

Against
Constitution-
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INTRODUCTION

What Is Constitutionalism?

CONFUSION about the meaning of constitutionalism derives from ambiguity about the very idea of a constitution. In modern understanding, a constitution is a consciously constructed artifact. A constitution is a document adopted in the name of the people that defines the powers of government, specifies the basic rights of citizens, and regulates the relationships between the established institutions of government and their citizens. By extension, constitutionalism expresses the conviction that the exercise of political power in that regime must be subject to the disciplinary constraints imposed by that special text.

This elementary point is not universally accepted. In a celebrated account, Charles Howard McIlwain maintains that constitutionalism long predates that modern meaning. It is fundamentally a “set of principles embodied in the institutions of a nation and neither external to these nor prior to them.”¹ The idea, therefore, does not derive from some formally adopted text; it is an expression of the rights and liberties that constitute the lifeblood of the political nation. In all its successive phases, McIlwain concludes, constitutionalism has only one essential quality: it imposes “a legal limitation on government” and in this respect it is “the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”²

It is not difficult to feel the force of McIlwain’s argument. The belief that constitutionalism rests on values that express the character of a people has long persisted. When Edward Corwin explained that the supremacy of the Constitution and “its claim to be worshipped” is founded on “the belief in a law superior to the will of human governors,” he was expressing the importance of this continuity of beliefs and values.³ And when Francis Wormuth argued that “the tradition of constitutionalism begins in ancient Athens and

has had a long, interrupted, and irregular history” that now finds its expression in the “auxiliary precautions” advocated by the framers of the American Constitution, he too was celebrating that continuous lineage.⁴ Yet these claims are not specifications of constitutionalism as such; they are elaborations of the values of constitutional government.

For constitutionalism to be accorded a clear meaning, it must be acknowledged as a purely modern concept. Constitutionalism did not exist before the idea that the basic terms of the governing relationship could be defined in a foundational document. Searching for the intellectual origins of constitutionalism, scholars commonly arrive at the pioneering mid-eighteenth-century work of Montesquieu. Again, this is an error. While extolling the values of constitutional government, Montesquieu believed that no universal solution to the tension between order and liberty could be found. Concluding that each regime must determine its own form of constitutional government, taking into account factors like climate, geography, economy, and political traditions, he maintained that the success of its constitution depended on the vibrancy of its political culture, or what he called “the spirit of the laws.”⁵ Montesquieu gives us a theory of relativity; constitutionalism, by contrast, is a universalist philosophy. The true foundational text of constitutionalism is James Madison, Alexander Hamilton, and John Jay’s *Federalist Papers*, published in 1787.

Constitutionalism, then, is a theory concerning the role, standing, appropriate institutional form, and telos of a purely modern invention: the documentary constitution. It maintains that the form of government established by the constitution rests its authority on two great pillars.

The first pillar is that of *representative government*. In *Federalist* 63, Madison explains that this principle requires “the total exclusion of the people in their collective capacity” from the business of governing and the delegation of that task to a small number of citizens elected by the rest. “The people” are acknowledged as the authors of the constitution and the ultimate source of governmental authority. But, as he notes in *Federalist* 10, in order to “refine and enlarge the public views,” the actual tasks of governing must be entrusted to a representative body “whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”

The second pillar requires the establishment of institutional mechanisms for limiting, dividing, and balancing the powers of government. This need for *institutional differentiation* is often presented as the doctrine of the separation of powers, a doctrine that Maurice Vile claims as “the most useful tool for the analysis of Western systems of government” and “the most effective embodiment of the spirit which lies behind those systems.”⁶

Although the institutional architecture of constitutionalism rests on these two crucial pillars, the concept of constitutionalism is not reducible to a specific institutional configuration. So we should not get hung up on the fact that in *Federalist* 51 Madison veers between advocating checks and balances on governmental powers and promoting a separation of powers. As Hamilton notes in *Federalist* 66, once the true purpose of institutional separation is appreciated, a “partial intermixture is . . . not only proper but necessary to the mutual defense of the several members of the government against each other.” Rather than reducing it to a doctrine concerning the institutional distribution of powers, constitutionalism is a theory that promotes a certain ethos of governing. The differentiation of functions and the imposition of checks and balances are both designed to constrain governmental power and maximize individual liberty.

If constitutionalism were conceived as a set of institutional safeguards to limit government, the criticism that it is an eighteenth-century theory reflecting the values of a bygone era would be compelling. After all, we no longer live in a world of limited government. Across the world and irrespective of the character of the regime, there is scarcely an area of civic life in which government’s reach is not felt. The challenges of limiting and directing government today are much more profound than those presented by a hereditary ruler exercising arbitrary power. And it is precisely because of the complexity of these challenges that constitutionalism has evolved and is now becoming so influential. Constitutionalism presents itself today as a method of advancing liberty in a world of total government.

What, then, is its basic template? The most rudimentary requirement of constitutionalism is that the exercise of political power is subjected to the discipline of a *text*. That text, the constitution, is drafted in the name of the people and designed to be *comprehensive*. It must contain the essential principles on which government is founded, the method by which it will be

organized, and the powers it will possess—in short, noted Thomas Paine, “everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound.”⁷ The scheme is not random: it aims to ensure that government sticks to its proper purposes and protects liberty. But the theory extends beyond these basic requirements in three important respects.

The first supplement is that the constitution is intended to establish a *permanent framework* of government. One remarkable attribute of constitutionalism is that, although it founds the constitution’s authority on the fact that “the people are the only legitimate fountain of power,” there are “insuperable objections against the proposed recurrence to the people.” Madison’s objection to such recourse, he explains in *Federalist* 49, is that the constitution would thereby be deprived of “that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.” Regular recourse to the people would only excite the passions and disturb the public peace. The constitution must therefore be established as a permanent framework because only then can “the reason, alone, of the public . . . control and regulate the government.”

But how exactly is the “public reason” that controls and regulates government to be discerned? The answer is provided by a second requirement: that the constitution takes effect as the *fundamental law* of the regime. This was the major innovation of the American settlement. It provided an institutional solution to the problem of how to render the exercise of the powers of rulers, including their powers to legislate, compliant with the principle of the rule of law. The remedy was to establish the constitution as a type of higher-order law and to entrust to the judiciary the responsibility of acting as its guardian.

No legislative act contrary to the constitution could be valid, it was claimed, because the latter, expressing the authentic will of the people, must take priority over the former. This is the logic of delegated authority. To deny this, Hamilton explained in *Federalist* 78, “would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves.” It therefore falls to the judiciary to police all governmental action to ensure its compliance with the constitution. To the objection that this assumes the superiority of the judiciary over the legislature, Hamilton answers that it merely supposes that “the power of the people is superior to both.” Unlike the other branches

of government, the judiciary possesses neither force nor will but only judgment and is disciplined by being “bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”

Hamilton’s arguments appear less compelling once placed alongside Madison’s point that the constitution must establish a permanent framework. Claiming the constitution as the authoritative expression of the will of the people might be convincing with respect to those citizens who consented, but what of the will of subsequent generations? If the judiciary is indeed to be bound by strict rules and precedents, then constitutionalism begins to look like what Paine called “the manuscript-assumed authority of the dead.”⁸ How can the “requisite stability” be maintained while at the same time accommodating social evolution?

The second remarkable feature of constitutionalism, then, is not just that it establishes the constitution as fundamental law: it also entrusts to the judiciary an altogether novel task. The judiciary, mandated to follow precedents according to common law and to adhere to strict rules of interpretation in compliance with legislative will, is now also invested with the authority to discern what public reason dictates. Liberty, declaims Hamilton in *Federalist* 78, “can have nothing to fear from the judiciary,” which, in asserting its constitutional jurisdiction, is established as “the citadel of the public justice and the public security.” Constitutionalism leads to the emergence of a new species of law, that of *constitutional legality*. By virtue of this innovation, the rule of law is converted from the rule of rules into the rule of reason.

The third additional requirement builds on these first two elements. Constitutionalism is commonly thought of as differentiating between governmental tasks in order to establish a system of “limited government” and therefore as a theory about the design of the office of government. But it harbors much grander ambitions. Devised in a world where public and private, state and society, were just emerging as distinct from each other, constitutionalism evolves as a theory that aspires ultimately to transcend those divisions. And in the course of that evolution, it presents itself as a theory not just to limit institutions of the state but also to regulate the entire society. Constitutionalism advances a conception of collective self-government that transforms the very idea of democracy. Democracy is no longer to be conceived as an expression of the collective *will* of a people; it is reconfigured as

an expression of the collective *identity* of a people and, critically, an identity that is permanently inscribed into the foundational principles of the constitution.⁹ According to the theory of constitutionalism, the constitution created by an exercise of democratic will comes to determine the very meaning of democracy within that regime.

In pursuit of this ambition, the constitution is converted from a political pact into a medium of societal self-organization. This shift, rarely articulated, has profound significance. It is most boldly expressed in Jed Rubenfeld's book *Freedom and Time*. Acknowledging the ambition underpinning the theory of constitutionalism, Rubenfeld maintains that democratic self-government can no longer be realized either "by way of a politics of popular voice" or "by declaring new constitutional rules perfectly congruent with our present collective will." This is because the constitution "continues to gather up generation upon generation of Americans into a single political subject" such that the people must now be conceived as the constitution's trustees. Freedom comes to be understood simply as adherence to the fundamental commitments expressed in the constitution as interpreted and memorialized over time. "We can achieve liberty," he concludes, "only by engaging ourselves in a project of self-government that spans time." In this manner, Rubenfeld claims to have solved the counter-majoritarian problem. His solution requires us to treat constitutionalism *as* democracy.¹⁰

Democracy, Karl Marx once suggested, "is the resolved mystery of all constitutions."¹¹ Rubenfeld now trumps this with the claim that constitutionalism is the resolved mystery of all democracies. His argument most surely captures the world-historical significance of constitutionalism but, as I aim to show, it does so at the cost of eviscerating the modern idea of democracy.

These elements can now be drawn together to give a more precise specification of the concept. Closely associated with the emergence of modern documentary constitutions, constitutionalism identifies the model characteristics of, and ideal aspirations behind, the adoption of a constitution. The constitution, it is suggested, (1) establishes a comprehensive scheme of government, founded (2) on the principle of representative government and (3) on the need to divide, channel, and constrain governmental powers for the purpose of safeguarding individual liberty. That constitution is also envisaged (4) as creating a permanent governing framework that (5) is conceived as establishing a system of fundamental law supervised by a judiciary charged

with elaborating the requirements of public reason, so that (6) the constitution is able to assume its true status as the authoritative expression of the regime's collective political identity.

Constitutionalism or Constitutional Government?

Constitutionalism is a discrete concept expressing a specific philosophy of governing. It should not be conflated with more general themes revolving around constitutional government or constitutional democracy. The promotion of constitutional government has a much longer history. McIlwain and Wormuth identify many of these practices but wrongly confuse them with constitutionalism. The practices of constitutional government continue to exert a guiding influence over many contemporary systems of government, including those of France, Sweden, and the United Kingdom, which do not adhere to the precepts of constitutionalism. Neither should constitutionalism be conflated with constitutional democracy. Attempts have been made to show that constitutional and democratic values are reconcilable, but so long as these values are in perpetual and productive tension with one another and recognized to be accommodated politically, constitutional democracy must be treated as a quite distinct regime. For similar reasons, the use of certain adjectival qualifiers, such as “popular constitutionalism,” “political constitutionalism,” and even “authoritarian constitutionalism,” are misnomers: their advocates advance arguments either about popular political agency or an authoritarian regime's use of these instruments that are antithetical to the actual meaning of constitutionalism.¹²

Constitutionalism, then, can be understood only when treated as a singular philosophy of governing of universal significance. This contrast between the pluralism of constitutional government and the universalism of constitutionalism was keenly felt from the moment of birth of the modern constitution. It is thrown into relief by contrasting the *Federalist* arguments with those contemporaneously expressed by Thomas Jefferson. Adhering to the principle of popular sovereignty, Jefferson believed that since “the earth belongs to the living and not to the dead,” the people must retain the power regularly to review the Constitution and reaffirm their consent. He therefore proposed that the US Constitution contain a sunset clause according to which it must be renewed every generation, which—following the then

accepted calculations—meant every nineteen years. If the regime’s fundamental law is indeed founded on the will of the people, then one generation should not possess the power unilaterally to bind another; to seek to do so would amount to “an act of force, and not of right.” Jefferson later explained that he was not advocating “frequent and untried changes in laws and constitutions.” Rather, he insisted that the powers and purposes of governmental institutions “must go hand in hand with the progress of the human mind.” The Constitution should not be held in “sanctimonious reverence” and regarded as “too sacred to be touched.”¹³

Jefferson foresaw the inevitability of constitutional innovation, recognizing that for the Constitution to retain its legitimacy it must be regularly ratified by popular assent. In this respect, he was asserting a basic principle of constitutional democracy, one that—contrary to constitutionalism—does not permit the elevation of the constitution from its useful role in establishing a stable governmental framework into a fixed object of worship. Whether the *Federalist* authors fully understood this is uncertain. They maintained that the Constitution rests on popular consent, forcefully asserting that the entire system rests on “the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.”¹⁴ But they also felt that Jefferson’s intervention could undermine the stability needed to establish and maintain the Constitution’s authority. Innovation through judicial interpretation, they implied, was a more secure means of adjusting to changing conditions, not least because—rather than fueling the passions—this method relied on “public reason.”

In contrast to a regime of constitutional democracy, the US Constitution is the original model of constitutionalism. This does not mean that it lacks democratic elements. Rather, it suggests that it was established and has evolved in accordance with the six basic criteria of constitutionalism. It has now imposed its authority as a comprehensive, fixed scheme of government in which the Supreme Court, through constitutional interpretation, is the principal medium of constitutional innovation and the Constitution itself is the most important symbol of national political identity. Whether this model of constitutionalism is sufficiently robust to maintain “the vigilant and [civic] spirit” needed to sustain constitutional government is a question for further consideration. But we should be in no doubt that it expresses a distinctive method of reconciling order and freedom in modern government.

The Project of Constitutionalism

In the late eighteenth century, the forces of industrialism, nationalism, and liberalism in an ever-quickenning process of change shaped certain powerful social and political movements that have left an indelible imprint on the modern world. The modern concept of the constitution was one of their creations. Invented during this first phase of universal history, the constitution was a product of the late eighteenth-century Enlightenment revolutions in America and France. But because the French failed to contain their revolutionary momentum in any fixed constitutional form, it was only in America that the associated concept of constitutionalism took hold.

One reason for Europe's relative failure to establish constitutionalism was its history of feudalism and absolutism. These legacies were so deeply inscribed in European societies that the struggles to establish new orders founded on liberty, equality, and solidarity were both long and intense. Consider only post-1789 France, whose history involved a continuous conflict between the forces of Revolution and Restoration, the outcome of which was only resolved after 1877 when the parliamentary advocates of the Third Republic prevailed over the will of a royalist president.¹⁵ Of more general significance is that the Enlightenment challenge to imperial forms led to the emergence of the modern nation-state, an entity that spawned a different relationship between state and constitution.

The modern nation-state, a corporate entity with a deeper and broader foundation than monarchy and feudalism, was constructed from a new type of national sentiment that derived from commonalities of territory, traditions, language, and religion.¹⁶ As much a cultural as a political phenomenon, the growth of nationalism invested the emerging idea of the "sovereign people" with a common political identity. And the cohesive power of nationalism created what in effect was a constitutional order of the state. Because these emancipatory nationalist movements enabled the people to acquire a clearer sense of themselves as a collective entity before their governmental arrangements had been drafted, the constitution was regarded as a phenomenon of secondary importance.

Circumstances in North America were rather different. The express purpose of early settlers to Britain's North American colonies had been to escape feudalism and monarchical authority. Migrating as free people, they

were imbued with the belief that they brought with them not just the ancient rights of the common law but also a long tradition of Anglo-Saxon liberties. Having successfully established settler regimes founded on Protestantism and republican ideals of self-government, they found the stability of their world undermined when the British Crown, seeking to manage its expanding empire more effectively, proclaimed imperial authority over its colonies. Maintaining that the assertion of hierarchical authority frustrated their rights as British subjects of Anglo-Saxon lineage, the colonists argued that the mother country had broken an implicit compact and had left them with no alternative but to vindicate their claims through a war of independence.

It was this fight for independence that launched the American experiment with constitutionalism. Given the challenge of uniting thirteen very different colonies in a novel federal arrangement, they were obliged to specify the terms of their union in a foundational document. And it is only in these unique circumstances that one could say the Constitution founded a nation and created a federal republic, a union of states that was not at that moment a state.¹⁷

The scale of their task should not be underestimated. Tensions had been heightened as early as 1772 when Lord Mansfield, Chief Justice of the King's Bench, ruled that slavery was incompatible with the traditions of the English common law. If it were permissible in the colonies, this could only be because, as conquered territories, they derived their law not from the common law but from the Crown's prerogatives. This ruling, notes Aziz Rana, challenged "both the future of slavery as a social institution and the vision of settlers as culturally superior to non-Anglo subjects."¹⁸ Independence was felt necessary to ensure the continuation of a unique republican project that had been founded on conquest,¹⁹ and consolidated through slavery.²⁰ The Constitution devised in this first phase of universal history thus sought not only to institute a republican model of government but also to legitimate the rule of conquerors,²¹ to protect a mode of human exploitation,²² and to advance what Jefferson called "the empire of liberty."²³

In a recent study, Paul Kahn has described how during the nineteenth century the American constitutional imagination was transformed from project to system. The revolutionary break was the moment when a new political order was envisioned as a constitutional *project*. The Constitution, drafted by an assembly and authorized by the political community, was conceived as the product of a collective political decision to shape the future. But

if the aim of the Constitution was to establish a comprehensive system of government and realize the telos of constitutionalism, the specific intent of its original authors eventually had to fade into the background. “It makes no sense to speak of authorship with respect to a systemic order,” explains Kahn, because “systems are not the end of any particular subject’s actions.”²⁴ Once its authority is consolidated, a *system* operates according to its own immanent principles of order and, having the capacity of self-regulation, can maintain itself against disturbance. A *project* speaks in the language of “we the people,” whereas a *system* jettisons authorial intention in favor of maintaining the integrity of a regime.

It would be wrong to think of this tension between project and system as a problem that can be entirely resolved. “The social scientist’s imagination of system,” suggests Kahn, “can no more displace our experience of project than the natural scientist’s imagination of causation can displace our experience of freedom.”²⁵ But that is not to diminish the significance of the American ambition. The Constitution is conceived as a *project* to establish the authority of a *system*. As an expression of freedom, the project subordinates the social to the political, but once the Constitution’s authority is consolidated, the political must be subordinated to the social. The Constitution is drafted as a political project to create a governing order, but once its authority is established the Constitution becomes a self-sustaining system. Its guardians, the constitutional lawyers, need no longer see their role as discerning the Framers’ intentions; their task becomes one of making curative adjustments to maintain the system’s equilibrium.

The great pioneer of this project to establish a system was John Marshall. Serving as chief justice for over three decades until his death in 1835, Marshall became the dominating force in crafting the Constitution as a system of fundamental law.²⁶ But this venture hit the buffers in the 1860s when a gulf was exposed between a *project* that protected slavery and an evolving *system* that acknowledged the implications of social and economic change. The Civil War that followed was not just another revolutionary upheaval. That it was mainly perceived as a conflict over competing interpretations of the Constitution indicates just how far the project had already advanced.²⁷ By the end of the century, the sense that the Constitution was a systemic order evolving through experience had gained broad acceptance. And once the Constitution is conceived as the dynamic order of an evolving society rather than an

authoritative text adopted by its founders, the basic ideals of constitutionalism have been realized.

During the first half of the twentieth century, constitutionalism was recognized as America's unique contribution to the art of governing. By the end of that century Rubinfeld was promoting it as a universal theory, but during its first half it stood alone. Other states had adopted written constitutions but, as the US diplomat David Jayne Hill wrote in 1916, "In their attempts to imitate our system they have neglected to adopt the two really original and distinctive features of it, namely our renunciation of the absolute power of majorities over individual rights and liberties, and our idea of judicial authority as a means of preventing the overthrow of constitutional guarantees by mere majority legislation."²⁸ A further round of extensive constitution-making was undertaken by many of those engaged in the First World War, but with less than uplifting results: by the end of the 1930s, of the seventeen constitutional democracies formed from the entrails of European empires, the majority had collapsed and reverted to authoritarianism.²⁹

Yet American constitutionalism itself was not immune from the social, political, economic, and technological changes of the times. In the interwar period, it faced a second crisis in which the tension between project and system resurfaced. "Believing in the approximate perfection of our system," Hill had proclaimed in 1916, "the people of the United States have, in general, desired to maintain the stability of the Constitution, and so far it has been subjected to very little change."³⁰ But Roosevelt's New Deal placed severe strains on that system's commitment to limited government and free markets.

The New Deal ushered in fundamental changes to both governmental relations and the constitutional meaning of liberty, but for two reasons it did not bring about major structural change to the constitutional system. First, constitutionalism is not reducible to an institutional doctrine of the separation of powers and, second, even though it originally advanced a conception of liberty as the absence of external constraints, once established as a system, this conception of liberty could no longer limit its aspirations. Constitutionalism requires the Constitution to be a permanent, comprehensive scheme of government that maintains institutional differentiation and protects liberty. But to maintain its symbolic status as an expression of collective political identity, its judicial guardians must also be authorized to reinterpret

meaning in the light of changing conditions. Like the Civil War, the New Deal was a dispute over constitutional interpretation.

Under the New Deal, the Constitution was reaffirmed neither as a “lawyer’s contract” nor a “layman’s document.” Capable of absorbing basic social and political change without formal amendment, the Constitution was acknowledged as a “charter of general principles” of “enduring wisdom.” The New Deal’s lasting impact was to strengthen both the Constitution’s permanence as a system and, *pace* Roosevelt’s criticisms of conservative judicial rulings, the Supreme Court’s vital guardianship function.³¹

Sowing the Seeds of Constitutionalism

In the aftermath of the Second World War, the seeds of constitutionalism were scattered not only over depleted European states but also across newly established postcolonial regimes. Most fell on infertile ground, but in two cases, those of Germany and India, the seeds managed to germinate and produce fruit. Their achievements are both impressive and instructive.

After the interwar experience, in which newly established constitutional regimes rapidly descended into totalitarianism, postwar constitutional reconstruction in Europe was a deliberative and reactive affair. In divided and demoralized Germany, responsibility for drafting the Basic Law—the Federal Republic’s provisional constitutional document—was entrusted to an assembly of delegates of the Länder. Working under the tutelage of the Allies, the document they produced was then ratified by the Länder governments alone. Determined to ensure that the failed experiment of Weimar was not repeated, drafters proposed a federal system, a more formal separation of powers, and a comprehensive catalog of basic rights. They also ensured that the core of the regime—the federal system and the protection of basic rights—was made invulnerable to constitutional change.³²

The template of the Basic Law bore all the hallmarks of constitutionalism. It established a regime of “constrained” democracy that abolished the plebiscite and declared unconstitutional any political parties seeking “to undermine or abolish the free democratic basic order or to endanger the existence” of the state.³³ It also made a significant innovation. Concerned that ordinary courts imbued in the formal traditions of civilian jurisprudence might not be sufficiently active in protecting constitutional values, the Basic Law established a

Federal Constitutional Court charged with the task of guaranteeing the integrity of the system. This Court quickly gained authority as guardian of the order. Promoting the Basic Law as an “order of values” that through its “radiating effect” overcame the public-private division and shaped the character of the entire regime,³⁴ it later became a model that many states transitioning to constitutional government would seek to emulate.

Under the Court’s supervision, the Basic Law quickly established itself as the most important symbol of the Federal Republic’s collective political identity. There is no clearer indication of the success of this project in constitutionalism than the fact that in 1989 the Basic Law was simply extended by treaty to encompass a reunited Germany. Conceived as a provisional measure that “shall cease to apply on the day on which a constitution freely adopted by the German people takes effect,”³⁵ the authority of the Basic Law was such that it was felt to be too unsettling for the regime at the moment of reunification to expose the character of this German constitution to popular deliberation.³⁶

Attempts at transplanting constitutionalism in the first wave of postcolonial states also had varying success.³⁷ But one remarkable success story is that of India. The task of drafting a constitution for a vast subcontinent of over 350 million people, the great majority of whom were poor and illiterate and divided not only by territory but also by language, religion and caste, was immense. It was entrusted to a Constituent Assembly comprising delegates of provincial legislatures constituted on a restricted franchise. The outcome was a constitution that, running to 395 articles and eight schedules, is the world’s longest. This Constitution was adopted without ratification and entered into force in January 1950.

According to the catechism of American constitutionalism, the constitution should fix only a general framework and articulate certain basic principles; it should not “form a detailed legal code” because that type of document “could never be understood by the public.”³⁸ But conditions in India were rather different. Reflecting these unique conditions, the Indian constitutional project rested on three fundamental objectives.

First, a strong centralized state apparatus able to provide leadership was felt to be required for the purpose of creating an Indian nation. Formally, a federal scheme was adopted, but the central government held the essential powers. Those responsible for drafting the new Constitution were mindful of the challenges they confronted in seeking to establish a democracy based

on universal suffrage in a society whose members had not yet made the transition from subjects to citizens. They recognized both that the people had to be guided and that their legislative representatives remained in need of strong governing leadership. It was from this requirement of a high degree of centralization of power that the second objective followed.

The drafters were conscious of the problems entailed in adopting too detailed a code. Jawaharlal Nehru, who was to become India's first prime minister, expressed concern that this would make the Constitution so rigid it could not adapt to change and would therefore be unlikely to endure. But B. R. Ambedkar, the chair of the drafting committee, explained its underlying rationale. "It is only where people are saturated with constitutional morality," he clarified, "that one can take the risk of omitting from the constitution details of administration and leaving it for the legislature to prescribe them." He emphasized that "constitutional morality," by which he meant "a paramount reverence for the forms of the constitution," was something that "our people have yet to learn."³⁹ The detail included in the constitutional text, Madhav Khosla explains, was intended to be "an instrument of political education" and a way "to liberate Indians from existing forms of thought and understanding."⁴⁰ That task included educating legislators on the limits of their powers. The second objective, of adopting the Constitution as a detailed code, was therefore felt to be necessary for the purpose of making Indians democrats.

The third objective of the new Constitution was to construct an image of the political subject as an individual rights-bearing citizen. This identity could perhaps be assumed in enacting a new constitution for a secularized Western regime at an advanced stage of social and economic development. In a traditional society shaped by religious and caste identities, it could not. The Constitution had therefore to assist with the task of liberating citizens from communal identities. This required not just the enunciation of civil and political rights but also action to address material conditions of social and economic disadvantage. It is for this reason that the Constitution included "Directive Principles of State Policy," principles that provided guidance to both the legislature and executive on how they should discharge their responsibilities.

The Indian Constitution thus established a centralized system of authority founded on a differentiation of powers and a platform of basic rights of the

citizen. In contrast to the rigidity of the US Constitution, it included a simpler amendment procedure, a provision that has been used more than a hundred times. But it is the realization of an additional—fourth—objective that provides the strongest evidence of the underlying project of constitutionalism. Not only has the Indian Constitution achieved its standing as a relatively comprehensive and permanent settlement, but its Supreme Court—affirming that the power of amendment cannot offend the Constitution’s “essential features” of democracy, equality, federalism, the rule of law, secularism, and socialism—has assumed the critical role of guardian of its “basic structure.”⁴¹ In India, “a vast range of political, administrative, and judicial matters have become constitutional questions that are routinely brought to the courts.” Indian constitutional law, the editors of *The Oxford Handbook of the Indian Constitution* conclude, “is interesting precisely because it has constitutionalized so much of Indian life.”⁴²

Germany and India illustrate how in the postwar period and in very different conditions the seeds of constitutionalism were sown and grew into modern regimes in which the constitution becomes a crucial symbol of national political identity. The social, political, economic, and cultural conditions of these regimes could scarcely be more different. But these cases share one important feature: in each, the constitution was drafted at a critical moment of rupture in the history of the state. This is a moment at which either there was no prior history of self-rule on which to draw or it was politically impossible to derive guidance from earlier practices of self-rule. When a clean break with the past was required, the project of constitutionalism offered a path to a new world.

The Age of Constitutionalism

Germany and India were indicative of postwar possibilities, but it is only in the last three decades that constitutionalism truly has come of age. This period has seen a dramatic growth in the number of constitutional democracies. One reason has been the disintegration of authoritarian regimes in Central and Eastern Europe following the collapse of the Soviet Union in 1989. Together with the downfall of dictatorships in Latin America and, to a lesser extent, in Asia and Africa, these changes led to new constitutions being drafted at an unprecedented rate. Over the last thirty years, most of the

world's constitutions have either been newly adopted or radically amended.⁴³ And as regimes have striven to renew their authority, they have sought to burnish their credentials as constitutional democracies.⁴⁴ Since 1989, the number of regimes adopting written constitutions that institute a separation of powers, commit to the principle of the rule of law, provide for the protection of individual rights, and require the holding of free and fair elections has almost doubled. Almost two-thirds of the 193 United Nations (UN) member states are now classified as constitutional democracies.⁴⁵

But this new wave of constitution-making is not the only, nor the most important, reason for the wider embrace of constitutionalism across the world. In both new and well-established constitutional regimes, the range of constitutional judicial review has extended dramatically and strengthened in intensity.⁴⁶ Across the world, judges are now reviewing contentious public policy questions that a generation ago were assumed to be beyond their competence. This has been spearheaded by enhanced rights protection, especially with respect to issues of ethnicity, gender, language, and religion. But the jurisdictional reach of courts extends far beyond individual rights protection; the judiciary is now bidden to adjudicate a broad range of disputes touching on fundamental aspects of collective identity and national character. The constitutional court has now emerged in many parts of the world as the key institution for resolving many of their most contentious political controversies.

This movement, which affects both established and new constitutional democracies, is a novel phenomenon. Its purpose has been to subject ever more aspects of governmental decision-making to the structural constraints, processes, principles, and values of the constitution. It aspires to bring the practices of constitutional government adopted across a range of regimes into alignment with the precepts of constitutionalism. This signifies the emergence of a new movement: that of *constitutionalization*. This term expresses the ways in which the variable practices of constitutional government are reshaped in accordance with the universal precepts of constitutionalism.⁴⁷

In his 2004 study of these developments, Ran Hirschl identified six “scenarios of constitutionalization” that have emerged since the Second World War: *reconstruction* (in Germany, but also Japan and Italy); *decolonization* (India, but also affecting many former British colonies in Africa and Asia); *transition from authoritarianism to democracy* (Greece, Portugal, and Spain

in Europe; many Latin American states; South Africa in Africa); *dual transitions* to market economy and democracy (post-Soviet bloc states in Central and Eastern Europe); the *incorporation of international standards* into domestic law (Denmark, Sweden, Britain); and a residual category of *no apparent transition scenarios* in which constitutional reforms have been introduced without basic changes to the political regime (Mexico, New Zealand, Israel, Canada).⁴⁸ Hirschl's work shows not just the increased pace of constitution-making but also how ever more extensive aspects of social and political life are being regulated by the principles and values of constitutionalism.

This is an extraordinary development. In 1979, Gordon Schochet introduced an influential collection of essays on constitutionalism by noting that, because the notion of "limited government" is of marginal relevance to contemporary challenges of governing, constitutionalism had ceased to be an important field of political study. "Expanding population coupled with growing economic disparities, the need to conserve natural resources, and the regulation of deadly technologies," he explained, "require more decisive and resolute action than limited constitutional government can provide."⁴⁹ The scale of these challenges has certainly increased since Schochet wrote but, remarkably, so too has the perceived importance of constitutionalism as a solution. And the reason is that constitutionalism is no longer seen as a useful institutional fix in establishing a system of limited government; it is now recognized as a distinctive, ambitious, and wide-ranging philosophy of governing.

What explains this dramatic reversal of fortunes? Any explanation requires a broader analysis. In his great trilogy on "the long nineteenth century," Eric Hobsbawm wrote an account of European history ranging from the *Age of Revolution* (1789–1848), through the *Age of Capital* (1848–1875), to the *Age of Empire* (1875–1914). Drawing on a remarkable range of economic, social, and political material, Hobsbawm's periods run in parallel to those of the American founding, the Civil War crisis, and the Reconstruction. They therefore span the period from the adoption of the Constitution as a project to establish an "empire of liberty" to its establishment as the immanent order constituting the political identity of the American Empire. Hobsbawm later supplemented this work by writing a "short history of the twentieth century," designated the *Age of Extremes* (1914–1991).⁵⁰ This spans two distinct periods in the history of constitutionalism: the first, running to the end of the Second

World War, in which America stands alone in the world as a constitutionalist regime, and the second, the postwar period in which the seeds of constitutionalism are scattered and propagated in a small number of states.

Hobsbawm's historical survey stops at the contemporary period: the fifth age. This age, opening in 1989, marks the era in which constitutionalism comes into its own. In labeling the contemporary period the *Age of Constitutionalism*, my account does not accord with Hobsbawm's scale, nor does it accept all the assumptions of his analysis.⁵¹ The point is to provoke reflection on the contemporary significance of constitutionalism by situating it in a broader context and noting that constitutionalization is associated with a series of profound social and economic developments.

What I am calling the age of constitutionalism is attributable to developments in the second phase of modernity. By modernity, I mean a mode of organized social life that emerged in Europe during the eighteenth century and which, by extending its influence across much of the world, marks the first phase of universal history. Generated by the processes of industrialization and urbanization and extended by colonialization, modernity eroded many of our traditional ways of social life. Max Weber called this a process of "disenchantment" in which metaphysics was demystified by science, religion was displaced by secularism, customary ways were suppressed by bureaucratization, and the imagination was supplanted by rationalism.⁵² Modernization led to the consolidation of the authority of the nation-state and, following revolutionary ruptures, to the emergence of the constitution as the key instrument for constraining the state's powers and enhancing its authority.⁵³

If modernity is signified by a questioning of established ways, the process is likely to eventually provoke questions about the foundations of modern societies. This questioning quickens in pace after 1989 and leads to the emergence of a new phenomenon—that of "reflexive modernization."⁵⁴ In this second phase of modernity, many solid structures of modern societies are shaken. Economic security bolstered by industrial regulation and full employment, social security provided by a welfare state, cultural security protected by the distinction between citizens and others, stable family structures, and vibrant political parties based on established class structures—all enter a state of flux. Even the founding political principles of modernity—liberty, equality, and solidarity—become objects of reevaluation and disenchantment.⁵⁵ And

not surprisingly some of the basic premises of the modern constitution, such as its template of institutional differentiation and its promotion of negative freedom, are caught up in this process.

The impact of these political changes is most visible in the effects of globalization on the standing of the nation-state. The accelerating expansion of global trade, investment, technology, and communication networks erodes the authority of government as the capacity of nation-states to regulate their own economies is diminished. As states become locked into rapidly developing global networks, they are obliged to participate in the work of international regulatory institutions whose rule systems impose structural constraints on them. Consequently, the enhanced constitutionalization of domestic governmental action commonly takes place at precisely the moment when more and more governmental action is conducted in transnational, supranational, or international arenas. Constitutionalization intensifies just as the proportion of domestic governmental action affected by it diminishes. Far from signaling an age of constitutionalism, then, it might be argued that these trends mark its twilight.⁵⁶

But this would be to overlook another dimension of change. Continuous modernization leads to a conviction that, wherever it is located, governmental action must be constitutionally authorized if it is to be legitimate. Globalization has been tracked by movements advocating the constitutionalization of such international institutions as the UN, the World Trade Organization (WTO), and the European Union (EU). During the second phase of modernity, this leads to the fixed coordinates of constitutionalism being loosed from their moorings. Nurtured in the crucible of the modern American republic, constitutionalism extends its horizons and becomes a set of self-sustaining principles that legitimate all forms of governmental decision-making. In this second phase, the six basic precepts of constitutionalism—comprehensiveness, representation, power differentiation, enduring framework, judicial guardianship, and expression of a regime's identity—become reflexive.

If the driving force of constitutionalism during the first phase of modernity was liberalism, that of its second phase is neoliberalism. The liberal model had focused on the powers of the modern state, specifically on the powerful Western states which, through imperialism and their dominant influence on the global economy, controlled the governments of much of the rest of the world. Constitutional government with liberal principles disciplined the

powers of Western governments at home while leaving them free to exert hierarchical authority over dependent states abroad. With the gathering pace of decolonization in the postwar period, however, this liberal project had to be extended to incorporate constitutional constraints into the governing structures of newly independent states. Constitutionalism became a double-edged philosophy. Promising the transformation of these societies by instituting values of liberty, equality, and solidarity,⁵⁷ it sought at the same time to ensure a regime that protected property and the institutions of the market.⁵⁸

Liberalism was supplanted by neoliberalism once its advocates realized that markets, far from being self-regulating organisms, required strong governmental institutions to flourish. In this second phase, the project became that of establishing constitutionalism on a worldwide scale. This ambitious institution-building project depended on the promotion of constitutionalism as a system within nation-states. It needed to establish the constitution of a representative democracy as a comprehensive structure of institutionally differentiated governmental agencies ruled by a body of fundamental law and policed by the judiciary, a development that gave voice to the progressive notion of aspirational constitutionalism. But worldwide constitutionalism also required the establishment of a global network of institutions to advance both liberal values and the market conditions underpinning them. This network—which includes the UN, the International Monetary Fund, the World Bank, the WTO, an increasing number of independent central banks, and regional bodies like the EU and the North American Free Trade Agreement—operates reflexively to institute a cosmopolitan regime of what might be called *Ordo-constitutionalism*. Recognizing that markets do not evolve spontaneously but require supportive governmental action to thrive, *Ordo-constitutionalism* seeks to ensure that all institutions exercising governmental power—whether national or international, public or private—adhere to liberty-preserving constitutional values. It aspires to uphold the basic values of classical constitutionalism in a globalized and extensively governed world.

Democratization has therefore tended to be accompanied by the constitutionalization of political regimes. Constitutionalism, devised as a set of principles for a new republic founded neither on “accident or force” but on “reflection and choice,” has evolved into a set of principles instituting a global order founded on rather abstract principles of rationality, subsidiarity, and proportionality. This global project has yet to establish its authority as a system and

remains a contentious undertaking. Indeed, in some regimes it is experienced not as a matter of choice but of force and necessity.⁵⁹ For those in the vanguard, it is advocated as the only method of ensuring that the democratic impetus does not lead to a disintegration of the world.⁶⁰ But there can be no doubt that in this reflexive form, constitutionalism has become the most powerful philosophy of governing shaping the world today.

Constitutionalism, I have suggested, has been widely perceived as a positive phenomenon largely because it has never been closely analyzed. It continues to circulate as both abstract and venerated, not least because it can be inscribed with whatever values the heart desires. In seeking a more precise specification, I identify constitutionalism as a governing philosophy that must be distinguished from the general values underpinning constitutional government. The concept was formulated at the founding of the American republic, steadily gained in authority through the development of the American empire, and came to be recognized as America's unique contribution to modern constitutional thought.

Had it remained a distinctively American experiment in government then, peculiar though it might seem to outsiders, that governing philosophy would be more difficult to criticize. To each their own, we might say; if it works for Americans, then it is not for others to denounce its practices. Over the last seventy years, however, the precepts of constitutionalism have gained a more wide-ranging influence, and during the last three decades an altogether new impetus.⁶¹ Constitutionalism has been rejuvenated, acquiring in this new reflexive form the capacity to reshape regimes across the world. It is this aspiration to extend constitutionalism beyond the patrimony of a particular regime and to repackage it as a universal philosophy that must be closely examined. Presenting one window onto reality, constitutionalism is converted into an abstract ideology, a striving for power.

This is the basic argument of the book. Its objective is not so much to examine social and economic developments that have shaped these changes; important though they may be, my primary aim is to capture the *spirit* of constitutionalism. I therefore focus on the implications of these changes in the meaning of constitutionalism on legal thought and political practice. Their significance, I suggest, cannot be fully appreciated without situating these innovations in modern historical context.

Part I, therefore, explains how constitutionalism first emerged as an influential theme in modern political thought. Designed as the centerpiece of an Enlightenment philosophy of governing, the modern constitution was fashioned as a liberal ideology that sought to protect established rights by instituting a system of limited government (Chapter 1). These aims were nevertheless threatened by structural changes in government following the expansion of the franchise; the rise of democracy, it appeared, signaled the decline of constitutionalism (Chapter 2). Having been designed to impose restraints on government, it was soon realized that the constitution could maintain its authority only by drawing on more basic narratives of the collective political identity of “the people,” an insight that confounded the ambitions of constitutionalism’s original advocates (Chapter 3). Consequently, attempts to revive the values of constitutionalism in the face of continuous governmental growth revealed its unrealistic character: either the role of the state must be limited to that of a custodian of a formal rule system or the entire modern worldview of political organization had to be overthrown. These radical consequences have been avoided only by reconceiving constitutionalism as a project to discipline government by requiring it to protect markets and individual freedoms (Chapter 4).

As classically formulated, constitutionalism is incompatible with mass democracy. But is it possible that its core values can still be realized in a world of administrative government? Many who believe so advocate the virtues not of constitutionalism as such but of constitutional democracy. Part II, therefore, examines the concept of constitutional democracy. Its two basic correlative principles—which express the competing values of public autonomy and private autonomy, of democracy and rights, and of will and reason—are first assayed separately as constituent power (Chapter 5) and constitutional rights (Chapter 6). Whether they are reconcilable is then directly addressed (Chapter 7). The conclusion reached is that the two principles can be reconciled only when constitutional democracy is reconstructed as constitutionalism. But such a rights-based reconstruction, I argue, renders constituent power redundant, and for constitutional democracy to remain distinct, not just the equal importance but also the irreconcilable character of these two principles must be acknowledged. Only then can the regime’s open, dynamic, and indeterminate qualities be maintained. And the fact that this tension

must be managed prudentially through political deliberation and accommodation and cannot satisfactorily be reconciled in law signifies that constitutional democracy is a discrete regime that differs from constitutionalism.

Part III, then, examines how, with the rejuvenation of constitutionalism in the second phase of modernity, the role of the constitution is transformed from that of an instrument of collective decision-making into a symbolic representation of collective political identity (Chapter 8). This development is driven by a “rights revolution” that subjects governmental action to comprehensive review through abstract principles (Chapter 9) and this engenders novel methods of interpretation as courts give meaning to the regime’s “invisible constitution” (Chapter 10). This idealized, invisible, and totalizing constitution dissolves the boundary between constitutional reason and political necessity, between norm and exception, leading to the emergence of a new species of law that draws as much on political as on legal rationality (Chapter 11). Revealing the constitution as a particularity masquerading as a universal, this transformation also drives a quest for inclusion advanced through constitutional litigation (Chapter 12). And as constitutionalism’s universal aspirations acquire prominence, its principles are harmonized across states, extended to international institutions, and presented as a self-sustaining system of values (Chapter 13).

The book concludes with reflections on why constitutionalism has been reinvigorated, how constitutional democracy is being degraded, and why constitutional democracy remains our best hope of maintaining the conditions of civilized existence.

Chapter 7

CONSTITUTIONAL DEMOCRACY

MODERN government acquires legitimacy from adherence to a constitution that “we the people” have authorized. This is the principle of public autonomy that, reflecting the ostensibly democratic founding of the modern state, assumes juridical form as constituent power. Government also acquires legitimacy by virtue of particular conditions imposed on the way it can use its powers. This is the principle of private autonomy that, reflecting respect for individual liberty, acquires juridical form as constitutional rights. Which of these principles has primacy? This is one of the most perplexing questions of modern politics.

Civic republicans prioritize the former, the democratic principle of equal citizen participation in the processes by which they are governed. Liberals prioritize the latter, the principle that upholds the primacy of protecting the citizen’s basic rights. By upholding the value of both principles, a regime of constitutional democracy is assumed to be able to resolve conflicts between them and to determine the circumstances under which either the will of the people must be circumscribed to guarantee the rights of the subject or basic rights must be qualified in pursuit of the common good.

The tension between these principles nonetheless continues to torment constitutional discourse. If the constitution merely establishes a framework of government for a single generation, that tension can be negotiated through political deliberation. But if, according to the precepts of constitutionalism, the constitution is intended to be permanent, the question of the relative priorities of these competing principles becomes much more pressing. Without a clear steer, the question is most likely resolved quietly on a case-by-case basis by unelected judges. This likelihood led republicans like Jefferson, convinced that one generation had no right to bind another, to fear that the establishment of a permanent constitution subverts democracy.

Some theorists argue that there is no need to trade between the principles of democracy and rights. They question whether republican values demand acquiescence to the unrestrained will of the people and whether liberal values rule out a reciprocal acknowledgment of the limits on individual rights, suggesting that the two values can be reconciled because they are interdependent. This is the critical issue around which the distinction between a regime of constitutional democracy and one founded on the philosophy of constitutionalism revolves.

The Liberty of the Ancients and the Liberty of the Moderns

The tension between democracy and rights played out differently in the politics of the American and French Revolutions. From the outset, the framers of the US Constitution were concerned about the impact of democracy on their regime. Advocating the establishment of a modern republic that included powerful institutional mechanisms to mitigate what Madison in *Federalist* 10 calls the deficiencies of a “pure democracy,” they implicitly upheld the primacy of individual rights. French revolutionaries, by contrast, modeled their regime on the republican virtues of ancient Greece and Rome, a quest that drove them to pursue a revolutionary cause without limitation. Into this febrile environment stepped Benjamin Constant. Following his arrival in Paris in 1795, he offered guidance on how the new French republic might direct its revolutionary fervor toward more stable institutional arrangements.

Reflecting on those developments twenty years later, Constant observes that the intensity of deliberation over constitutional forms that had engaged French writers since the Revolution was now out of favor. In the decade following the Revolution, the French “tried some five or six constitutions and found ourselves the worse for it.” Instead, “in the name of freedom . . . we got prisons, scaffolds, and endless multiplied persecution.” Far from liberating the people, the descent of the Revolution into the Terror had simply made them fearful, insecure, and ripe for servitude.¹

His explanation is instructive. The great failure of the revolutionaries was in trying to build their regime by “grinding and reducing to dust the [inherited] materials that they were to employ.” Having removed this “natural source of patriotism,” they sought to replace it with “a factitious passion for an

abstract being, a general idea stripped of all that can engage the imagination and speak to the memory."² Authority could only be restored and political power generated by strengthening institutional arrangements that command respect. The only hope of reconciling competing principles of democracy and rights, he concludes, was by devising a constitution that accorded with the customs of the people.

Constant's argument synthesizes the principles of Rousseau and Montesquieu. From Rousseau, he derives the principle that a regime gains legitimacy from popular sovereignty, and from Montesquieu, the principle that the ruling power gains authority not only from popular will but also from how power is exercised. Modern governments must be able to claim a democratic mandate but, to strengthen their authority, they must act within accepted constitutional forms.³

The Revolution took a wrong turn, Constant maintains, because it conflated two rather different concepts of liberty. Modern liberty, founded on individual subjective rights, protects a zone of privacy and independence from the exercise of arbitrary power. The ancient idea of liberty, by contrast, expressed independence from rule by foreigners and required the participation of citizens in collective self-government. This was the type of liberty that could only be realized in a small, culturally homogeneous city-state pursuing a politics of virtue founded on martial spirit, a type of state that was invariably a slaveholding, warrior republic of male citizens. It was also the type of liberty that could not be enjoyed equally. For some to be free, others had to be slaves.⁴

Acknowledging the value of each kind of liberty, Constant argues that the task is to find a balance between the two. The prevalence of the modern concept is as distortive as the dominance of the ancient: the atrophy of politics by retreat to a private sphere could be as dangerous as a total politicization of society. Liberty in the modern world involves a novel challenge: it must accept the distinctions between public and private, political and social, and participation and independence. Political liberty presupposes civil liberty, and the primary aim of the constitution must be to establish an interlocking arrangement in which these two forms of freedom reinforce one another.

How can this be realized? Constant argues that the emergence of a civil society founded on subjective rights need not diminish the domain of the political founded on objective law. Indeed, the autonomy of the political and

the autonomy of the social presuppose one another. His profound point is that democratization releases social power at the same time as it extends the nature, scale, and range of governmental power. Under a modern constitution, hierarchical ordering, a characteristic feature of regal authority, diminishes, but “the political” continues to operate as “society’s symbolic underpinning, the source of its collective identity and cohesiveness.”⁵

This “symbolic underpinning” must be reflected in a constitution drafted not in terms of command and obedience but on the principle of highly differentiated modes of association. To maintain the government’s authority and legitimacy, the modern constitution must assume the crucial function of representing society, to which end it must somehow establish its authority as a neutral power. It must be able to bolster the authority of the office of government against the forces of division.

Maintaining Political Freedom in Modern Democracy

Writing in the mid-nineteenth century as a member of the first postrevolutionary generation, Alexis de Tocqueville was driven to understand the significance of the two great political revolutions of the late eighteenth century. His task was to explain the profound implications for government and society of the decline of monarchy and aristocracy and the emergence of democracy.

Tocqueville produced two major studies, each of which became a classic of modern political thought. *Democracy in America*, published in two volumes in 1835 and 1840, and *The Ancien Régime and the French Revolution* in 1856 analyze the crisis of European regimes. How, he asks, might political freedom be realized in these emerging democracies? These societies cannot prevent these modernizing developments, he concludes, but “it depends upon themselves whether the principle of equality is to lead them to servitude or freedom, to knowledge or barbarism, to prosperity or to wretchedness.”⁶ The freedom he upholds as a cardinal virtue is not individual freedom from political engagement but the maintenance of the conditions of freedom as collective self-government.

Tocqueville recognized that the relentless force destroying monarchy and aristocracy and driving toward democracy was “the gradual development of the principle of equality.” Whereas his contemporary, Karl Marx, had once rhetorically declared that democracy “is the resolved mystery of all consti-

tutions,” Tocqueville set himself the task of unpacking that solution. His lasting reputation derives from his total commitment to the political as a distinct domain of human interaction, a commitment that leads him to make a powerful contribution to a “new science of politics . . . for a new world.”⁷

The new regime he foresaw sweeping the world was not simply democracy in the broad sense of moving toward an equality of conditions.⁸ He saw that the only regime that could truly legitimize a modern government was a constitutional democracy. The primary aim of *Democracy in America* was to reveal the basic principles and working practices of such a democracy. Revolutionary movements destroy traditions and create new opportunities, but the paradoxical threat he identifies is that the liberty generated in this upheaval can also lead to an equality that, enforcing conformity, destroys liberty. Tocqueville follows Constant in arguing that any new basis of authority must find its expression in the constitution.

Constitutional democracy, he argues, can be understood by reference to changes in three basic phenomena: power, constitution, and law. Political power is transformed in modernity; no longer emanating from the ruler, it assumes the amorphous form of social power. Democracy must therefore be conceived not as a system of government but as a form of society in which power is generated from the growth of equality. This power “appears to belong to no one, except to the people in the abstract, and which threatens to become unlimited, omnipotent, to acquire an ambition to take charge of every aspect of social life.”⁹ The key challenge is to establish a constitution that channels this social power and, through institutionalization, harnesses it and converts it into political power.

Symbolically, power rests with “the people,” but it is only through the constitution that it is channeled into a political form that enables people to conceive of themselves as a unity. Beyond this, it is unclear whether the constitution merely establishes the office of government or is able to determine the constitutional order of the state. Tocqueville was sensitive to this ambiguity. He emphasizes that to be effective, the constitution’s formal written principles and procedures must work with the grain of society. “Without ideas held in common,” he notes, “there is no common action, and without common action, there may still be men, but there is no social body.”¹⁰

The third innovation concerns a transformation in the role of law. The democratic impetus leading to a documentary constitution converts it into a

kind of higher-order law with, at least in the American model, the judiciary acting as its guardian. This is an important aspect of constitutional democracy. If the danger to democracy is a sense of equality that jeopardizes liberty, the bulwarks against this threat are lawyers. The influence of lawyers on governmental power, argues Tocqueville, is “the most powerful existing security against the excesses of democracy.” This is because their professional training endows them with certain orderly habits that “render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.” They neutralize the vices inherent in popular government because, however much they value liberty, they “are attached to public order beyond every other consideration.” And they “secretly oppose their aristocratic propensities to its democratic instincts, their superstitious attachment to what is antique to its love of novelty, their narrow views to its immense designs, and their habitual procrastination to its ardent impatience.”¹¹

Once equipped with the power to declare laws unconstitutional, the American judge “perpetually interferes in political affairs.” And since there are so few political questions that do not eventually come before the judiciary, organized political movements soon begin to express themselves in the language of constitutional law, and “the spirit of the law” gradually extends beyond the courtroom to “the bosom of society.” “Without this admixture of lawyer-like sobriety with the democratic principle,” Tocqueville concludes, “I question whether democratic institutions could long be maintained.”¹²

Tocqueville identifies constitutional democracy, born of the combined transformation of power, constitution, and law, as the legitimating principle of modern regimes. His purpose was to persuade European politicians of its value and so avoid the threat of an emerging “democratic despotism.” That threat was most real in his own country. In the four decades before he set off on his American voyage, France had experienced revolution, constitutional monarchy, regicide, the Terror, war, republican government, empire, monarchical restoration, and in 1830 revolutionary overthrow. But he is careful not to project an idealized image of constitutional democracy. Democracy releases new energies and confers new rights, but it also creates new possibilities for servitude born of standardization and normalization. Noting that “every man allows himself to be put in leading-strings, because he sees that it is not a person or a class of persons, but the people at large who hold the end of his chain,”¹³ he expresses a profound paradox of constitutional democracy.

The Internal Relation between Rights and Democracy

Tocqueville's ideas about power, constitution, and law have also shaped the thought of the most influential European social philosopher of the late twentieth century. Jürgen Habermas's major work of the 1990s is a powerful analysis of the legitimacy of contemporary constitutional democracy. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* ostensibly advances the thesis that "in the age of a completely secularized politics, the rule of law cannot be had or maintained without radical democracy."¹⁴

Habermas's study of constitutional democracy must be situated within his general social theory. In earlier work, he argues that modernity is signified by a growing systematization of ordinary life, leading to social relations being formally organized by law. He identifies four stages in this increasing juridification of social relations: the *bourgeois state* developed during the period of absolutism, the construct of which we saw in the work of Hobbes; the *constitutional state* associated with nineteenth-century jurists of the *Rechtsstaat* and exemplified earlier in the work of Locke; the *democratic constitutional state* identified as having "spread in Europe and in North America in the wake of the French Revolution" examined by Tocqueville; and finally the *democratic welfare state*, a twentieth-century product of the struggles of workers' movements to provide social welfare that Habermas, following Tocqueville, recognizes is now being undermined by "the ambivalence of guaranteeing freedom and taking it away."¹⁵

During the 1970s, Habermas argued that this last stage was leading to a "legitimation crisis" in which the political system was not generating sufficient problem-solving capacity to guarantee its own continued existence.¹⁶ *Between Facts and Norms* examines the crises that fiscal strains, welfare burdens, bureaucratization, and growing social complexity are imposing on contemporary constitutional frameworks. He acknowledges that functionally differentiated, decentered modern societies cannot easily be politically constituted; they may be integrated systemically but cannot be integrated socially through shared meanings. The critical issue is whether this political relationship can be reconstructed within a constitutional arrangement that respects both individual rights as normative ideals and democratic will-formation through the governmental system.

To address this, Habermas first considers the strains between the two main schools of constitutional order: liberals who prioritize respect for individual rights and republicans who uphold the value of popular sovereignty. Redefining the differences between them, he suggests that the principles they advance are not antagonistic but reciprocal. Constitutional democracy is capable of fully acknowledging both private and public autonomy, reason and will, rights and democracy.

This internal relation between rights and democracy is explained by reconstructing the regime of constitutional democracy entirely in the language of rights. Five sets of rights needed to establish a constitutional democracy are specified. The first three establish a horizontal association of free and equal persons. These are rights to “the greatest possible measure of equal individual liberties,” status rights acquired as a member of the association, and rights to due process of law. Such rights guarantee the private autonomy of the individual, recognizing the individual as a subject of the law. The next two sets of rights acknowledge the individual as a citizen. First is the right to equal participation in the processes of opinion-formation and will-formation, which expands private and public autonomy simultaneously. The final set establishes rights to the basic material conditions needed so that citizens can actually make use of their civil and political rights.¹⁷

This rights-based account is the core of Habermas’s co-originality thesis: “The principle of popular sovereignty is expressed in rights of communication and participation that secure the public autonomy of citizens and the rule of law is expressed in those classical basic rights that guarantee the private autonomy of members of society.” He acknowledges that his argument has the greatest plausibility with respect to rights that safeguard the exercise of public autonomy and seems less plausible with respect to classical individual rights that guarantee private autonomy. But he stresses the point that without basic rights securing private autonomy, there can be “no medium for legally institutionalizing the conditions under which these citizens . . . can make use of their public autonomy.” Private autonomy rights, or negative liberties, which republicans might treat as constraints, are to be reinterpreted as enabling conditions.¹⁸

The key to Habermas’s thesis is that “political power is not externally juxtaposed to law but is presupposed by law and is itself established in the form of law.”¹⁹ On this, he is following Heller, though surprisingly without citing

him. Habermas presents democracy as an expression of rightful authority, and by “law” here, he must surely mean (again following Heller) an idealized expression of “political right.” It is on this implicit understanding that Habermas maintains the mutual presupposition of public autonomy and private autonomy.

Habermas’s sophisticated philosophical treatment has transformed the terms of the debate.²⁰ But it has not escaped criticism. Frank Michelman, for example, argues that once the actual processes of constitution-making are examined, the rudimentary tension between liberal and democratic presumptions persists, and Habermas’s attempt to resolve this by postulating some hypothetical universal agreement is “pure abstraction, a transcendental-logical deduction necessitated by the prior determination of a thinker to think something.”²¹

Habermas has responded by maintaining that the internal relation between will and reason evolves over time so that we should see constitutional ordering as “a self-correcting historical process.” Michelman’s argument that it leads to an infinite regress, he suggests, is “the understandable expression of the future-oriented character, or openness, of the democratic constitution.” But constitution-making should be seen as “a tradition-building project” in that “later generations have the task of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitution.” It requires acceptance of a “dynamic understanding of the constitution,” such that it can be conceived as “a self-correcting learning process,” whereby “with the inclusion of marginalized groups and with the empowerment of deprived classes, the hitherto poorly satisfied presuppositions for the legitimacy of existing democratic procedures are better realized.” Subsequent generations, Habermas concludes, “can learn from past mistakes only if they are ‘in the same boat’ as their forebears.”²²

This explanation clarifies, but does it resolve? One obvious limitation is that it offers a conceptual solution to a practical problem. But even on its own terms, it leaves doubts. Whereas Michelman argues that Habermas skews reciprocity towards liberalism,²³ Charles Larmore thinks the co-originality thesis privileges republican democracy. In Habermas’s scheme, Larmore argues, individual rights do not limit the authority of popular sovereignty but “draw their rationale from their supposed ability to make democratic self-rule possible.” Basic rights are therefore presented as devices that empower

individuals to participate in the process of democratic self-rule. Rather than protecting us from collective will, rights are shaped in such a way as “to protect the means necessary for creating a collective will.” In Habermas’s version, Larmore concludes, democratic self-rule is “the sole normative foundation of the modern liberal-democratic state.”²⁴

Habermas’s argument rests on the claim that in modern functionally differentiated and culturally heterogeneous societies, the legitimating principles of constitutional democracy cannot presuppose the validity of conceptions of the common good. Legitimating principles must be procedural: the right must be prior to the good. Unable to depend on the standard republican argument about civic virtue, he turns instead to a set of universal principles he calls “discourse ethics.” This ambitious move nevertheless becomes less compelling in the context of change over time. Even if he solves the paradox between democracy and rights in the task faced by framers of the constitution, the argument fails if future generations who did not consent with one another are similarly bound by that constitution.

Habermas’s attempt to resolve this by suggesting that successors should recognize they are “in the same boat” as their forebears is revealing. The “boat” must surely be something more fundamental than the enacted constitution. As Alessandro Ferrara notes, the metaphor requires that we “conceive of the political identity of the people as something that pre-exists the constitution,”²⁵ that is, there must be a broader sense of a political association that precedes the constitution. This is what I have been calling the state. “We the people” endowed with a historically derived cultural and political identity recognize that our forebears drafted these governing arrangements as a constitution. The problem for Habermas is that this brings him back to the question of the common good and the sense of patriotism as loyalty to a set of common values that make up a political tradition.

It is a problem for Habermas because he maintains that the only patriotism that can be coherently embraced today is what he calls “constitutional patriotism” (*Verfassungspatriotismus*), an allegiance to the principles inscribed in the constitution.²⁶ This surely underestimates the degree to which a common life that shapes the political identity of a people continues to provide the basis of political allegiance. In making this move, Habermas’s thesis begins to look much less like an argument for “radical democracy” or even

“constitutional democracy.” In promoting allegiance to the principles in the constitution, it ends up as nothing less than a defense of constitutionalism.

Constitutional Democracy or Constitutionalism?

The concept of constitutional democracy contains apparently ineradicable tensions between democracy and rights, will and reason, power and right, and ultimately between facts and norms. In their different ways, social contract thinkers help us appreciate how these tensions might be negotiated. Habermas’s study of constitutional democracy is the latest of this type. He clarifies the character and extends the ambition of constitutional democracy, not least in synthesizing the classical constitutionalism of Locke and the aspirational constitutionalism of Rousseau. But like those of his social contract predecessors, this seems ultimately to be an account in which the conclusions follow from built-in assumptions.

Contractual thought experiments illuminate the conditions of legitimate order, but they underestimate the role of power in the task of generating authority. The constitution does not acquire authority by virtue of its creation. Its authority is generated through social processes in real historical time, and that authority is always conditional. Contractual writers show how the tensions between democracy and rights can be reconciled in thought. In practice, though, constitutional democracy is ever an exercise in continuous upheaval generated by the indeterminacy of its founding principles. Habermas’s “boat” needs to be filled with common historical experiences generated by memories of past conflicts over competing ideas of the common good. Abstract constitutional principles acquire determinate meaning only because of what has been learned, especially through historical instances of what happens when a people fail to uphold them.

The written constitution performs a critical role in providing a framework for institutionalizing such social conflicts. It is a medium through which people express their sense of the right, the good, and the just in ways that transcend particular interests. But the regime retains its democratic character only when, far from achieving reconciliation between basic principles, it holds them in a condition of indeterminacy. Democracy, notes Claude Lefort, is “instituted and sustained by the *dissolution of the markers of certainty*.”²⁷

Democracy persists through continuous and active political deliberation over the right and the good. Conflict and dissent are constitutive features that must be preserved, and they are preserved by ensuring that the meaning of these basic and contestable values remains the subject of continuous political negotiation through democratically constituted and democratically accountable processes.

This feature of democracy places structural limitations on the degree to which it can be sublimated into constitutionalism. Once a political regime is conceptualized in the language of rights, lawyers too readily assume that it contains an overarching framework to be attended to by the judiciary, with legislative and administration activity being reduced to mere regulative action that can be trumped by a claim of right.²⁸ This overvalues the ability of the judiciary to reach political judgments on intensely contestable rights claims and undervalues the importance of the implicit rights judgments that legislatures and other officials make.²⁹ The maintenance of institutional sites of democratic deliberation, decision-making, and accountability are essential markers of indeterminacy. They are essential preconditions for upholding Tocqueville's vision of political freedom.

Can modern societies maintain political unity while keeping open this theater of contestation, or is it inevitable that Tocqueville's conduits, the lawyers, will colonize constitutional discourse to such an extent that they stifle open deliberation and extinguish indeterminacy? To the extent that they have done so, we find ourselves in the grip of a pervasive ideology, an ideology of constitutionalism that blends the values of classical and aspirational constitutionalism so that the constitution is transformed into the authoritative medium through which all inherent tensions between power and right are resolved. This theme is taken up in Part III.

CONCLUSION

Overcoming Constitutionalism

CONSTITUTIONALISM has recently gone through a remarkable rejuvenation. Languishing in the mid-twentieth century as an anachronistic doctrine reflecting an eighteenth-century vision of limited government, it has been transformed into the world's most powerful philosophy of governing. The constitution has accordingly been elevated from its original task of regulating relations between governmental institutions to the symbolic representation of social unity. Driven by a rights revolution that dramatically strengthens the power of the judiciary, these developments have generated a novel concept of constitutional legality which, marking the fusion of legal and political reason, upholds an "invisible constitution" of abstract principles that is rapidly acquiring universal influence. But how did constitutionalism become such a powerful ruling philosophy?

One explanation can immediately be discounted. Constitutionalism was cemented as the ideology underpinning the world's first experiment in organizing government through a constitution. Whatever the reasons for its extending influence, they are not attributable to the model characteristics of the US Constitution itself. A century ago, Harold Laski complained that the Constitution "is the worst instrument of government that the mind of man has so far conceived,"¹ a judgment that subsequent developments have done nothing to rebut. In his 2006 book *Our Undemocratic Constitution*, Sanford Levinson examines its many egregious features. These include the equal representation of states in the Senate, despite the fact that the largest has a population seventy times greater than the smallest; an Electoral College to formally elect the president, resulting in candidates entering the White House without winning the popular vote; Supreme Court justices' appointments for life, leading to infirm octogenarians unable to discharge their onerous

responsibilities; and an amendment procedure that makes the Constitution the most difficult to alter of any in the world. Levinson concludes that the Constitution erects “almost insurmountable barriers in the way of *any* acceptable notion of democracy.”²

American experience has undoubtedly influenced contemporary developments but not because of the constitutional text. Much more powerful has been the great number of sophisticated theories of constitutionalism propagated by American jurists. Written primarily as idealized visions of their own “invisible constitution,” they have been dusted down and offered to states with more recently adopted constitutions. Bruce Ackerman was only half joking when he opened his third volume of *We the People* with a “familiar conversation” between himself and a government official, explaining that “since 1989, the State Department had been badgering me to serve on delegations to advise one or another country on its constitutional transition to democracy.”³ We might harbor doubts about the value of these culturally specific insights to regimes only recently seeking the transition to liberal democracy, but there can be no doubt about the global influence of American constitutional jurisprudence.

That influence has been most keenly felt in countries that have reached a critical point in their development and need a clean break with the past.⁴ When circumstances decree that almost nothing from historic practices can be retained, constitutionalism presents itself as a legitimate scheme for modern government. States facing “year zero,” the complete rupture caused by a break with fascism, colonialism, communism, or other forms of authoritarian rule, have discovered that constitutionalism offers an alluring basis for reconstruction. In these circumstances, nations cannot draw on an existing culture as the source of constitutional renewal. The modern state is a two-sided entity comprising both normative and material aspects but, when a clean break is necessary, the normative power of the factual is precisely what must be rejected. Presented as a comprehensive normative scheme for a fundamentally reconstructed state, the image of the constitution proposed by the theory of constitutionalism offers a blueprint for the good society to come, promising to bridge the gap between present reality and future ideals.

This is one reason why classical constitutionalism, once an institutional arrangement to protect the liberties of the propertied class, is now an anachronism. Far from instituting a scheme of limited government, recent consti-

tutions impose manifold duties on government that seek the conversion of its inscribed values into political reality. These aspirational constitutions convert the legislative role into executive action directed toward the realization of those values. This is constitutionalism as emancipatory project. But it encounters a powerful rival in Ordo-constitutionalism which, reworking classical constitutionalism for contemporary conditions, skews the constitution toward the quite specific end of preserving individual freedom by protecting a market-based order. Of much greater significance than these diverse political ends, however, is the fact that each project seeks to advance its claims through the template of constitutionalism. In the real world of global politics, where ideal expressions of right must bend to the dynamic forces of power, such a template imposes stringent constraints on any aspirational ambitions.⁵

But it is not just the growing numbers of states making radical breaks with their pasts that has so dramatically expanded the reach of constitutionalism. Deep-seated socioeconomic changes have altered the conditions of constitutional government as profoundly as those marking the movement from traditional to modern constitutions. These changes are a consequence of what has been called the second phase of modernity. It begins once mass production capitalism reaches the critical point of creative destruction, a stage that many advanced economies have reached over the last few decades. In this second phase of modernity, the effectiveness and legitimacy of many collective institutions of modern life—factory systems, big bureaucracies, major corporations, and even nation-states—are undermined by a series of structural changes falling under the general heading of “individualization.”⁶

Extending its influence across the range of social, economic, political, and cultural fields, individualization has had a major impact on all systems of government. Its momentum has led to the erosion of hierarchies, the outsourcing of many collectively organized tasks, and the displacement of collective decision by individual judgment. This in turn has meant the fragmentation of institutional arrangements as bureaucracies are broken down through policy-operational differentiation and the outsourcing of activity, the perforation of boundaries between public and private, and the increased influence of rights discourse. A further feature of second-phase modernity is the growing dominance of systems organized on a global scale. Because of this, national governments have seen their authority challenged, both

from above by global systems and from below by the blurring of public and private and the demands of individual rights. Such rapid structural changes have unsettled conventional expectations and generated yet more formal and transparent arrangements, transforming the role of the constitution in the social life of the nation.

This transformation leads to constitutionalism taking a reflexive turn. Individualization encourages this in numerous ways. The constitution is reinterpreted through the prism of individual rights rather than institutional powers. The center of action shifts away from legislatures into the courts, where a determinate decision by legislative will is replaced by deliberative judgment through judicial reasoning. The growing social influence of constitutional discourse leads to the emergence of the total constitution, which is reimagined according to universal principles such as rationality, proportionality, and subsidiarity. Finally, reflexive constitutional reasoning permeates all social and political discourse, leading to the reconceptualization of state and society on the foundation of individual rights. The name I have given to this entire process is constitutionalization.

The contemporary period is not “the age of constitutionalism” just because of a growing number of states that are reconstituted in ways that mark a clean break with the past. It is so designated because, as a result of these socioeconomic changes, the role of the constitution in all regimes of constitutional government is revitalized. The dramatic impact that constitutionalization has had on constitutional jurisprudence was examined in Part III. If we focus only on domestic developments, it is tempting to see the move toward a principled, rights-based, universalizing jurisprudence of aspiration as an entirely progressive change. But this overlooks the way that constitutionalization dissolves the sharp lines dividing the national from the international.⁷

A particularly insidious aspect of the second phase of modernity is the increasing amount of governing power now exercised by international institutions. Established as intergovernmental arrangements to coordinate action in a world of growing interdependencies, constitutionalization reinforces their authority. Yet these institutions are not established by democratic authorization, that is, by an expression of the people’s constituent power. If they are legitimated at all, it is according to certain universal precepts of public reason. And as these global networks of governance extend their power and influence, Ordo-constitutionalism comes of age. Working through the con-

stitutionalization of international institutions and the interpenetration of national and international, its neoliberal cosmopolitan and market principles not only permeate national constitutional discourse but even impose structural constraints on its range of operation. Despite the apparently competing rhetorics of aspirational and Ordo variants, it is the disciplinary template of constitutionalism itself that determines their relative influence.

The impact of this reflexive turn can be summarized by revisiting the six main criteria of constitutionalism specified in the Introduction. The first principle, that the constitution establishes a *comprehensive scheme of government*, must be extended: the constitution now provides a blueprint for a *comprehensive scheme of society*. The second, the principle of *representative government*, is converted to the constitution as the *symbolic representation of collective political identity* and, with respect to international institutions, signifies a reinstatement of the principle of virtual representation once vehemently opposed by the American colonists. The third, the *division, channeling, and constraining of governmental powers*, devised to establish limited government through the horizontal allocation of powers between legislative, executive, and judiciary, now also expresses the *vertical differentiation of powers* between global, regional, national, and local authorities in a scheme of total government. The fourth, that the constitution creates a *permanent governing framework*, now bolsters the legitimacy of international institutions through the *constitutionalization of intergovernmental arrangements*. The fifth, that the constitution establishes a system of *fundamental law*, is globalized and so loses its link to collective political will, becoming the embodiment of *universal public reason*. Finally, the principle that the constitution assumes its status as the regime's *collective political identity* becomes the common template of an *invisible constitution of neoliberal values with a global reach*.



Do these rapid developments signal the waning of constitutional democracy? The most compelling argument to the contrary seems to be the dramatic growth in the numbers of states classified as constitutional democracies in the last few decades. At the end of the Second World War, only twelve established constitutional democracies were left standing in the world.⁸ By 1987, the number had grown to 66 of the world's 193 United Nations member states

and, by 2003, that figure had almost doubled again, to 121.⁹ Almost every state seeking to legitimate its rule in the eyes of its citizens and the world now feels it must present itself as a constitutional democracy.

But these statistics are deceptive and must be qualified. Constitutional democracy's key feature is to maintain the tension between two basic concepts of freedom: freedom as collective self-rule and freedom as individual autonomy. These must be kept in a state of productive irresolution because it is this that confers on constitutional democracy its open and dynamic character. Like all modern regimes, constitutional democracy involves governing by an elite. But it is distinctive in conferring the equal right on citizens to elect and be elected, and in requiring all major decisions to be subject to the ultimate verdict of the people.

Vital though it is, the practice of constitutional democracy is not reducible to regular elections based on universal suffrage. For elections to be meaningful, there must be a culture of active political engagement facilitated by a free press, vibrant civil society associations, and transparency in public decision-making. Constitutional democracy also promises advancement toward what Tocqueville called a growing equality of conditions. For this to be realized, we look for an increase not just in the number of those with a right to participate in decision-making but also in the number of arenas in which this right can be invoked.

Constitutional democracy cannot be defined simply as a form of government. The regime might be presidential or parliamentary, unitary or federal, and its electoral procedures can vary, as can the ways in which it identifies and protects rights. Constitutional democracy is both local and pluralistic, and justly so since it owes its authority to a particular people of a defined territory. In these respects, the adopted constitution must be seen to have been erected on the foundation of an already existing constitution of the state. It is this constituted order that invests with precise meanings principles of popular authorization, transparency in public decision-making, political equality, and accountability. Crucial to the flourishing of the regime are active civil society associations that educate and formulate, strong political parties that convert diverse views into a common will, a relative equality of income and wealth, and a civic culture that tolerates difference. As John Stuart Mill appreciated, these strenuous conditions are most likely to be met by a people "united among themselves by common sympathies."¹⁰

Few of the constitutional democracies appearing in recent global trends qualify according to these more rigorous criteria. This is not just because they are populous, culturally diverse states with complicated histories and a wide variety of governmental arrangements. The crucial point is that all too often they have been invested with the institutional trappings of constitutional democracy without the underpinning political culture to sustain it. Quantitative studies classify as constitutional democracies those regimes that have been modernized by the imposition of constitutionalism as a technical fix. Yet the ambition behind this exercise is daunting. It often requires newly independent nation-states with little prior experience on which to draw to quickly establish functionally effective market systems, vibrant civil society networks, strong and competitive political party systems, and workable mechanisms for ensuring transparent and accountable government.

Given the scale of this task, it is hardly surprising that so many newly established constitutional democracies are not functioning as many had hoped.¹¹ And yet, the apparent failure of the experiment has not led to the overthrow of these regimes. Rather than being ousted by coups d'état or other revolutionary action, they have kept the institutional trappings of constitutional democracy but without adhering to the norms and values by which they are supposed to work. Such constitutional democracies are degraded by being hollowed out from within.

This phenomenon is not just a feature of newly established regimes. It also afflicts relatively mature constitutional democracies. The strains are felt on multiple fronts. Constitutional democracy builds its authority on the pivotal role of the legislature as the primary institution of representative democracy. Yet legislatures are now losing authority to governments, regulatory officials, and courts. This erodes the principle of popular authorization, simultaneously weakening legislatures and political parties. Organized as vehicles for the formation of popular will, political parties now seem remote from their members and beholden to powerful backers. The result is that most established political parties have experienced a serious decline in support.¹² These domestic political trends are reinforced by the sense that governing power is increasingly exercised by officials in international organizations whose remit is opaque and who are insulated from established methods of control and accountability. Together, these trends indicate a marked decline of trust not just in political elites but also in governing institutions.¹³

The decline in political authority is accentuated by the impact of recent social and economic changes. Of particular importance has been the accelerating growth of economic inequality in all constitutional democracies.¹⁴ In direct contrast with Tocqueville's principle of a growing equality of conditions, this erodes the sense of common feeling that sustains constitutional democracy. The cause is not just the corrosive effects of the threat of economic power being converted into political power, but also, in a new take on Sieyès's views of the nobility, the wealthy no longer seeing themselves as part of a territorially bounded political nation. Compounded by historically unprecedented levels of migration into advanced democracies, it is a trend that fragments the sense of "the people" and loosens the "common sympathies" that sustain constitutional democracies.¹⁵

The cumulative effect of these changes on the status of constitutional democracy has been profound. The challenges of accommodating the interests of large heterogeneous societies through representative politics, of securing both economic growth and acceptable wealth distribution, of maintaining territorial controls in a world of porous borders, and of curbing the power of transnational institutions all put enormous strain on the capacity and legitimacy of constitutional democracy.



Such somber developments considerably complicate any defense of constitutional democracy against constitutionalism. But at least they present a more realistic basis for analysis. Recent developments have triggered numerous studies examining how and why constitutional democracies are in decline and what might be done to protect them.¹⁶ The startling fact, however, is that these studies assume that the regime under attack is a constitutional democracy. Invariably conflating constitutional democracy with constitutionalism, they fail to consider whether the problem is not with constitutional democracy but with the way that rampant constitutionalism transforms constitutional democracies.

There have been many discussions about the emergence of so-called illiberal democracies in states like Hungary and Poland, about the growing electoral success of nationalist parties such as the Front National in France (since 2018 renamed *Rassemblement National*), *Alternative für Deutschland* (AfD) in Germany, the *Freedom Party of Austria* (FPÖ), *Lega Nord* (in 2018 re-

branded as Lega) in Italy, or the Bharatiya Janata Party (BJP) in India, and about the erosion of constitutional norms following the emergence of authoritarian leaders. But these studies have focused determinedly on sources of dissatisfaction with constitutional democracy. They have not engaged with the possibility that these developments might be reasonable responses to how constitutional democracies have been undermined by the extending influence of constitutionalism.

The contemporary crisis is widely considered to have its source in the looming specter of “populism.”¹⁷ This label has been applied to a range of political movements whose manifestations vary according to circumstances. Unlike liberalism, socialism, or indeed constitutionalism, populism is not a specific ideology giving rise to a distinctive political movement. Populism is a syndrome, a set of symptoms indicating an ailment afflicting contemporary democracies.¹⁸ Born of dissatisfaction with the ways in which constitutional structures and party politics are working, populist politics seek more direct means by which popular opinion can influence governmental decision-making. In this respect, the aim is to restore the voice of the majority as the authentic expression of constituent power. It is not difficult to denigrate the movements falling under this label as nationalist, xenophobic, simplistic, antipluralist, a revolt of the “left-behinds,” and downright dangerous if transformed from syndrome to project for power. Populism is undoubtedly a reaction to the impact of deep-seated social and economic changes falling under the umbrella of globalization. But it can also be seen as the inevitable political response to the reflexive turn taken by contemporary constitutionalism.

This is not how the rise of populism is seen in contemporary constitutional scholarship, which invariably assumes it is simply an expression of antagonism to constitutional democracy.¹⁹ These studies offer an inventory of solutions: imposing bans on radical political parties and curbs on free speech, adopting “eternity clauses” that prohibit the amendment of basic principles of the constitution, instituting threshold voting arrangements, and strengthening the powers of arms-length reviewing institutions.²⁰ The solution commonly touted to threats associated with the rise of populism is to strengthen the institutional mechanisms of constitutionalism. Having wrongly diagnosed the ailment, what is proposed as a remedy is an intensification of the treatment that is one of the main sources of the original disorder.

Many if not most of these populist movements have arisen in opposition not to constitutional democracy but to the way it has been reshaped by constitutionalism. Consider for example the rise of populism in central and eastern European states that have undergone a rapid transition from Soviet-style socialism to market capitalism. Here, the growth of populism seems directly linked to the imposition of constitutionalism. In these regimes, argue Ivan Krastev and Stephen Holmes, “discontent with ‘the transition to democracy’ was . . . inflamed by visiting foreign ‘evaluators’ with an anaemic grasp of local realities.” The rise of populism, they suggest, is born of “humiliations associated with the uphill struggle to become at best an inferior copy of a superior model.”²¹

Indeed, some radical theorists have argued that populism is less a symptom of decline than a sign of the possible renewal of democracy.²² Populism provokes us to inquire more deeply into the sources of these recent constitutional developments, but it is best seen as a warning symptom of how the political foundations of constitutional democracy are being eroded.²³ If rampant constitutionalism is part of the problem, a more productive way forward must be to restore the basic values of constitutional democracy.



Is constitutional democracy a twentieth-century phenomenon whose time has passed? That certainly is the view of cosmopolitans who believe that the second phase of modernity has demolished the foundations of modern state-based constitutional democracy. They argue that the project of building constitutional authority on the foundation of the modern idea of the state—the union of territory, people, and sovereign authority—is over, claiming that authority now depends on the degree to which governmental practices conform to an ideal “invisible constitution.”

The invisible constitution does not prescribe a particular arrangement of governing institutions but comprises a set of universal principles explicated by a network of judicial bodies. The modern idea of the constitution as a text in which the people, through an exercise of constituent power, outline the terms by which they govern themselves is relegated to secondary matter. The hierarchical relationship between ordinary law made by legislatures and the fundamental law of the constitution has been superseded. In the new cosmopolitan paradigm, the constitution no longer has ultimate authority

since it is now subject to the creative powers of judicial interpretation that render it compliant with the principles of the invisible constitution. Super-legality reigns.

This looks like progress: who could object to the subjection of governmental decision-making to rationality review? In fact, it is political naivete. Cosmopolitan constitutionalism promotes the authority of a set of self-sustaining principles, but these principles only acquire meaning when infused with values. And these values become clear when it is seen that the invisible constitution is closely linked to a powerful global network of invisible power.

In the 1980s, Norberto Bobbio drew attention to the ways in which the values of democracy as a system of open government by a visible power were being eroded by the growth of a corporate state wielding influence through invisible methods beyond the reach of democratic control and accountability.²⁴ The world has much changed since then. Second-phase modernity has resulted not in a diminished state but in a much more fragmented one. With the proliferation of semiautonomous agencies, the blurring of public-private boundaries, and the growing power of global networks, invisible power has now become a more pervasive phenomenon even less susceptible to political accountability. Constitutionalization might therefore be seen as an attempt to regulate invisible power. But whatever benefits constitutionalization might confer—and it does at least operate on the principle of openness—it ends up legitimating a system that is no longer the project of a people and no longer subject to popular control. The new species of law it brings in its wake is itself a new type of invisible power. In the nineteenth century, Tocqueville recognized that, by neutralizing the vices inherent in popular government, lawyers inevitably become the conduits of constitutional democracy. Continuing to value liberty and being attached to order above all other considerations, they have now become effective agents in bolstering the new global system.²⁵

At the beginning of the twentieth century, Weber outlined the thesis that modern capitalism had its origins not in the Enlightenment and the processes of secularization, but in the emergence of new forms of religious conviction that preached individual responsibility, required more methodical control over conduct, and embraced acquisition as the ultimate purpose of life. He concluded his argument by suggesting that no one knows “who will live in

this cage in the future.” It is surely not fanciful now to see in the triumph of constitutionalism the culmination of Weber’s claims.²⁶ Marking the apotheosis of individual rights, it contributes to the hollowing out of democracy and the retreat of the individual into a privatized society in which few participate in public affairs. And as Tocqueville foresaw, this will lead to a void that can only be filled by an extensive regulatory network operating in a governing mode that is “absolute, minute, regular, provident, and mild.”²⁷

There are many powerful forces directing contemporary change and subverting the authority of a political worldview founded on equal liberty in solidarity.²⁸ Yet the fact remains that civilized life still requires an extensive governmental apparatus to provide the physical and social infrastructure essential for peace, security, and welfare, and no more effective method of ensuring the realization of these goals has been devised than the political conception of constitutional democracy I have outlined. Ultimately, the argument against constitutionalism rests on the claim that it institutes a system of rule that is unlikely to carry popular support, without which only increasing authoritarianism and countervailing reaction will result.