

United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” This provision too is animated by an underlying principle, or perhaps two principles. First, the people are the ultimate source of political powers; government does not have inherent powers of its own, but only those delegated to it in the Constitution. This is the principle of popular sovereignty. Second, the Tenth Amendment indicates that the limitations on the power of the government of the United States derive from the fact that people have reserved some powers to themselves; that is, they have not delegated the full sum of power, and, moreover, they have delegated power to two levels of government —the government of the Union and the governments of the states. Finally, we might notice the care with which the branches of the federal government are granted power. There is an enumeration of the powers of each branch, indicating that each branch has limitations on its powers imposed by the Constitution.

It is striking, then, that modern constitutionalism, the kind of constitutionalism we now take for granted, was so late in coming; it was roughly two thousand years from Plato to seventeenth-century England and eighteenth-century America. Why did it take so long for this now almost self-evident idea to appear? No doubt a full answer to that question would have to be a very long one, but one aspect of an answer stands out: the idea of constitutionalism is a truly daring one, perhaps even an insane one. As we said, constitutionalism represents the attempt to set limits on government—on what it can do, how it can act, and who can act. But is it safe or sensible to set such limits, especially to set such limits as legally binding norms? The political world is a tough one—as the saying goes: “politics ain’t bean bag.” The common good may at times require actions of the sorts meant to be limited in one of the various ways we have mentioned. Often constitutionalism is the attempt to limit the actions of the executive branch, as the most dangerous agency of government, the one in control of the organized force of the community. But the executive is also the agency of government most able to act quickly, decisively, and effectively in the face of new threats and dangers. Does it, therefore, make sense to limit the executive? Moreover, almost any substantive limitation one can have might at some times need to be violated in order for the community to successfully confront dangers. For example, we constitutionally reject coerced confessions, but might there not be occasions when coercing a prisoner might be necessary? There are well-known hypothetical cases often raised in this context: Let us say that a captured terrorist knows where a nuclear device is hidden, a device which is scheduled to explode within twenty-four hours. Given that millions might die if the bomb does explode, would it not be acceptable, or even desirable and morally obligatory, for the FBI to deploy coercion (i.e., torture) to extract the information, if there appears to be no other way to get it? And so on. It is relatively easy to think of examples where limitations of the sort constitutionalism attempts to implement are potentially disarming and therefore very dangerous for the community that adopts them. It is easy to understand why modern constitutionalism was slow to appear. Nonetheless, it had a sparkling future.

We have now provided a preliminary answer to our question “What should constitutions do?” Constitutions should limit and channel power and at the same time should somehow permit and foster those actions required to achieve the common good, actions that are sometimes quite different from what ordinary times require.

There are those who say that the aspiration to constitutionalism as sketched above is impossible to fulfill. Historically, perhaps the most famous such person is Thomas Hobbes, who made a dual case