

Introduction

Constitutional Boundaries

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OUR LARGE THEME IS FAILURE and success in constitution making, or the limits of constitutional democracy. The convergence of recent scholarly work in political science and law and political events throughout the world make this a timely project inside and outside of the academy. The number of new constitutional texts written in support of regime formation in the past thirty years is astonishing. The profusion of ideas and scholarship on constitution making also marks a milestone for social science, which had long neglected the study of laws and constitutions, and for legal studies, which recently added the study of constitutional design to its usual emphasis on constitutional interpretation and analyses of court doctrine.

This worldwide effort in political and academic arenas is, however, marked by a kind of ambivalence. On the one hand, there is considerable optimism that constitutional democracy represents a high point, if not a culmination, in the history of political life. The attractiveness of this political idea is so powerful that even countries such as Russia, whose long anticonstitutional pedigree continues to shape politics as it is experienced there, claim to be constitutional democracies. On the other hand, for all the attractiveness of the idea of constitutional democracy, establishing it in practice has proved difficult in many new regimes throughout the world, as the Russian case and the conflicts in Iraq and Afghanistan vividly illustrate. Constitutional democracy is at once an attractive idea and a daunting enterprise. There are limits to the possible establishment, to say nothing of the flourishing, of the idea of constitutional democracy.

This book takes up the concern about the limits of constitutional democracy by returning to its most basic questions: What is constitutional democracy? What does it mean for constitutional democracy to succeed or fail? To address issues so fundamental that they are often overlooked or taken for granted means that one can no longer assume the attractiveness of the idea of constitutionalism but must interrogate the meaning, limits, and appeal of the constitutional idea. Our usual way of talking about the limits of constitutional democracy is to discuss the variety of indigenous circumstances—ethnic and tribal traditions, lack of

commitment to a rule of law, religious strife—that hinder its development. For many who adopt this usual approach, constitutional democracy itself is unlimited in its appeal, but circumstances limit its establishment. In this book, we reverse the lens on these phenomena. Here we ask: What are the limits of constitutional democracy under minimally plausible circumstances for its establishment? What can we expect of constitutional democracy even under hospitable social circumstances? In a political order in which the citizenry is committed to constitutional democracy and its basic tenets, such as the rule of law properly conceived, what can constitutional democracy accomplish and what will it fail to accomplish? This is another way of asking what constitutional democracy is, what its *theoretical boundaries* are. Can this sort of regime adequately contend with emergencies? Can constitutional democracies conduct war effectively and still remain constitutional democracies? Can constitutional democracy cope with global interdependence?

This distinction between the conventional understanding of limits and the approach of this book is intentionally overdrawn. Studies of political and social circumstances inevitably run up against the question of the limits of constitutional democracy *per se*. And our analyses of constitutional democracy will inevitably raise questions about indigenous political and social circumstances or prerequisites. But in each case there is a distinct emphasis that colors the presentation. Our emphasis here is on the meaning and the limits of constitutional democracy itself.

This project was inspired by a remarkable recent study that offers an account of the creation, maintenance, and change of constitutional democracy. In *Constitutional Democracy: Creating and Maintaining a Just Political Order*, the late Walter F. Murphy developed a constitutional theory that was unusually comprehensive. Murphy showed how the problems of constitutional creation and maintenance could be illuminated by conjoining literatures and fields that rarely spoke to one another. He brought together the concerns of legal academics who study constitutions with political scientists who study law in one overarching account. It may be surprising to the general reader that these intellectual communities often work separately even though they study the same subject. To be sure, legal academics and political scientists usually raise different questions and often deploy different methods. Yet there is much to learn from each community, and Murphy's book transcended that divide. Within political science, Murphy synthesized literatures from warring conceptual and methodological approaches and from diverse subfields—ranging from comparative politics to American political development, from theories of rational choice to studies of political behavior, and from political theory to political history. The result is a modern version of an Aristotelian idea that constitutional theory could be architectonic.

We decided to bring the spirit of Murphy's approach to a topic mentioned but not developed at length in his book. Murphy attended to the problems of constitutional creation, maintenance, and change but only obliquely dealt with the issues of failure and limit. Like the earlier contrast between two understandings of limits, this distinction—between constructive constitutionalism and the limits of constitutionalism—is a matter of emphasis. Murphy emphasized the constructive capacity of constitutionalism but necessarily discussed limits as a subsidiary theme. The scholarship gathered in this book takes up the theme of constitutional limits and constitutional failure as our central theme but, of course, necessarily discusses success and constitutional capacity as well.

What Is Constitutional Failure?

Part I includes four chapters that treat the issue of constitutional failure or success as a theoretical problem. What is constitutional failure or success? All four authors bring original, thought-provoking, counterintuitive answers to this question. Sotirios Barber argues that a healthy constitution requires a group of diverse and self-critical citizens "who see each other as moral equals and parts of one community of abstract interests conceived as real interests." These citizens and the politicians among them are contestants regarding the meaning of the common good and the most effective means to secure it. Because he shows these political attitudes to be more constitutive of success for a constitutional democracy than institutional capacities and pathologies, Barber upends the conventional understanding of constitutional failure. For Barber, the Articles of Confederation was not a failure (as is usually assumed in historical accounts) because the peaceful constitutional revolution occasioned by institutional breakdown and economic crisis revealed potent civic attitudes capable of constitutional revision and redesign. On the other hand, the long-term stability of the U.S. Constitution and the American political system it created (usually interpreted as evidence of constitutional health) may portend failure to the extent that it is symptomatic of a mentally inert citizenry no longer capable of self-critical constitutional reflection and debate.

Like Barber, James Fleming seeks to challenge the conventional understanding of success and failure. He surveys the growing literature on constitutional breakdown in the United States in order to show that most constitutional critics mislabel institutional, policy, or cultural problems as constitutional crises or constitutional failures. Fleming urges greater care in distinguishing constitutional failures from other sorts of failure by delimiting the constitutional sort to those that can be tied explicitly to the

constitutional text. Because the text is subject to plausible but divergent interpretations, Fleming argues that the American political order has been marked by numerous “successful failures”: that is, plausible but faulty interpretations that would have undermined the health of our polity have frequently lost out in the course of American political development.

It might be thought that the most successful constitution would be like a well-wrought urn, perfectly coherent with all parts contributing to a harmonious whole. Gary Jacobsohn argues that successful constitutions require disharmony, as elements in tension or even contradiction form a dialogical relation that allows constitutions to develop over time while maintaining an identifiable identity. He reveals the difficult puzzle of constitutional design to be not so much to overcome disharmony but rather to constitute it. He illustrates this argument with examples that span the globe.

The final chapter in this part, by Will Harris, takes Jacobsohn’s insight to a higher level of abstraction. Harris shows how political design can bind two projected worlds—one of success, the other of failure in mutual constitution. He argues that constitutional democracy requires these two constitutions of failure and of success as part of its life as well as its origin. Indeed, in the American case, Harris argues that the deep structure or grammar of constitutional politics can be found in two failures and two successes corresponding to the negative and positive constitutional visions of the Federalists and Antifederalists. Harris shows that America invented or brought to self-consciousness a new form of regime, replacing what used to be called a “mixed constitution” with what he calls a regime of contending “multiple constitutions.”

How Can Constitutional Democracy Contend with Emergency?

Tools used to fight the war on terror include military commissions, enhanced interrogation techniques, and limitless detention along with extraordinary measures devised to contend with economic crises. These measures have raised anew the question of how and whether constitutions can work in emergencies. Are constitutions best preserved by forcing emergency action outside of the constitutional order until the emergency has passed? Or should constitutions provide mechanisms within their design to contend with unforeseen emergencies? In part II, three essays provide contending answers.

Most discussions of this topic recur to the classic account of “prerogative” in John Locke’s *Second Treatise on Government*, where it is argued that unanticipated emergencies require executives to go beyond the law, sometimes against the law, to preserve the polity and its legal system.

Locke wrote before the distinction between a written constitution and ordinary law had become commonplace, so he did not address the question of whether the necessity to go beyond law in emergencies requires an executive to go beyond the constitution as well.

Ben Kleinerman argues that emergency power must be exercised outside of the legal and constitutional order for constitutions to preserve their compositional and moral integrity and to prevent extreme action from becoming routine. In his account, appeals to necessity that are ratified by the people or by the legislature can bring extralegal action back under a constitution—but all extralegal emergency actions are initially extraconstitutional as well. Kleinerman insists on this conceptualization to force the polity to confront necessity as the determining issue and to avoid any sense that emergency action is authorized by normal processes. He illustrates the importance of this extraconstitutional conceptualization by comparing Lincoln's actions and arguments under its auspices with those of Woodrow Wilson in World War I, who sought legal authorization for illegal acts with the deleterious consequence of normalizing the extreme.

Jeffrey Tulis shows that Locke's problem of prerogative is more vexing than Locke acknowledged because, as Carl Schmitt argued, extreme emergencies raise the possibility of actions beyond all familiar normative orders. A people may be rendered incapable of bringing an executive back under a constitution in such circumstances. Tulis's solution to this problem is to broaden the reach of constitutions to encompass emergency power and to preserve the operation of separation of powers through emergency, while narrowing the classic conception of statesmanship at the same time. He also argues that this Hamiltonian solution is the best reading of the U.S. Constitution.

Finally, Kim Scheppele surveys emergency actions throughout the world in recent history to suggest that neither the extraconstitutional approach nor the intraconstitutional approaches have worked. Whether one attempts to force executives beyond the constitution in emergency or to temporarily expand the constitution in emergencies and retract it in normal times, all recent exercises of extraordinary power have been made part of the normal operations and expectations of governance. Scheppele's solution is to thicken the constitution to better anticipate emergencies or to at least normalize the processes through which emergencies are discussed, addressed, and limited. In her view, greater attention to the mechanisms of emergency power can actually better preserve the distinction between emergency power and normal political action. One might describe this approach as challenging the Lockean problematic itself by suggesting that law can comprehend the power and institutional mechanisms needed to contend with all future emergencies.

How Can Constitutional Democracy Contend with War?

Closely related to the question of emergency is the limit of constitutional democracy in war. Are constitutional democracies adequate for the successful prosecution of war? Does the conduct of war necessarily undermine constitutional cultures? These questions are taken up in part III. Unlike the previous two parts, these essays do not offer contending answers to the same question. Instead, they use this topic to generate an array of new questions and their distinct answers show just how important these hitherto neglected questions are for the large issue of constitutional democracy and war.

Adrian Vermeule argues that the commander in chief's power needs to be understood not only as designating the head of the armed forces but as the constitutional marker for "an economy of glory." He shows how Machiavelli can inform this understanding of the commander in chief's power and also argues that the economy of glory helps us understand the relationship between the executive and the legislature. Mariah Zeisberg argues that debates over the war powers in the U.S. Constitution are fundamentally miscast because they treat the issue as one of legal settlement. Instead, she develops and illustrates a "relational" understanding of constitutional power that accommodates the competing needs of legislative and executive powers. Joseph Bessette revisits Justice Jackson's opinion in the *Youngstown* case, upon which almost all current understandings of the limits of presidential power are built. In an essay sure to provoke debate, Bessette shows how Jackson's classic opinion is fundamentally mistaken because it transmutes a separation-of-powers principle into one of legislative supremacy. Finally, Mark Brandon notes that the United States has been engaged in various wars most of the time since World War I. Brandon argues that this state of affairs has serious constitutional costs, costs that extend beyond civil liberties to the mental state and civic capacities of ordinary citizens. Brandon raises the profound question whether contemporary circumstances mean that war is no longer an external circumstance with which constitutions must contend. Is war now becoming a normal feature of constitutional democracy itself?

How Can Constitutional Democracy Contend with Globalization?

The final section of the book, part IV, takes up the challenges that globalization and interdependence pose to the future of state-based constitutional democracy. The phenomenon is so new that there is no classic account or even set of questions to revisit and develop. Like the authors in the preceding part, these scholars define and address a set of distinct

questions that, taken together, begin to map a subject—in this case, the problems globalization pose for constitutional theory.

Jan-Werner Müller argues that the limits and possibilities of constitutionalism are best revealed by three paradigmatic responses to the facts of globalization and interdependence. Müller describes these as “constitutional closure” focused on sequestering state-based constitutional regimes from the pressures of internationalization; “limited mutual constitutional opening” or “constitutional tolerance” in which state-based constitutions are preserved but altered somewhat to accommodate the requirements of interdependence; and, finally, a global constitution, replacing altogether state-based constitutional democracy. Müller develops normative standards to evaluate these three paradigms, moving back and forth between the paradigms and the standards in a kind of reflective equilibrium.

Is orthodox Islam compatible with constitutional democracy? Ran Hirschl offers a fundamentally new approach to this issue. In *Democracy in America*, Alexis de Tocqueville made the troubling claim that the Islamic faith was incompatible with constitutional democracy. Some contemporary theorists have pondered the ways in which Islam could be incorporated into modern constitutional democracies much as orthodox versions of Christianity have been absorbed by, and perhaps transformed in, the American constitutional tradition. Hirschl argues that a new political form, a new regime, is emerging in late modernity. He calls this “constitutional theocracy” in which a principle of separation of powers is incorporated—with roles for religious and secular authority separate and distinct—but at the same time a very robust role for an established religion is preserved. This powerful original essay shows the challenges posed and the limits for constitutional democracy revealed by the religious resurgence throughout the world today.

Rogers Smith extends the idea of interdependence to include foreign peoples whose lives have been importantly constituted by the actions of constitutional democracies. In this provocative chapter, Smith argues that constitutional democracies whose actions and policies alter the lives of aliens incur an obligation to offer citizenship to affected peoples who desire it. Making good on this obligation will be constrained by circumstances and other obligations, but Smith makes a strong case for a new and extraordinary principle of inclusion.

The problem of terrorism and the proliferation of nuclear weapons pose new challenges to constitutional democracies. In the final chapter of part IV, Daniel Deudney defends an unorthodox proposition he labels “‘nuclear constitutional internationalism,’ which holds that the survival of limited constitutional government, particularly in the United States, is coming increasingly to depend upon the strength of the international arms control system.” Deudney establishes the first intellectual bridge between,

on the one hand, the theory and practice of constitutional design and, on the other hand, international arms control. In his view, this conjunction is the last hope for state-based constitutional democracy, which otherwise may need to be replaced with a new form of governance altogether, such as global constitutionalism.

Christopher Eisgruber's conclusion nicely knits the essays together and draws out several basic themes. Eisgruber gets to the core argument of many of the chapters in his acute restatement of their theses. He shows how these chapters speak to each other not only within the four broad categories in which we have arranged them but also in other conjunctions that span the book. For examples: he shows how Deudney's essay on the implications of global forms of war speaks to issues in Brandon's essay on the constitutional culture of war; he sees a similar logic in Zeisberg's arguments about the relation of Congress and the presidency on war power and Scheppele's cross-national account of the need for constitutionalized emergency power; and he reflects on the different intellectual purposes for which Lincoln is invoked in many of the essays.

Yet Eisgruber's conclusion on "Constitutional Engagement and Its Limits" offers more than an acute closing commentary: it advances its own constructive argument about the nature of constitutionalism. Drawing on the entire set of essays, he redescribes the limits of constitutional democracy as "a series of four tensions, two internal and two external: personal freedom–civic virtue, political order–sustained argument, state sovereignty–constitutional sovereignty, and equality–membership. All eight poles of these dyads correspond to essential constitutional aspirations." He shows how each of these four tensions is a potential source of constitutional failure, yet a well-designed constitutional order cannot flourish, indeed cannot exist, without these tensions. It would be hard to imagine a more astute summary and elaboration of the idea that there are limits inherent in the enterprise of making and sustaining a constitutional order.

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nor would it produce a *Festschrift* in his honor. Instead, we designed a conference of original research that would emulate the project that Murphy began and carry it forward to subjects meriting new or renewed attention. Stephen Macedo and Jeffrey Tulis brought together leading scholars in political science and law working on questions of constitutional design, maintenance, and change. It was decided that this second conference would probe the problem of constitutional failure.

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