
Constitutionalism and Dictatorship

Pinochet, the Junta, and
the 1980 Constitution

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Chapter One

Dictatorship, Legality, and Institutional Constraints

The opposition between constitutionalism and dictatorship pervades the contemporary social sciences and reflects a long-standing theoretical conception of absolute power. This chapter explores the theoretical dimensions of the relationship between institutional constraints and dictatorship. After noting the prevalence of conceptions that view authoritarian power as unlimited, I explore at length the many aspects of the standard argument against autocratic self-limitation. To do this, I set out a conception of institutional limits, discuss the theory of sovereignty as an explanation of why rulers bearing absolute power cannot limit themselves, caution against conceptual confusions that might suggest facile – though inadequate – responses to the traditional theory, and conclude by presenting an account of the conditions under which institutional constraints might be effectively introduced under an authoritarian regime.

Dictatorship and Unbound Power

Since the beginning of the twentieth century the opposition of democracy and dictatorship has increasingly dominated political discourse on forms of government. In contrast to earlier classifications which elaborated variations on the classical trichotomy of monarchy, aristocracy, and democracy, the contemporary discussion of political regimes is largely exhausted in the dualism of dictatorship and democracy. Although scholars use a range of terms to refer to authoritarian regimes and have elaborated a number of subtypes, the principal criterion for differentiating dictatorship and democracy is the manner whereby laws binding upon a territory's inhabitants are created: In dictatorships laws are imposed from above, whereas through the mediation of elections and representation, laws emerge in democra-

cies from among the very citizens who are subject to them. This distinction between heteronomous and autonomous modes of creating and modifying legal systems, whose clearest formulation is Kelsen's (1945) general theory of the state as a legal system, dominates comparative political approaches to regimes: In most cases authoritarian regimes are defined negatively in terms of their nondemocratic character.¹

Yet notwithstanding the prevalence of this dichotomous classification based on how individuals attain public office and the authority to govern and make law, analyses and definitions of dictatorship tend to stress how power is wielded. In practice, the initial distinction is displaced toward a classification organized around whether power holders are constrained by legal-institutional restraints. This shift is clearly seen in the numerous and varied definitions of dictatorship which characterize autocratic rule as the exercise of state power without restraint. Franz Neumann (1957, 233), for example, defines dictatorship as "the rule of a person or a group of persons who arrogate to themselves and monopolize power in the state, exercising it without restraint." Similarly, in the *International Encyclopedia of Social Science*, dictatorship appears as "the unrestricted domination of the state by an individual, a clique, or a small group" (Stammer 1968, 161). Ernst Fraenkel (1969, xiii), in turn, writing during World War II about Nazi Germany, refers to the "prerogative state," which he describes as a "governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees."

The notion that dictatorial power is absolute and unconstrained by institutions is not specific to presumably dated theories tied to the heyday of the totalitarian framework. The subsequent reappraisal among historians of Hitler and Stalin's omnipotence, the development

¹ These are the criteria used by Linz (1975) in his typology of nondemocratic regimes, as well as in the guidelines for classifying regimes recently elaborated in Przeworski et al. 2000. I am aware that by interchangeably using such terms as authoritarianism, autocracy, and dictatorship, I obscure important conceptual distinctions. For example, in Linz's typology, authoritarianism is not the genus but a subtype developed in contrast to totalitarianism and also distinguished from other subtypes of nondemocratic rule, such as "post-totalitarianism" and "sultanism" (Linz and Stepan 1996). Similarly, Kelsen's opposition is with autocracy, not dictatorship. The former is broader and technically more accurate than the everyday language of dictatorship, which from a historical perspective is a misuse of the term. On this point, see Bobbio 1989, 158–60. On the classical Roman dictatorship which gives rise to this problem, see Rossiter 1948, chap. 2; Friedrich 1950, chap. 13.

of more elaborate typologies of nondemocratic rule, and the invention of the category of bureaucratic authoritarianism in Latin America during the 1970s left untouched this conception of authoritarian power as legally unlimited.

The shift away from analyzing the course of Nazi Germany and the Soviet Union under Stalin in terms of the intentions of a single personage has not affected how scholars view power in the two regimes. The question of whether the policy of these dictatorships should be viewed as the implementation of the deliberate dictatorial will of a single individual or as the cumulative product of ad hoc, chaotic rivalries and antagonisms among individual power blocs has sparked considerable controversy among historians, particularly those studying Nazi Germany.² Hans Mommsen, the chief advocate of qualifying Hitler's alleged omnipotence, explicitly links pluralism within the dictatorial power bloc with unlimited power. He argues that Hitler's aversion to institutional restrictions on his power gave rise to increasingly informal modes of decision making, progressive fragmentation of the political system, and ongoing internal rivalries that ultimately prevented any political rationality and led to the self-destruction of the state. These plural power bases within the Nazi state did not alter the unconstrained character of power, but allowed for the "unbridled arbitrary rule of each man for himself among the Nazi elite (Mommsen 1976, 195)."³ Though not necessarily monolithic, even for so-called "revisionist" historians dictatorial power remains absolute.

A similar point can be made with regard to the influential distinction between authoritarian and totalitarian regimes that Juan Linz developed as a way of understanding Franquist Spain (1970; 1975). This distinction emphasizes differences in the forms that nondemocratic rule assumes, not a difference in the character of power in authoritarian and totalitarian regimes. The essential difference Linz noted was the absence in authoritarian regimes of attempts to wholly dominate society by mobilizing social actors through proregime organizations and by suppressing all independent forms of association. The absence of the totalitarian combination of strong ideology, a single party, and mass mobilization through the party's auxiliary organizations made possible the "limited social pluralism" that Linz identified as constitutive of authoritarianism and the key to the dynamics of this

² For an initial formulation of the terms of the German discussion, see Mason 1981. More recent contributions can be found in Childers and Caplan 1993, and Mommsen 1997.

³ For a similar perspective, see Kershaw 1997.

regime type. Notwithstanding these differences, power in both regime types remains formally unlimited. Referring generally to nondemocratic regimes, Linz (1975, 183) notes that they tend to impose their domination through law but leave “the interpretation of those laws to the rulers themselves, rather than to independent objective bodies, and apply[ing] them with a wide range of discretion.” Whether totalitarian or authoritarian, authoritarian power is institutionally unlimited.

This same conception is found in writings on the “new” or “bureaucratic” authoritarianism and transitions to democracy in Latin America. Although some scholars insisted that labeling military regimes “fascist” was incorrect, beyond stressing the exclusionary character of military rule, the research on authoritarianism in Latin America during the 1960s and 1970s did not repose the nature of autocratic power. Rather, scholars were concerned primarily with a critique of modernization theory (O’Donnell 1973) and the economic determinants of authoritarianism (Collier 1979). When political features were touched upon (Cardoso 1979), it was to underscore the distinctiveness of both the military forces in power – the armed forces ruling as “an institution” instead of a single *caudillo* (dictator) – and their project – to retain power and rule directly rather than intervene to oust and replace an unacceptable president, as in the “moderator model” analyzed by Stepan (1971). Once attention shifted toward the conditions for transition to democracy, the legally unconstrained character of authoritarian military power came to the fore as scholars stressed the uncertainty inherent in moments of regime liberalization and transition (O’Donnell and Schmitter 1986). Without institutions capable of holding them to their promises, authoritarian power holders, as long as they retained political capability, could at any moment reverse prior commitments to respect rights or proceed to elections, a specter which rendered uncertain the course of all such situations. This uncertainty discovered in transitions is constitutive of autocratic power. In Przeworski’s (1988, 60) words, “a particular regime would be authoritarian if there existed some power apparatus capable of overturning the outcomes of the institutionalized political process.” Authoritarian power, regardless of its specific form, stands above the law.⁴

⁴ In his recent work on the rule of law, Guillermo O’Donnell (1999, 334) restates this traditional view: “The distinctive mark of all kinds of authoritarian rule, even those that are highly institutionalized and legally formalized (a *Rechtsstaat*, in the original sense of the term), have somebody (a king, a junta, a party committee, or what not) that is sovereign in the classic sense: if and when they deem it necessary, they can decide without legal constraint.”

We find further evidence of this conception of authoritarian power as discretionary and subject only to the will of those who bear power in the self-conception of authoritarian power holders themselves. Whether they attain absolute power through a violent rupture with the standing constitutional order or through a legally continuous transmutation of democracy into dictatorship by suppressing party competition or representative institutions, dictators typically justify their discretionary hold on power as an imperative imposed by the immediate concrete situation – subversion, insurrection, severe unrest, economic crisis, natural disaster, or any other extreme crisis. Before such states of affairs, they argue, absolute power is justified because normal rules and institutions are too cumbersome or have broken down and inaction threatens to undermine state and national security. This type of argument was prominent among the commanders of Latin American military regimes who portrayed Left-inspired popular mobilization as subversion and a form of irregular war (Perelli 1990). In these cases, action, the concrete goal, the measure, as unilaterally defined by those in command of the state, takes precedence over any and all legal, institutional, or procedural norms in force, even those enacted by the authoritarian regime itself.⁵

From this perspective, dictatorial power is essentially extranormative and instrumentally rational. The authority to decide what action to take derives not from a prior legal order but from the present fact of the actual possession of state power. In Carl Schmitt's (1985b, 13) words, "authority proves that to produce the law it need not be based on law." Or, as the popular formulation contends, authoritarianism is the rule of men, not law.

This understanding of dictatorship explains why scholars focus scant attention upon legal and constitutional institutions under authoritarian regimes. When they are discussed, these phenomena are portrayed as instruments of rule or as rituals that are enacted to place a veneer of legitimacy upon regimes which also operate arbitrarily by secretly committing egregious acts beyond the law.⁶ In neither case

⁵ The most acute presentation of this view is given by the controversial German legal theorist Carl Schmitt (1985a, 1985b). As he notes (1985b, 13), "The exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about. . . . There exists no norm applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists."

⁶ See, for example, Loewenstein 1951; Sartori 1962; Bonime-Blanc 1987; Shain and Linz 1995, 11–14; and Smith 1996.

do these practices limit the machinery of the state and contain its activity within preestablished legal and constitutional bounds. We can classify these types of authoritarian constitutionalism using categories drawn from Karl Loewenstein's typology of constitutions (1951, 203–6).⁷ In contrast to “normative” constitutions which guarantee rights and structure a frame for democratic competition and government, Loewenstein distinguishes “nominal” and “semantic” constitutions. A nominal constitution on paper upholds the values of democracy and limited government, but despite its legal validity is not effective and is a constitution in name only. A semantic constitution, on the other hand, is fully activated and holds, but merely formalizes the existing locus and exercise of power which presumably neither guarantees rights nor is democratic. By these terms, authoritarian constitutions are either nominal or semantic: They are ineffectual facades or else only codify authoritarian power arrangements. In both cases these constitutions are of dubious force. Thus, in the standard view autocratic constitutions are such in name only: They are not a source of institutional arrangements that effectively bind authoritarian power holders to act within the confines of preestablished procedural and substantive rules. In Loewenstein's words, the absence of effective constitutions in authoritarian contexts is structural: “Autocracy cannot operate under a constitution and, therefore, as a rule dispenses with one. It cannot countenance, and would not endure restriction in the exercise of power, because the formalization of authority is inconsistent with its dynamism (1946, 114).” As a consequence, nominal or semantic constitutions stand or fall with the regimes that enact them.⁸ Constitutionalism and the rule of law represent practices to be instituted or restored upon the demise of nondemocratic regimes, but not phenomena that warrant close attention in authoritarian contexts.⁹

⁷ These categories are further discussed in Sartori 1962.

⁸ With the exception of the Chilean constitution of 1980, this has been the norm in Latin America. According to one study (Complak 1989, 69) of “de facto governments” in Latin America during the period 1930–1980, in eight cases the de facto government derogated the prior constitution and instituted a constitution of its own making. In all of these cases these constitutions were in force only as long as the authoritarian government remained in power. The wave of constitution making that followed the collapse of state socialism also appears to confirm this point. On these processes, see Elster, Offe, and Preuss 1998.

⁹ This perspective is extremely common. For examples, see Sartori 1962 and Bonime-Blanc 1987, as well as most writings on law in the Soviet Union or Nazi Germany, such as Berman 1966; Fraenkel 1969; Linz 1975; or Beirne 1990.

Sovereignty, Self-Binding, and Limits

Despite the ubiquity of the view that autocratic power is absolute and unlimited in practice, does the fact of absolute power imply that autocrats cannot under any circumstances bind their own power with institutions? Is a form of constitutionalism other than the merely nominal or semantic wholly incompatible with concentrated power, or can autocrats institute limits that restrict their discretion and in some sense subject them to rules and institutions?

A long tradition, whose origins can be traced to Jean Bodin and Thomas Hobbes's theories of sovereignty, denies that institutional restraints are compatible with absolute power. Recently, following a substantively identical argument, the same conclusion is reached in new institutionalist and rational choice analyses of self-binding, precommitment, and credible commitment. As part of a larger concern with institutions and economic development, these studies ask whether autocrats – be they the kings of France and England during the seventeenth century or reform-oriented leaders of centrally planned economies – can credibly promise to not interfere with property rights, and by so acting sustain incentives for private investment.¹⁰ Like Bodin and Hobbes on the feasibility of subjecting political sovereigns to law, these theorists answer in the negative: Autocrats cannot self-limit their powers because they cannot free themselves of the very discretion that defines their power as absolute and allows them to overrule institutional constraints as expedient.¹¹ Not only then do autocrats in practice stand above law and institutions; it cannot be otherwise: Absolute power is constitutive of autocracy and, paradoxically, omnipotence reaches its limit at that point where autocrats might attempt to limit this power.

Although I accept the structure of the problem as posed by Bodin, Hobbes, and, more recently, new institutionalist writers, there are alternative solutions under which institutions that limit power at the

¹⁰ See, in particular, North and Weingast 1989 and North 1990, 1991, 1993. Litwack (1991) addresses the problem in reference to market reform in Soviet-type economies. Root (1994) presents a historical comparison of France and England.

¹¹ Thus, Olson (1993, 571) writes that dictators cannot credibly promise not to confiscate wealth “because autocratic power by definition implies that there cannot be any judges or other sources of power in the society that the autocrat cannot overrule.” Similarly, Elster (1989, 199), argues that the Chinese Communist Party cannot assure legal certainty to economic agents because “It has many sorts of power, *but not the power to make itself powerless*” (italics in original).

apex of an authoritarian regime can be sustained while the regime remains nondemocratic. Under specific conditions, which I will argue concern the composition of the authoritarian power bloc, autocratic regimes can effectively self-limit their powers. Though we will have to ask what such limits protect, effective constraints can be compatible with nondemocratic rule. Before I can suggest how self-binding is possible in an authoritarian context, some conceptual groundwork must be laid. This is necessary to specify the problem of autocratic institutional self-limitation and to avoid theoretical confusions that lead some scholars to dissolve the problem or accept false solutions. To this end, I will seek to detach the idea of institutional constraint or limit from its association with constitutionalism and some versions of the rule of law; introduce the concept of sovereignty; and distinguish between institutional limits and other forms of constraint, as well as between the rule of law and rule by law. Autocratic self-binding through institutions is independent of other types of constraints and rule by law, and this independence must be acknowledged to clarify the structure of the tension between institutional limits and autocracy. Once these contours are in relief, we can examine conditions under which autocratic self-binding may occur.

The Nature of Institutional Limits

To avoid short-circuiting from the outset the study of authoritarian self-limitation, it is important to detach the notion of institutional limit or constraint from broader understandings of constitutionalism. As criteria for limits on power, both rights-based and republican conceptions of constitutionalism are stringent enough to foreclose consideration of legal constraints outside of liberal or democratic contexts. If “constitutional” is meaningful only in reference to a fundamental law and a corresponding institutional framework that effectively guarantees and protects individual rights (Sartori 1962), its use as a standard of limit would disqualify most autocracies from study and obscure the possibility that institutional limits may protect the rights and interests of only a subset of actors without ceasing to be effective. Similarly, if we associate limits with a republican understanding of constitutions in which the constitution stands as a higher law created by a people to structure and protect a democratic framework of government, we also reach a stalemate. The criteria of popular origin would exclude authoritarian constitutions for having been made and imposed unilaterally from above, as would the requirement that they structure a

government framework that allows the governed to be the ultimate source of all political authority.¹² Either approach to constitutionalism ends up reiterating by definition the original antinomy between limits and authoritarianism.

This impasse can be avoided by detaching the concept of institutional limit from the ends associated with constitutionalism. Such limits, according to Charles Howard McIlwain (1947, 21), are the “one essential quality” that traverses the history of constitutionalism. Regardless of differences in emphasis, all variants of constitutionalism conceive of constitutions as a higher law that establishes and makes effective legal limits on state actors. Written constitutions structure and arrange the powers of the state, specify restrictively the functions that correspond to each authority, and create negative powers that enable incumbents to block attempts by other state authorities to exceed the authority conferred upon them by the constitution. As a set of higher order enabling rules, the constitution sets limits upon the procedures and scope of power and sets in operation institutions that uphold these limits.

For present purposes the variety of specific mechanisms that constitutions establish to divide and limit power is of less interest than the general structure and effects of institutional or legal limits.¹³ First, institutional limits are contingent upon the existence of rules that provide standards with which to qualify the validity of acts committed by different state authorities. That is, they depend upon rules that stipulate how and in what areas specific officials or powers may properly act. Examples are rules that guarantee rights that cannot be contravened by ordinary legislation or executive acts, as well as rules that restrictively confer specific powers. These rules thus provide legal criteria with which to identify and criticize departures from legitimate authority as positively set by these same rules.

Second, these limits are upheld by state authorities who among their powers hold authority to actively control authorities regulated by law. In these instances, whether it be a higher court exercising judicial review, a body reviewing the legality of executive orders, or a legislature sitting in judgment of a state official in an impeachment proceeding, the controlling power exercises a negative power. It does not take

¹² For a typology of how constitutions are made, see Elster 1997. Arato (1995) evaluates the legitimacy of these different forms.

¹³ On the variety of constitutional forms and mechanisms, see Vile 1967; Casper 1989; van Caenegem 1995; Elster 2000, chap. 2.

positive action; instead, by exercising its control power it blocks an action of another body, holding it to its powers authorized by standing legal/constitutional law.¹⁴

Third, the exercise of negative powers implies that state powers are divided: For one branch to check another, powers must be distinct. In fact, institutional limits, in the form of checks and balances, were incorporated to pure theories of the separation of powers to provide mechanisms to effectively uphold a division of powers and enjoy the virtues associated with a separation of powers. In this context, institutional limits complement broader institutional arrangements that limit power by diffusing authority and preventing any single actor or branch of government from controlling all of the machinery of the state and wielding it at its whim. Thus, for example, a separation of legislative and executive powers may constrain an executive from acting arbitrarily by restricting it to the execution of laws made by another body. Such a separation of powers, though, may not imply limited government, as the legislature may remain free from any rules that constrain the areas in which it can legislate. Furthermore, a pure separation of powers in which each branch, staffed by different persons, exclusively exercises a separate function of government, though it may divide powers, lacks institutional mechanisms with which to restrain an agency or actor that exercises its power improperly and encroaches upon the function of another branch (Vile 1967, 18–19). Nevertheless, although a separation of powers does not necessarily involve institutional limits as I am discussing them here, the operation of institutional constraints does require that powers be divided so that one authority may check another.¹⁵

Fourth, by blocking improper exercises of authority or encroachments upon the powers of others, institutional limits defend antecedent decisions (Sejersted 1988, 142). In these instances the controlling body upholds the previously enacted rules which delimit the form and range of powers held by each authority. Institutional limits thus produce a subordination of present power to rules, that is, to prior decisions. Under most constitutions, this prior decision – the constitution itself – and the web of limits that it defines not only trumps legislation through mechanisms of constitutional review but also includes rules that make

¹⁴ The distinction between positive and negative power is developed by Sejersted (1988). Hart (1961, 64–69) presents a similar conception of legal limits.

¹⁵ This division, though, will not involve a pure separation of powers. On this point, see Vile 1967, 18–19; and Manin 1994.

it difficult to subsequently modify the constitution. These barriers to facile change include stipulation that the constitution either be amended by a body other than the ordinary legislature or by the latter following a special, more demanding procedure. In very abstract terms, this logic of holding present action to a past decision is the essence of what we may call constitutionalist rule of law: Laws rule instead of men because state officials can exercise no authority other than that conferred by the law/constitution and regular legislative majorities cannot mold past decisions to suit present purposes.

In general terms, then, an institutional limit implies a legal standard, a mechanism of enforcement, a division among the authorities subject to the standard and those who uphold it, with the result that actors are constrained by prior decisions in the form of rules. It is precisely in this general sense that institutional limits have traditionally been held to be incompatible with autocratic power. Although they were not formulated with regard to dictatorships, Thomas Hobbes's and Jean Bodin's accounts of the logic of sovereignty explain why absolute power cannot be subject to rules, and insofar as the structure of power in dictatorships resembles absolutism their theories set the terms of the puzzle that we must address. Furthermore, as already mentioned, these formulations anticipate the arguments of contemporary analyses of credible commitment.

Sovereignty and Absolute Power

Sovereignty is the power that comprises the attributes of an ultimate deciding agent – be it a person or a body of persons – entitled to make rules and settle controversies with some degree of finality at the apex of a legal hierarchy (King 1987, 492). Though for both Hobbes (1991, chap. 18) and Bodin (1992, bk. 1, chap. 10) this supreme power encompasses the authority to: establish rules that are generally binding; declare war and make peace; settle controversies and enforce the rules; and choose the principal officers of the state, the key faculty is the power to make and repeal law, and the sovereign is that person or group of persons who holds this power.¹⁶ The two principal charac-

¹⁶ Bodin (1992, 58) states that the power to legislate comprehends all of the other marks of sovereignty. The same general argument appears throughout Hobbes's *Leviathan*. Both, however, maintain that legislative power may be held indirectly if an actor other than the agent who directly legislates can freely select the legislator. In these instances, the actor exercising full powers of selection is sovereign, as it can replace the legislator at will and thereby indirectly mold the law.

teristics of sovereignty which lead these theorists to maintain that sovereignty cannot be limited by legal institutions concern the location of this power and its finality.

With regard to location, sovereignty refers to the highest power in a legal system and should not be conflated with an entire legal order. The concept of sovereignty involves a principle of hierarchy whereby the validity of any law or authority derives from a superior law or authority. In other words, a legal system may contain multiple levels at which state officials make decisions and enact rules, but their acts are valid only because a higher rule or authority has granted such powers to these officials. In this regard, sovereignty is wholly compatible with limits that hold lower officials to rules at subordinate levels of a legal-political system. However, for both Hobbes and Bodin, the finality inherent to sovereignty makes any legal limitation of the apex of the legal hierarchy structurally impossible: If we trace powers and authorities up the legal hierarchy, we reach a point where the decision-making system closes in a final authority beyond which there can be no appeal. Whereas some legal scholars (Kelsen 1945; Hart 1961) contend that this final decider may consist of a set of rules, Hobbes rejects this possibility and insists that final authority can only reside in some person or group of persons. For Hobbes contends that to be effective rules must be interpreted, and if a purported sovereign is bound by a law, then a higher authority must stand who interprets and enforces the binding rule; should even this authority be in turn bound, the same requirement reiterates, until ultimately, by regress, we arrive at a final interpreter who stands above rules and is sovereign (Hampton 1986, 98–105; Hobbes 1991, 224). As Hobbes and Bodin repeatedly insist, if a purported sovereign authority is limited we have misidentified the sovereign; elsewhere an unbound power must stand. The decisions of this supreme authority, the sovereign, are final in the sense that no subordinate authority can (or is authorized to) override it. Sovereign power is therefore supreme because, although it may repeal or overrule any other rule or authority within the hierarchy, it cannot be reversed by any of them (Hart 1961, 102–4; King 1987, 493; Goldsmith 1996, 278).

Consequently, freedom from any subjection to limiting institutions is not essentially a matter of the will of a particular power holder but a structural characteristic of any supreme body or person that stands as the highest power in a particular legal hierarchy. If this agent is truly supreme and not subordinate, no higher mechanism of enforcement can exist to hold it to a prior limit; and even if the sovereign authority

attempts to circumscribe its power through the creation of an institutional limit, any self-imposed legal restriction cannot be effectively binding. Its efficacy can only be contingent, conditioned by the acquiescence of the sovereign who at all points retains the power to decide and make law at will and consequently to reverse a prior decision and suppress any legal checks if deemed expedient.¹⁷ As Hobbes (1991, 184) explicitly states, “For having the power to make, and repeal Law, he [the bearer of sovereignty] may when he please, free himself from that subjection, by repealing those laws that trouble him.”¹⁸ Institutional limits may be effective at subordinate levels of government; however, should the organs exercising these controls rule in ways considered inappropriate by the highest legislative authority, this sovereign can override them by modifying the relevant legislation to preclude the irritating interpretation or, at the extreme, suppress the controlling body. Thus, sovereign power is absolute and by its very nature free from the constraint of institutional limits. The sovereign cannot be held to a prior decision because the sovereign always remains free to decide and to reverse her prior decisions.

Hobbes’s argument about absolute sovereignty is not intended to refer to only one among many forms of government. Hobbes contends that effective government always requires a final human decision maker because he discounts that a system of divided powers is viable in practice, viewing it as a formula for conflicts among powers and an eventual dissolution of the state. Contemporary political theorists, such as Gregory Kavka (1986, 165–68, 225–36) and Jean Hampton (1994, 38–42), have challenged this claim by arguing that systems in which the “final decider” is a set of rules that structure a division of limited powers can and have proven to be feasible. The details of these arguments are not pertinent here. Still, we should note that both theorists leave standing Hobbes’s argument as an account of autocratic regimes; both Kavka and Hampton premise constitutional systems of divided and limited government upon periodic democratic elections, and neither suggests that autocracies may be limited. Although modern dictatorships differ in important respects from the absolute monarchies

¹⁷ As mentioned, the contemporary literature on credible commitments restates this argument from a different theoretical perspective to argue that autocracies cannot effectively bind themselves.

¹⁸ The principle that a single party cannot bind itself is discussed at length by Holmes (1988, 210–12), who also considers the democratic variants developed by Pufendorf and Rousseau to deny that popular sovereignty may be limited.

that Hobbes describes,¹⁹ the concept of sovereignty appears to describe the structure of power in authoritarian regimes and to explain why such regimes cannot subject themselves to institutional limits.

Before suggesting conditions under which institutional limits can be compatible with dictatorship, it is necessary to distinguish institutional limits from other forms of constraint, as well as from rule by law. If we conflate the second term of either of these distinctions with institutional limits, authoritarian self-limitation might not appear to be problematic. However, such conceptual confusions only apparently undermine the force of the problem of sovereign reversibility.

Limits and Rule by Law. It is important not to confuse certain forms of rule of law with institutional limits because autocracies can be highly legalistic without being limited. In Hobbes's theory the irreconcilability of sovereignty and legal limits is a tension internal to the operation of a legal system; it persists even when authoritarian rulers do not rule arbitrarily in the sense of constantly ignoring or violating their own norms. Absolutism is not a function of the use of extralegal resources to hold onto power but a characteristic of unconstrained legislative power. Law is its currency, and the detection of highly institutionalized legal practices or of subordinate agencies and actors subject to institutional constraints and operating according to rules is not sufficient grounds to conclude that an authoritarian regime is limited. As we have seen, lower level constraints are allowed for in Hobbes's theory and other legal practices that might appear to imply limits are also compatible with unlimited power.

The legal theorist Joseph Raz (1979), for example, has argued that the properties associated with the rule of law are independent of whether the law-making body is limited or not. These properties include that: (1) laws be prospective, publicly promulgated, and clear; (2) laws be relatively stable; (3) the making of particular legal orders, such as administrative regulations, be subject to open, stable, clear, general rules; (4) laws be consistently applied by an independent judiciary; and (5) law enforcement agencies not pervert the law by applying it discretionarily. When a legal system satisfies these requirements,

¹⁹ In Hobbes's account the sovereign is a legitimate authority because her power has been authorized by a social contract. More generally, Neumann (1957, 234) notes that kings are held to possess a legitimate title to office – be it hereditary, elective, or arising of a social contract, whereas dictators do not.

actors subject to its terms can know what types of behavior are required of them, develop expectations, and act accordingly since they face a clear, predictable framework of rules. Rule of law, in this sense, “is designed to minimize the danger created by the law itself” (Raz 1979, 224); it seeks to avoid the types of uncertainty and unpredictability that subjects face when norms are ambiguous or unknown, inconsistently applied, or retroactively applicable. The doctrine does not specify any requirements regarding how laws are made or the purposes that they serve and is wholly compatible with systems in which lawmakers themselves are not subject to law. In the *Leviathan*, Hobbes himself expends considerable energy describing the nature of law in terms that conform with this sense of the rule of law.²⁰ This type of rule of law, which we may refer to as rule by law to avoid confusion with constitutionalist rule of law, can be in the interest of autocratic rulers insofar as it provides mechanisms to assure that central dictates are being correctly enforced. For example, a formally independent judiciary not only can allow a ruler to deflect resentment and avoid responsibility for imposing punishments, if accompanied by a system of appeals reaching the highest levels, it can also provide central authorities with an independent flow of information about how lower-level authorities are implementing the law, while also allowing it to use appellate decisions to impose desired interpretations of the law (Shapiro 1981, 53–56).

My insistence that unlimited power is compatible with rule by law is not meant to suggest that authoritarian regimes regularly rule in this manner but to underscore that the problem of institutional limits is independent of the rule of law understood in this sense. Autocracies are notorious for deviating from the requirements of rule of law. These deviations may concern characteristics of a regime’s legal and judicial system or involve practices that altogether disavow or violate even the regime’s own legal requirements.²¹ Generally capricious, arbitrary rule

²⁰ Hobbes 1991, chap. 26–28. In this legal organization of the state, law is publicly promulgated, prospective, general, applied by a public authority, and punishments not founded in such law or applied by agents without legal authority are described as “act[s] of hostility” (1991, 215). For an interpretation of Hobbes as a theorist of the rule of law, see Oakeshott 1983.

²¹ Examples of the former include: the doctrine of analogy, by which an individual may be punished for committing an act not expressly prohibited by law but “analogous” to one prohibited; the retroactive application of law; the trial of political opponents by special administrative boards or military courts that are not required to follow standard trial procedures; and the administrative detention of individuals, without any requirement that they have committed a criminal offense, as may be authorized by standing emer-

of this type nevertheless tends to be restricted to a relatively minor subclass of nondemocratic regimes (Chehabi and Linz 1998). As Fraenkel (1969) suggests in his study of Nazi legal practices, even highly repressive dictatorships are likely to take the form of a “dual state”: In specifically political realms, power holders may directly apply administrative sanctions or extrajudicial force upon political adversaries, while they allow the rule of law to operate in less conflictive areas, such as the market or the repression of moderate opponents. The tendency of dictatorships to operate legalistically has been emphasized by a number of studies of authoritarian and post-totalitarian regimes (Linz 1970, 268–69; Linz 1975, 287; Shain and Linz 1995, 10–16; Martínez-Lara 1996, chap. 1). Whether these practices conform with accepted standards of rule of law in each case needs to be assessed. Yet even when they do, rule by law should not be confused with institutionally limited power.²²

Noninstitutional Constraints and Sovereignty. Similarly, it is important not to conflate the argument that autocratic power is legally unbound with a claim that authoritarian power holders are free from all forms of constraint. The theory of sovereignty concerns freedom from rules, not the manner by which any number of material and political factors may frustrate the realization of regime objectives, restrict the range of feasible ends authoritarian rulers may pursue, lead autocrats to prudentially temper the exercise of their power, or even force upon them outcomes they never desired or anticipated. These constraints may include the finitude of resources and administrative capabilities; the presence of powerful external actors; the political dynamics of rivalries, factions, and power plays within a regime; the perceived

agency powers. Though the dividing line is hazy and permeable, examples of practices that are often arbitrary even in regard to a dictatorship's own law include: the seizure of property without legal justification; detentions effected without following judicial or administrative formalities that are unrecognized or denied by the state; extrajudicial executions; the assassination of political opponents; and the kidnapping and murder of persons, followed by the illegal interment or destruction of their remains.

²² Stable rule of law, though, is highly dependent upon limited government. As Fraenkel noted (1969, 56–57), the jurisdiction governed by law under the Nazi dictatorship always remained secondary to the “prerogative state,” as the ruling clique could at its discretion decide whether a case be adjudicated in accordance with law or be handled “politically.” Since these actors themselves are not subject to law, “the jurisdiction over jurisdiction rests with the Prerogative State.” This point suggests that, although compatible in principle with autocracy, stable rule by law in nondemocratic regimes is contingent upon a broader subjection of state actors to rules, such that jurisdictions are not permeable to discretionary, political manipulation.

need to hold together a diverse coalition of supporters; or the need to gain the cooperation of key economic actors. In all contexts, such extra-institutional constraints narrow a decision maker's feasible choice set and influence their actual political capacities. Theorists of sovereignty were not claiming that absolute rulers could act free from these types of constraints.²³

Any dictator, or for that matter, any ruler, who is strategic and concerned with effectively exercising and retaining power will be constrained in this sense by the need to pragmatically assess objectives and anticipate how decisions are likely to affect other officials, powers, and agents that may be capable of frustrating regime policy objectives, disrupting the government, or displacing the ruler from power (Tullock 1987, 115–16).

Such material and political constraints upon authoritarian power have been noted in studies of particular military regimes, and this type of constraint figures prominently in Linz's analyses of authoritarian as opposed to totalitarian regimes.²⁴ In Linz's works, the political as opposed to legal-institutional character of these constraints is indisputable. In his usage, "limits" generally refer to how the properties of authoritarian coalitions or originating contexts constrain regime elites from mobilizing or pursuing regime institutionalization along totalitarian lines. Thus, rulers are constrained from asserting forceful ideological commitments because an exclusive ideology would break the equilibrium among the diverse support groups which Linz associates with limited pluralism in authoritarian regimes; in turn, this lack of a strong ideology limits the capacity of the regime to mobilize mass support which, if effective and channeled through a single party, would also threaten components within the ruling coalition (Linz 1975, 268–70). In a similar manner, Linz (1973) emphasizes how the post-World War II disavowal of nondemocratic legitimacy formulas has constrained authoritarian regimes from attempting to institutionalize along the lines of single-party or corporatist forms of representation.

²³ On this point, see Hart 1961, 65. Perhaps in no instance was the gap between claims to state power and effective capacity greater than during the absolutist period. On the historical weaknesses of the absolutist state in Europe, see van Caenegem 1995, 78–88. On limits more generally during the early modern period, see the essays in Dunn 1990. Also see Bobbio 1989, 89–90.

²⁴ The manner whereby military presidents in Brazil were constrained by the interplay between hard-line and soft-line factions is stressed by a number of scholars (Stepan 1971, 248–66; Cardoso 1973, 168–72; Stepan 1988; and Skidmore 1989). Neuhauser (1996) examines political constraints upon economic policy implementation under successive military regimes in Ecuador.

These types of constraints, as well as those given by factionalism within the military, may be central to explaining the dynamics of particular authoritarian regimes, but they do not constitute institutional limits upon authoritarian power holders.

Most scholars who note these types of “limits” in authoritarian contexts usually are not addressing the problem of sovereignty. Still, it is important to draw out the difference between material and political constraints and institutional limits because references to the former may lead readers to erroneously think that limited authoritarianism is relatively unproblematic. The distinction is even more significant because some writers have confused the two types of constraints to argue that autocrats can in fact effectively bind themselves.

In an important essay, whose central thrust is to stress how relatively fixed rules enable democratic practices and thereby challenge the view that constitutions are constraints upon democracy, Stephen Holmes (1988), for example, fails to adequately distinguish these two forms of constraint and allows an autocrat who prudentially restrains the use of her powers before factual constraints to stand as refutation of the Bodin/Hobbes thesis that “a will can not be bound to itself.” At one point, he noticeably confuses institutional limits and political and material constraints to minimize the theoretical problem posed by Hobbes. He writes, “A constitution-maker can never be an unbound binder; any more than a sovereign can be an uncommanded commander.” Why is this so? Because, “To influence a situation, an actual power-wielder must adapt himself to preexistent patterns of force and unevenly distributed possibilities for change. The influencer must be influenced: that is a central axiom of any realistic theory of power” (1988, 222). In other words, sovereigns are limited by what I have called political and material constraints. In the same essay and elsewhere, Holmes discusses Bodin’s recommendation to sovereigns to desist from arbitrary rule, emphasizing how such restraint actually increases a king’s power because it permits him to mobilize cooperation and avoid antagonizing subjects who might destabilize his authority (1995, 109–20). In particular, he stresses Bodin’s exhortation that a commonwealth “should by laws, and not by the prince’s will and pleasure, be governed” (1962, 490, as cited in Holmes 1995, 114). However, as just discussed, rule by law does not dissolve absolute power, and all of the restrictions that Holmes discusses similarly leave the sovereign position of the ruler intact. Holmes seems to be aware of this problem, as he often notes that these limits are prudential and informal. Nevertheless, he (1995, 109, 111, 112, 118) repeatedly presents them in

terms of an opposition between “limited” and “unlimited” power or rule, suggesting that such constraint resolves the incompatibility posed by Hobbes, when in fact the forms of prudential self-restraint he refers to are limited only in reference to the sovereign’s freedom to rule capriciously, not her position as supreme authority within the legal system. Hence, although Holmes calls this self-binding, it is not clear why such “precommitment” should be construed as tying the hands of the ruler, as nothing constrains her from reversing prudential practices and commitments when expedient.

Neither to confuse institutional limits with the rule of law, nor to conflate them with constraints given by the strategic context of action, is to refute Hobbes’s claim that autocratic power cannot be bound by rules. An autocrat may have much to benefit from disabling her capacity to freely reverse herself and modify rules and laws at her discretion, but the benefits that may accrue from controlling discretion are no guarantee that an authoritarian regime can avail itself of a technology with which to both effectively free itself of the discretion that is intrinsic to sovereignty and remain in command. Without such an institutional mechanism capable of holding rulers to prior commitments and laws, the facility with which any autocracy can legislate always leaves open a potential for disjuncture between present decisions and earlier ones. These three dimensions – the insufficiency of perceived benefits, the problem of intertemporality, and the need for institutions – are central themes in the literature on commitment.

Precommitment and Credible Commitment

The literature on credible commitment is directly relevant to the problem of sovereignty and limits as it seeks to explain why and how an actor possessed of discretionary authority might seek to constrain her own future freedom of action.²⁵ This literature provides an extended discussion on why absolute power may not be in an actor’s interests over time and why institutional constraints may be beneficial. In its general form, the problem of credible commitment applies to both single individuals and interactions among multiple actors, including collective actors, such as the state: When an agent possesses discretion and may reverse herself at will, that actor may only be capable of

²⁵ The seminal formulation of the commitment problem with regard to political institutions is found in North and Weingast 1989. Other discussions are Weingast 1990; Shepsle 1991; North 1993.

inducing desired behaviors in herself or others if she can provide credible assurances that she will not depart from the course of behavior or policies foreseen as beneficial; to do so often involves the use of some device to disable the discretion that would allow a failure to follow through on a commitment.

In this manner, the literature on credible commitments points to the shortcomings of anticipated benefits as a foundation for behavior, the frailty of voluntary self-restraint, and the need for institutions to overcome the suboptimal consequences that free discretion may produce over time.²⁶ Though North and Weingast (1989) have suggested that seventeenth-century institutional change in Britain is an example of a ruler using institutions to credibly commit herself, a close reading of their argument suggests that the Glorious Revolution does not involve a sovereign bound by institutions of her own making. Before developing this point, two aspects of the credible commitment approach should be stressed.

First, benefits expected to accrue from a course of action are insufficient to make a commitment credible. Regardless of the gains anticipated from fulfilling promises or pledges, whenever the *ex ante* motivations for striking a bargain and the *ex post* reasons for executing it may differ, there is a commitment problem.²⁷ In such instances,

²⁶ The prisoner's dilemma that arises when two parties commit to an exchange yet institutions for enforcing contracts are not available is the classic example that has focused the attention of new institutionalist economists. In this case, both parties may recognize that they each would gain from trade and agree to a trade, but when the time comes to actually exchange goods neither party has an incentive to follow through, since neither can be assured that the other will not cheat him. In this situation the commitments involved in promising to exchange are not credible. Under certain conditions parties in such a context will find it worthwhile to cooperate: play is repeated indefinitely, parties possess information about other players' past behavior, and there are a limited number of players. Nevertheless, these conditions are too restrictive and unrealistic to explain impersonal exchange on a large scale, and much of the literature explores how institutions can provide assurances of cooperation that make possible gains from trade, producer specialization, and economies of scale. This is a major theme in North's work on institutions and economic development (1990, 1991, 1993). Milgrom, North, and Weingast (1990) and Greif, Milgrom, and Weingast (1994) explore different nonstate institutions which facilitated the development of impersonal trade over time and distance in early modern Europe.

²⁷ The possible sources for such changes in incentives over time are many. Among others, these include the effects of weakness of will, passions, and time inconsistency resulting from strategic interaction or hyperbolic discounting, among others – and have been studied extensively (Loewenstein and Elster 1992; Elster 2000). Any of these factors can cause an imperfectly rational actor to forgo actions which they had initially chosen as optimal in favor of alternatives that are best in an immediate time period but inconsistent with the actor's original preferred course of behavior over time.