible case, the assumption by the Vice President of the Presidency, or even of the President's duties and powers, is not automatically authorized by the unamended Article II, Section 1, Clause 6.⁵⁰ Earlier presidents (Garfield and Wilson) had been incapacitated without the Vice President (Chester Arthur and Thomas Marshall) assuming the disabled President's functions. The scenario by which a Vice President could step into the role of a disabled President was evidently not spelled out in sufficient detail to guide uncertain actors in an inherently stressful situation. By 1965, however, it was 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.

The 25th amendment, among other things, is an *instrument of government*, providing those in the President's entourage with an agreed-upon playbook for managing effectively and legitimately a crisis caused by the incapacitation of the President. Section 4 of the amendment is of particular interest for our purposes because it addresses the issue, neglected by Article II, Section 1, Clause 6, of who decides by what method if the President really is unable to fulfill his constitutional duties. It also anticipates the possibility that a half-delirious President may not recognize his own disability and may have to be legally ousted from office against his will. This is a crucial point, because it again underlines the practical irrelevance of legally unconstrained executive discretion (the Imperial Presidency) for managing at least one kind of national-security emergency. I will not comment on the intricacies of Section 4 of the 25th amendment, but I will cite it in its entirety to drive home its character as an emergency protocol, detailing what to do and how to

⁴⁹ Cf. the Roman office of *interrex*, filled for brief interlude to organize the election of a new consul or new consuls when one or both consuls were killed or were otherwise incapable of serving out their terms.

⁵⁰ "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected" (Article II, Section 1, Clause 6).

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. It is, instead, a script.⁵¹

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

If we think of constitutional rules as scripts, rather than ropes (and the U.S. Constitution provides many other examples⁵²), it is much easier to understand why powerful actors, looking for bright lines and rallying points to allow rapid coordination, might be willing to internalize them as obligatory principles of conduct.

Significantly, such a script can also be described as a spur, as opposed to a rein. That, at least, is the argument advanced by Akhil Amar, who claims that the 25th amendment was designed to encourage the Vice President to do what Garfield's and Wilson's Vice Presidents had, perhaps because clear protocols were not yet in place, felt unable to do:

⁵¹ Scriptwriters are presumably drawn to succession crises because they recognize a dramatic script when they find one lying ready-made on the shelf. A sub-constitutional example is the hair-raising process by which the Captain of a nuclear armed submarine who (cut off from communications with the chain of command) loses his mind is removed from his command by subordinates acting "by the book." It's a screenplay made for Hollywood, but it's also based a real emergency protocol, rehearsed in advance, for managing an unlikely but not impossible eventuality.

⁵² 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 . . .

Precisely because the vice president would not be unilaterally stepping forward, he might be more likely to act when needed. After all, the cabinet or “other body” would be standing with him and vouching for him, thus reducing any public perception of overeagerness on his part.⁵³

Such constitutionally specified scripts provide powerful incentives (or “inducements” to use the vocabulary of the Framers) to do what is needed. They are not incapacitating but capacitating. They are not shackles making unwanted action impossible, but encouragements making wanted action likely. Seen in this way, their “binding power” becomes more commonsensical than mysterious.

Congress has made three stabs (1792, 1885, and 1947) at providing by law for succession in case of double vacancy of both the Vice Presidency and the Presidency as the Constitution explicitly permits and implicitly instructs it to do. The last of these, the Presidential Succession Act of 1967 remains controversial for a variety of reasons.⁵⁴ Some of the most important objections to the statute point to the incompleteness of the rules it lays out, that is, the silence of these rules in the face of plausible emergency scenarios. What happens if everyone on the list is killed? What happens if the Vice President is dead and the President is disabled? What happens if the VP, the Speaker of the House, and the President pro tempore of the Senate are all killed and the Secretary of State is installed as President, and the House subsequently elects another Speaker? And, more generally, would a midterm switch in the partisan affiliation of the President, especially after an assassination, be viewed as legitimate? And so forth. That is to say, our emergency constitution is incomplete. It may not, “in case of emergency,” provide guidance about what to do, that is, tell all relevant actors how to coordinate rapidly on a univocal outcome. It is a defective script.

But these shortcomings, and the need to correct them, powerfully corroborate the hypothesis that constitutional constraints are treated as binding on powerful actors when and if these powerful actors see the apparent constraints as potentially enabling. Important political actors incorporate constitutional rules into their personal motivations, or treat them as binding, because these scripts facilitate (and are understood to facilitate) mutually beneficially cooperative action, and not only in times of crisis.

⁵³ Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), p.450.

⁵⁴ The key point notoriously concerns whether the Speaker of the House and the President pro tempore of the Senate are “officers” in a Constitutional sense. But there are many other issues, such as the apparent folly of placing the perhaps senile incumbent of an honorific post (President pro tempore of the Senate) three heartbeats away from the Presidency.

§ 3: Insulation Through Abdication: When Power Wielders Voluntarily Off-Load Burdensome Powers

Elster introduced the Ulysses analogy, in part, to explain abdications of power. It does relatively little to illuminate the first two forms of enabling restraint that I have discussed, constitutions as organizational disciplines that create power out of powerlessness and constitutions as scripts that facilitate rapid coordination during a crisis. But the Ulysses analogy, while not covering cases such as these, does shed light on some other forms of enabling constraint.

If we assume that the powerful never feel that they have enough power, that they are continuously laboring to increase their power, then abdications of power seem genuinely mysterious. But the mystery of dispelled, to some extent, if we start from the premise, introduced in the “Preface,” that power is not homogeneous and that some forms are much less attractive than others. A good way to focus attention on this theme is to recall the political adage: *where there is power, there pressure will be applied*.

To avoid being relentlessly assailed by favor-seekers and pressure groups, the powerful can sometimes be induced to abdicate some of their power. Shedding power is an appealing technique for fending off annoying supplicants and time-consuming petitions for redress of grievances. Understanding this pattern helps us see constitutional and legal “limits” on power in a new light.

Limits upon power seem incompatible with the power of the powerful only because of a common fallacy about the environment in which legally or constitutionally unconstrained government officials have to operate. Officials are not “unvexed” or *factually* unencumbered simply because they are *legally* unlimited. Hobbes famously defined “Liberty” as “the absence of external impediments, which impediments may oft take away part of a man’s power to do what he would.”⁵⁵ Needless to say, the absence of legal restraints is by no means equivalent to the absence of external impediments. Even if they are unbound by laws, they are constrained by scarce resources, including their own limited capacity to process information and focus on problems. And they have to operate in an environment teeming with organized interests, some of which are shrewdly devious and even overtly or covertly malicious. Some of these organized interests, moreover, possess considerable leverage, and use it relentlessly to cajole or intimidate the government into serving factional or personal goals. Legal and constitutional restraints are introduced not into a realm of pure freedom, therefore, but into a domain cluttered with extra-legal conspiracies and offers that cannot be safely refused. That is one of the principal reasons why legal restraints can be enabling or emancipating. Abdications of power by the government can empower the government by insulating it from unwelcome pressures, by weakening to some extent the capacity of organized interests to harass officials and manipulate government policy to serve factional ends.

Rescuing political officials (“hostages,” to use President Obama’s description of himself) from captivity by narrow factions is one of the principal objectives of constitutionalism, ideally understood. This pattern can be observed, for example, in

⁵⁵ *Leviathan*, 79.

the operation of checks and balances, at least as the Founders thought it would work. Let us assume, not unrealistically, that a new President is surrounded by various place seekers and hangers-on. They will be clamoring for appointments, naturally enough. He may wish or need to reward loyalty and past service. But he might occasionally be tempted to appoint genuinely competent people to the most important posts in his administration, people who can help him understand and solve the most pressing problems. In that case, he will not necessarily chafe painfully under a constitutional arrangement whereby his executive appointments must be approved by an independent body without patronage power of its own. If he cannot make appointments unilaterally, his power is limited in one sense. But his dependence on the consent of an independent body also shields him to some extent from perhaps unwelcome and otherwise irresistible pressures and therefore, in another sense, increases his freedom of maneuver.

Federalist #76, devoted to the President's need to obtain the Senate's consent to his high-level appointments, spells out this logic. The Senate's "partial agency" in the appointment's process is

an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Only a President of the highest moral character would be able to resist the blandishments of incompetent office-seekers and personal acquaintances if he was constitutionally permitted to make appointments unilaterally. The Constitution supplies the defect of better motives, therefore, by insulating the President to some extent from his own private animosities and affections, not to mention his temptation to sell office for private gain.⁵⁶ By inhibiting to some extent the President's freedom to make patronage appointments, the advice-and-consent clause protects the community from being ruled by incompetent cronies. But it also *frees* the President himself from perhaps unwanted clientelistic pressures. That is at least a possible reason why an honorable chief executive, with a sense of professional responsibility,⁵⁷ might welcome sharing the appointments power with an independent body.

A parallel logic, whereby abdications of power increase the capacity for independent action, can be found in Hamilton's defense of the jury system in *Federalist #83*. Explicitly, the Constitution assigns to the jury partial agency in the judge's decision making in order to prevent the judge from taking bribes: "The temptations to prostitution which the judges might have to surmount must certainly be much fewer, while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes." To reduce the lure of bribes, the judge's verdict is made to hinge upon the independent decision of

⁵⁶ Similarly, as suggested in §1, the need for the President to obtain the Senate's consent to treaties is said to make it more difficult and costly for foreign powers to purchase treaties biased against U.S. interests (*Federalist*, #75).

⁵⁷ There is no reason why a theory of voluntarily accepted restraints should assume that public officials are never motivated by professionalism, a sense of decency, or a desire to do a good job.

twelve randomly selected citizens.⁵⁸ These jurors are much less vulnerable to bribes than sitting judges because the former are suddenly plucked out of the anonymous body of people and just as abruptly dispersed back into the multitude: "there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion." By hinging the judge's choices on the decision of the jury, the judge's power is, undeniably, somewhat diminished. But notice an implicit tradeoff. Insulating the judge from bribes simultaneously insulates him (and his family) from threats. Surrounded by a constantly changing cohort of jurors, a judge is somewhat harder for those who bitterly resent his or her decisions to bring into their rifle sights. By reducing his unilateral power, and hinging his decision on the decision of individuals he cannot reliably control, he can obtain a degree of security to supplement what not-always vigilant bodyguards provide.

Constraints on discretion, particularly "partial agency," can conceivably shield government agencies from easy *capture* by private interests. The methods actually used to shield government officials from capture are more important, for constitutional theory, than the methods purportedly used to protect them from weakness of the will.⁵⁹ The government's dependency on, or vulnerability to, conniving private interests is perfectly natural. Its independence from these interests must be organized. Heteronomy is the default position and autonomy is artificially contrived. This asymmetry resurfaces in the *Federalist's* discussion of decision making in a popular assembly. Bicameralism is favored because single and numerous assemblies are easily seduced by factious leaders into intemperate resolutions that they will soon regret.⁶⁰ Bicameralism, like other forms of checks and balances, will force legislators to push the pause button and to take "time and opportunity for more cool and sedate reflection."⁶¹ Such restraints should be understood as enhancing rather than subverting the autonomy of the legislature. They do so by counteracting "the effects of those ill humors which *the arts of designing men* [my emphasis] sometimes disseminate among the people themselves."⁶²

A different perspective on the contribution of abdication to insulation is provided by one of the most important forms of unwanted power, already mentioned at the outset, namely a unilateral power that, on balance, makes more enemies than friends.

Some legal historians interpret the gradual development of independent courts, say, in England as an evolving division of labor whereby the king's court

⁵⁸ Similarly, because the Electoral College was not a sitting body, it was thought to be shielded to some extent from bribery and illicit influence (*Federalist*, #68).

⁵⁹ Although I suppose that some "precommitment" theorists might want to stretch ordinary language to the point of saying that "a legislator who runs a multimillion-dollar 'consulting' business out of his government offices in order to exploit the influence that comes with his legislative role" (New York Bar Association memo, CITE) is suffering from a failure of impulse control.

⁶⁰ *Federalist*, #62, #67.

⁶¹ *Federalist*, #30.

⁶² p. 469, #78?

slowly cast aside aggravating and time-consuming burdens.⁶³ 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 support the independence of the judiciary.

But the powerful have an additional reason to divest themselves of judicial power. They are naturally willing to shed powers that are liable 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 they have really or supposedly harmed.

It is possible to fake it, of course. Political authorities can pretend to hand over judicial decisions to independent judges while manipulating outcomes behind the scenes, as in "telephone justice." To choose a trivial example from a non-political context, when an editor rejects an article for his journal, he blames his anonymous editorial board and claims that his "hands are tied." This claim may be wholly untrue, but it relieves the pressure to some extent. According to Montesquieu, however, such rhetorical stratagems will not suffice to protect a prince. To diminish the danger of reprisal, power-wielders can achieve plausible deniability only by yielding in reality, not merely in appearance, some key elements of decision-making power. If the ruler pulls strings behind the curtains, people will notice where ultimate decision-making power lies, and 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."⁶⁴ To avoid these pressures, a shrewd prince will respect the independence of judges from executive power, one of the keystones of any moderate constitution.⁶⁵ In a republic, the legislature can insulate itself from supplicants seeking favorable verdicts in ongoing legal cases by, among other things, publicly renouncing any power to influence judges by manipulating judicial salaries.⁶⁶

While the 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 fertility of the pardoning power, as did Machiavelli before him: "Princes must make others responsible for imposing burdens, while handing out gracious gifts themselves."⁶⁷ Loyalty and political support are excited by gifts that are undeserved, and even unhopd-for, not by benefits that recipients fully merit and therefore expect and believe to be their

⁶³ J.H. Baker

⁶⁴ Montesquieu, *The Spirit of the Laws*, Book VI, Chap. 5, p. 78.

⁶⁵ Montesquieu, *The Spirit of the Laws*, Book VI, Chap. 5, p. 77.

⁶⁶ *Federalist*, #48.

⁶⁷ Machiavelli, *The Prince*, XIX.

due. 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.

Evidentiary rules in a criminal trial also reveal how power can insulate itself from malicious influences by adhering to rules. High evidentiary standards might seem at first to be hurdles over which government prosecutors must leap in order to achieve the criminal convictions they seek. In this sense, high evidentiary standards restrict the government's freedom of maneuver. On the other hand, these same limits on the government also *protect the government* from witness malice and other attempts by private parties (jilted lovers, disgruntled coworkers, convicted felons seeking early release, and so forth) to inject disinformation into the criminal justice system in an attempt to use state power to exact personal revenge or achieve other illicit ends. In other words, high evidentiary standards protect private parties from being abused not only by government officials but also by other private parties who connive to manipulate the instrumentalities of government and law to attack rivals in illicit ways. Government officials can be persuaded to accept such restraints of their own freedom of action because of the trade-off these restraints enshrine, insulating them from private manipulation (or "capture") by tying their own hands to some extent.

Montesquieu makes exactly this point. Here is the way he summarizes what the executive branch gains by abdicating judicial power:

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.⁶⁸ Relinquishing power in one domain may increase the executive branch's power overall not only because of the obvious advantages of specialization but also because this selective abdication of control reduces the incentives of inveterate dissemblers to feed disinformation into the deliberative processes by which the executive makes policies and decisions.

All government bodies act upon the basis of information gleaned from a social environment crowded with organized interests attempting, sometimes by deception, to lure the government into serving factional ends. (Think of the tribal informants in Pakistan and Afghanistan who mislead American drone operators into thinking that a personal or clan rival is a member of al Qaeda or the Taliban.) If the government does not wish to be duped, it can presumably be induced to submit to high evidentiary standards which are, in effect, a set of enabling constraints, designed to help them discriminate between unreliable and reliable information. To gain freedom of action in one sense, one has to sacrifice freedom of action in another sense.

⁶⁸ Montesquieu, *The Spirit of the Laws*, Book VI, Chap. 5, p. 79.

* I intend to conclude this section with some examples of the voluntary abdication of a power that, when exercised, threatens to undermine the otherwise precious coherence of the group.

This logic might explain, for example, the Foreign Sovereign Immunities Act (FSIA) of 1976. The State Department, debilitated by the power to decide if foreign states were or were not to receive immunity from being sued in U.S. courts, lobbied to have this power transferred to the federal courts. The executive branch, in other words, divested itself willingly of a power that it did not want, namely a power that created more enemies than friends.

Another example of collective self-abnegation for the sake of group coherence is the Constitution's narrow definition of treason. Overly broad definitions of treason are "the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other."⁶⁹ Violent domestic faction and "party rage" are the principal reasons why republican governments are historically unstable and short-lived.⁷⁰ A narrow constitutional definition of treason, therefore, is an additional "barrier against domestic faction" designed "to guard the internal tranquillity of states."⁷¹ Faction leaders themselves, in a cool moment, can be persuaded to accept this mutually agreed disarmament because "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."⁷²

The power to make decisions is not especially valuable unless the decisions are accepted and obeyed.⁷³ It is perfectly plausible, therefore, that power-wielders would accept constitutional restraints if these restraints would, while limiting their range of permissible choice, simultaneously increased the probability that their choices would be put into practice.

Legislators naturally want their laws to be obeyed. But willingness to obey legal imperatives depends on various factors, including their coherence and intelligibility. "It will be of little avail to the people that the laws are made by men of their own choice if the laws be . . . so incoherent that they cannot be understood."⁷⁴ Contradictions among laws passed at various times and for various motives decrease the likelihood (and even possibility) of obedience. To mobilize compliance with its decisions, therefore, the legislature can willingly "hand over" the power to interpret the laws, including the power to "liquidate" the contradictions between laws, to independent courts: "it is the province of the courts to liquidate [the contradiction between statutes] and fix their meaning and operation."⁷⁵

Other considerations confirm that the Framers meant the federal courts to be instruments of, rather than checks upon, national power. The new Constitution designed to substitute judicial enforcement of tax requisitions on individuals for the

⁶⁹ *Federalist*, #43.

⁷⁰ *Federalist*, #9.

⁷¹ *Federalist*, #9.

⁷² *Federalist*, #43.

⁷³ Owen Glendower: "I can call monsters from the vasty deep." Hotspur: "Why so can I, and so can any man, but will they come when you do call for them?" (*Henry IV*, Part I.)

⁷⁴ *Federalist*, #62???

⁷⁵ *Federalist*, #78.

ineffective and potentially violent system of levying taxes on the states.⁷⁶ The federal courts were also meant to help Congress prevent the states from printing paper money, taxing imports, and so forth. Without the courts, in fact, laws passed by Congress would be advice individuals could safely ignore, very much like Gorbachev's decrees or UN resolutions, instructions without teeth.

And just as they can increase their capacities by deferring to independent courts, legislatures can protect themselves from a military coup by deferring to a semi-independent executive. Montesquieu justifies the legislature's delegation of power to the executive on just these grounds: "When once an army is established," he says, "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 is not the only or perhaps the most urgent consideration, from a republican point of view. Montesquieu's principal argument, instead, concern the way a legislature that attempts to retain managerial control over the army, in the ordinary course of human affairs, will inadvertently weaken civilian control of the military:

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.⁷⁷

To help the legislature fend off a military coup, a liberal constitution will therefore place operational control of the army in the hands of someone whom the military is likely to obey. This should be a single commander-in-chief who will operate under the eye of, and within guidelines set by, the legislature. The impeachment power, too, might be "a bridle in the hands of the legislative body upon the executive servants of the government."⁷⁸ But the chief executive must nevertheless 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 depends on its willingness to abdicate power in this specific respect.

Hamilton provides another reason why the legislature, even in a republic where the legislature is the dominant constitutional body, would be wise to abdicate some of its power to a chief executive. Part of the reason for this delegation is the obvious one, namely that the executive is better constituted for making ad hoc managerial decisions than an assembly that acts through the promulgation of general rules. But Hamilton provides an additional rationale, namely that "a well-timed offer of pardon to insurgents or rebels may restore the tranquillity of the commonwealth."⁷⁹ A law, granting blanket immunity ahead of time to rebels, would encourage insurrections; and it is therefore much better to make pardon for rebels a matter of executive discretion, so it cannot be reliably foreseen.

⁷⁶ *Federalist*, #45.

⁷⁷ Montesquieu, *The Spirit of the Laws*, Book XI, Chap. 6, p. 161

⁷⁸ *Federalist*, #65.

⁷⁹ *Federalist*, #74.

§ 4: Cognitive Constitutionalism: False Certainties and Obligatory Consultations

Human beings are not only fallible. They are also obstinate and intensely dislike admitting their mistakes. As Jay wrote: “The pride of states, as well as of men, naturally disposes them to justify all their actions, and opposes their acknowledging, correcting, or repairing their errors and offenses.”⁸⁰ The Constitution he helped draft was meant to supply this defect of human nature as well.

I illustrated the cognitive aspect of constitutional restraints above by citing Bodin’s interpretation of parliamentary immunity as a royal strategy to protect the king from being deceived by his own agents. The same idea was echoed in Montesquieu’s description of genuinely independent courts as the “eyes” of the king. We could describe this tactic as abdication for insulation; but it would be simpler to call it abdication for information. To deepen our understanding of this dimension of constitutionalism, it may help to draw another analogy. I am thinking here of the rules of scientific research. This analogy, inadequate in many ways, can nevertheless help us focus on the cognitive advantages of certain restraints. Even the most brilliant scientist must subject his or her theories to, for example, double-blind tests to avoid contaminating the results by wishful thinking or by the near universal human tendency to interpret ambivalent evidence so that it confirms preexisting beliefs. Obligatory scientific procedures empower researchers by freeing them from their cognitive biases. Such a “restriction” on what scientists can publicly claim to know improves their cognitive performance, not merely their public reputation. If we wished to indulge in metaphor, we might even say that, due to these entrenched rules, the organized system of scientific research can “think” much better than can any individual scientist.

The loose analogy between liberal constitutionalism and the organization of scientific research suggests that constitutions, by organizing decision making to counteract natural human aversion to self-criticism, can help a democratic society “think.” There is something to this idea, even though political conflict is a far cry from scientific debate. Politics differs from science, for one thing, because the former implicates more powerful and extensive interests and passions than the latter. A more instructive analogy, for drawing attention to the cognitive functions of a political constitution, can therefore be found in criminal procedure. One reason to explore this parallel is that the American Framers were all intimately familiar with the common law of crimes, referring to it repeatedly in their writings. Criminal procedure involves notice, the right to counsel, evidentiary standards, compulsory process, the right to confront an adverse witness and so forth. We might think of these rules as protecting the interests of the criminal suspect, who would otherwise be unbearably weak, standing alone before the massive power of the system of criminal justice. But it is equally plausible to understand the core elements of the public trial as a kind of cognitive constitution, improving the accuracy of the legal system, helping it get at the truth of the matter, discouraging dishonest testimony,

⁸⁰ *Federalist*, #3.

alerting additional material witnesses to the case, and helping convict the guilty and acquit the innocent.

William Blackstone, another formidable influence on the Framers, describes the trial by jury in precisely this way. The jury trial, an essential feature of what he calls the English “constitution,” prevents the British crown from behaving like the rulers of France and Turkey who “imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure.”⁸¹ On the surface, therefore, the trial by jury seems to be a limit on the power of the government, preventing it from behaving as it would like. But this is not Blackstone’s central point.

To bring out the positive function of the trial by jury, from the crown’s own point of view, Blackstone emphasizes its cognitive advantages, that is, the many ways in which it serves “the through investigation of truth.”⁸²

The jury trial is an institution or organized procedure with well-defined rules and roles. On a miniature scale, it has a “constitution” of its own, and one which Blackstone describes in detail. The centerpiece of the jury trial is the “public examination of witnesses” which Blackstone calls “the English, way of giving testimony” even though it was already known among the Romans,⁸³ because it is foreign to the civil law. Here is Blackstone’s summary of the virtues of public examination and cross-examination:

THIS open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.⁸⁴

Written testimony has less probative value than spoken testimony delivered in public and under oath because, when testimony is delivered in written form, the jurors cannot watch the witness squirm or blanch as he answers questions. Viva voce testimony provides an excellent opportunity for the jurors to sift the truth:

⁸¹ William Blackstone, *Commentaries on the Laws of England* (1765-69), (University of Chicago Press, 1979), Vol. IV, Chapter 27, p. 343.

⁸² William Blackstone, *Commentaries on the Laws of England* (1765-69), (University of Chicago Press, 1979), Vol. III, Chapter 23, p. 369.

⁸³ Quintilian “lays down very good instructions for examining and cross-examining witnesses viva voce” (Ibid., p. 374).

⁸⁴ Ibid., pp. 373.

In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the matter of it.⁸⁵

The rule favoring spoken over written testimony may protect the innocent from being falsely convicted. But it also improves the cognitive performance of the legal system. It is a positive or enabling constraint, not a negative or disabling one.

An analogy between the rules governing a jury trial and political constitutions is suggestive. Constitutions serve power by organizing decision making so that it is somewhat more thoughtful and intelligent than it would otherwise be. Some of the most important constitutional restraints facilitate self-correction, for example by centralizing accountability and compelling decision makers to ponder relevant counter-evidence and counter-arguments. One of the 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. Viewed from this perspective, our eighteenth-century Constitution is based on three still-valid principles: All people, including politicians, are prone to error; all people, especially politicians, dislike admitting their blunders; and all people 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 of political dissent), set forth a series of second-order rules, that is, rules specifying the process by which concrete decisions and first-order rules are to be made and revised. If America's eighteenth-century Constitution is still helpful in dealing with twenty-first century threats 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.

The idea a liberal constitution, by organizing decision making to counteract natural human aversion to self-criticism, can help a democratic society "think" lies behind a basic constitutional principle that informs federalism as well as the separation of powers at the national level: never give the power to correct a mistake to the same body that made the mistake. For example, judges should not give exercise preliminary review of legislation because "the judges, who are to be the interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacities."⁸⁶ Similarly, because it has the power to approve but not to initiate appointments, the Senate is less likely to be inhibited by

⁸⁵ *Ibid.*, pp. 374.

⁸⁶ *Federalist*, #73.

authorial vanity from admitting that the appointed individual is worthy of impeachment.⁸⁷ Along the same lines, the power to impeach should be lodged in one body and the power to conduct the trial in a separate body because otherwise “the strong bias of one decision would be apt to overrule *the influence of any new lights* [my emphasis] which might be brought to vary the complexion of another decision.”⁸⁸ Behind this division of responsibilities, in other words, lies cognitive dissonance theory, namely the observation that people tend to filter out information that contradicts decisions that they have already made.

Machiavelli, once again, helps us understand what is at stake here. His examination of the cognitive function of popular assemblies was presumably the inspiration for Bodin’s argument about parliamentary immunity. Public assemblies are useful, Machiavelli says, because they allow mistakes to be corrected in a convincing way. Ordinary people sometimes wrongly believe that they have been injured by their rulers and superiors. The Roman constitutional order provides a remedy for this problem: “If these opinions are false, there is for them the remedy of assemblies, where some good man gets up who in orating demonstrates to them how they deceive themselves.”⁸⁹ Poisonous rumors can be neutralized in a free-spoken assembly, where liars cannot simply whisper their slanders, but must state their charges openly, can be forced to produce some semblance of proof, and can even be publicly shamed if their claims prove false. As a machine for reducing the impact of false rumors, public assemblies can stabilize a republic while honoring veracity.

Constitutions may protect rights and prevent tyranny, but they may also organize the process of decision making to favor the “deliberate sense of the community”⁹⁰ over impulsive judgments. If the process includes elements of adversarialism, impulsive judgment, false certainty, tunnel vision, and rank prejudice can “speedily give place to better information, and more deliberate reflection.”⁹¹ 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.”⁹² One solution to this problem is to make sure that various independent bodies 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.”⁹³

That the legislature can enhance the cognitive performance of government by serving as an information-gathering device was also a leading theme in the

⁸⁷ *Federalist*, #66; an even more subtle argument is that emotional indignation at an appointee’s bad behavior is hard to sustain if the appointment was made collectively, so that it is difficult or impossible to point a finger at the individual genuinely responsible for the appointment: “The censure of a bad appointment, on account of the uncertainty of its author and for want of a determinate object, has neither poignancy nor duration” (*Federalist*, #77).

⁸⁸ *Federalist*, #65.

⁸⁹ Machiavelli, *Discourses*, I, 4, p. 17

⁹⁰ *Federalist*, #71.

⁹¹ *Federalist*, #78.

⁹² *Federalist*, #73.

⁹³ *Federalist*, #73.

Federalist. Referring to the Congress assembled under the Articles of Confederation, Jay observes that, “being convened from different parts of the country, they brought with them and communicated to each other a variety of useful information,” adding that “in the course of the time they passed together in inquiring into and discussing the true interests of the country, they must have acquired very accurate knowledge on that head.”⁹⁴ The same will be true of the new Congress, where representatives will bring into national deliberations “a local knowledge of their respective districts.”⁹⁵ Congress’s ability to mobilize and integrate local knowledge from all parts of the country is essential to the federal government’s capacity to tax fairly and effectively, for example.⁹⁶ The need to bring knowledge of local circumstances into the national assembly dictates that the House of representatives be a fairly large body,⁹⁷ despite the well-known danger of demagoguery in large assemblies.

The “the restraint of frequent elections” helps counteract the natural amnesia of office holders, their tendency to forget that they should be working for those they represent.⁹⁸ Unfortunately, only long terms of office provide an incentive for representatives to invest in their own knowledge of public issues, a knowledge that would make them more useful to the voters who elect them.⁹⁹ These clashing considerations are invoked to justify the organization of bicameralism whereby one body is elected for two-year terms and the other body for six year terms. In addition, the staggered terms of Senators are justified as a cure to a different sort of amnesia that afflicts governments wholly elective, where incumbents are periodically removed from office. This turnover can trigger a wasteful and confusing loss of institutional memory. The Senate helps supply this defect because it is a continuous body, where accumulated knowledge can be passed onto newcomers before old timers leave the scene.¹⁰⁰

[NOTE I: In *Outliers*, Malcolm Gladwell tries to explain a paradox about decision making under emergency conditions. In commercial aviation, Captains and co-pilots fly roughly the same amount of time. But 80 percent of the accidents occur when the Captain, who has had on average about twice the amount in-flight experience, is flying the airplane. Why would this be? Gladwell’s answer, based on serious research conducted by airplane disaster specialists, involves hierarchical relations inside the cockpit. When the co-pilot is flying the plane, the Captain becomes the observer-critic. When he is in that role, during an unfolding emergency, the Captain is completely uninhibited in his comments and criticisms. He has no trouble telling the lower-status pilot that the latter has overlooked this or that warning signal or failed to consider this or that emergency response. When their roles are reversed, however, deference to a superior inhibits the co-pilot from playing the same role. The point is not obscure. Hierarchy inhibits the healthy self-

⁹⁴ *Federalist*, #2.

⁹⁵ *Federalist*, #56.

⁹⁶ *Federalist*, #36.

⁹⁷ *Federalist*, #58.

⁹⁸ *Federalist*, #57.

⁹⁹ *Federalist*, #62.

¹⁰⁰ *Federalist*, #77.

criticism that any operational unit that needs to respond intelligently to a complex and stressful environment.]

[NOTE 2: The cognitive function of constitutional restraints is also intimated by the following psychological thesis: "Restraint is always in part the cognitive attention to multiple possibilities in a situation; when all restraint is lost, the cognitive universe is simplified in a single focus."¹⁰¹]

By way of conclusion, let me return to the way in which constitutional constraints can enhance the cognitive performance of the executive. From Montesquieu's explanation for why the legislature should sometimes defer to the executive, I leap ahead 150 years to Max Weber's argument for why the executive should sometimes defer to the legislature. In a famous series of articles published in 1917 in the *Frankfurter Zeitung*, Weber inverted Montesquieu's argument, and for thoroughly Machiavellian reasons. He argued that the executive weakened the state militarily by refusing the share power with parliament. He attacked Bismarck for having dulled the problem solving capacity of the German state as a whole, and therefore for having indirectly produced Germany's humiliating defeat in the Great War, by his myopic weakening of the legislature.¹⁰² The refusal of the German executive to share power with the legislative branch, according to Weber, produced a bit of "flexibility" in the short term but a great deal of obtuse policy in the long term. Condemned to either powerless opposition or convictionless obedience, the Reichstag could develop no effective institutions of accountability able to penetrate the self-defeating secrecy of the executive branch. No MP could correct even flagrant mistakes made inside the ministerial bureaucracies, because no one could find out what decisions were being made and why.

Weber, in effect, was expounding and defending a form of cognitive constitutionalism. A well-functioning parliament in a modern mass democracy, he argued, should overcome the defective rule of those unchecked German bureaucrats who idiotically lost WWI. Great Britain provides the succinct rationale for this *raison d'état* constitutionalism. From a Darwinist perspective, the UK Parliament is a valuable institution because it *selects* the fittest political leaders (Gladstone, Disraeli and so forth) and brings them to the forefront: "The whole internal structure of parliament must be such as to produce such leaders and enhance their effectiveness, as has long been the case with the structure of the English parliament and its parties."¹⁰³ The Reichstag, by contrast, failed to breed and promote the innovative leaders Germany badly needed because it was a powerless body, imprudently deprived by a jealous executive of political responsibility. Not having to uphold the government or keep the cabinet in office, the German parliament was condemned to "negative politics." Trapped in dilettantish ignorance, MPs operated in an informational vacuum and were easily outmaneuvered by well-informed ministerial

¹⁰¹ Jonathan Shay, M.D., *Achilles in Vietnam: Combat Trauma and the Undoing of Character* (Scribner, 1994), p. 86.

¹⁰² Max Weber, "Parliamentary Government in Germany," in *Political Writings* (Cambridge: Cambridge University Press, 199), pp. .

¹⁰³ Weber, *ibid.*, p. 191.

officials. Few talented people were drawn to enter such an ineffectual body and the ones who did had little chance to improve their problem-solving, as opposed to point-scoring, skills. The assembly's committees of inquiry were basically impotent. The speeches of deputies were intellectually unimpressive and no one listened.

This classic rationale for the executive to share power with the legislative branch supports two aspects of my argument thus far. It suggests how constitutional restraints can be voluntarily embraced when they enhance the government's performance both cognitively and militarily. By monopolizing power, according to Weber, the executive branch undermines the government's ability to mobilize all dimensions of national power for war as well as its ability to correct its own mistakes.

§ 5: Safety through Submission: How Exposure to Electoral Defeat Serves Political Elites [incomplete]

Profit seekers do not like competition but must have competition thrust upon them by political power representing the interests of consumers in better products at lower prices. The question therefore arises, who imposes competition on political power?

The logic of my argument is that political power willingly accepts competition for its own long-term gain, most likely to mitigate the frustration of the Outs by offering the hope that they will eventually join the Ins, and also to avoid pent-up popular frustration with elites in general, fomenting bloody revolution where the leaders heads are stuck on spikes.

If “the ruler” has life tenure then those with an interest in removing him from office will also have an interest in removing him from life. A study of the method of informal term limits inflicted on several generations of Roman Emperors brings this point home. Chapter 19 of *The Prince* contains Machiavelli’s advice for avoiding assassination, beginning with the suggestion that rulers refrain from taking the property and women of their subjects. It is better to be feared than loved; but it is worst of all, and most dangerous, to be hated. The best fortress for a ruler is the support and loyalty of his subjects. The ruler’s popularity will make evident to potential assassins that they can expect no clemency and no refuge if they kill the ruler. The reason why rulers might willingly accept the possibility of being voted out of office may have similar roots. The prospect (or certainty when there are term limits) of a potential end-point to the ruler’s incumbency reduces the felt need to eliminate him by violence; it will suffice to wait.

John Stuart Mill and Alexis de Tocqueville, interestingly, suggest a more specific reason why elites will submit to a process whereby popular suffrage determines when the Ins are kicked out and the Outs let in. Mill introduces the idea as follows: “It is useful that there should be a periodical general muster of opposing forces, to gauge the state of the national mind, and ascertain, beyond dispute, the relative strength of different parties and opinions.”¹⁰⁴ On election day, in a liberal democracy, the citizenry paints a collective portrait of itself, informing itself by this method of the relative strength of different factions and parties. Mill’s assumption here is that such a collectively observed joint self-portrait will inject a spirit of moderation into public opinion, since no party will believe or contend that it deserves to prevail 100 percent of the time.

Mill may well have borrowed this idea from his sometime friend, Tocqueville who had concluded from his study of France in 1793-1794 that the most dangerous faction is one that acts in the name of the majority of citizens. In any egalitarian society, the will of the majority necessarily has enormous moral prestige. A crazed minority faction, such as the Jacobins, persuasively confiscating the name of the majority, can perpetrate unthinkable atrocities. How can this problem be solved? The only effective solution is to construct political institutions that make it

¹⁰⁴ John Stuart Mill, *Considerations on Representative Government*, in *Collected Works* (Toronto: Toronto University Press, 1977), Vol. XVIII, p. 502.

impossible for minority factions convincingly to claim the right to speak for the majority. Only one institution can do this: universal suffrage.

perhaps universal suffrage is the most powerful of all the elements tending to moderate the violence of political associations in the United States. In a country with universal suffrage the majority is never in doubt, because no party can reasonably claim to represent those who have not voted at all. Therefore associations know, and everyone knows, that they do not represent the majority.¹⁰⁵

In the absence of universal suffrage, faction leaders claim to speak for the people as a whole.¹⁰⁶ And who can prove that they do not?

Where the franchise is severely restricted, moreover, factions become conspiratorial, aggressive, and swollen with a sense of their own holy mission. They operate according to "military ways and maxims."¹⁰⁷ They become Leninist, one might say. Universal suffrage changes all this, cordializing militant factions into democratic parties, ready to compromise. Above all, when the franchise is extended, radical factions "lose the sacred character belonging to the struggle of the oppressed against the oppressor."¹⁰⁸ Universal suffrage will not only make impossible the dictatorship of Paris over France. It will desacralize radical groups, diminishing their prestige in the public eye. Not ultimate values, it will appear, but group interests alone are at stake.

The chance to achieve one's aims through persuasion and electioneering is a social sedative. It takes the wind out of radical sails. Similarly, the more frequently elections are held, the less bitterness and frustration will the losers feel.¹⁰⁹ And the less inclined will they be to destroy the entire system by insurrection. In sum, Tocqueville has turned ultraroyalism upside down: the more democratic the system, the less revolutionary it will be.

Elites can resolve conflicting ambitions within their own ranks by delegating decisions about promotion and advancement to outsiders, in some cases to the electorate at large. This is one way to think about the seventeenth amendment (ratified 1913), that transferred the selection of Senators from the state legislatures to the people of each state. Conflicts within several state legislatures, in the run-up to the Civil War, sometimes made it impossible to select a Senator. The selection process was often plagued with problems of bribery and corruption. Rivalries over the position poisoned the air. It is in this context that some state legislatures supported reform efforts aiming at direct election.

¹⁰⁵ Lawrence trans., 194.

¹⁰⁶ "En Europe, il n'y presque point d'associations qui ne prétendent ou ne croient représenter les volontés de la majorité" (1, 200; 194-195).

¹⁰⁷ Lawrence trans. 195; 1, 200.

¹⁰⁸ Lawrence trans., 195; 1, 201.

¹⁰⁹ 1, 208; 202.

Conclusion: How the Rights of the Weak Increase the Power of the Mighty

[unwritten]

Consider in this context the constitutional allocation of the power to annul state laws incompatible with the Constitution. Madison, as is well known, wished to give this power directly to Congress. But here is how Hamilton explains why the power to annul state laws was “presumably” given to the federal courts:

This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of the Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the States.¹¹⁰

Congress itself could better accomplish the subordination of state to national power by divesting itself of the annulling power and giving it to the court, where its exercise, because less vehemently resisted, would be more effective on balance and over time.

It is relevant here that the vast majority of laws declared unconstitutional by the American Supreme Court, exercising its power of judicial review, have been state laws. In other words, the Supreme Court, through most of its history, has been an accomplice of the national government in its long battle to subordinate the states. Formulated still differently, the Supreme Court has always been and continues to be a tool of power. And this is exactly what we should expect from a constitutional body.

[unwritten]

¹¹⁰ *Federalist*, #80.