

Thick and thin constitutionalism

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A simple majority is enough to pass ordinary laws. In the case of fundamental laws, however, a good deal more is needed. Laws of this kind cannot be enacted or repealed with less than a supermajority, a referendum, multiple decisions, or the like.

This difference between ordinary and fundamental law raises the question of what is constitutionally privileged, and why. As the adherents of *thin* constitutionalism see it, only a few basic provisions ought to enjoy such a status: e.g., the rules protecting free speech and association, or the procedures setting out how parliaments are elected and governments formed. Public faith in democracy is enhanced when voters are able to choose among a wide range of social and economic policies.

For the champions of *thick* constitutionalism, on the other hand, it is the purpose to which procedures are put that is the critical thing. If legislation can be changed with a simple majority, they warn us, it tends to assume too short-term a character. In certain crucial respects, therefore, the content of policy should be privileged too.

The project has two aims. Empirically, the object is to ascertain the degree to which existing systems of government in fact conform to the precepts of thin or thick constitutionalism, and to consider

how differences may be explained. Normatively, the purpose is to take a stand on the merits of the various arguments. For both purposes, the project will make use of existing literature and available data bases.

I have derived these two research questions from my previous work on the European Union, where I have analysed the concepts of ‘accountability avoidance’ (Gustavsson 2009) and ‘transnational constitutionalism’ (Gustavsson 2010). This work has persuaded me that we confront a universal problem here. The issue we face in Europe is by no means unique. On the contrary, it is a specific instance of a general problem: how to strike a balance, when basic values are being constitutionalised, between procedure and substance.

Procedure only, or procedure and substance?

The underlying normative problem is whether a constitution ought to be procedural, impartial, and content-neutral; or whether instead it should incorporate a certain policy content, and favour certain substantive values over others. A constitution of the latter kind privileges not just certain procedures, but certain policies as well. In political terms, such a constitution is not neutral with respect to social, economic, and cultural cleavages.

Political scientists in the great tradition of Robert Dahl, Norberto Bobbio, and Giovanni Sartori have been strong proponents of thin constitutionalism. They have championed substantive neutrality, among other things on the grounds that an impartial openness to a variety of options enhances the prospects for democracy’s survival. This is a result, they contend, of the fact that a thin constitution

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leaves little room for ‘opposition of principle’ (Kirchheimer 1957: 134 ff). If we want opposition to take a legitimate form, we should avoid a constitution “that takes it upon itself to establish policies ... preempts the popular will and tramples upon the policy-making bodies ... to which the policy decisions are constitutionally entrusted” (Sartori 1997: 200).

Three forms of thick constitutionalism

During the last twenty years, however, the alternative view – that not just procedure but substance too should enjoy constitutional privilege – has taken centre stage in the debate. The movement from thin to thick constitutionalism has mainly taken three forms:

- Many scholars have focused upon the irreversible delegation of critical powers to central banks and other regulatory agencies (Thatcher & Stone Sweet 2002; Lohmann 2006; Moran 2006; Gilardi 2008).
- Others have stressed the drive for an irreversible delegation of powers to the European suprapstate (Scharpf 1999, 2009; Alter 2001, 2009; Bartolini 2005; Majone 2005, 2009).
- Still others have emphasized the global spread of judicial review and judge-made law through constitutional courts (Tate & Vallinder 1995, Holmström 1998; Ginsburg 2003, 2008; Hirschl 2004, 2008; Hilbrink 2007; Ginsburg & Moustafa 2008; Woods & Hilbrink 2009). To a considerable and increasing extent, these courts adjudicate whether universalized human rights and professional norms of proportionality – as opposed to the policies promulgated by parliaments – are being observed.

My research idea is to characterize, explain, and criticize this overall tendency towards thick constitutionalism, seen in relation to the precepts of thin constitutionalism. As far as I can see from the outset, I have two tasks ahead of me. One is to ascertain why thicker constitutions are actually preferred to thin ones. The other is to identify and evaluate the best available arguments for taking that normative position.

Self-restraint, insurance or hegemonic preservation?

In practice, this will entail an elucidation and critique of all three of these research literatures (all of them interesting and intellectually rich) from recent years.

When push comes to shove, I will have to take a stand on whether the constitutionalisation of policy substance is better explained and defended through an ideational analysis; or whether, instead, it is a strategic argument that furnishes the better solution to the problem. With regard to the former, the central concept will be ‘self-restraint’ (Waldron 1999, 2006; Shapiro 2002; Bellamy 2007; Bartolini 2008; Dworkin 2009). With regard to the latter explanation and motivation, the most interesting notions will be ‘hegemonic preservation’ and ‘political insurance’ (Thatcher & Stone Sweet 2002; Ginsburg 2008; Gilardi 2008; Hirschl 2008, 2009; Ginsburg & Moustafa 2008; Woods & Hilbrink 2009).

My guiding supposition will be that the arguments made when explaining and justifying the overall tendency towards thick constitutionalism – the irreversible delegation of powers to technocratic organs, the irreversible European pooling of sovereignty, and the irreversible spread of judge-made law based on universalized

human rights and professional norms – all have something in common.

What is it that constitutes the common core of all these afraid-of-the-people (Möllers 2007) positions, seen in relation to the thin constitutionalism championed by Dahl, Bobbio, and Sartori? And what accounts for the conviction of the constitutional minimalists that, provided the electorate assumes full responsibility for the entirety of social development, its maturity will grow in accordance with the task it has conquered for itself? The purpose of the project is to answer these questions.

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