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What is Constitutionalisation?

Martin Loughlin

I. INTRODUCTION

A new term has recently entered the vocabulary of politics: constitutionalisation. It stands as an expression of a set of processes that are now having a significant impact on decision making at all levels of government—local, regional, national, transnational, international. Constitutionalisation involves the attempt to subject all governmental action within a designated field to the structures, processes, principles, and values of a 'constitution'. Although this phenomenon is having an impact across government, its prominence today is mainly attributable to the realisation that the activity of governing is increasingly being exercised through transnational or international arrangements that are not easily susceptible to the controls of national constitutions. Constitutionalisation is the term used for the attempt to subject the exercise of all types of public power, whatever the medium of its exercise, to the discipline of constitutional procedures and norms.

In this chapter, I aim to specify the character of this phenomenon, offer an account of its dynamic, and raise some questions about the processes it engenders. Constitutionalisation is, I believe, best understood by reference to the related concepts of constitution and constitutionalism. I therefore begin by considering the eighteenth-century movements that gave rise to the modern idea of a constitution and its associated political theory, that of constitutionalism. By situating constitutionalisation in this context, I aim to offer a perspective that will help us to reach a judgment on the question of whether this emerging phenomenon of constitutionalisation signals the global triumph of constitutionalism, its demise, or its transmutation.

II. CONSTITUTIONS

The concept of the constitution today generally refers to a formal contract drafted in the name of 'the people' for the purpose of establishing and controlling the powers of the governing institutions of the state. This concept came to be delineated only in the late eighteenth century and mainly as a consequence of the American and French Revolutions. This modern idea of the constitution results from a basic shift

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that took place in conceiving the relationship between government and people: rejecting traditional orderings based on status and hierarchy, it expressed the conviction that government, being an office established for the benefit of the people, must be based on their consent.

This modern concept emerged alongside social contract theories that were circulating in Western political thought during that critical period. Shaped by the philosophy of the Enlightenment, such theories imagined a situation in which somehow the people would come together to reject their traditional constitutions, the products of 'accident and force', and would deliberate and devise a new framework of government from 'reflection and choice'.[1] The new type of constitution that results takes the form of a written document establishing the main institutions of government, enumerating their powers, and specifying the norms that would regulate their relations.

Since the late eighteenth century, many states across the world have adopted modern constitutions. These written constitutions were generally devised at critical moments in their history, often with the aim of protecting the people from regimes of absolute, authoritarian, or arbitrary rule that had preceded them. Their adoption marked the attempt to open a new chapter in the nation's political development. The constitution often signalled the intention to institute a republican scheme of government, with the constitution performing the function of establishing a framework of limited, accountable, and responsive government. Constitutions were therefore linked to the promotion of a particular theory of government: based on contract, enumeration of powers, institutionalisation of checks over the exercise of powers, and protection of the individual's basic rights, they were founded on a theory of limited government. This is the theory of constitutionalism. It has exerted such an impact on the drafting of written constitutions since the late eighteenth century that the theory has almost become synonymous with the modern concept of the constitution itself.

Before discussing constitutionalism, however, I must briefly consider three issues relating to modern constitutions: how they differ from the older idea of the constitution, their key characteristics, and the basic changes in social life that have tended to accompany the establishment of modern constitutional arrangements.

Constitutions, ancient and modern

The ancient sense of the constitution treats the state as an organic entity. Just as the body has a constitution, so too does the body politic. Drawing on this metaphor, the ancient idea of the constitution expressed the health and strength of the nation, and the constitution evolved as the nation itself increased in vitality. This was the meaning Burke drew on when he argued, against French revolutionary developments, that 'the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico, or tobacco, or some other such low

[1] James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* [1788], ed I. Kramnick (London: Penguin, 1987), 87.

concern'.[2] A constitution must be revered precisely because 'it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature'. It has evolved through the life of a nation and 'becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born'.[3]

In this ancient sense, the constitution expressed a political way of being. Understood as such, constitutions can no more be made than language is made: like language, constitutions evolve from the way of life of certain groups that come to conceive of themselves as 'a people' or 'nation'. There may come moments when attempts are made to specify some of the basic rules of political existence in a text, but this document no more provides the source of the nation's constitution than a grammar book is the authoritative source of a language. In this understanding, written constitutions cannot provide the foundation of governmental authority.[4]

It was this ancient understanding which the modern concept sought to replace. In *Rights of Man* in 1791, Paine specified the innovations brought about by the late eighteenth-century revolutions. Expressing frustration about disputes over the significance of the changes, Paine stated that 'it will be first necessary to define what is meant by a *constitution*'. 'It is not sufficient that we adopt the word', he explained, 'we must fix also a standard specification to it.'[5] Paine provides us with the first clear statement of the character of modern constitutions.

Characteristics of modern constitutions

Constitutions, wrote Paine, have four key elements. First, a constitution 'is not a thing in name only, but in fact'. That is, it has not merely 'an ideal, but a real existence' and therefore, 'whenever it cannot be produced in a visible form, there is none'. A constitution, in short, is a thing—and specifically it is a *document*. Secondly, 'it is a thing antecedent to a government, and a government is only the creature of a constitution'. A constitution 'is not the act of its government, but of the people constituting a government'. Paine here draws a distinction between the constituted power (the government) and the constituent power (vested in the people), and fixes the *primacy of the people* over their government. Thirdly, Paine highlights the *comprehensive nature* of the constitution. It is, he states, 'the body of elements … which contains the principles on which the government shall be established,

[2] Edmund Burke, *Reflections on the Revolution in France* [1790], ed C. C. O'Brien (London: Penguin, 1986), 194.

[3] Ibid 194–5.

[4] A country's constitution, Maistre noted, cannot be known from its written laws 'because these laws are made at different periods only to lay down forgotten or contested rights, and because there is always a host of things which are not written' (Joseph de Maistre, 'Study on Sovereignty' [1794–5] in J. Lively (ed), *The Works of Joseph de Maistre* (New York: Macmillan, 1965), 93–129, at 103–4).

[5] Thomas Paine, *Rights of Man* [1791–2] in his *Rights of Man, Common Sense and other Political Writings*, ed M. Philp (Oxford: Oxford University Press, 1995), 83–331, at 122.

the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and, in fine, everything that relates to the compleat organization of a civil government, and the principles on which it shall act, and by which it shall be bound'. Finally, Paine refers to its status as *fundamental law*: a constitution 'is to a government, what the laws made afterwards by that government are to a court of judicature'. That is, the court 'does not make the laws, neither can it alter them; it only acts in conformity to the laws made: and the government is in like manner governed by the constitution.' Similarly, he suggests that the government neither makes nor can alter the constitutional laws which bind it; these can only be altered through an exercise of the constituent power of the people.[6] Although each of these elements was controversial at that time,[7] they have now become widely accepted principles of modern constitutions.[8]

Modern constitutions, based on these key features, have since—in stages—acquired an enhanced authority in public life. To the extent that this has occurred, it is related to the modern processes of positivisation and juridification. Not only are constitutional norms today accepted as being 'fundamental law', but this fundamental law is now conceived as a category of positive law, and the judiciary have asserted their authority to act as ultimate interpreters of its meaning. The modern constitution is now widely accepted as providing the foundation of legal order, not only by establishing the authoritative law-making institutions of the state but also in laying down the basic norms that guide law-making. The constitution is now perceived as providing the basis of the legitimacy of legality.

These claims are controversial. If the constitution is simply a document why should we have reason to believe in its power-conferring character? One answer is that the document was 'authorised' by 'the people'. But if so, then 'the people' must not only be anterior to, but also superior to, the document. This leads certain social contract theorists to postulate two different contracts: with the first, the multitude constitute themselves as a collective entity (the people, the nation, the state) and with the second this collective entity then agrees a framework of government (the constitution).[9]

[6] Ibid 122–3.

[7] See, eg Maistre, above n 4, at 107: 'In his evil book on the rights of man, Paine said that a constitution is antecedent to government [etc] … It would be difficult to get more errors into fewer lines.'

[8] See, eg D. Grimm, 'Verfassung—Verfassungsvertrag—Vertrag uber eine Verfassung', in O. Beaud et al (eds), *L'Europe en voie de Constitution* (Brussels: Bruylant, 2004), 279–87, at 281–2 (identifying as the five key characteristics of modern constitutions: (1) a set of legal norms, (2) establishing and regulating the exercise of public power, (3) founded on an agreement of the people, (4) that forms a comprehensive framework, and is (5) erected on the principle of the primacy of constitutional law). See also Grimm in this volume.

[9] See Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* [1673], trans M. Silverthorne, ed J. Tully (Cambridge: Cambridge University Press, 1991), ii., ch 6.

What is presented as the fundamental law with respect to positive law (ie the written constitution) cannot bind 'the people'.

This type of argument poses specific difficulties for those who would argue that, once adopted, the constitution binds future generations.[10] But it also raises more general complications. In particular, since 'the people' is to be distinguished from a multitude, that concept is itself a legal construction. The modern constitution is a constitution of government, but it cannot be the constitution of the state.[11] That being so, the question arises: is there a fundamental law—that which constructs the people (the original compact)—which lies behind the fundamental law that authorises positive law?

One alternative to the postulation of sequential contracts is to reject the historical claims being made of the foundation and assert its hypothetical character. Since 'the people' comes into existence only by virtue of the basic contract, it is difficult to envisage how the multitude—with their differing interests and conflicting needs—could ever transcend their differences and come together to devise an agreement that creates political unity.[12] Recognising the virtual character of the basic contract, some scholars argue that—paradoxically—'the people' who supposedly agree the contract come into existence only by virtue of the contract.[13] That is, the foundation can only be understood as a reflexive construct.

However those matters are resolved, examination of the foundation seems to reveal that the modern constitution is fundamental only with respect to the office of government, and the constitution's authority derives from a more basic construct, that of the people (however conceptualised). Once this is recognised, however, the

[10] Paine recognised this, arguing against constitutional entrenchment: 'Every age must be as free to act for itself, *in all cases*, as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies. … That which the whole nation chooses to do, it has a right to do. … I am contending for the rights of the *living*, and against their being willed away, and controuled and contracted for, by the manuscript assumed authority of the dead' (Paine, above n 5, 92 (emphasis in original)).

[11] See Emmanuel Joseph Sieyès, *What is the Third Estate?* [1789], trans M. Blondel (London: Pall Mall Press, 1963), 124: 'The nation is prior to everything. It is the source of everything. Its will is always legal; indeed, it is the law itself.'

[12] See Jean-Jacques Rousseau, *The Social Contract* [1762] in *The Social Contract and Other Later Political Writings*, ed V. Gourevitch (Cambridge: Cambridge University Press, 1997), 39–152, at 71: 'For a nascent people to be capable of appreciating sound maxims of politics and of following the fundamental rules of reason of State, the effect would have to become the cause, the social spirit which is to be the work of the institution would have to preside over the institution itself, and men would have to be prior to the laws what they ought to become by means of them.'

[13] P. Ricoeur, 'The Political Paradox', in his *History and Truth*, trans C. Kelbley (Evanston, Ill.: Northwestern University Press, 1965), 247–70; L. Althusser, 'Rousseau: *The Social Contract* (the Discrepancies)' in his *Politics and History: Montesquieu, Rousseau, Marx*, trans B. Brewster (London: Verso, 2007), 113–60; J. Derrida, 'Declarations of Independence' (1986) 15 *New Political Science* 7–15.

attempt to forge a sharp distinction between the ancient and modern concepts of the constitution is less convincing; while the modern concept is directed to the constitution of government, the ancient concept addresses itself to the constitution of the nation—and this is the issue that modern constitutions tend to suppress. When questions are asked about the authority of the written constitution, however, it is precisely these more basic considerations that come to the surface. The point of Burke's analysis was to indicate that, to be able to command authority, the constitution must be treated as a sacred thing worthy of reverence, and the ancient understanding carries its power precisely because it is not, at least in any simple sense, a man-made instrument.[14]

We are now able to grasp the ambition that underpins modern constitutions: specifying the structure of the office of government is one matter, but forging the bonds of unity of the nation is quite another. Yet this is what modern constitutions are expected to do. Modern constitutions are required to serve both instrumental and symbolic purposes. In its instrumental role, the constitution gives guidance for the future by establishing the authoritative modes of collective decision making of a nation. In its symbolic function, it provides a point of unity; the constitution must operate in such a way as to bolster the established order of things. The instrumental aspect, which expresses the principle of legality, looks primarily to the future, whereas the symbolic, drawing on custom and myth and expressing the principle of legitimacy, primarily makes an appeal to the past. The latter is a sacred task and, when no longer able to rely on the power of religion or the authority of the 'eternal past', this task is incapable of being fulfilled without developing a civil religion.[15]

It is evident, then, that although presenting themselves as instrumental documents, modern constitutions must also perform the function—similar to that of the ancient understanding—of nation building. This is often a delicate task, especially since much of modern constitution making takes place under circumstances in which the new settlement seeks to draw a line under the past. This task is often advanced by the adoption, as part of the constitutional settlement, of new symbols of nationhood (flags, anthems, special anniversary dates, etc.)[16] or in an exercise of ideological re-traditionalisation, invoking an idealised version of an earlier narrative about the customs and values of the people.[17] In certain cases, however, the past is such a barrier that reverence of the constitution must in itself provide a substitute for reverence of

[14] Maistre makes a similar point to Burke: 'One of the greatest errors of this age is to believe that the political constitution of nations is the work of man alone and that a constitution can be made as a watchmaker makes a watch … Men never respect what they have made.' Joseph de Maistre, 'Study on Sovereignty' [1794–5], in *The Works of Joseph de Maistre*, ed J. Lively (London: Allen & Unwin, 1965), 93–129, at 102–4.

[15] See Rousseau, above n 12, iv., ch 8.

[16] R. Smend, *Verfassung und Verfassungsrecht* (Munich: Duncker & Humblot, 1928), 48; D. Grimm, 'Integration by Constitution' (2005) 3 *International Journal of Constitutional Law* 193–208.

[17] See W. Kymlicka and M. Opalski (eds), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press, 2002).

a political way of being of a people. And in this situation, as is illustrated by the case of the post-war Federal Republic of Germany,[18] it leads to the claim—exemplified by Habermas—that we are now living in a post-metaphysical age orientated to the future, where the only justifiable source of allegiance is to the set of principles of liberty and equality that the constitution declares.[19]

Civil society and government

The role of modern constitutions in bolstering contemporary political identity brings us to the third issue to consider in relation to modern constitutions: the way in which modern constitutional relationships reflect more basic changes in modern social life. The essential question is highlighted by asking: how in modernity is the public sphere to be characterised?

Although social contract theories continued to use the language of sovereignty, it seems clear that Paine was seeking to move beyond that conceptual scheme. When arguing in defence of French revolutionary principles, he occasionally referred to sovereignty as appertaining to the entire nation.[20] But he believed that the envisaged 'universal reformation' would result in a radical shift in the nature of modern political discourse, in which the concept of sovereignty could no longer stand as an adequate representation of the public sphere.

Paine argued that this reformation was being driven by natural laws of social development. These natural laws were operating to reorder governmental regimes not because of the action of some revolutionary vanguard but as expressions of fundamental laws of social development. This natural law 'does not gain its validation subjectively through the consciousness of politically active citizens'; it achieves this objectively 'through the effect of the uninhibited workings of society's immanent natural laws'.[21] Building on the natural jurisprudence of Adam Smith, Paine argued that the workings of 'society's immanent natural laws' was leading to the opening up of trade and commerce and, in its train, the formation of what might be called 'civil society'.[22]

[18] See, eg J. Habermas, 'A Kind of Settlement of Damages: The Apologetic Tendencies in German History Writing' in *Forever in the Shadow of Hitler?*, trans J. Knowlton and T. Cates (Atlantic Highlands, NJ: Humanities Press, 1993), 30–43, at 43: 'The unconditional opening of the Federal republic to the political culture of the West is the greatest achievement of the postwar period.'

[19] J. Habermas, 'On the Relation between the Nation, the Rule of Law and Democracy', in his *The Inclusion of the Other* (Cambridge: Polity Press, 2002), 129–54.

[20] See, eg Paine, above n 5, 140, 193. Art III of the French Declaration of the Rights of Man and Citizen, 1789, stated: 'The Nation is essentially the source of all Sovereignty.'

[21] J. Habermas, 'Natural Law and Revolution', in his *Theory and Practice*, trans J. Viertel (Boston, Mass.: Beacon Press, 1973), 82–120, at 94.

[22] Adam Smith, *The Theory of Moral Sentiments* [1759], ed K. Haakonssen (Cambridge: Cambridge University Press, 2002); id, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776]; K. Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996).

In *Rights of Man*, Paine remarks that the 'great part of that order which reigns among mankind is not the effect of government' but has its origins in 'the principles and natural constitution of man'. This order pre-dates government and would continue to exist even 'if the formality of government was abolished', because human interdependence and reciprocal interest form a 'chain of connection' which holds together all the parts of civilised community. And it is through the workings of these natural laws, rather than any social contract, that humans were led into society.

Substituting the distinction made in social contract theory between the state of nature and the civil state with that between society and government, Paine argues that mankind is elevated by society rather than government. Government 'makes but a small part of civilized life', and it is 'to the great and fundamental principles of society and civilization … infinitely more than to any thing which even the best instituted government can perform, that the safety and prosperity of the individual and of the whole depends'. As civilisation evolves, Paine argues, government dissipates, since civil society becomes more able to regulate its own affairs and to govern itself.[23] Building on the work of Locke and Smith, Paine brings natural law into alignment with the laws of trade and commodity exchange. 'All the great laws of society', Paine proclaims, 'are laws of nature.' But these are laws of a different order; they are obeyed not because they are commands backed by sanctions, but because it is in the individual's interest to follow them. The laws of trade and commerce 'are laws of mutual and reciprocal interest'.[24]

In this world-view, society, not government, represents the public interest, and government acts legitimately only when promoting society's interests. The newly emerging regime of government—that of which the American republic provides the model—'promotes universal society, as the means of universal commerce'.[25] Paine here seeks to move beyond sovereignty as a representation of the autonomy of the public sphere and to replace it with the separate spheres of society and government. His argument marks the emergence of civil society as the paramount force in the public sphere. The universal reformation he envisages goes hand in hand with a limited role for government, and this limited role is to be defined in its constitution. One vital function of the constitution, Paine argues, is to protect certain rights enumerated in written constitutions—especially the rights of life, liberty, and property—which exist to protect the operation of the natural laws of the commercial republic from undue political interference by government.

From the perspective of public law, the critical issue is not the division of the public sphere into civil society and government since these are not separate entities but only distinctions in thought; the critical issue is whether or not civil society is able to offer an adequate expression of public reason. To this question, Hegel gave a robust answer. While acknowledging the emergence of civil society and the power of its laws—the laws of political economy—to meet particular social needs, Hegel also

[23] Paine, *Rights of Man*, above n 5, 216.

[24] Ibid.

[25] Ibid 223.

recognised that, far from addressing the natural inequality of man, these laws had the effect of reinforcing them.[26] Forming a sphere of competition and antagonism, civil society can express only particularistic interests. Contrary to Paine's claim that the rise of civil society will lead to a diminution in the power of government, Hegel demonstrated that this reformation would result in governments assuming a much greater role in the regulation of social life. Since the operation of the natural laws of civil society lead to disequilibrium and disorganisation, Hegel suggested that civil society stands in particular need of regulation by government.[27] Hegel's analysis gives a different twist to Paine's argument about the function of modern constitutions. If the modern constitution exists mainly to protect subjective rights exercised in civil society, then they are likely to act as barriers to the realisation of objective freedom.

III. CONSTITUTIONALISM

At its core, the modern concept of the constitution requires only the adoption of a formal document establishing a set of governmental institutions; constitutionalism is the political theory that generally accompanies the technique. Constitutionalism is a theory of limited government and is concerned mainly with the norms which modern constitutions should contain. These norms not only impose limits on the exercise of public power but also on the procedures through which such power should be exercised. Its key principles are independence of the judiciary, separation of governmental powers, respect for individual rights, and the promotion of the judiciary's role as guardians of constitutional norms.

The theory of constitutionalism has exerted such an impact on the drafting of constitutional documents that it is often assumed to be synonymous with the modern concept of the constitution itself. Although modern constitutions exhibit significant variation as to the particular form of their governing institutions, they increasingly seem to acquire legitimacy only to the extent that they measure up to the norms of constitutionalism. In this sense, the contemporary era would appear to be one marked by the triumph of constitutionalism. This, however, remains an ambiguous achievement. In part, this is because constitutionalism has, with justification, been called 'one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse'.[28] But it may also be the case that its symbolic aspect has been enhanced as its instrumental aspect has declined. I will return to this point later. First, we should try more precisely to determine the content of these norms.

[26] G. W. F. Hegel, *Philosophy of Right* [1821], trans T. M. Knox (Oxford: Oxford University Press, 1952), § 200.

[27] Ibid § 236.

[28] T. C. Grey, 'Constitutionalism: An Analytical Framework', in J. R. Pennock and J. W. Chapman (eds), *Constitutionalism: Nomos XX* (New York: New York University Press, 1979), 189–208, at 189.

This issue can most concisely be addressed by highlighting two contrasting articulations of constitutionalism. Having informed deliberations over the US Constitution, these rival positions have been expressed from the originating moments of birth of modern constitutions. These positions are, in that context, exemplified in the writing of two *Federalist* colleagues, James Madison and Alexander Hamilton. For ease of exposition, I refer to these positions as republican and liberal variations.

Madison and Hamilton agreed that, once adopted, the Constitution must be protected from the people: modern republican government must be government of the people and for the people, but demonstrably not government by the people. Notwithstanding the rhetorical claim that government receives its authority from the people, the government must possess the capacity to control and manage the people. In framing a government, argued Madison, 'you must first enable the government to control the governed; and in the next place oblige it to control itself'.[29] Constitutionalism bases itself first on the necessity of accepting the authority of the Constitution and then on the necessity of creating institutional arrangements to ensure that the established government is able to control itself.

Republican constitutionalism

Madison and Hamilton both accepted the need for such 'auxiliary precautions', and both accepted that the constitutionalist objective was to establish an institutional configuration that would, through the reason of its principles, generate the allegiance of the nation. Their differences flow mainly from the type of safeguards each believed to be conducive to the realisation of that objective. Madison takes the institutional framework created by the Constitution—the establishment of checks and balances—as the primary mechanism of control, whereas Hamilton relies on a more centralist and rationalist solution which places greater faith in the special role of judicial review.[30]

Madison's position placed great importance on the necessity of 'so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places'.[31] And since the several departments of state are 'perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers'.[32] The Constitution is thus conceived as establishing an elaborate institutional configuration through which all political action is channelled, but is held in tension—in a state

[29] *The Federalist*, above n 1, No 51 (Madison), at 320.

[30] Controversy continues over the extent to which the authors of the *Federalist* papers conceived their writings as a coherent whole: see D. F. Epstein, *The Political Theory of The Federalist* (Chicago, Ill.: University of Chicago Press, 1984), 2. Here, I use Madison and Hamilton's arguments in a stylised manner for the purpose of exposing two different strands of constitutionalist argument.

[31] Ibid at 320, 318–19.

[32] Ibid No 49 (Madison), at 313.

of irresolution. In the words of John Adams: 'Power must be opposed to power, force to force, strength to strength, interest to interest, as well as reason to reason, eloquence to eloquence, and passion to passion.'[33] By dividing, channelling, and opposing political power in this manner, constitutional meaning—the proper ordering of constitutional values—remains the subject of continuing structured political contestation. Constitutional maintenance is a political task.

Within this institutional arrangement, Madison accorded no special place to the judiciary. Believing that these checks should remain plural, this was not an oversight. Madison was sceptical about the desirability of vesting an appointed cadre of judges with the powers to fix constitutional meaning and enforce the Constitution as fundamental law. For similar reasons, he had initially been opposed to the inclusion of a bill of rights in the US Constitution: such rights are better protected, he maintained, by the structure of the federal system and also 'because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed'.[34] Madison presents us with an account of what may be called republican (or political) constitutionalism.[35]

Liberal constitutionalism

Madison's account of the nature of constitutionalism can be contrasted with that of Hamilton, who placed greater importance on the role of a small elite in maintaining political power and constitutional stability. For Hamilton, a strong, independent central government was essential, a position that led, for example, to a specific policy opposition between Hamilton and Madison over the necessity of establishing a national bank.[36] Within the structure of Hamilton's centralising philosophy, the judiciary was expected to perform a special role. This is most clearly expressed in Hamilton's analysis in *The Federalist* No 78, in which he argued that because the judiciary 'will always be the least dangerous to the political rights of the Constitution' they should be entrusted with the duty 'to declare all acts contrary to the manifest tenor of the Constitution void'.[37] Although constitutional judicial review is not explicitly provided for in the US Constitution, it is later claimed by the judiciary in *Marbury v Madison* (1803), in a judgment in which Chief Justice Marshall drew heavily on Hamilton's analysis.[38]

[33] Z. Haraszti, *John Adams and the Prophets of Progress* (Cambridge, Mass.: Harvard University Press, 1952), 219: cited in H. Arendt, *On Revolution* (Harmondsworth: Penguin, 1973), 152.

[34] Madison to Jefferson, 17 October 1788: cited in S. Snowiss, *Judicial Review and the Law of the Constitution* (New Haven, Conn.: Yale University Press, 1990), 91.

[35] See G. Thomas, 'Recovering the Political Constitution: The Madisonian Vision' (2004) 66 *Review of Politics* 233–56.

[36] *McCulloch v Maryland* 17 US (4 Wheat.) 316 (1819). See C. A. Sheehan, 'Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion' (2004) 98 *American Political Science Review* 405–24.

[37] See especially *The Federalist*, above n 1, No 78 (Hamilton), at 438–9.

[38] *Marbury v Madison* 5 US (1 Cr) 137 (1803).

In Hamilton's constitutional philosophy, the Constitution is a type of positive law and the judiciary, as the institution charged with the responsibility of interpreting and enforcing the law, have the ultimate authority to determine the meaning of the Constitution. There was nothing inevitable about this development.[39] It had initially been recognised only that the judiciary had some role to play in the determination of unconstitutionality. Such unconstitutionality, however, was felt 'not to be determined by judicial exposition of written supreme law but to consist of violation of long-standing and publicly acknowledged first principles of fundamental law, written or unwritten'.[40] And there was no expectation that the judiciary would have a role in determining conflicting interpretations of general constitutional provisions.

Only during the nineteenth century did perceptions change. Much of this is attributable to Chief Justice Marshall's statecraft.[41] In the process, the US Constitution was transformed into a species of positive law, and the judiciary became impressed with the duty, through the forensic processes of judicial review, of determining its meaning and enforcing its provisions. But behind Marshall's statecraft lay Hamilton's analysis. In *The Federalist*, he had argued that, holding neither the power of the sword nor the purse, the judiciary possesses neither force nor will, but only judgment.[42] The authority of the judiciary thus rests on its relative weakness, and is sustained only by its independence and the integrity of its own judgment, that is, by adherence to 'strict rules and precedent'. Hamilton's argument reinforces the conviction amongst both the judiciary and the public that, in the exercise of constitutional review by the courts, a strict analytic logic must be seen to operate in preference to a demonstrable exercise in political prudence. Hamilton presents us with an account of what may be called liberal (or legal) constitutionalism.

Constitutional development

These accounts are presented as two stylised interpretations for the purpose of making a general claim. Although Hamilton and Madison's ideas draw from a common source, and although the detailed history reveals a considerable intertwining of their ideas, the general trajectory is fairly clear. Crudely expressed, the history of the development of the US Constitution is the history of the triumph of liberal-legal over republican-political constitutionalism. In the course of constitutional development, the US Constitution has become positivised, individualised,

[39] See G. S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, NC: University of North Carolina Press, rev edn, 1998), 292: 'There was … no logical or necessary reason why the notion of fundamental law, so common to Englishmen for over a century, should lead to the American invocation of it in the ordinary courts of law. Indeed in an important sense the idea of fundamental law actually worked to prohibit any such development, for it was dependent on such a distinct conception of public law in contrast to private law as be hardly enforceable in the regular court system.'

[40] Snowiss, above n 34, 37.

[41] See ibid ch 5.

[42] *The Federalist*, above n 1, No 78 (Hamilton), especially at 437.

and legalised. The critical technique in this evolution has been judicial review. 'What in the final analysis gave meaning to the Americans' conception of a constitution', comments Wood, 'was not its fundamentality or its creation by the people, but rather its implementation in the ordinary courts of law.'[43]

In this sense, the history of American constitutionalism is that of the diminution in authority of Madison's account and the augmentation of Hamilton's. This involves the replacement of a relational logic, in which the interpretations and claims of different institutions pull in different directions and it is the tautness of that arrangement that contains the essence of constitutionalism, with an analytical logic, in which the judiciary, through a forensic technique of textual interpretation, assert final and exclusive authority to resolve the Constitution's meaning. In contrast to the idea of constitutionalism as an evolving arrangement of institutional forms, this conception promotes the authority of an independent group to interpret and enforce the terms of the text of the constitutional document. The Hamiltonian position leads to a position in which the Constitution is what the judges say it is; the history of the Constitution is reduced to the history of the work of its Supreme Court.[44]

The question remains: to what extent does the development of Western constitutionalism follow a similar pattern to that of the American experience? To what extent is the history of Western constitutionalism a story about the ascendancy of liberal-legal constitutionalism over its rival form? These questions are best addressed with reference to the emergence of 'constitutionalisation'.

IV. CONSTITUTIONALISATION

Constitutionalism is a political theory that was developed as part of a liberal philosophy to guide the formation of modern constitutions. Predicating an arrangement of limited government constructed by free, equal, rights-bearing individuals, constitutionalism reflects the concerns of a particular time, place, and social situation. With the emergence of welfare-regulatory states during the twentieth century, it was often claimed that constitutionalism no longer carried much purchase. 'Many of the urgent problems of modern society have arisen after the heyday of constitutionalism', wrote Schochet in 1979, and these problems—economic inequalities, regulation of technologies, resource conservation, and so on—'require more decisive and resolute

[43] Wood, above n 39, 291.

[44] P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), 3: 'The central issue in the constitutional debate of the past twenty-five years has been the legitimacy of judicial review of constitutional questions by the United States Supreme Court.' See also M. Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1987), 9: 'This propensity to conflate the Court and the Constitution is hardly limited to grass roots America. It seems to have been shared by a great many scholars because the constitutional history of the United States has been primarily written as the history of Supreme Court decisions, doctrines, procedures and personalities.'

action than limited constitutional government can provide'.[45] Whatever the symbolic function being performed by constitutionalism, from an instrumental perspective, the mid-twentieth century marked its twilight period.[46]

During the last twenty or so years, however, interest in the theory of constitutionalism has been rekindled. Some of this is attributable to the transitions made by post-fascist (Spain, Portugal), post-communist (central and eastern Europe) and post-Apartheid (South Africa) regimes towards the formation of market-based economies and liberal democratic constitutional regimes. At the same time, many constitutional democracies—new and old—have been reconfiguring their governmental arrangements in response to domestic and international changes. Domestically, many regimes have scaled back the public sector through privatisation of public service provision, and reordered governing arrangements through the formation of public–private partnership schemes, and the subjection of public processes to a range of market disciplines.[47] Internationally, governments are increasingly obliged to participate in a variety of transnational arrangements for the purpose of enhancing their ability to deliver their economic, social, and environmental objectives.[48]

These various developments have led to a complicated situation, with some trends strengthening constitutionalist values and others weakening them. Some domestic changes, for example, have strengthened modes of review and accountability of governmental action, while others, by blurring the public–private distinction, have done otherwise. International developments have also resulted in governmental action being undertaken through arrangements that are not easily susceptible to review and control through the procedures and standards of the national constitution. For many regimes, these changes appear to erode the constitution's status as the authoritative and comprehensive framework for guiding and regulating the exercise of public power.[49] One type of response has been to strengthen the processes by which governmental action can be subjected to the discipline of a constitution. This movement has led, in turn, to a rekindling of interest in the theory of constitutionalism, leading to the emergence of interest in the processes of constitutionalisation.

[45] G. J. Schochet, 'Introduction: Constitutionalism, Liberalism, and the Study of Politics', in Pennock and Chapman (eds), above n 28, 1–15, at 6.

[46] See, eg G. Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin: de Gruyter, 1986). In this extensive analysis of this problem by European and American scholars, constitutional issues are only briefly discussed (Preuss, 154; Habermas, 219; Wiethölter, 242). Teubner here introduces the idea of 'legal control of social self-regulation' (308), which later becomes the basis of his rather different concept of constitution: see Teubner in this volume.

[47] See, eg E. Suleiman, *Dismantling Democratic States* (Princeton, NJ: Princeton University Press, 2003).

[48] See D. Held and A. McGrew, *Governing Globalization: Power, Authority and Global Governance* (Cambridge: Polity Press, 2002).

[49] D. Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447–65.

Constitutionalism reconfigured

Constitutionalisation, it is suggested, is a process born of a reconfiguration of the political theory of constitutionalism. Traditionally conceived as a loose template against which the framework of government of the modern state might be drafted, constitutionalism is now being repackaged purely as an expression of liberal-legal constitutionalism and it is presented as a more or less free-standing set of norms. Constitutionalism is no longer treated as some evocative but vague theory which expresses a belief in the importance of limited, accountable government, to be applied flexibly to the peculiar circumstances of particular regimes. It now is being presented as a meta-theory which establishes the authoritative standards of legitimacy for the exercise of public power wherever it is located. Once repackaged in this manner, and especially when harnessed to the socio-economic forces that have been driving recent governmental changes (ie liberalisation, marketisation, globalisation), it emerges as the phenomenon of constitutionalisation. Constitutionalisation refers to the processes by which an increasing range of public life is being subjected to the discipline of the norms of liberal-legal constitutionalism.

The contentious character of constitutionalisation can best be explained by bringing this process into alignment with the account of constitutions and constitutionalism. The concept of constitution here being invoked is much closer to that of the constitutional text rather than the way of being of a people. But the concept of constitution in this new account refers not so much to the text itself but rather the set of norms that are assumed to underpin it: it asserts a concept of constitution as a set of rational principles. Questions about the source of authority of these principles tend to be avoided; the norms of right conduct prescribed in these texts acquire their authority from precepts of reason rather than approval of 'the people'. It is the authority of these norms that is being asserted and these norms acquire the status of fundamental law not because they have been authorised by a people but because of the self-evident rationality of their claims.

The process of constitutionalisation tends not to endorse decentralisation, diversity, and the idea of constitutional meaning being derived from the competing political values being held in tension through a taut institutional configuration. Constitutionalisation expresses a centralising philosophy: it both proclaims basic rights as trump cards in the political game and maintains that the nature, scope, and status of these rights must be determined by a small cadre of judges, either in the rarefied atmosphere of supreme courts or, in the international arena, through a variety of tribunals of uncertain status. At its core, constitutionalisation presupposes legalisation; as greater swathes of public life are brought within the ambit of constitutional norms, so too are they disciplined by formal legal procedures. Constitutionalisation is the process of extending the main tenets of liberal-legal constitutionalism to all forms of governmental action.

There is one final, particularly contentious, aspect of constitutionalisation to be brought into the frame. In the form promoted today, constitutionalisation absorbs much of Paine's assumptions about the relationship between society and government. Hegel was right in his observation that the emergence of civil society would

lead to a growth, not a diminution, in government; extensive governmental action has been required in the modern era, not least for the purpose of controlling and regulating the operation of market freedoms. Constitutionalism may have lived on as symbol but it ceased to be an effective instrument. Constitutionalisation as it is now emerging is part of a more basic set of changes driving governmental reform—those of privatisation, marketisation, and contractualisation—and which are designed to make government more limited in its reach, more focused in its goals, more responsive to its stakeholders, and more accountable to its citizens.[50] Constitutionalisation is required to ensure that public power, in whatever manifestation, is exercised in accordance with the canons of rationality, proportionality, and by means that involve the least restrictive interference with the enjoyment of the individual's basic rights.

Domestic constitutionalisation

Although the impact of constitutionalisation has most often been discussed with respect to international arrangements, its effect on national arrangements should not be overlooked. In many regimes, the written constitution has occupied an ambivalent status in national life, often owing to the existence of a significant gap between constitutional norms and the ways in which governmental decision making actually occurs. In this situation, the constitution may have performed a symbolic role in presenting the public face of the regime to the world, but it was not fulfilling its instrumental role of regulating government decision making. Here, the enactment of a written constitution formed only an initial stage in a more general process of making a reality of the constitution's claims to be higher-order law. This is what constitutionalisation has meant at the domestic level, and it is realised through political and cultural changes that have been spearheaded by an activist judiciary assuming the responsibility to enforce the provisions of the constitutional text.

At the domestic level, constitutionalisation has reached a mature stage only in recent years. This has been achieved primarily through the instigation of a 'rights revolution',[51] a movement that even in the United States—where the Constitution rapidly acquired a sacred character—has been essentially a post-war phenomenon.[52] Elsewhere, it has been a much more recent development,[53] though one which is

[50] See, eg D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Harmondsworth: Penguin, 1993) and the plethora of studies falling under the umbrella of 'new public management' or 'new governance'.

[51] N. Bobbio, *The Age of Rights*, trans A. Cameron (Cambridge: Polity Press, 1996); C. R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago, Ill.: University of Chicago Press, 1998); M. Ignatieff, *The Rights Revolution* (Toronto: Anasi Press, 2000).

[52] See R. A. Primus, *The American Language of Rights* (Cambridge: Cambridge University Press, 1999).

[53] Epp, above n 51, chs 5–10.

rapidly gathering pace.[54] It is extending its reach both territorially and with respect to scope, that is, not only across the world but also beyond the sphere of individual rights to embrace judicial scrutiny of electoral processes, review of government policy making in such matters of high policy as national security and macroeconomic planning, and even judicial determination of major issues of nation building.[55] The movement entails the absorption of broader elements of the ancient idea of the constitution into the frame of the modern constitution, the conversion of the Constitution into a species of ordinary law (albeit with 'higher' status), and the consequent establishment of the judiciary as the authoritative determinants of its meaning. General aspirations in the Constitution are thus rendered justiciable, and the implicit values on which the Constitution rests are explicated as fundamental legal norms that govern all aspects of public decision making.[56]

The rapid advance of the process of constitutionalisation at the national level coincides with a growing recognition that, to an increasing extent, governmental decision making is occurring beyond the structures of the nation state. Public power is now being exercised by supranational bodies of regional or global reach. In fields such as financial regulation, competition policy, energy and trade policy, environmental protection, crime and security, and such like, governmental policy making is regularly formulated through transnational arrangements. These developments undermine the claims of modern constitutions to be comprehensive in their reach, not least because governmental decisions in these fields appear to be made through networks that are unknown to national constitutions and with respect to which existing accountability mechanisms seem ill-suited. One response to this situation has been to loosen the anchorage of these constitutional norms for the purpose of extending their reach.

Supranational constitutionalisation

The supranational aspect of constitutionalisation takes two main forms. One is to reform the basis on which various supra or transnational bodies currently operate: these bodies, it is suggested, should themselves become constitutionalised. A second

[54] R. Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721–53. The British case provides an unusual but illustrative example: lacking a modern written constitution, it has operated as the epitome of political constitutionalism with constitutional values protected through a series of tensions in institutional arrangements that are not expressed in the law of the constitution. Since 1997, however, the Labour government has instituted a programme of modernisation, which incorporates devolution of governmental power, reform of the second chamber, enhanced human rights protection, and in which a central theme has been the formalisation of constitutional and governmental arrangements (which, of course, is the first step to their legalisation).

[55] Ibid at 729–43. See further Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004).

[56] One manifestation of this movement has been the debates within various jurisdictions over what is generally called the horizontal effects of charters of rights, that is, the degree to which these charters may be used to regulate conduct between private actors.

type of response has been to argue that the emergence of networks of transnational governance has eroded the foundational elements of modern constitutions, thereby undermining their authority. The proposed solution involves a reconfiguration of the basis of constitutionalism in the light of late modern conditions. This type of reconfiguration is promoted under the label of 'multi-level constitutionalism'. Although these two aspects of supranational constitutionalisation are related, they need to be kept distinct.

Constitutionalisation of international, treaty-based bodies is a major topic in its own right. A great deal of scholarly attention has recently been devoted to the issue of the 'constitutionalisation' of such bodies as the World Trade Organization (WTO).[57] What this development is intended to signify, however, remains unclear. Having developed a set of binding rules enforced by an adjudicative body, the WTO has certainly become more legalised.[58] But the rights that the WTO promotes are essentially market freedoms and, while there have been claims that it promotes broader (liberal) constitutional functions,[59] such claims remain contentious.[60] While the WTO continues to conceive itself as developing a *lex specialis*, any constitutional claims for its status must remain highly speculative; in this sphere, the way in which the growth of constitutional rhetoric is altering the perception of the nature of the organisation's task is as important as the institutional changes that are occurring.

Such claims are not restricted to sectoral bodies like the WTO. A debate has also recently evolved over the question of whether the United Nations Charter should now be treated as the 'constitution' of the 'international community'.[61] This type of

[57] See, eg R. Howse and K. Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity' (2003) 16 *Governance* 73–94; D. Z. Cass, *The Constitutionalization of the World Trade Organization* (Oxford: Oxford University Press, 2005); J. L. Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647–75.

[58] S. Picciotto, 'The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance' (2005) 18 *Governance* 477–503; C. Carmody, 'A Theory of WTO Law' (2008) 11 *Journal of International Economic Law* 527–57.

[59] See, eg E.-U. Petersman, 'The WTO Constitution and Human Rights' (2000) 3 *Journal of International Economic Law* 19–25; Petersman, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society' (2006) 19 *Leiden Journal of International Law* 633–67.

[60] See, eg S. Picciotto, 'Constitutionalizing Multilevel Governance?' (2008) 6 *International Journal of Constitutional Law* 457–79, at 477–8: 'The strong vision of the constitutionalization of the WTO, as put forward especially by Petersman, … seems to consider all politics—including the WTO's rules and procedures and its deliberative democratic discourse—as favouring a producer-biased mercantilism. … However, giving individuals, including investors and corporations, rights they could enforce directly … could work to exacerbate economic inequalities by handing a powerful weapon to those whose considerable economic power could be defended in terms of morally underpinned economic rights.'

[61] See B. Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529–619; Fassbender, '"We the Peoples of the United Nations": Constituent Power and Constitutional Form in

analysis postulates the existence of an 'international community' as a surrogate for 'the people' and treats the legal framework through which this community acts as its constitution.[62] In this debate, the 'world constitution' is conceived as a set of norms which not only binds all states, but which also guarantee their claims to autonomy by protecting them from unauthorised invasions of their 'rights' by others. This, then, presents itself as a purely normativist claim, an assertion of the normative authority of general rules of international law. Without a 'world state', without some agency that guarantees enforcement, the power that underpins these norms remains ambiguous: constitutionalisation here presents itself as a free-standing process.

The most intense level of discussion on the subject of supranational constitutionalisation concerns the question of the constitution of the European Union (EU). It is impossible here to do justice to this issue. What is clear, nevertheless, is that our investigations should not come to rest on the failed venture of the EU Constitution, the attempt to agree a formal constitution to mark a process of evolution of a 'new legal order' for the benefit of which member states had conceded some of their governing rights.[63] It might focus instead on the ways in which the entity has grown incrementally in capacity and competence.[64] One important indicator of constitutionalisation concerns competence, shown by the way the EU has altered from being an international organisation creating duties and rights binding on member states to an entity which has established itself as a vertically integrated legal order that, within its jurisdictional limits, determines rights and duties that are binding on all legal persons within the EU territory. A second concerns capacity, by which is meant the way the EU has, through force of circumstance, acquired a capacity to extend its own remit.[65] The limits to the EU's competence and capacity are uncertain and contested, and while that is the

International Law', in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 269–90.

[62] See C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century* (The Hague: Martinus Nijhoff, 2001), 72–90; J. Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', in his *The Divided West*, trans C. Cronin (Cambridge: Polity, 2006), 115–93.

[63] The draft European Constitution was signed in October 2004 but rejected by referendums in France and the Netherlands in 2005; for developments, see <http://europa.eu/institutional_reform/index_en.htm>.

[64] See especially J. H. H. Weiler, *The Constitution of Europe: 'Do the new clothes have an emperor?' and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999); J. H. H. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2002); E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1–27.

[65] One illustration is the way in which respect for fundamental rights came to form part of the general principles of law protected by the European Court of Justice. See A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 172: 'Without supremacy, the ECJ had decided, the common market was doomed. And without a judicially enforceable charter of rights, national courts had decided, the supremacy doctrine was doomed.'

case constitutionalisation of the entity remains partial and similarly contested. But it is on the claim that the EU possesses its own autonomous power of innovation—the power unilaterally to extend its own competence and capacity—that the critical question of constitutionalisation revolves.

The crucial point to be made about constitutionalisation of the EU is that, to the extent it has been achieved, it is the epitome of liberal-legal constitutionalism.[66] The EU constitutionalisation project has been centrally devised, with the Court and Commission setting the pace. This process of what might be termed 'constitutionalisation through integration' is most evident in the work of the Court. Extending the scope of the 'new legal order' to claim that the founding treaties have become the Community's 'basic constitutional charter',[67] the Court has, through creative interpretation, created a hierarchy of 'constitutional' norms. But although a textual constitutional arrangement is being set in place, the question of political unity—which ultimately is the source of power of the entity—continues to confound.[68] As promoted by Commission and Court, constitutionalisation through integration has been a form of liberal-legal constitutionalism allied primarily to market freedoms. A critical constitutional tension point—one that expresses the underlying ideology of the constitutionalisation process—manifests itself whenever this normative authority is exercised in ways that undermine the social rights established in member states.[69]

Tensions between national and European authorities bring us to the second, more general, aspect of supranational constitutionalisation: the claim made by certain jurists that these internationally driven changes are on the brink of effecting a 'paradigm shift', in which the modern era of nation-state constitutionalism will be superseded by 'twenty-first century constitutionalism'. This movement presents itself under the banner of 'multi-level constitutionalism'.

Multi-level constitutionalism is founded on the notion that 'in the era of globalization a constitutionalist reconstruction [at the global level] is a desirable

[66] See Weiler, above n 64, 221: 'Constitutionalism is the DOS or Windows of the European Community'. When Weiler states this, it is legal constitutionalism he has in mind. He continues (ibid): 'The constitutionalism thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court, a constitutional charter governed by a form of constitutional law.' But this, it should be noted, is not Weiler's position on European constitutionalisation.

[67] Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 294/83 *Parti Ecologiste, Les Verts v Parliament* [1986] ECR 1339.

[68] D. Grimm, 'Does Europe need a Constitution?' (1995) 3 *European Law Journal* 282–302. Grimm concludes (at 299) that: 'Since this State would not … have the mediatory structures from which the democratic process lives, the Community would after its full constitutionalization be a largely self-supporting institution, farther from its base than ever.' See also Wahl in this volume (on the constitutional constellation).

[69] F. W. Scharpf, *Reflections on Multi-level Legitimacy* (Cologne: Max Planck Institut für Gesellschaftsforschung, 2007), Working Paper 07/03, especially 14–15. Scharpf (16) seeks solutions in the establishment of arrangements drawn from a tradition of republican-political constitutionalism. See further, Scharpf in this volume.

reaction to visible de-constitutionalization at the domestic level'.[70] It is claimed that at the domestic level non-governmental actors are now exercising governmental tasks and 'this means that state constitutions can no longer regulate the totality of governance in a comprehensive way and the states constitutions' original claim to a complete basic order is thereby defeated'.[71] The solution, argues Peters, must be found in 'compensatory constitutionalization on the international plane'.[72] Building on the arguments of de Wet and Cottier and Hertig, Peters contributes to an emerging group of scholars advocating multi-level constitutionalism.

The core thesis of multi-level constitutionalism is that there is 'an emerging international constitutional order consisting of an international community, and international value system and rudimentary structures for its enforcement' and this requires the concept of the constitution to be extended 'to describe a system in which the different national, regional and functional (sectoral) constitutional regimes form the building blocks of the international community'.[73] In de Wet's words, it 'assumes an increasingly integrated international legal order in which the exercise of control over the political decision-making process would be possible in a system where national and postnational (i.e. regional and functional) constitutional orders complemented each other in what amounts to a *Verfassungskonglomerat*'.[74] State-based constitutionalism, it is contended (this time in Cottier and Hertig's words), now needs to 'give way to a graduated approach' which extends 'to fora and layers of governance other than nations' and which treats these 'layers of governance … as on[e] overall complex'.[75]

The common feature of multi-level constitutionalism is its pervasive normativism.[76] Legal rules and values are treated as forming a set of rational moral principles implicitly located within legal constitutionalism, with constitutional values rooted in the constituent power of the people scarcely being mentioned.[77]

[70] A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579–610, at 580.

[71] Ibid.

[72] Ibid.

[73] E. de Wet, 'The International Legal Order' (2006) 55 *International & Comparative Law Quarterly* 51–76, at 51, 53.

[74] Ibid 53.

[75] T. Cottier and M. Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 *Max Planck Yearbook of United Nations Law* 261–328, at 264.

[76] This criticism is addressed in more detail in M. Loughlin, 'In Defence of *Staatslehre*' (2009) 48 *Der Staat* 1–27, especially at 17–23.

[77] Peters, above n 70, at 592, does refer to the need to establish transnational democratic structures (without details), but this concern does not seem to register on de Wet's horizon. Cottier and Hertig do address the point that state constitutionalism is authorised by 'the people' but they claim that this concept, being ethnic or cultural in character, ought simply to be transcended: 'This is not a constitutional model upon which the future can build' (ibid at 287–93). Peters shares such concerns, arguing that the claim that the Constitution is 'owned' by the people suffers 'from a gender bias and risks overstating the importance of irrational and mythological foundations of constitutional law' (ibid 608).

Peters offers the most reflective account of the thesis, noting the existence of certain anti-constitutionalist trends in the international arena and acknowledging that 'the constitutionalist reading of current international law is to some extent an academic artefact'.[78] But while accepting that objections to the thesis may come from 'the legal soundness of the reconstruction' and to 'arguably negative policy effects', there is no recognition that the most pressing objections to the project come from the basic assumptions that underpin the concept of liberal-legal constitutionalism itself.[79] The concept of multi-level constitutionalism being touted is an exemplary illustration of constitutionalisation: freed from the governing traditions of specific nation states, its advocates present constitutionalism as an autonomous set of rational legal norms of universal validity.

V. CONCLUSION

The process of constitutionalisation is born of the reconfiguration of the values of constitutionalism, an extension of their reach, and a loosening of the connection between constitutionalism and the nation state. The process draws on some of the achievements of modern constitutions and constitutionalism in regulating government, but it jettisons those aspects of these modern processes which have rested on the particularities of history and culture. In the frame of constitutionalisation, it is not the way of being of a people (ie culture) that provides the source of authority of constitutional norms, but neither is this authority attributable of the enactment of a constitutional text (ie historical fact). As a social philosophy, constitutionalisation marks the elevation of certain constitutional norms—those expressing the principles of liberal-legal constitutionalism—to the status of rational truths. As a social movement, constitutionalisation is allied to the restructuring forces of 'new governance' and, as such, forms a movement that extends specific types of discipline across the range of governmental action.

The effect of this process of constitutionalisation has recently been felt across all levels of government. It has been spearheaded domestically through a 'rights revolution' that has sought to extend the reach of judicially enforced constitutional rights. But its work can also be seen, more generally, in the ways that recent government restructuring—privatisation, reform of the administrative arrangements of the welfare state, and emergence of the regulatory form of government—has enhanced the importance of those constitutional norms that promote governmental accountability

[78] Ibid 605.

[79] Ibid 606. Habermas, who in his advocacy of constitutionalisation of the world society is acutely conscious of issues of democratic legitimation, does appear to recognise the tension between the logics of legal and political constitutionalism: J. Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 *Constellations* 444–55, at 446: 'Whereas the world organization would have a hierarchical organization and its members make binding law, interactions at the transnational level would be heterarchical.' This is, however, the statement of a problem without any clear solution.

and responsiveness. The movement has generated most interest, amongst certain constituencies at least, in the international arena where, ironically, the loss of the 'comprehensive' authority of national constitutions becomes the justification for extending the processes of constitutionalisation to trans and supranational bodies. The fact is that, in the sense being suggested, national constitutions were never comprehensive in their reach: modern constitutions provide a general framework for resolving governmental issues but have been able to do their work mainly through their gaps and silences and the vagueness of their formulations rather than because of the precision of their normative commitments. International constitutionalisation actually follows the same trajectory as the domestic level: it is part of a general restructuring movement, founded on particular conceptions of liberty and equality, and promoted through a rights and responsiveness agenda.

It might be objected that this argument presents constitutionalisation as some clearly designed project with universalising objectives and that in reality the nature of the changes that are taking place in government are more nuanced, complex, ambiguous, and uncertain. The impact of the processes that have been outlined has been differentially experienced across various regimes and in this sense, any general claims made for constitutionalisation must remain qualified. Further, the impact of transnational developments has generated sophisticated analyses from scholars who, recognising the difficulties of bringing the assumptions of liberal-legal constitutionalism directly to bear on these initiatives, are searching for alternative frameworks of explanation.[80] There is a measure of force in such claims. But my objective here has been to present an account based on two assumptions: that beneath the variety and particularism of instantiations there is a common trajectory of change, and that before abandoning modern understandings in favour of a 'new pluralism' or some 'new paradigm', the extent to which an explanation of these developments within the terms supplied by modern discourse should first be examined.

[80] See, eg N. Walker, 'Postnational Constitutionalism and the Problem of Translation', in Weiler and Wind, above n 64, ch 2; Walker, 'Post-Constituent Constitionalism? The Case of the European Union', in M. Loughlin and N. Walker (eds), above n 61, ch 13; M. Maduro, 'Contrapunctual Law: European Constitutional Pluralism in Action', in N. Walker (ed), *Sovereignty in Transition* (Oxford: Hart, 2003), 502–37; N. Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 *Modern Law Review* 183–216; Kumm in this volume; Teubner in this volume.