

Freedom by Shackle

Passions and Constraint: On the Theory of Liberal Democracy. By Stephen Holmes.* Chicago and London: University of Chicago Press, 1995. Pp. xiii, 337. \$29.95.

I

Mainstream liberal theory paradoxically embraces both popular decisionmaking and constitutional checks on populism. In *Passions and Constraint*, Stephen Holmes seeks to demonstrate that this paradox represents not a contradiction, but an integrated and self-reinforcing theoretical system. Unlike those liberals who justify restraints on the majority in terms of deontologic conceptions of individual rights,¹ Holmes argues that these restraints serve an instrumental function. A properly functioning democracy, he contends, must channel and restrict its own decisionmaking authority, so as to protect the deliberative process that is central to democracy itself.

Well-known for his attacks on antiliberals,² Holmes has resolved in this book to “say something constructive about liberalism itself” (p. ix). Although he devotes the majority of his book to defending liberalism from its critics and from libertarians who would claim its legacy as their own, Holmes returns throughout to his central theme: “The interdependence of constitutionalism and democracy presents a paradox, not a contradiction” (p. 178). He seeks to demonstrate both that liberal constitutionalism allows for restraints not only on the agents of government, but on the majority itself, and that such restraints on the majority are consistent with the principle of majority rule.

Holmes’s effort is undermined by his perfectionist refusal to recognize *any* necessary tension between the elements of this paradox. Nevertheless, even Holmes’s partial success in resolving the paradox makes *Passions and Constraint* a useful book for any serious student of political thought. Holmes’s journey through the historical sources he finds most relevant proves at times

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1. See, e.g., RONALD DWORKIN, LIFE’S DOMINION 123 (1993) (arguing that protection of individual rights is precondition to moral legitimacy of majority’s right to govern liberal state).

2. See, e.g., STEPHEN HOLMES, THE ANATOMY OF ANTILIBERALISM (1993); Stephen Holmes, *The Community Trap: The Philosophers’ War on the L-Word*, NEW REPUBLIC, Nov. 28, 1988, at 24; Stephen Holmes, *The Lion of Illiberalism*, NEW REPUBLIC, Oct. 30, 1989, at 32 (reviewing RICHARD A. LEBRUN, JOSEPH DE MAISTRE: AN INTELLECTUAL MILITANT (1988)); Stephen Holmes, *The Wrong And Winding Road*, NEW REPUBLIC, Mar. 25, 1991, at 29 (reviewing CHRISTOPHER LASCH, THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS (1991)).

meandering, but his synthesis of these materials makes an investment in careful reading profitable, and his elegant style makes it enjoyable.

II

Holmes grounds his account of the utility of self-binding in the writings of the sixteenth-century French absolutist Jean Bodin.³ Although Bodin supported the king's right to rule by fiat, he pragmatically advised the monarch to limit his power in a variety of strategic ways. Bodin's primary concern was the religious strife that had engulfed his country. In Holmes's telling, Bodin counseled the king to refrain from "attempting to save souls, punish heretics, or eliminate religious dissonance" because "[s]uch futile efforts only undermine political order and provoke rebellion" (p. 121). Similarly, Bodin reconceptualized the traditional dictates of natural law as "conditions for the successful exercise of royal power" (p. 110). All constraints on the sovereign's power were justified for Bodin by the strategic benefits the constraints would bring. The king should not tie his hands out of moral scruple, but because he recognizes that in so doing he can actually enhance his power.

Holmes identifies Bodin as "the father of *positive constitutionalism*" (p. 8). Holmes applies Bodin's lesson—that the sovereign can increase its power by strategically limiting its reach—to the democratic sovereign, the people. In doing so, Holmes seeks to contest the principle of *negative constitutionalism*: "the view that the primary or even sole purpose of a constitution is to secure individual liberty by hamstringing the government and its agents" (p. 101). Holmes argues that negative constitutionalism neglects the constructive—or *constitutive*—function of a constitution (pp. 101–02). The limits that a constitution puts on state authority, Holmes argues, exist not so much to keep government and its officials in check, but to foster the deliberative democratic process.⁴

While negative constitutionalism posits consistency between constitutionalism and majoritarianism by conceptualizing constitutional limits as restraints not on the majority, but on its unruly agents,⁵ Holmes must fight an uphill battle to prove that *limits on the majority's own authority* can be

3. See JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE* (Kenneth D. McRae ed. & Richard Knolles trans., Harv. Univ. Press 1962) (1576). Although Holmes recognizes Bodin's absolutism, he labels him with admiration a "protoliberal" (p. 122).

4. On the deliberative conception of democracy, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45–48 (1985). See also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–27 (1948) (arguing that First Amendment should be understood as instrumental to democratic process).

5. For the proposition that the Bill of Rights was drafted primarily to reduce the "agency costs" inherent in representative democracy, see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991).

understood as consistent with majoritarianism.⁶ Holmes advances two related lines of argument. First, he argues that liberal restraints on the majority serve to build procedures that enhance majority rule. Second, he argues that current majorities may justifiably bind their successors because democratic institutions could not otherwise come into existence.

Although Holmes acknowledges that constitutions act as “higher law,” which, by design, cannot be easily modified by majorities (p. 134), he argues that constitutional restraints on majority will can make democracy and majoritarianism more meaningful. Holmes analogizes constitutions to the rules of grammar: “Far from simply handcuffing people, linguistic rules allow interlocutors to do many things they would not otherwise have been able to do or even have thought of doing” (p. 163). Holmes does not merely make the obvious comparison between grammatical rules and such plainly procedural institutions as electoral districts and bicameralism. Like Professor Ely,⁷ Holmes seeks to show that even constitutional provisions protecting individual rights can be conceptualized as procedural enhancers of democratic rule.⁸ Holmes argues that constitutional guarantees of freedom of speech and religion, for example, serve to promote democratic rule, even though they necessarily tie the hands of the majority. Relying heavily on John Stuart Mill,⁹ Holmes argues that “[l]iberal restrictions on the powers of the majority, such as the legally protected right to criticize publicly those who win political power in fair elections, are designed not only to ward off majority tyranny, but also to organize popular decision making and put deliberative democracy into effect” (p. 178). Freedom of religion, in Holmes’s view, serves a different but equally democracy-enhancing function: By keeping politically divisive and rationally unresolvable issues off the political agenda, religious freedom allows majorities to spend their time more fruitfully, and a community of citizens may be built without fissures along religious lines (pp. 222–27).

Having reconceptualized liberal constitutional restraints as majority-reinforcing, Holmes is left with the task of explaining how one generation can bind its successors—as it must do in order to place credible limits on itself—without violating those successors’ rights to majoritarian self-determination. Once again, Holmes rests his case on the enabling character of self-restraint. When the generation living at time T_1 binds itself and its

6. Holmes’s stated commitment to majoritarianism is unflinching: “The *only* morally justified decision-making rule in liberal politics is majoritarian” (p. 34).

7. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

8. See *id.* at 181. While Holmes and Ely are both concerned with the democracy-reinforcing potential of constitutional restraints, Ely focuses on the judicial methodology of interpreting such restraints into the open-ended provisions of the U.S. Constitution. Holmes acknowledges his debt to Ely, but notes that Ely failed to provide either historical background or abstract theoretical elaboration for his position (p. 137). The deeper difference between the two is that while Ely envisions democracy reinforcement as protecting the rights of those outside the majority, Holmes extols it for the benefits it brings to the democratic system and to democratic majorities.

9. See JOHN STUART MILL, *ON LIBERTY* (David Spitz ed., W.W. Norton & Co. 1975) (1859).

successors to a rule of procedure, broadly understood, it allows generations living at time T_2 to make meaningful democratic decisions. A generation blessed with a democratic legacy can focus its energies on the operations of government, rather than on its design: "When they enter the voting-booth . . . voters decide who shall be president, but not how many presidents there shall be" (pp. 167–68). Holmes explicitly justifies intergenerational precommitment on the understanding that constitutional rules are procedural rules akin to "bishops move diagonally," rather than regulative rules like "no smoking" (p. 163). Such constitutive rules are not "hindrances or chains" (p. 163).

III

Holmes is on safe and well-trodden ground in identifying a democracy-reinforcing function of constitutional protections of speech and religion.¹⁰ He falters, however, in his attempt to demonstrate that majority self-binding and democracy are mutually reinforcing outside those areas. In fact, precommitment may impede majoritarianism, and not all liberal restraints on the majority can be conceptualized instrumentally.

Holmes seems to neglect the possibility that a majority might err, binding itself and future generations to a suboptimal procedural rule. Because strategic self-restraint requires that majorities make it difficult to break self-imposed bonds, misconceived procedural rules may be hard to fix.¹¹ In places, Holmes recognizes the importance of ensuring that majorities have the ability to reform the constitution. He calls constitutional democracy "fallibilist democracy" (p. 274) for its commitment to self-reflection and reform. Democratic citizens, he argues, "embrace constitutionalism not only because it increases the probability of intelligent decision making . . . , but also because it maximizes the opportunity for intelligent self-correction later on" (p. 274). In fact, Holmes argues that only by precommitting to such rules as the guarantee of unpunished dissent can a people come to recognize its own errors (p. 177).

But Holmes's error lies in his unwillingness to recognize even minimal tension between the concepts of self-binding and self-reform. It is at least

10. On the democracy-reinforcing effects of free speech, see, for example, Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57. For the proposition that separation of church and state serves to keep religious differences from translating into political fault-lines, see *Lemon v. Kurtzman*, 403 U.S. 602, 622–24 (1971); Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969).

11. Article V of the U.S. Constitution, for instance, makes constitutional amendment notoriously difficult. See, e.g., Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 265 (Sanford Levinson ed., 1995) (concluding on the basis of data comparing amendment procedures in 30 national constitutions that "the U.S. Constitution is unusually, and probably excessively, difficult to amend"). But see Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) (arguing that "an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate").

plausible that a democratic people, having the freedom to discover its earlier mistake, will be inhibited by precommitment from making necessary reforms. The example of the electoral college is instructive. Although national polls suggest that the institution lacks popular support,¹² and although scholarly commentary urges that the institution is deeply flawed,¹³ the prospects for reform through Article V seem dim.

Holmes's proceduralist vision of liberal constitutionalism also cannot account for the noninstrumental constitutional protection of substantive rights. For Holmes, freedom of expression is justified because it serves as an instrument of democracy. Similarly, he embraces religious freedoms because they serve democracy-reinforcing ends, removing divisive and unresolvable issues from the public agenda. But it is difficult to see, for instance, how the rights of the criminal defendant or the right of privacy could be cast as a catalyst for majoritarian self-rule. Like Ely's proceduralist account of the Constitution, Holmes's theory "does not . . . have anything to say about *Miranda* and the exclusionary rule."¹⁴ And even if Holmes or Ely were to fashion an instrumentalist account of a substantive right such as that of privacy, it seems probable that such an account would justify only a narrow right—one not extending beyond the sphere of collective self-government.¹⁵ Of course Holmes has not undertaken the task of explaining or defending the United States Constitution; still, his conception of the function of a liberal constitution will ring hollow to those liberals who see value in rights independent of the contribution of those rights to democratic procedure.

Ironically, Holmes recognizes this flaw in Ely's argument, but not in his own. Summarizing criticism of Ely's thesis, Holmes explains that "[t]he Constitution is not merely a procedural document, silent about all substantive issues. . . . Some rights arise from the needs of representative government; but others do not" (p. 299 n.8). If, as Holmes hints, he is committed even to those rights that do not "arise from the needs of representative government," his

12. See, e.g., *ABC News, Washington Post Poll*, PUB. OPINION ONLINE, June 30, 1992, available in LEXIS, Market Library, Rpoll File, Question No. USABCWP.88944D,Q28 (citing statistics showing that, in 1988, 72% of registered voters favored popular election of President over electoral college system).

13. See, e.g., Akhil R. Amar, *A Constitutional Accident Waiting to Happen*, 12 CONST. COMMENTARY 143, 143 (1995) (nominating electoral college for "Most Mistaken Part of the Current Constitution").

14. Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 414 (1981) (commenting on ELY, *supra* note 7).

15. This criticism parallels the early commentary on Meiklejohn's instrumentalist account of the First Amendment. See Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 899-900 (1949) (reviewing MEIKLEJOHN, *supra* note 4). Meiklejohn responded, however, that the informed citizen is the effective citizen; even when the political implications of a particular work of literature, for example, are not salient, free access by the citizen will enhance her ability to participate in deliberative democracy. See Meiklejohn, *supra* note 10, at 257. But Holmes's project is broader than Meiklejohn's. While Meiklejohn articulated a theory of the scope of the free speech guarantee, Holmes seeks to justify constitutional restraints as a class. Holmes cannot translate Meiklejohn's argument—that a free speech guarantee intended to serve only the needs of democracy would indeed require robust and expansive protection of speech—from Meiklejohn's narrow focus to his own wide-ranging task. Unlike the freedom to speak and to hear, such substantive rights as those of the criminal defendant do not protect the citizen qua democratic participant.

insistence upon majoritarianism as the end to which constitutional precommitment is a means falters.

IV

Holmes has set for himself a Herculean task: demonstrating that the majority rules even when a constitution says it does not. He has met this task valiantly, albeit imperfectly. Holmes succeeds in showing some counterintuitive forms of symbiosis between constitutionalism and majoritarianism, but he cannot make out the perfect fit he claims.

Two gaps between majoritarianism and constitutionalism survive Holmes's account. The first one—that constitutional precommitment and constitutional reform may conflict—seems beyond resolution. Precommitment may foster learning, which in turn may prompt majorities to discover useful constitutional improvements; but the mechanisms of precommitment may also stifle that very improvement by erecting hurdles to constitutional change. Society may choose the level of precommitment that it believes will best balance the goals of learning and reform, but some tradeoff is inevitable.

The second gap—the one between majoritarian decisionmaking and liberal constitutional protection of noninstrumental rights—strikes at the heart of Holmes's thesis. How can the protection of rights that do not “arise from the needs of representative government” (p. 299 n.8) be conceptualized as enhancing the power and efficacy of the majority? Holmes does not provide a satisfactory answer. While Bodin's monarchical sovereign stood apart from the people, binding himself in order to manipulate them for the aggrandizement of his own power, the democratic sovereign *is* the people. The democratic counterpart to Bodin's monarch, then, is not the majority, but the *entire* people. Thus, the rights of those outside the majority may deserve protection not simply for the instrumental satisfaction of the majority, but because they have equal claim to the advantages of the throne. Constitutional checks on majority rule, then, may be justified not only for their enhancement of the majority's power, but for their protection of the interests of that segment of the sovereign that would be disenfranchised by blunt majoritarianism.

Holmes has taken a great step forward in posing and seeking to resolve an important paradox within liberalism. His account falls short, however, because he insists on resolving the paradox on its own terms. The majority must not be impaired by constitutional restraints, he argues, because liberalism posits majoritarian decisionmaking. But majoritarian decisionmaking—even when it is supplemented by deliberation—cannot tell the whole story of liberal democracy. In a liberal democracy, the people—not the majority alone—rule supreme as sovereign, however self-conflicted.

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