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Constitutions and Democracy

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1 Introduction

When the Berlin Wall fell in 1989, followed by the collapse of the Soviet Union in 1991, the former communist dictatorships were anxious to adopt Western institutions as a mechanism for achieving Western freedom and prosperity. Popular opinion, both in those newly-freed nations and in the nations they were trying to emulate, was that democracy was the key to freedom and prosperity, and political reforms moved along at a much more rapid pace than economic reforms. A minor theme of this paper is that economic reforms, not political reforms, are the key to prosperity (although not freedom). Another minor theme of this paper is that the key to both political and economic freedom is a system of constitutionally protected rights, not democracy. Democracy, unchecked, is as much a threat to freedom as dictatorship. The major purpose of this paper is to discuss the role of democracy in a system of constitutional law, and to show how democracy threatens rights and freedom, using the case of the United States to illustrate the point.

2 Law, Politics, and Prosperity

At the beginning of the 21st century, Western democracies are the most prosperous nations in the world, but this does not necessarily imply that democracy causes prosperity. Indeed, the literature examining the issue suggests that the protection of private property rights, the existence of market institutions, low taxes and government regulation, and a free and stable monetary system are the key elements that produce prosperity (Gwartney and Lawson 1997; Keefer and Knack 1997; Landes 1998). When these factors are taken into account, Barro (1996) and Gwartney, Lawson, and Holcombe (1999) find that democratic political institutions have, if anything, a negative effect on the performance

of an economy.¹ Democratic institutions allow citizens to participate in the political process and engage in rent-seeking, as Tullock (1967) and Kreuger (1974) have noted, which, following Mancur Olson's (1982) thesis, weakens a nation and precipitates its decline.

Government action is, at its foundation, based on coercion. As Yeager (1985) persuasively argues, no matter how much people like or approve of their government, government offers people no choice but to obey its laws, pay its taxes, and follow its regulations. Dictators can use the power of government to divert resources away from a nation's citizens for the private benefit of the dictator², but so can citizen coalitions in a democracy. Thus, as Buchanan (1975) and Usher (1992) argue, to protect the rights of its citizens, government must have enough power to protect its citizens from the predatory actions of other citizens, but not so much that government itself becomes a predator.

The classical liberal answer to this problem, Hayek (1973, 1976, 1979) explains, is to design a government based on rule of law. Under rule of law, government acts according to well-defined rules that apply equally to everyone. As Holcombe (1994) argues, under such a system, those in government have the incentive to protect the rights of their citizens, because those citizens are the source of government revenue. Through taxation, government forces citizens to finance its activities, which means that its citizens are the source of its revenue and its prosperity. Thus, policy makers have an incentive to protect the rights of the citizens, because by doing so, they are protecting their own source of revenue.

When government is seen in this way, the fundamental activity of all government is an exchange of protection for tribute. Government revenue comes from the productivity of its taxpayers, so any government that does not protect the productive capacity of its source of revenue must be very short-sighted. Citizens want protection, and have an incentive to pay tribute to the government because this is how the production of protective services is financed. Both citizens and government have an incentive to participate in, and perpetuate, this exchange of protection for tribute. This is why governments can be stable institutions.

Viewing public finance in this way is more consistent with standard economic principles than the traditional public goods view that government altruistically produces public goods because otherwise they would be underprovided by the market.³ When national defense is

¹ Casual observation provides some cases to support the empirical findings that democracy does not ensure prosperity. Russia, which is much more democratic than China, is not growing as fast, and authoritarian capitalist nations like Singapore (Lingle 1996) have had substantial economic growth, while democratic nations with policies that inhibit market institutions like India (Kreuger 1974) have had poorly-performing economies.

² However, see Levi (1988) who argues that if dictators have a sufficiently long time horizon, their interests are congruent with the general public interest.

³ See Holcombe (1997) for an elaboration of the ideas in this paragraph.

viewed instead as an exchange of protection for tribute, one can see that all parties have an incentive to participate for their own self-interests, rather than arguing altruistic behavior on the part of public policy makers. Similarly, constitutional constraints on government power give citizens the assurance that if they accumulate wealth, the government will not confiscate it. As the private sector grows wealthier, the tax base grows, making the public sector wealthier too. Those in government have an incentive to place credible constraints on their behavior to enhance the resources at their disposal. Seen in this way, constitutional constraints on government power not only benefit citizens of a nation, but also benefit those in government, because such constraints enhance the resource base available for taxation.

When one recognizes that government receives its income from the productivity of its citizens, it becomes apparent that the interests of government and the interests of its citizens are congruent, and that constitutional constraints on government powers and rule of law, where everyone is treated equally, benefit everyone. Of course, a single thief in a law-abiding society stands to gain much from plunder, but if everyone were a thief, a lawless society would be bad for everyone. The same applies to government. Seen as monolithic entities, government is better off with constitutional constraints and rule of law, and citizens are better off with the same institutional arrangements. But just as a single citizen could benefit from lawless behavior unless the appropriate sanctions and enforcement mechanisms are applied, so too can individual actors in government benefit from opportunistic plundering of resources. The opportunities are even greater in government than in the private sector because government has the power to take resources from private citizens by force.

In designing government institutions, one must design them so that there are constitutional limits on government's own predatory behavior, in order to keep some from trying to use the institutions of government to take resources from others. In this respect, democracy has the serious flaw that it allows a group of people to form a majority coalition that can exploit those not in the coalition. A majority can prey on the minority. For democratic institutions to work successfully, constitutional constraints must be designed that limit the powers of the majority to engage in political predation.

3 Democratic Politics

Democratic politics has the tendency to become predatory because a majority can always vote to transfer resources from others to them. Regardless of what political actions others take, individuals benefit from forming coalitions that vote transfers to themselves and lose from not being coalition members, because everybody pays for the benefits

that go only to coalition members. Even if individuals believe that they would be better off if the majority coalition loses, most issues are not going to pass or fail by one vote, so voters realize that their vote is unlikely to be decisive. But while the individual's vote will not determine whether the coalition succeeds, it will determine whether that individual is in the coalition or not. Thus, every individual has the incentive to join with predatory coalitions whenever the opportunity arises. Unfettered democracy gives all individuals an incentive to pursue predatory politics, creating interest groups that use the political process in order to get government to produce concentrated benefits for them, at the expense of the general public.⁴ As Olson (1982) explained, unconstrained democracy produces interest groups that abuse political power for their own advantage, setting the stage for the decline of a nation.

Constitutionally constrained government that protects individual rights and treats everyone equally under a rule of law benefits everyone when compared to the rent-seeking losses encouraged by democracy. Unconstrained democracy allows citizens to form coalitions that use the force of government to transfer resources to them, and predation becomes an alternative to production. Rule of law provides the incentives to create institutions that maximize productivity and wealth. Rule of law prevents people from using political power for their own benefit, at the expense of other citizens. Democracy undermines rule of law, because it allows people to form coalitions and use political power to benefit some at the expense of others.

4 The Role of Democracy

Despite the problems that arise with unchecked democracy, democracy still has two important and related roles to play. The first is to act as a check on the power of those who hold government power. The second is to provide a mechanism for replacing people in positions of authority in a peaceful and orderly manner. Democratic political institutions require the support of others to take action. Democracy, by its nature, is a collective decision-making institution that prevents single individuals from making decisions for the group.

The second function of democracy is to provide an orderly succession of power. Through an electoral process, those who are given positions of power in government can be removed by democratic procedures. As Downs (1957) described, democracy sets up a competition whereby challengers can routinely vie for public office by offering to

⁴ Weingast, Shepsle, and Johnsen (1981), Holcombe (1985), and Usher (1992) are examples in a large literature explaining this idea. Not everyone agrees with this assessment. Wittman (1989), for example, gives strong arguments in favor of the idea that democratic decision-making is as efficient as market allocation of resources.

satisfy the demands of voters. Even if the incumbents are adequate, challengers can run on the basis that they can do better. Thus, there can be an orderly succession of power in a democracy, and governments can be replaced without conflict. Despite the problems inherent in democratic decision-making, democratic institutions have a vital role to play in constitutionally limited government.

One can see the theoretical advantages of constitutionally constrained government and the establishment of rule of law, and one can also see the theoretical problems with democracy as a collective decision-making device. The clear implication is that citizens should prefer governments that make public policy decisions within a framework of strict constitutional constraints, and that public policy should not be determined by the will of the majority. At the same time, there is an important role for democracy to play in constitutionally limited government. However, unless the role of democratic decision-making is itself constrained, democratic government has the tendency to evolve into predatory government. The challenge is to use democratic decision-making in areas where it can constrain the power of government without creating a democracy where some people can use the political system to prey on others.

The United States is often cited as an example of the advantages of democratic government. Thus, the United States Constitution can be used as a case study to illustrate the importance of constitutional constraints on democratic government. This analysis shows that the American Founders intended for democracy to be used as a method of constraining the power of those in government, and that it was not intended as a method for making public policy decisions conform with the will of a majority of the electorate.

5 Democracy's Role in the U.S. Constitution

The United States Constitution was written to create a government that protected the rights of individuals, and gave the government limited and enumerated powers. The government was designed to have three branches of government, each undertaking a subset of the government's activities, that would check and balance each other. For such a system to offer effective checks and balances, each branch of government would have to be roughly equal in power to the others, and following this line of reasoning, American government was not designed to be democratic, but rather to insulate governmental actions from democratic pressures. The judicial branch, headed by the Supreme Court, is staffed by individuals appointed by the president and confirmed by Congress, with no direct input from ordinary citizens at all. The legislative branch is composed of two chambers, the House and the Senate, and the original Constitution provided for House members

to be chosen democratically, but for Senators to be chosen by state legislatures, and again, insulated from democratic pressures. Similarly, the President, as head of the executive branch, was originally chosen by an Electoral College, with the final determination made by the House of Representatives if the Electoral College did not reach consensus, so the selection of the President was also designed to be non-democratic.

Separation of powers means that no branch of government can act independently, without the cooperation of the others. Legislation is passed by the legislative branch of government, but it is up to the executive branch to carry out that legislation, and if it is challenged, the judicial branch may rule on its constitutionality. Similarly, the executive branch may not act unilaterally, but is only empowered to undertake those activities approved by the legislature. Again, action in apparent violation of this principle may be challenged in the courts. The judicial branch has no power to act unilaterally either, as it may only rule on cases that are brought to it. As a check on government power, the separation of powers was designed so that one branch of government can only take action with the approval of the others. As discussed below, the system does not always work this way, but the point is that the Founders did not intend for public policy to be made democratically. They intended for it to be made following a clearly-defined and very limited constitutional framework.

With checks and balances, the idea was that each branch would be vigilant in making sure that the other branches do not exceed their constitutionally mandated limits, regardless of popular opinion. Merely influencing the legislature would be inadequate without the support of the executive and judicial branches. Over a period of two centuries, constitutionally limited government gave way to democratic government in the United States. While there were many factors at work in this transformation, they all point back to the very limited democratic institutions the Founders originally put into place, which evolved over more than a century into a fully democratic government. Thus, when looking to the U.S. case, it is important to see how limited a role the American Founders really intended for democracy.

6 The Bicameral Legislature

The American Founders adopted a bicameral legislature to limit the power of the legislature to pass laws that were not congruent with the interests of the states or the people. The American Founders admired the way the division of powers had evolved in Britain so that the House of Commons, the House of Lords, and the Crown checked the powers of each other, and along those lines deliberately designed a bicameral

legislature to represent different interests.⁵ The members of the House of Representatives were elected by popular voting, so they would represent the interests of the people, while the members of the Senate were selected by their state legislatures, so they could be expected to represent the interests of their state governments. Thus, for legislation to pass, it had to meet with the approval of both the representatives of the people and the representatives of the states.

From the beginning, many critics of American government viewed it to be insufficiently democratic,⁶ and by the end of the 19th century popular opinion strongly favored increased democratic control of government as a method of counteracting concentrated power. People believed that a more active government was needed both to control the economic power of the relative handful of Americans who controlled concentrated wealth, and more generally to look out for the economic well-being of its citizens. This constituted a dramatic change in the way that Americans viewed their government. Originally, government was viewed as the protector of individual rights and the guardian of liberty. The idea that government should also look out for people's economic well-being, which became increasingly popular at the end of the 19th century, signified a substantial change in ideology.⁷

This change in ideology, which favored a larger role for government, was directly related to a demand for more democratic government, because political decision-makers are likely to be responsive to the economic well-being of those to whom they are accountable. This popular sentiment for an expansion in the role of government began with the Populist movement around the 1880s, which was primarily agricultural interests who believed that big capitalists (largely, railroad barons) were using their economic power to exploit smaller interests, and especially farmers. It continued with the Progressive movement, which included more urban interests, including small business people and journalists. The Progressive era in the United States is commonly dated from around 1900 until the beginning of World War I, although Progressive ideas began building strength prior to that time, and survived well beyond that time.⁸

Because a part of these movements for expanded government was based on having government act in the interest of the general population, there was a demand for increased popular control of government, through an extension of democracy. One of the most visible manifes-

⁵ See Bailyn (1992) for a discussion of British influence on the American Founders. Buchanan and Tullock (1962) discuss the theoretical advantages of a bicameral legislature.

⁶ See McDonald (1994), and in particular his discussion of Andrew Jackson, president from 1829 to 1837, who promoted greater democratic representation as a method of controlling the power of political elites.

⁷ Higgs (1987) insightfully documents this shift in American ideology that began at the end of the 19th century.

⁸ See McMath (1993) and Bates (1976), and for the idea that Progressivism extended well beyond World War I, Blum (1980).

tations of this demand was the Populist and Progressive support for direct election of U.S. Senators.⁹ The Constitution originally provided for Senators to be selected by state legislators, but this meant that Senators were accountable to their state governments, not to the people. This was changed when the 17th Amendment to the Constitution was ratified in 1913, mandating that Senators be chosen by popular vote, which was the same way that Representatives had always been chosen. This change had two major effects. First, it reduced the constraint on legislation imposed by a bicameral legislature. Second, it made the legislature completely accountable to the democratic demands of the electorate.

As Buchanan and Tullock (1962) note, a bicameral legislature places additional constraints on the type of legislation that can be passed, without proportionally raising the collective decision-making costs. Rather than just having one group approve of legislation by majority rule, a bicameral legislature requires that the same test be met by two different groups. In the case of the U.S. Congress prior to 1913, legislation had to meet with the approval of both the representatives of the people, in the House of Representatives, and the representatives of the state governments, in the Senate, in order to become law. One can easily envision proposals that would be favored by the people, but not by their state governments, or that would be favored by state governments but not by their citizens, so could pass one house but not the other. Thus, without using a decision rule more inclusive than majority rule, legislation under the original constitutional regime had to meet a much more stringent test than simply the approval of a majority to become law. After the passage of the 17th amendment, the House and Senate were both elected directly by the voters, so they represented the same interests. Thus, legislation only had to be approved by the representatives of the voters, albeit in two different settings, weakening the constraint on passing legislation.

This is in keeping with the more democratic ideology of the 20th century (when compared to the 19th). The popular view of government had evolved from the idea that government's role was to protect its citizens' rights and liberties to the idea that government's role was to further the will of the majority. The increased democratic control, through the direct election of Senators, came along with the increasingly democratic ideology – the idea that government actions should conform with the will of the majority. Thus, the bicameral legislature had evolved from a device to constrain legislation and keep it within its constitutionally-defined limits into an organization designed to implement the will of the majority. A significant step in this evolution was making the legislature completely accountable to the voters by the passage of the 17th amendment.

⁹ For a discussion and analysis of the 17th amendment, see Kenny and Rush (1990) and Holcombe and Lacombe (1998).

7 The Electoral College

The U.S. Constitution says that the president is to be selected by an Electoral College made up of Electors from each state. As originally specified in the Constitution, Electors vote for two candidates, at least one of which could not be from the elector's state. Electors cast their votes in their states and submit the votes to the House of Representatives. If a majority of Electors voted for a candidate, that candidate would be the president. Otherwise, the House of Representatives would choose the president from among the top five vote-getters. The Founders believed that most Electors would tend to vote for someone from their state, so that many people would receive electoral votes, reducing the likelihood that any one candidate would get a majority. Furthermore, Electors were to meet in their states to cast their votes, rather than meeting in a central location. Surely, if Congress could convene in Washington, the Electors could too, if the Founders believed that would be important. Yet the Constitution specifies that they do not, again as a way of preventing them from meeting face-to-face and perhaps negotiating to give some candidate an electoral majority. The Founders believed that they had designed the system so that typically, no candidate would get a majority of the votes, so the House would select the president from the top five candidates from the Electoral College.¹⁰

The Constitution has never specified how states choose their Electors. The method of selecting presidential Electors has always been, and remains, up to the states to determine. Originally, the most common method for selecting presidential electors was to have the state legislature select them.¹¹ The current method of selection, in which a state gives all of its electoral votes to the candidate who gets the most votes in a popular election, is called general ticket voting. In 1792 there were 15 states, and 10 states had their state legislatures select their presidential electors while only three used general ticket elections. In 1800, when Thomas Jefferson was elected to his first term, there were 16 states, 10 of which had their legislatures choose their electors and only one of which used general ticket elections. While it has always been up to the states to determine their own methods of selecting presidential electors, general ticket elections rapidly became the choice of the states. In 1824, 12 of 24 states used general ticket elections, in 1828, 18 of 24 states chose their Electors by general ticket, and by 1832, every state but South Carolina used general ticket elections. South Carolinians did not vote directly for their Electors until after the War Between the States.

¹⁰ The system was modified slightly by the 2nd amendment, but those modifications do not affect the arguments given in this paper.

¹¹ See Martis (1982) for data on the selection of Electors, and Ketcham (1984) for a more general discussion of the election of the nation's earliest presidents.

The way the Founders envisioned the presidential election process, states would select Electors who would be knowledgeable about presidential candidates, and these experts would forward their choices to the House of Representatives. In effect, the Electoral College would act like a search committee made up of experts, who would forward their top choices to the House of Representatives. Because of the way in which electoral voting took place, the Founders believed that in most cases, no candidate would get a majority of Electoral votes, so typically, the House would choose the president from among the top candidates forwarded by the Electoral College.

In fact, the system never worked as it was intended. Every president received an electoral majority until 1824, when Andrew Jackson got the greatest number of electoral votes, but not a majority. The House of Representatives chose John Quincy Adams as president, following the procedure specified in the Constitution, but there was widespread outrage that the House passed over Jackson. At that point it was clear that democratic election had replaced the electoral college system the Founders had designed. If the Founders had intended for Congress to choose the candidate with the highest number of electoral votes, the Constitution would have said so, but the original intent was to allow the House to choose among the leading candidates. By 1824, the original intent was irrelevant. The nation had already had well over a third of a century's experience in which the candidate with the most electoral votes became president, and also, by that time, most Electors were chosen by democratic election. Although it was not intended to be that way, the process of selecting the president had evolved from being insulated from democratic decision-making by the Electoral College into a process of direct democratic election.

8 The Creation of American Democracy

The Founders wanted to design a government that insulated public policy and governmental decision-making from democratic forces. The House of Representatives was democratically elected to give the people a check on the powers of government, but the Senate was chosen by the state governments, the president was to be selected by an Electoral College, and the Supreme Court was to be appointed by the president for life terms. The Founders wanted a constitutionally constrained government in which the branches of government would police each other to maintain constitutionally constrained limits. They did not want their government to be accountable to the electorate, but the forces of democracy expanded so that, by democratically electing the president and moving to direct election of Senators, the government now is directly accountable to the voters. Constitutionally limited government has been displaced by democracy.

The increased role of democracy in choosing political leaders is some evidence that democracy is displacing constitutional rules as a determinant of public policy, but the actual institutional change is much broader than just the difference in how political leadership is determined. Because the more democratic process for selecting political leadership makes politicians more accountable to the majority, politicians are more likely to try to enact policies that further the will of the majority.

The displacement of constitutionally limited government by democracy is especially interesting in the U.S. case, because of the explicit constitutional limits on the government's authority. Higgs (1987) describes the expansion of government power during World War I, and Holcombe (1996) notes that this expansion continued in the 1920s, solidifying the role of government as a protector of people's welfare. The impact of FDR's New Deal in expanding the role of government is well-known. While many New Deal programs might be cited as significant, the social security program stands out because similar programs had been proposed and declared unconstitutional by the Supreme Court in the past. But in 1937 the Court ruled, in three separate decisions handed down on the same day, that social security was constitutional, signifying a major change in the way that the Court viewed the role of government. The U.S. Constitution explicitly states that the federal government has only those powers that are enumerated in the Constitution, and it is difficult for a reader to find any specific provision allowing the government to run a compulsory retirement program. Once social security was declared constitutional, that effectively eliminated any constitutional bounds to the scope of federal government action.¹² Following that precedent, one might argue that the New Deal completely replaced constitutional limits on government action with public policy determined by the will of the majority. If most people want it, then government can do it, regardless of the Constitution.

The degree to which individual rights are protected at the beginning of the 21st century is increasingly a function of the will of the majority rather than constitutional guarantees. People's actions are restricted through increasing regulation, an increasingly large share of national income is transferred through government redistribution programs, and government restrictions on the way people can use their property. Despite a political system largely governed by rule of law and protection of individual rights, all rights are up for grabs if the majority

¹² Whether the social security program is desirable is completely beside the point. The Constitution has provisions for amendment, so there is a straightforward procedure that could have been followed to amend the Constitution to allow for a social security program. Indeed, this was done in 1913 when the 16th Amendment was passed, allowing the federal government the power to levy income taxes. The fact that no constitutional amendment was needed to implement social security is evidence that the constitutional limitations on the scope of government had seriously eroded in the years between 1913 and 1937.

wants them to be. As Olson (1982) argued, movement in this direction is what causes the decline of nations.

9 Constitutions Versus Democracy

The United States is often cited as the primary model for proponents of democracy, yet this brief review of American constitutional history shows that the American Founders went to great lengths to design a government that was insulated from the pressures of democratic politics. They wanted to employ democracy as a tool to systematically evaluate and replace top government officials, and as a check on the power of government leaders. At the same time, they wanted to create a government whose actions were governed by rule of law, and were shielded from the pressures of the majority. In short, the United States government was not created to be democratic; rather, it was created to prevent democratic decision-making. One might cite two centuries of successful American democracy, but that would be a misreading of the history. In fact, the United States has had two centuries of constitutionally limited government, with a minimal but growing role for democracy.

Democratic decision-making leads to rent-seeking behavior, as some people try to use the political process to transfer resources from others to themselves. It encourages the formation of political interest groups who try to generate wealth through political transfers rather than productive activity, which both hinders the productive capacity of an economy and threatens the rights of those who own resources. Majorities have the potential to be more oppressive than dictators. With a dictator, at least there is a single head of state, and political decisions to enhance the dictator's well-being must also take into account the well-being of citizens, because citizens are the source of the government's wealth.¹³ In a democracy, even though everyone would be better off if the government did not allow predatory politics, every individual has the incentive to use the political system to try to capture private benefits at the public expense. Thus, constitutional constraints on the power of any government are essential, but they are even more important in a democratic setting, because democracy allows everybody access to the predatory powers of government.

The United States has successfully managed to have a constitutionally limited democracy for more than two centuries, creating the

¹³ Two caveats are needed. First, in a politically unstable situation, a dictator may try to plunder as much wealth from the nation as possible while he still has power. Second, dictators do rely on others for support, and might have to satisfy them too, for example by providing benefits to the military. Thus, the statement in the text applies to a single government decision-maker with a long time horizon.

illusion that constitutionally constrained government and democracy are complementary political institutions. However, there is an inherent tension between them, and democracy poses a significant threat to constitutionally limited government. The threat is exacerbated because people erroneously attribute the successes that have been produced by constitutionally limited government to democracy. Thus, those in constitutionally limited democracies push to further erode constitutional limits on government and to extend the scope of democratic decision-making, threatening the very institutions that have made their governments successful, while those in transitioning political systems place too much emphasis on the importance of establishing democratic political institutions and insufficient emphasis on the importance of establishing constitutional limits on governmental power.

10 Politics and Law

Politics and law are two different things. While nobody would disagree with that statement, when made explicitly, politics has increasingly displaced law as a method of determining how people interact with their governments. Rule of law has been displaced by majority rule. The conventional wisdom at the beginning of the 21st century is that public policy should be determined by popular sentiment and the will of the majority, rather than being based on rule of law and adhering to constitutional constraints on government action. Thus, it is important to make the distinction between politics and law, and to emphasize that freedom and prosperity are the result of law, not democracy. Schumpeter (1950) was worried that democracy could vote itself out of existence, but a far more serious threat is that democracy will replace constitutional constraints in the legal system. Democracy may act as a check on the power of those in government, to keep them from limiting the freedom of citizens, but when public policy is determined by majority rule, democracy works against the rule of law.

Rule of law means that people can count on government to act in a certain way, and that laws are transparent and well-known to everyone. In sharp contrast, democracy means that government action is determined by the will of the majority, so laws and rights are what the majority decides they will be. In this setting, individual rights are insecure because they can be amended by democratic means. Individuals cannot count on government acting in a particular way, because public policy is always subject to change, depending upon popular opinion. Democratic decision-making is incompatible with the rule of law.

Nations must have some institutional structure for making political decisions, and democracy provides a good foundation because it keeps power from becoming concentrated and because it provides a ready method of replacing those in power. Problems arise when politics

– whether in a democracy or any other political system – expands its role to displace the legal system. The same problems that so obviously can occur when a dictator uses his political power to replace rule of law with arbitrary policy can also occur when majorities have the power to displace rule of law with popular opinion. Democracy can play a supporting role in the maintenance of constitutional rules, but politics is not law, and unconstrained democratic politics is a potential threat to the constitutional order.

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Résumé

Cet article étudie le rôle des démocraties dans un système constitutionnel et montre comment la démocratie menace les droits et libertés des individus. L'exemple des Etats-Unis illustre l'argument. L'article montre également que les réformes économiques, et non politiques, sont la clé de la prospérité (mais pas nécessairement de la liberté); ce n'est pas la démocratie mais un système dans lequel les droits sont protégés constitutionnellement qui assure la liberté politique et la liberté économique. La démocratie, si elle n'est pas contrôlée, est aussi dangereuse qu'une dictature.

Abstract

The purpose of this paper is to discuss the role of democracy in a system of constitutional law, and to show how democracy threatens rights and freedom, using the case of the United States to illustrate the point. There are some minor and correlated themes : first, economic reforms, not political reforms, are the key to prosperity (although not freedom); second, the key to both political and economic freedom is a system of constitutionally protected rights, not democracy. Democracy, unchecked, is as much a threat to freedom as dictatorship.

Mots clé

constitutions, démocratie, liberté, règle de droit.

Key words

constitutions, democracy, freedom, rule of law.

Classification JEL : D72, H11.