

Leonard O Goenaga

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Professor Fatovic

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Question 2: Constitutional Precommitments, and Their Relation to Democracy: An Evaluation of Holmes and Waldron.

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For some time, Constitutional Democracy has been seen as somewhat of an oxymoron. This tension has been between Constitutionalist (such as Hayek) and Democrats (such as Shapiro), who have argued over the dangers of an unchecked democratic mob, or aristocratic preserving tendencies of a dead constitution-writing elite. This debate has long been fought between both of these sides, each claiming their system to be the best, while fretting over perceived dangers of the other. However, Stephen Holmes, in *Constitutionalism and Democracy*, dares to argue that these two views are not so much mutually exclusive, and that they are essentially beneficial to one another's existence. Holmes seeks to argue that Constitutionalism preserves and protects the opportunity for democracy in the form of precommitments. These precommitments can be defined as higher laws and principles, decided during the founding stages of a nation's creation, which organize the functions and powers of government, as well as the rights and rules of the citizenry. In such a way, precommitments may be seen as binding restrictions, found in the form of written constitutional high law, that dictate a framework for further laws, and the functioning of government and power. It is the goal of this paper to survey the ideas of Holmes, a supporter of precommitments, and Waldron, whom opposed Holmes' ideas, and discover which of these two areas of thought best preserve the idea of Democracy.

Before discovering the ways in which Constitutionalism enables Democracy, Holmes and those whom support precommitments must answer two questions regarding the ability of one generation to bind the latter. This argument against restraint is found within Thomas Paine and Thomas Jefferson, whom state that "the present generation has an unlimited and illimitable right to new-model the institutions under which it lives. The only consent that legitimates any form of government is 'the consent of the living,'" (202). The trouble for Constitutionalism comes in this: how can dead generations of the past, set the rules for the present? Does it not initially seem that this process is anti-democratic? In addition, individuals who supported this view, such as Jefferson, suggest that ""only periodic and obligatory constitutional plebiscites can disenthral the present from the past and assure every generation its proper say," (205).

Having observed the complaints of Jefferson and Paine, we must now ask if a generation can bind the next. To answer this, we must observe first the type of contract being passed over, and the parties involved. “Rather than being presented as an exchange of promises between separate parties, modern constitutions are typically styled as frameworks which ‘we the people’ give ourselves,” (209). In other words, there are not two parties involved, but rather a single entity of the people prescribing to the established precommitments. “The present generation is bound by the decisions of its forefathers because the dead and the living constitute one people...Just like any other individual, a nation is bound by its original vows,” (208). This leads us to ask, why can one generation bind the next with such principles as constitutional precommitments? We find this in Holmes’ analysis of the inheritance of debt. “If you inherit another’s property you also inherit his debts,” (212). Perhaps conceptualizing the passing of debt improves an understanding of the individuals involved. “Whenever he accepts a bequest, a nonsigner of the original contract implicitly consents to the political conditions which make enjoyment of that property possible,” (213). The people, agreeing to this contract not with a second body, but within itself, and within the consent and contractual nature described in Locke’s second treatise, participates in the inheritance of the ‘property’ of the government. We also must ask, having established that the people constitute one body, and not contractual between two groups, if an individual can bind itself. A theological argument illuminates that one can restrain himself, while still preserving freedom. God committing himself to his own principles is a sign of His freedom. Committing to omnipotence allows omnipotence (213-214). Even Bodin understands the need for self-restraint, “by claiming that precommitment is a vehicle of royal freedom – the strategy by which a sovereign may most effectively assert his will.” (215).

After asking the question of whether generations can bind the other, and whether individuals can bind themselves, it is probably best to probe into this thing called a ‘generation’. A nation is not merely composed of current individuals, but is a common agreement found in a web of generational ‘divide’. As a contract may be generational, it may also be enabling. A specific generation in time does not have exclusive ownership of a nation’s debt. Debt incurred from public spending, or other such hypothetical

assumptions, is something to be passed upon later generations. Viewed in light of this ‘debt’ metaphor, a current generation is linked with the generation of the past (in the debts this past generation left to the current), and is linked with the future generation in the debt the current one will leave them. This exposes a web of responsibility, and indirect consent to an interwoven tradition. As Madison argues, precommitments actually enable the possibility of democracy, by stipulating restraints upon one generation from preventing the future ones from experiencing democracy. “Precommitment is justified because it does not enslave but rather enfranchises future generations,” (216). Understanding that a future generation will incur the ‘political debt’ of the current, precommitments allow the future generations to actually participate and experience democracy, by preventing past and current generations from restraining the future ones. As Jon Elster echoes in his *paradox of democracy*, “Each generation wants to be free to bind its successors, while not being bound by its predecessors,” suggesting again this cross-generational reality in democracy (222). In addition, the current generation only has real access to participating in democracy if the previous was restrained in any attempts to limit the later ones. This is the shared relationship between generations, and the ability of a higher-law of precommitments to make Democracy even a possibility.

In addition, there is a difficulty regarding defining and isolating one generation from the next. One main complaint regarding precommitments is that a generation should have a right to decide democratically for itself. This begs the question, what do we mean by a generation? Holmes brings up a valid critique of the notion, as Jefferson stated, of an “idea of government by the living with an unrealistic image of discrete present generations,” (221). Is this idea of a single ruling generation even practical? Where does one generation begin, and the other end? “Precisely because generations overlap, the living has no right to repeal, at set intervals, the legacy of the past, (221). With such an interwoven reality of generational society, “closing the doors on our predecessor’s commitment is impractical, because the members of every new generation must coexist with survivors of the old,” (221).

“The American Constitution was an instrument of government, not an obstacle to government; it was not disabling, but enabling,” (215). This concept of precommitments enabling the possibility of

government is the most important argument in favor of Democracy posited by supporters such as Holmes. Constitutional precommitments are not merely to be seen as restricting, but rather restrictions that allow the flexibility of opportunity. Holmes relates this concept to the purpose of the rules of grammar, or the rules of a game. These rules do not create such rigidities that it becomes impossible to play a game or communicate, but rather create the possibilities of communicating and playing the game (227). One would find it terribly difficult, if not impossible, to communicate with someone else if two individuals decided their own grammar, or if one attempted to play a sport with another yet the two devised their own rules on how to play. In addition, grammar allows one generation to communicate with another. As these rules create the opportunity and flexibility to communicate and play games, so do limits create opportunity (227). By limiting himself to being tied to the mast, Ulysses enjoyed hearing the music, and by limiting ourselves to the Constitution of the Founders, generations are able to enjoy this concept of a nation and national unity (228). “They [the Framers] had a right to bind us minimally to prevent us from binding our successors maximally,” (226).

Having established this dependence of interwoven generations, the nature of responsibility and inherited political debt, and its ability to enable democracy, we will now examine examples of this enabling power within functions in the United States government. One such important function is the Separation of Powers. One must ask how dividing powers between an executive, legislature, and judiciary does not remove the democratic nature of a society through a single all-powerful legislative power. First, all three are easier to affect, allowing the public various avenues to lobby government for change, making participation and detailing of grievances more democratic. In addition, removing the power to execute law by those who draft the law prevents the dilemma of the legislature enacting laws that they themselves ignore. In addition, a Judiciary removed from the political tide of representative politics, is eligible to observe through reason the hierarchy of higher and lower law, with a focus of preserving the contractual laws that preserve rights and democratic discussion, as well as protecting the minority and future generations. Another prime example of a precommitment enabling Democracy is the First Amendment. “Democracy is government by public discussion, not simply the enforcement of the will of the majority,”

(233). With this understanding, the need to voice a minority opinion against a majority, and possibly receive a consensus that represents the People as a whole, is only possible with the ability to communicate freely. If a democratic majority was able to silence a minority and future generations, as seen within the German Republic of 1933, then this discourse essential to Democracy would be overridden, and lead to potential disaster. As such, a higher law, above the whimsical decision of the public, is needed to preserve this fundamental principle of communication, and thus democracy as a whole.

In conclusion, Holmes argued that all of these various constitutional precommitments enable democracy, and sought to prevent self enslavement: “a democracy choosing to destroy the framework in which nonviolent disagreement and conflict-resolution can occur would be acting suicidally,” (239). The evidence of a society as being a cross-generational creature, the necessity to play within the boundaries of higher rules (when one votes for the President, they do not first vote on how many presidents, or how to vote), the inheritance and responsibility of ‘political debt’, and the enabling factors of precommitment (such as Free Speech, preservation of the Minority and rights, and other such pro-Democracy principles), lead Holmes to conclude that constitutionalism is not incompatible with Democracy, but rather a pragmatic necessity to the preservation of Democracy from ruling itself out of existence (as seen in Greece and Germany).

In opposition of Holmes we find Waldron, who argues that precommitments are undemocratic. In approaching the potential hazards, and undemocratic nature of precommitments, Waldron conjures the scenario of the drunk driver. Within this argument, the action of the drunk driver offering his friend his car keys, as to prevent him from driving drunk is an example of precommitment. In it, Waldron points out two stages: the first, which he calls t_1 , is the precommitment of handing his keys to his friend, while the second, which he calls t_2 , is the friend not giving his keys back to the individual. This scenario is dependent on the external factor of the friend’s judgment. An example to this model of external judgment is that “such forms of constraint...do not operate rigidly, but instead leave some room for judgment.” (278). Some cases may arise where an individual must drive home intoxicated above a legal limit (such as Waldron’s example of needing to rush a child to the hospital after having hosted a cocktail party, etc.).

However, Waldron points the area of external judgment to be a challenge and a disadvantage to democratic principles. “The disadvantage is that they [the external force] then become capable of operating in ways that do not represent the intentions of the agent who instituted them at all,” (278). The conflict with external judgment is this: while a casual mechanism may accurately reflect an agent’s precommitment intent, “if Agent A has vested a power of decision in someone else, B, with room for the exercise of judgment by B, then one may wonder whether this is really an instance of autonomous precommitment by A,” (278). With the room of judgment to allow Agent B to go against the spirit of the precommitment, one is left to question whether a precommitment was truly established within the sovereignty of Agent A. In terms of a critique on judicial review, if the people established various Constitutional restraints, and gave away the power to interpret the infringement of these restraints by other branches to the Judiciary, then the issue of the restraint has been removed to the judgmental will of this judicial body.

In addition to the concern of external judgment, Waldron further objects to the problem of constitutional restraint and judicial review by an analysis of Supreme Court disagreements and the adaption of those very constitutional restraints. Where a restraint is placed through a difficult supermajority amendment process, the interpretation falls within the hands of a simple majority of 9 select individuals. In other words, where millions may decide the placement of a constitutional provision, a simple 5 individuals may determine its interpretation, and perhaps go against the spirit of the supermajority during the amendment’s creation (283). In addition, within a “constitutional case we are almost always dealing with a society whose members disagree in principle and in detail, even in their ‘calm’ or ‘lucid’ moments, about what rights they have, how those rights are to be conceived of, and what weight they are to be given in relation to other values,” (283-284). As such, constitutional restraints do not solve the issue of allowing the preservation of one group’s thought and opinion over another, as “a constitutional ‘precommitment’...is rather the artificially sustained ascendancy of one view in the polity over other views,” (284). Another area of disagreement is the comparison between a single individual precommitting themselves to something, and the aspect of millions doing so as a polity. The diversity of

politics and disagreement put into question the value of such tools as the drunk driver and Ulysses (287).

Waldron summarizes his argument against the Ulysses example and need for precommitments as follows: “because of these background issues of political structure, political procedure, and political culture remain the subject of ongoing, healthy, and benign disagreement, the panic-stricken model of Odyssean pre-commitment seems singularly inappropriate as a basis or template for constitutional theory,” (295).

Several complaints are made about such a constitutional system with various precommitments. One could argue that the need of supermajorities, the ability of a veto, bicameralism, separation of powers, and other precommitments are strictly against the spirit of democracy. How can one individual veto the will of the majority, while still maintaining a democracy? Surely it can be argued that the veto exists to quell the passion of the majority, but who quells the political passion of the one welding a veto? In addition, as argued by Waldron, Judicial review contains anti-democratic principles. In wishing to remove itself from the passions and opinions of people, review is placed in the Judiciary; however this judiciary still disagrees amongst itself, while still experiencing the differing of opinions that it sought to correct from the electorate. Perhaps a better example of a Democracy for Waldron would be the Greek Athenian model. Its judiciary system is more a product of its democracy: the Jury is the result of a complex choosing by lots of citizens to reside over the trial of citizens. In addition, the Athenian Assembly represented a direct form of democracy limited to citizens. However, its methods were not completely free of the precommitment restraints. Although both the Judicial, Executive, and Legislative powers rested within the citizens, they were still constrained by the restraint of past decisions (paranomon: the possibility of a fine for proposing something against a current law).

Having analyzed both approaches towards precommitments with Holmes and the positive argument on one side, and Waldron and the negative argument on the other, we are left with one more very important question: what is democracy. It is the opinion of this paper, in drafting a decision whether or not precommitments benefit democracies, that a democracy must first be defined and analyzed. It is also the opinion that two groups of democracy are present within Holmes and Waldron’s studies: those of democracy as the rule of the majority, and democracy as the rule of the People for the Common Good. If

Waldron accepts the initial definition, and Holmes the second, is this the possible reason for their initial disagreement? In addition, if one defines democracy differently, it surely would have an affect on deciding whether precommitments injure their brand of democracy. If both of them are using different definitions of democracy, then perhaps both can be correct within their given definitions. If democracy is the rule of the majority, then surely precommitments such as judicial review, or a veto, or a supermajority blatantly defy that brand of plain democracy to rule as such. In that scenario, Waldron would be correct. However if Democracy is something beyond majority rule, such as the rule of the people not only immediately, but as dictated by a cross-generational contract and responsibility, and the rule for the common good of not only the current mix of generations, but those yet to be born, then Waldron's vacant solutions do not approach the defined goal of democracy. On one side, Waldron's critiques embrace his definition of democracy, while on the other side, Holmes arguments of practicality and generational responsibility embrace his. If I were forced to pick of the two, in asking which definition of democracy best represents the rule of the people, and thus produces the best argument for or against precommitments, I would pick Holmes. If Democracy is to be defined as the rule of the people, then the greater democracy would be that which includes the greatest amount of people. A society which only white males can vote, versus one with universal suffrage, provides a good example of which of the two are more democratic (the latter, because more of the 'people' are involved in the decisions of democratic rule and their governing). As such, Holmes' definition of Democracy is arguably better than Waldron's, as precommitments in his argument preserve the possibility for the greatest participation of the people: the future, current and past generations. In Waldron's sample, we only address the democratic rule of those in power, without providing any real answers against the rule of passion besides further critiques, while in Holmes the concept of Democracy is expanded to preserve the ability for the future to act democratically. For this reason of expanding the potentiality of Democracy, I must agree that Holmes' notion of Democracy is most democratic, and as such, his arguments that precommitments preserve the extensiveness of this democratic aim, are most beneficial to the very idea and maximization of democracy, thus supporting the claim that precommitments enable Democracy.

Works Cited

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