

1987

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## Recommended Citation

Gerhard Casper, "Constitutionalism," University of Chicago Law Occasional Paper, No. 22 (1987).

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Occasional Papers from  
The Law School  
The University of Chicago

Number 22

Constitutionalism  
Gerhard Casper

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# Constitutionalism

Gerhard Casper\*

Constitutionalism is a term not altogether congenial to American lawyers. It seems to share the characteristics of other “isms”: it is neither clearly prescriptive nor clearly descriptive; its contours are difficult to discern; its historical roots are diverse and uncertain. Legal realist Walton H. Hamilton, who wrote on the subject for the *Encyclopedia of the Social Sciences*, began his article in an ironic vein: “Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order.”

Historians, on the other hand, employ the concept with some confidence in its meaning. American historians tend to use it as a shorthand reference to the constitutional thought of the founding period. European historians have a somewhat harder time. Given a largely unwritten constitution and the sovereignty of Parliament, what does it mean to refer to British constitutionalism? What is the significance of Dicey’s distinction between the “conventions of the constitution” and the “law of the constitution”? How meaningful is the distinction? As Dicey noted: “Whatever may be the advantages of a so-called unwritten constitution, its existence imposes special difficulties on teachers bound to expound its provisions.” French authors view constitutionalism as an important element of the French Revolution, but run into difficulties as they contemplate the fact that, since the constitution of 1791, France has had fifteen of them—and by no means all democratic. German historians tend to restrict the use of the term *Konstitutionalismus* to the Central European constitutional monarchies of the nineteenth century, though German-language equivalents for constitutionalism (*Verfassungsstaat*, *Verfassungsbegriff*) are frequently encountered in the literature. The German constitutionalist trauma is, of course, the ease with which the Weimar constitution, in its time viewed as one of the most progressive in the world, could be brought to

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\*William B. Graham Professor of Law and Dean of the University of Chicago Law School. This essay was first published in *The Encyclopedia of the American Constitution*. Leonard W. Levy, editor-in-chief, and Kenneth L. Karst, associate editor. Volume 2, pp. 473–80. Copyright©1986 by Macmillan Publishing Company, a division of Macmillan, Inc. Reproduced by permission of the publisher.

collapse at the hands of determined enemies who then managed to organize arbitrariness in the form of law.

Constitutionalism has both descriptive and prescriptive connotations. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's right to "consent" and certain other rights, freedoms, and privileges. This struggle extends roughly from the seventeenth century to the present day. Its beginnings coincide with the "enlightenment" of the seventeenth and eighteenth centuries. Used prescriptively, especially in the United States, its meaning incorporates those features of government seen as the essential elements of the American Constitution. Thus, F. A. Hayek called constitutionalism the American contribution to the rule of law.

Constitutionalism obviously presupposes the concept of a constitution. A Swiss authority of some influence in the American revolution, Emerich de Vattel, in his famous 1758 treatise, *The Law of Nations or the Principles of Natural Law*, provided a definition: "The fundamental law which determines the manner in which the public authority is to be exercised is what forms the *constitution of the State*. In it can be seen the organization by means of which the Nation acts as a political body; how and by whom the people are to be governed; and what are the rights and duties of those who govern. This constitution is nothing else at bottom than the establishment of the system, according to which a Nation proposed to work in common to obtain the advantages for which a political society is formed."

This rather neutral definition has to be read against the background of Vattel's theory of natural law. Vattel recognized the right of the majority to reform its government and, most important, excluded fundamental laws from the reach of legislators, "unless they are expressly empowered by the nation to change them." Moreover, Vattel believed that the ends of civil society were "to procure for its citizens the necessities, the comforts, and the pleasures of life, and in general their happiness; to secure to each the peaceful enjoyment of his property and a sure means of obtaining justice; and finally to defend the whole body against all external violence."

Later in the eighteenth century strong prescriptive elements became part of the very definition of a constitution. Two examples are equally famous. On October 21, 1776, the town of Concord, Massachusetts,

resolved “that a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession and enjoyment of their Rights and Privileges against any Encroachment of the Governing Part.” Article 16 of the French Declaration of the Rights of Man of 1789 put it even more bluntly: “A society in which the guarantee of rights is not assured nor the separation of powers provided for, has no constitution.”

Although it would be impractical to make such substantive features a necessary part of one’s definition of a written or unwritten constitution, a proper understanding of constitutionalism as a historical phenomenon depends on them. Constitutionalism does not refer simply to having a constitution but to having a particular kind of constitution, however difficult it may be to specify its content. This assertion holds true even in the case of the interplay of old forces (monarchies and estates) with new forces (the middle class in particular) which characterized the emergence of constitutional monarchies in Central Europe during the nineteenth century. Seen from a constitutionalist perspective, many of the German constitutional monarchies were influenced by concepts that had much in common with constitutionalist thought. The most important of these concepts was the *Rechtsstaat*: a state based on “reason” and a strict regulation of government by law.

The concepts of a constitution and of fundamental laws have not had a constant meaning over time. Since the eighteenth century (though not before), it has become customary to translate Aristotle’s word *politeia* as “constitution”: “A constitution is the arrangement of the offices in a *polis*, but especially of the highest office.” This definition precedes Aristotle’s differentiation among six forms of government—those for the common good (monarchy, aristocracy, and “polity”) and their perversions, which serve individual interests (tyranny, oligarchy, and democracy). Aristotle thus introduced substantive, not merely formal, criteria into his teachings about constitutional arrangements.

Cicero is usually credited with first giving the Latin term *constitutio* something like its modern meaning. About a mixed form of government, he said in *De Re Publica*: “This constitution has a great measure of equability without which men can hardly remain free for any length of time.” Indeed, Roman law was characterized by constitutional notions. The constitution of the Roman republic, putting other

substantive arrangements aside, was marked by the power of the plebs to pass on laws which bound the entire Roman people. While this republican prerogative of the plebs was later replaced by Senate law-making and eventually by the emperor's legislative monopoly, its status is perhaps best illustrated by Augustus's repeated refusal, on "constitutional" grounds, to accept extraordinary powers to renew law and morals. Though this Augustan reticence may have been a triumph of form over substance, "triumphs" of this kind have frequently illustrated how constitutional notions have become deeply entrenched.

In subsequent Roman usage the term *constitutio* came to identify imperial legislation that preempted all other law. The understanding of *constitutio* as signifying important legislation was retained during the Middle Ages in the Holy Roman Empire, in the church, and throughout Europe. A well-known English example is the Constitution of Clarendon issued by Henry II in 1164.

In England, the modern use of constitution as referring to the nature, government, and fundamental laws of a state dates from the early seventeenth century. In the House of Commons, in 1610, James Whitelock argued that the imposition of taxes by James I was "against the natural frame and constitution of the policy of this kingdom, which is *ius publicum regni*, and so subverteth the fundamental law of the realm and induceth a new form of State and government."

In Europe, perceptions that some laws were more fundamental than others were well established before the eighteenth century. Magna Carta (1215), the Petition of Right (1628), and the Habeas Corpus Act (1679) are the best known English illustrations of this point. In addition, by their coronation oaths English kings obliged themselves "to hold and keep the laws and righteous customs which the community of [the] realm shall have chosen." Even if the law could not reach the king, the king was viewed as under the law (and, of course, under God). The bounds of the king's discretion were defined by the ancient laws and customs of England or, put differently, the common law. By the seventeenth century, Edward Coke was even prepared to claim that acts of Parliament were subject to review under the common law (and natural law).

Though the status of French kings was considerably more mysterious and legal constraints on them

were far fewer than in England, they too were viewed as subject to fundamental laws. The French Protestant political theorists of the sixteenth century expressed far-reaching views on the matter. François Hotman subtitled the XXVth chapter of the third edition of his *Francogallia* (1586): “The king of France does not have unlimited domain in his kingdom but is circumscribed by settled and specific law.”

Beginning in the seventeenth century, the struggle over the limits of power, the ends of government, and the limits of obedience was frequently expressed in terms of social contract theory. Johannes Althusius, Hugo Grotius, John Locke, and Jean-Jacques Rousseau all influenced the civil struggles of their age. Although the differences among these writers are profound, all of them stipulate a social compact as the foundation for the constitutional arrangements of the state. While such a contract is not necessarily based on an assumption of popular sovereignty, a social contract without the assumed or actual consent of “the people” or their representatives is unthinkable. Once this notion spread widely, it was difficult to maintain the divine right of kings, and it became almost irresistible to relocate sovereignty in the people—Thomas Hobbes notwithstanding.

One must not confuse the concept of a social contract with that of a constitution. For the “contractarians,” constitutions follow from the social contract; they are not identical with it. Although the social contract is mostly a logical stipulation, at times the contract seems real enough, embodying or justifying specific constitutional arrangements. The Glorious Revolution in England, the American Revolution, the French Revolution—all appealed to the social contract.

The Glorious Revolution, like the English Civil War before it, was seen in contractarian terms. The Convention Parliament of 1689 resolved that James II “having endeavored to subvert the constitution of the kingdom by breaking the original contract between king and people . . . has abdicated the government and the throne is hereby vacant.” The Declaration of Rights of 1689 was part of Parliament’s contract with William and Mary and, later that year, was incorporated into the act of Parliament known as the Bill of Rights. After reciting Parliament’s grievances against the absolutist tendencies of James II, the Bill of Rights prohibited the suspension of the laws by regal authority; provided for the election and privileges of Parliament (including a prohibition of prerogative

taxation); and dealt with the right to petition, excessive bail, and the jury system.

Although this catalogue of constitutional concerns is modest by contemporary standards, the Bill of Rights, in conjunction with other British traditions and the “mixed government” confirmed by the Glorious Revolution, led Montesquieu to celebrate England as the one nation in the world “that has for the direct end of its constitution political liberty.” Montesquieu concluded his chapter on “The Constitution of England” in *The Spirit of the Laws* with the wry comment that it was not his task to examine whether the English actually enjoyed this liberty. “Sufficient it is for my purpose to observe, that it is established by their laws; and I inquire no further.” When Montesquieu’s book was published in 1748, some questions about constitutional liberty in England might indeed have been examined. For instance, the right to vote was extremely restricted and even that small electorate was not consulted when, by the Septennial Act of 1716, Parliament extended its own duration by another four years. For the American colonists who fought more against the British Parliament than against their monarch, this example of the “sovereignty of Parliament” marked the limit of British constitutionalism. As James Madison wrote in *The Federalist* No. 53, citing the Septennial Act: “Where no constitution paramount to the government, either existed or could be obtained, no constitutional security similar to that established in the United States, was to be attempted.”

American constitutionalism during the colonial and revolutionary periods included the notions of a constitution as superior to legislation and the notion of a written constitution. As concerns the “writing” of constitutions, Gerald Stourzh has remarked, for the period after 1776, that Americans clearly differentiated “between the functions of constitution-making (with an additional differentiation between drafting and ratifying functions), of amending constitutions, and of legislating within the framework of the constitution.”

One formal element in the American colonies was bound to have a profound impact on American constitutionalism, especially its choice of written constitutions as the means for anchoring the organization of their governments and the protection of their rights and privileges. Colonial charters, fundamental orders, and other written documents were used in the establishment of the colonies. These contracts be-

tween rulers and ruled provided for the government of the colonies, secured property rights, and even extended the guaranteed liberties and privileges of the English constitution. The 1629 Charter of Massachusetts Bay is an important early example.

Pennsylvania, however, provides the most vivid illustration of the essential features and conundrums of American constitutionalism. In England, in 1682, a “frame of government of the province of Pensilvania” was agreed to by the Governor, William Penn, and “divers freemen” of the province. It was a revision of an earlier plan drawn up by Penn which he had called “Fundamental Constitutions of Pennsylvania.” The frame of government was replaced by a new frame as early as 1683. Its place was taken in 1701 by the Pennsylvania Charter of Privileges, granted by Penn during his second visit to the province and formally approved by the General Assembly. Though the focus here is on the Charter of Privileges, William Penn’s preface to the Frame of Government deserves quotation: “*Any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, or confusion.*” Having invoked the notions of government of laws and popular consent, Penn went on, however, to warn against excessive optimism about the rule of law: “Governments, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too.” It is difficult to imagine a better reflection on the challenges faced by the American constitution makers of the eighteenth century.

The Pennsylvania Charter of Privileges of 1701 was a remarkable constitutional document. First of all, the charter itself was adopted in a constitutional manner, according to the provisions for amending the Frame of Government. Second, it began, not with the organization of government, but with an issue of fundamental rights: it guaranteed the freedom of conscience and made all Christians eligible for public office. Third, the charter provided for a unicameral representative assembly to be elected annually by the freemen with the right to initiate legislation and with all parliamentary powers and privileges “according to the Rights of the free-born Subjects of *England*, and as is usual in any of the King’s Plantations in *America*.” Fourth, far ahead of its time, it gave to all “criminals” “the same Privileges of Witness and Council as their Prosecutors.” Fifth, it guaranteed

the “ordinary Course of Justice” in all disputes concerning property. Sixth, the proprietor committed himself and his heirs not to breach the liberties of the charter; anything done to the contrary should “be held of no Force or Effect.” Seventh, the liberties, privileges, and benefits granted by the charter were to be enjoyed, “any Law made and passed by this General Assembly, to the Contrary hereof, notwithstanding.” Eighth, the charter could be amended only by a vote of “*Six Parts of Seven*” of the Assembly and the consent of the governor. Ninth, the guarantee of liberty of conscience was placed even beyond the power of constitutional amendment “because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences.”

This colonial charter, granted by a feudal landowner, embodies the most significant elements of American constitutionalism as it emerged in the course of the century—the concept of consent and the concept of a written constitution sharply differentiated from ordinary legislation and with provisions for its amendment and a bill of rights, however rudimentary. Indeed, by placing the liberty of conscience beyond the amending power it posed the ultimate conundrum of constitutionalism—the possibility of unconstitutional constitutional amendments.

The concept of consent had direct consequences for questioning the powers of Parliament over America and for the American understanding of representation. In terms of constitutionalism, the most important part of the long list of grievances against George III with which the Declaration of Independence began (following the model of the Declaration of Rights of 1689) was the passage which stated that the king had “combined with others to subject us to a jurisdiction foreign to our constitutions, and unacknowledged by our laws; giving his assent to their acts of pretended legislation.” The nation began with an assertion of the right to consent.

In the decades of constitution-making following independence the main organizational task of American constitutionalism was to spell out in detail the implications of popular sovereignty for the structure of government. What, for instance, should follow from the famous formulation in the Virginia Declaration of Rights, of June 12, 1776, “that all power is vested in, and consequently derived from, the people; the magistrates are their trustees and servants, and at all times amenable to them”? Four subjects were of overriding importance: the franchise; the

separation of powers; the amending process; and the protection of individual rights.

Political status in the colonies had mostly depended on property ownership, and the Revolution had not done away with these requirements. The federal Constitutional Convention of 1787 could not agree on who should have the right to vote. Sovereignty of the people did not mean all the people. But who should have the right to vote was discussed frequently and with great seriousness. The voters of the Massachusetts town of Northampton, for instance, concluded in 1780 that restricting the franchise for the Massachusetts house freeholders and other men of property was inconsistent with the concepts and principles of native equality and freedom, the social compact, personal equality, and no taxation without representation. Their objections pertained only to elections to the house; indeed, they were based on the notion that in a bicameral legislature one chamber should represent property, the other persons. A few more decades had to elapse before property and taxpaying qualifications disappeared. The franchise was expanded in all Western societies in the course of the nineteenth century. The earliest and most inclusive expansion, however, came in the United States—although even here the vote was withheld from women, American Indians, slaves, and, as a rule, free blacks.

The colonists widely believed that their governments were “mixed” in accord with the British model. A London compendium from 1755 said of the colonial governments: “By the governor, representing the King, the colonies are monarchical; by a Council they are aristocratical; by a house of representatives, or delegates from the people, they are democratical.” While this was more an “ideal type” than an accurate description of the constitutional facts, the post-Revolution problem for those who had grown up within the tradition of mixed or balanced government was how to institute it under radically changed conditions. The question was not really whether to have balanced government, though some advocates of “simple” government existed.

The separation of powers doctrine, as put forward most influentially by Montesquieu, sought to limit power by separating factions and, to some extent, associating them with the executive and legislative functions of government. To Montesquieu the separation of powers was a necessary if not a sufficient condition of liberty. By 1776 the American constitutional

problem had become not the separation of “powers” but the distribution of power flowing from a single source—the people.

Though the Americans continued to view the separation of powers as necessary to liberty and therefore indispensable to constitutionalism, they faced a formidable challenge in attempting to implement the concept. The towns of Essex County, Massachusetts, wrote “the Essex Result,” a veritable dissertation on the subject in voicing their objections to the proposed Massachusetts constitution of 1778, which they considered insufficiently mindful of the separation of powers. They propounded the principle “that the legislative, judicial, and executive powers are to be lodged in different hands, that each branch is to be independent, and further, to be so balanced, and be able to exert such checks upon the others, as will preserve it from dependence on, or an union with them.”

Practical problems were inevitable. The different powers of government do not imply clearly differentiated functions; they will necessarily be closely intertwined—especially if one adds the notion, urged in the Essex Result, of checks and balances. In the major states constitutions enacted in 1776 and immediately after, the legislative branch usually dominated, but the constitutions distinguished conceptually between legislative, executive, and judicial functions. They made members of one branch ineligible to serve in the others, and they gave some measure of autonomy to the judiciary. However, with respect to such crucial features as the structure and election of the executive and the power of appointments, they differed radically one from the other.

As successful revolutionaries, the Americans faced a difficult political task. They needed to justify the power of the people to change their government and at the same time to assure the stability of the new order based on popular sovereignty. If, as a practical matter, consent meant consent by a majority, was that majority not also at liberty to change the states’ new constitutions? If not, why not? Vattel had struggled valiantly to develop a satisfactory framework for thinking about constitutional change, though without much success. His argument in *The Law of Nations* that the legislative power could not amend the constitution is hardly a model of tight reasoning. Concluding his essay, Vattel observed: “However, in discussing changes in a constitution, we are here speaking only of the right; the expediency of such

changes belongs to the field of politics. We content ourselves with the general remark that it is a delicate operation and one full of danger to make great changes in the State; and since frequent changes are hurtful in themselves, a Nation ought to be very circumspect in this matter and never be inclined to make innovations, except for the most urgent reasons or from necessity.”

In America, Thomas Jefferson was the foremost theorist of constitutional change. He believed that each generation has “a right to choose for itself the form of government it believes most promotive of its happiness . . . .” The same man who provided us with this theory of constitutional change wanted to be remembered in his epitaph for the Virginia Statute of Religious Liberty (1786), which ended with a proviso that sought to secure the statute forever: we “do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.”

In a way, the matter was simple. Jefferson and many of his fellow citizens were for change, stability, and inalienable rights all at the same time. These disparate aims were somewhat reconciled in practice by having the constitutions provide for their own amendment and for bills of rights. This course had important practical implications: it legitimized the concept of constitutional change and thus dramatically reduced the need for revolutions; and it advised the majority that it had no power to regulate at will the structure of government or basic rights of individuals. Enlightened America was anything but unanimous on the status of specific rights. Not every state constitution had a bill of rights; those that did almost always included the liberty of conscience, freedom of press, trial by jury, and protection of property. Some of the rights, as Penn and Jefferson suggested, were considered so fundamental that their amendment would conflict with the very nature of constitutional government.

The Constitutional Convention of 1787 and the main features of the federal constitution, after a decade of state constitutions, further defined American constitutionalism. The Constitution precariously provided for a mode of ratification hardly in accord with the Articles of Confederation. Among the ironies of history is the fact that the Constitutional Convention's preference for the convention method

of ratification (rather than ratification by all state legislatures as required by the Articles) resulted in attaching to the Constitution, in 1791, a Bill of Rights, which the Framers of Philadelphia had considered unnecessary.

The most important aspect of the Constitution was its implementation of the goal "to form a more perfect Union." Carl J. Friedrich characterized the claim that federalism is an American invention a defensible overstatement. The Constitution's effort to delineate clearly the powers of the federal government as against those of the states is remarkable indeed. Its main accomplishment was not to get bogged down by the metaphysics of sovereignty and to enable the federal government to legislate and tax in a manner binding the people directly, without using the states as intermediaries. This structure of "dual sovereignty" assured the viability of the federal government and, at least well into the twentieth century, the viability of the states. It underwent one substantial modification. When the "perpetual" nature of the Union was challenged over the issue of slavery, constitutional amendments were enacted at the end of the Civil War for the primary purpose of securing equal rights to recently emancipated black citizens. These amendments eventually legitimized a great expansion of federal influence on the law of the states in the interest of greater equality for blacks and other minorities.

The constitutional organization of the federal government is delineated by the organization of the constitutional text. The Preamble speaks of the people of the United States as ordaining and establishing the Constitution. The first (and presumably most important) article deals with the election and legislative powers of Congress. Article II vests the executive power in a President. Article III concerns the judicial power and its jurisdiction. Although this organization seems to provide us with a rather pure example of the separation of powers, the Constitution combines elements of separate and independent powers (such as an independent judiciary or a President not dependent on Congress for his term of office) with a thorough mixing of powers, best summarized by the concept of checks and balances.

Superficially, the legislative and executive branches seem to be assigned separate functions: lawmaking and law executing. The judicial branch, through dispute-settling, performs one part of the executive function under special conditions and special proce-

dures. In reality, however, both the executive and the judiciary engage in lawmaking through interpretation and rule-making. The executive intrudes into the legislative function by exercising the veto power. Congress, on the other hand, performs executive functions through legislative oversight, appropriations decisions, and confirming appointments. One might better forgo the Framers' own characterization of the system as one of separation of powers. American constitutionalism indulged itself in heaping checks upon checks so that the love of power of officials occupying the various branches of government could be harnessed.

On one of the most important of these checks and the most distinctly American contribution to constitutionalist doctrine, the Constitution of 1787 was silent. Nowhere does the constitutional text grant the power of judicial review of legislation. On the basis of the debates in the Constitutional Convention one can make a strong case that some of the most influential Framers thought that judicial review was implied, but this is not the same as saying that the Constitution implies it. How then did the American judiciary end up as the guardian of the Constitution?

There had been instances of courts exercising the power of judicial review as well as public debate of the issue in the new states. The case for judicial review was based on a peculiarly American amalgam of various strands of constitutionalism. First, there was the notion of a constitution as fundamental law. If Lord Coke could claim the common law as a basis for reviewing acts of Parliament, how much more plausible the claim that judges were bound to obey a fundamental charter viewed as supreme law. Second, if the constitutions derived their authority from the sovereignty of the people, and if legislators and other government officials were simply the people's trustees and servants, it was no great leap to reason that judges had to obey the will of the whole people as expressed in the constitution. Third, the special procedures for constitutional amendment typically denied the legislatures the power to amend by ordinary legislation, which suggested that attempts of that kind should go unenforced. Fourth, those constitutions containing bills of rights reenforced the notion of a constitution as superior law with the aim of protecting the rights of individuals against tyrannical majorities. Fifth, in the case of the federal constitution there was the added need to assure its status as supreme law throughout the Union. The arguments for

and practice of judicial review of state legislation served to consolidate the understanding of the American Constitution as the supreme law of the land to which all government actors were subject.

Chief Justice John Marshall in *Marbury v. Madison* (1803) to the contrary notwithstanding, the issue of judicial review was an intricate one. No simple constitutionalist syllogism could be constructed that invariably led one to conclude that judges had the power of judicial review. The amalgam, however, proved powerful under the conditions prevailing in the United States. When the Supreme Court went ahead and in effect appointed itself and the other judges guardians of the Constitution (in the case of the Supreme Court, eventually to become the pre-eminent guardian), the people, by and large, acquiesced.

The American institution of judicial review has influenced developments abroad. Various forms of constitutional review exist in Austria, Germany, India, Italy, Japan, and, now, even France—to name the most important. While their historical roots are many and their institutional characteristics diverse, the American model was highly visible when they came into being. One of the most instructive contemporary instances is that of the Court of Justice of the European Community. Starting with the need of assuring the uniformity of Community law throughout the member nations, the Court of Justice has transformed the treaties underlying the European Community (especially the Treaty of Rome) into the constitution of the community. These are radical developments. The constitutionalization of the Treaty of Rome has led to the introduction of judicial review, or what one might more appropriately call Community review, even into countries that have not previously recognized the power of their courts to pass on the constitutionality of legislation.

As constitutionalism does not refer to having a constitution but to structural and substantive limitations on government, it would be a gargantuan task to determine its incidence in a world full of written constitutions, of which many do not mean what they say, while others do not accomplish what they mean. The need to distinguish between form and substance would necessitate impossibly vast empirical assessments. The distinction between form and substance would also make desirable a detailed examination of the legal situation in countries, such as Great Britain, that meet most substantive requirements of consti-

tutionalism without a written constitution, an entrenched bill of rights, or the power of judicial review.

Constitutionalism matured in the context of the liberal democracies with their emphasis on civil and political rights and their attempts clearly to define the public and the private sphere. The rights guaranteed, with the exception of certain rights to participate in the exercise of governmental power, were rights of the citizen against infringement by government of his own sphere, or "defensive" rights (German constitutional law has coined the term *Abwehrrechte* for this category). The eighteenth- and nineteenth-century constitutions do not contain social rights aimed at guaranteeing citizens a fair measure of well-being. A notable aspect of the Weimar constitution was its effort to formulate rights that would guarantee everyone a worthwhile existence. As the concept of citizenship expanded from the formal equality of sharing legal capacities to the substantive equality of sharing goods, the contemporary welfare state became clearly committed to some undefined (and probably undefinable) minimum of such substantive equality. The predominant means for accomplishing such goals has been legislation rather than constitutionalization. Certain legislation of this kind has been viewed by some as in actual conflict with the constitutionalist scheme. This alleged conflict has, in turn, led to substantial efforts in the United States and other countries to reinterpret the liberal constitutions as not only permitting but demanding government intervention on behalf of the underprivileged.

In conjunction with these difficulties, but by no means restricted to them, American constitutional scholarship engages in periodic debates about methods of constitutional interpretation. Much of the discussion reinvents the interpretive wheels of earlier generations. Its main focus is the degree of fidelity which may be owed the words of the Constitution and the intentions of its Framers. Some contemporary writing argues that the Constitution can incorporate contemporary value preferences of a highly subjective kind. The tension is between the need to expound an essentially unaltered eighteenth-century Constitution in a manner consistent with "the progress of the human mind," on the one hand, and the danger of dissolving the Constitution in the process. The dispute is further complicated by endless varieties of highly refined theories concerning the proper scope of judicial review.

Over its two hundred years the American Constitution has been assigned the role of a national ideology. It has performed this role for a people that has grown from a few million to almost 250 million citizens of very diverse background. While the historical disinclination to amend the Constitution by means other than judicial review may help account for its durability, it has also subjected the Constitution to considerable strain. As the secular equivalent of the Bible, as Walton Hamilton observed, "it became the great storehouse of verbal conflict, and rival truths were derived by the same inexorable logic from the same infallible source." More often than not, Americans invoke constitutional principles in order to understand and resolve conflicts. This fact attests to the extraordinary vitality of American constitutionalism. It may also endanger its viability. Too frequent crossings of the line between "constitution as ideology" and "ideology as constitution" will blur the line. The American concept of the legitimacy of government is closely tied to the Constitution. Its limitless manipulation may endanger the very legitimacy that has been the great accomplishment of American constitutionalism.

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