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# The Confines of Modern Constitutionalism

DAVID T. BUTLERITCHIE\*

## I. INTRODUCTION

Constitutionalism is an ambiguous concept, or at least the term is used in ambiguous ways. Virtually every political theorist of the modern period, certainly during the last two hundred years or more, has used the concept of a political constitution in some way or another. There is very little agreement, however, on what the term constitutionalism actually represents. Some mean it in a restrictive way, others in a more expansive way. Some use it in a proscriptive manner, while others employ it prescriptively (some, perhaps, even use it pejoratively). What nearly everyone who uses the term shares, though, is the thought that modern societies need a constitution in order to be properly constructed.<sup>1</sup> In fact, many maintain that the development and implementation of a constitution is a prerequisite to a nation-state being recognized as legitimate.<sup>2</sup>

In what follows, I explore the development of modern constitutionalism. Such an exploration is necessary in order to show two things. First, that the contemporary notions surrounding the design, use, and efficacy of a constitution rests on distinctly rationalist grounds.<sup>3</sup> Second, such an examination will show that this rationalist foundation, with its attendant lib-

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1. Jan-Erik Lane, *Constitutions and Political Theory* 42 (Manchester U. Press 1996); see Allen N. Sultan, *Principle and Practical Foundations of a Global Constitutional Order*, 3 Wash. U. Global Stud. L. Rev. 155, 162 (2004) (maintaining a view that this normative requirement should be viewed from a global perspective).

2. Ziyad Motala, *Constitutional Options for a Democratic South Africa: A Comparative Perspective* chs. 1-2 (Howard U. Press 1994); Saïd Amir Arjomand, *Constitutions and the Struggle for Political Order*, 33 Eur. J. Sociology 39, 73 (1992); Cass R. Sunstein, *On Property and Constitutionalism*, 14 Cardozo L. Rev. 907, 907 (1992).

3. See e.g. Thomas C. Grey, *Constitutionalism: An Analytic Framework*, in *Constitutionalism: Nomos XX* 189–209 (J. Roland Pennock & John W. Chapman eds., N.Y. U. Press 1979).

eral political apparatus, has led many founders to view constitutionalism (in application) as a very narrow formalist enterprise. I will not attempt a fully formed history of constitutionalism and the concepts associated with it. Such examinations have been undertaken before.<sup>4</sup> I also do not develop the notion of ancient constitutionalism, or the Romanized variants that led to the development of modern constitutionalism, in any real depth.<sup>5</sup> What I will do, however, is trace the development of certain threads that have had a tremendous influence on how constitutionalist concepts are employed today. These threads form the fabric of modern constitutionalism. This examination will show how the conflation and oversimplification of important social and political ideas actually undermine the constitutionalist enterprise. Ultimately, I maintain that the sort of narrow constitutionalism that has gained conceptual hegemony constrains social formation because it is beholden to concepts and interests that lie outside the incipient state involved in the constitutional project.

Prominent in my analysis of how modern constitutionalism has developed are the concepts of “modernism” and “liberalism.” A note should be made here about my use of these concepts. Any discussion that hinges on generalized notions such as these runs the risk of being at best oversimplified, and at worst incoherent. My targets here, then, should be more discretely defined. By “modernism” I mean a set of philosophical presumptions about the formal, rational structure of ideas that relate to the world and our ability to access and understand these structures.<sup>6</sup> These presumptions have held sway, more or less, since the Enlightenment.<sup>7</sup> My references to “liberalism” are perhaps more problematic in that the term is so often used in reference to disparate and often contradictory concepts associated with political theory and law.<sup>8</sup> In my discussion below, I concentrate on a conception of the good that embeds a form of market capitalism and laissez-faire economics into the political and legal structures that are found in society.<sup>9</sup> This might be called “traditional liberalism.”<sup>10</sup> This crypto-normative presumption in favor of capitalist economic structures shows up in certain forms of liberal political theory that favor the sorts of

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4. Two excellent books have been written on this during the last century. *See generally* Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (rev. ed., Cornell U. Press 1947); Francis D. Wormuth, *The Origins of Modern Constitutionalism* (Harper & Bros. 1949).

5. McIlwain, *supra* n. 4; Wormuth, *supra* n. 4.

6. *See e.g.* Bernard Yack, *The Fetishism of Modernities: Epochal Self-Consciousness in Contemporary Social and Political Thought* (U. of Notre Dame Press 1997).

7. *Id.*

8. *See e.g.* F. A. Hayek, *Liberalism*, in *New Studies in Philosophy, Politics, Economics and the History of Ideas* 119–51 (The U. of Chi. Press 1982).

9. *Id.* at 119.

10. *Id.* at 138–39.

constitutional mechanisms I discuss in detail below.<sup>11</sup> My use of these concepts in the present context is, in a sense, instrumental. By showing how these versions of modernism and liberalism guide constitutional founders to a particular notion of the good,<sup>12</sup> I hope to illuminate why accepting modern constitutionalism uncritically is problematic.<sup>13</sup> In my view, contemporary societies that engage in formative or re-formative moments are treading on dangerous ground if they accept and employ this uncritical and formulaic notion of constitutionalism.

## II. THE ENLIGHTENMENT AND CONSTITUTIONALISM

Constitutionalism has at least two distinct meanings.<sup>14</sup> It means, in one sense, the actual forces and composition of society. When one asks, “How is a society constituted?” she is using the term in this sense. Used in this way, the concept is meant to capture the actual forces—cultural, economic, legal, political, and social—which comprise the nation in question.<sup>15</sup> This is a more textured, albeit more amorphous and difficult to define conceptualization of the term.<sup>16</sup> Alternatively, when one talks about the “constitution of a society” she invariably means just the formal written document<sup>17</sup> in which the superficial structure of the state institutions are set forth.<sup>18</sup> This is a distinctly formalist notion of constitutionalism.<sup>19</sup>

It is important to note in what sense one uses the concept of constitutionalism. Contemporary commentators often confuse and conflate the

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11. *Infra* pts. III-VII.

12. Both of these concepts are, of course, incredibly complex and contestable at some level. Nonetheless, I find the present constructions defensible (on usage and reasonableness grounds) and useful for my present endeavor. See Marshall Berman, *All that is Solid Melts into Air: The Experience of Modernity* (Simon & Shuster 1982) (discussing the use of “modernism” as a philosophical concept); Patrick Neal, *Liberalism and its Discontents* (N.Y. U. Press 1997) (discussing the use of “liberalism” as a philosophical concept).

13. See also David T. ButleRitchie, *Critiquing Modern Constitutionalism*, 3 *Appalachian J.L.* 37 (2004).

14. Lane, *supra* n. 1, at 5-11.

15. Lane calls this the second constitutional context. Lane, *supra* n. 1, at 10-11.

16. I discuss this in much more detail elsewhere. See David T. ButleRitchie, *Shifting Foundations and Historical Contingencies: A Critique of Modern Constitutionalism* (unpublished Ph.D. dissertation, U. of Or. Aug. 2004) (on file with author).

17. A notable exception, of course, would be the English constitution. See Edmund Burke, *The Philosophy of Edmund Burke* 176 (The U. of Mich. Press 1967); Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* 417 (10th ed., St. Martin’s Press 1961) (discussing the English constitution, not as a single document but as a series of proclamations and accords).

18. In Lane’s formulation, this is the first constitutional context. See Lane, *supra* n. 1, at 10-11.

19. Frank I. Michelman, *Can Constitutional Democrats be Legal Positivists? Or Why Constitutionalism?*, 2 *Constellations* 293, 296 (1996); see James W. Ceaser, *Reconstructing Political Science*, in *A New Constitutionalism: Designing Political Institutions for a Good Society* 41, 43 (Stephen L. Elkin & Karol Edward Soltan eds., The U. of Chi. Press 1993).

term, attempting to capture both meanings (more or less), while not checking to see whether their use maintains a sense of consistency and coherence.<sup>20</sup> It is, in fact, the ambiguous and sloppy use of the concept that permits the superficial application of formalist constitutional structures on top of the actual practices and structures of complex social groups.<sup>21</sup> In effect, when the two senses of constitutionalism are conflated the important aspects of the culture, history, and social structure of a nation are drowned beneath the formalist impulse. Content is subsumed and inundated by form.

Interestingly, the two senses of the concept that I mention above correspond fairly closely with the division between ancient and modern constitutionalism.<sup>22</sup> Ancient constitutionalism focused primarily on the nature of the social group, looking at the normative questions which impact that group.<sup>23</sup> “What was the history of the Spartan people?”, for instance, or “Were the economic forces which led Corsica to an agrarian economy formative in their culture?” These were the types of questions that ancient constitutionalists such as Aristotle and Cicero asked.<sup>24</sup> These sorts of questions can be contrasted with the formalist and instrumental perspectives of modern constitutionalists such as John Locke,<sup>25</sup> James Madison,<sup>26</sup> and Hans Kelsen.<sup>27</sup> This latter group, along with very many political and legal theorists who have followed them, concentrates invariably on the second notion of constitutionalism I mention above.

So why have we lost this focus on the actual composition of society, on the normative questions (concerning what a just and proper order of economic and social resources would be, perhaps) that affect the actual workings of state power, and focused on the formalisms inherent in institutional structure? I suggest that this move is tied to the whole-scale embrace of modernist presumptions about rational order and the impossibility of substantive social and political discourse.<sup>28</sup> In his study of the effects of

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20. Lane, *supra* n. 1, at 5.

21. See ButleRitchie, *supra* n. 16.

22. McIlwain, *supra* n. 4, at chs. 1-2 (tracing this split a bit earlier to the division between Greek and Roman variants of constitutionalism; acknowledging, however, that the real division does not take hold until the modern period).

23. McIlwain, *supra* n. 4, at chs. 1-2.

24. McIlwain, *supra* n. 4, at chs. 2-3.

25. See e.g. John Locke, *Two Treatises of Government* (Peter Laslett ed., Cambridge U. Press 1988).

26. See e.g. Alexander Hamilton et al., *The Federalist Papers* (Modern Library n.d.).

27. See e.g. Hans Kelsen, *General Theory of Norms* (Michael Hartney trans., Clarendon Press 1991).

28. Jürgen Habermas has been attempting to show how such discourse is not only compatible with the constitutionalist enterprise (and as such supportive of liberal political theories concerning democracy and economics), but is actually necessary in order to have these things. See e.g. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William

modernism on social and political theory, Stephen Toulmin has said, “the research program of modern philosophy . . . set aside all questions about *argumentation*—among particular people in specific situations, dealing with concrete cases, where varied things were at stake—in favor of *proofs* that could be set down in writing, and judged as written.”<sup>29</sup> The rationalism of the Enlightenment was an attempt to harness and categorize the world.<sup>30</sup> This led to advances in science and mathematics, and had a palpable effect on our social world as well.<sup>31</sup> As Toulmin put it, “[t]he comprehensive system of ideas about nature and humanity that formed the scaffolding of Modernity was thus a social and political, as well as a scientific device: it was seen as conferring Divine legitimacy on the political order of the sovereign nation-state.”<sup>32</sup>

Western political theory has, in the last two hundred years or so, reduced the social and political content of societies to a small set of procedural safeguards and institutional mechanisms.<sup>33</sup> This can be traced to the influence of liberal political theories that arose during the enlightenment.<sup>34</sup> The rationalism of the enlightenment had an enormous impact on social and political theory.<sup>35</sup> The effect on political theory was perhaps as dramatic as on science and mathematics.<sup>36</sup> As Stephen Toulmin has said:

The idea that society is a formal “system” of agents or institutions has exerted a major influence on the modern world. It was hinted at by Hugo Grotius . . . in 1625, even before Descartes published; but its detailed content, and underlying assumptions, only took on definitive shape later in the 17th century. At this point, the Cartesian division of matter from mind, causes from reasons, and nature from humanity, was endorsed and continued by Isaac Newton, and

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Rehg trans., The MIT Press 1996); Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, 3 Eur. J. Phil. 12 (1995).

29. Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* 31 (The U. of Chi. Press 1990).

30. *Id.*

31. *Id.* at 128.

32. *Id.*

33. Lane, *supra* n. 1, at 41; see Stephen L. Elkin, *Constitutionalism: Old and New*, in *A New Constitutionalism: Designing Political Institutions for a Good Society* 20, 24 (Stephen L. Elkin & Karol Edward Soltan eds., The U. of Chi. Press 1993).

34. Lane, *supra* n. 1, at 25-50; see *Constitutionalism: The Philosophical Dimension* 9-113 (Alan Rosenbaum ed., Greenwood Press 1988) (the essays in Part I); Karol Edward Soltan, *Generic Constitutionalism*, in *A New Constitutionalism: Designing Political Institutions for a Good Society* 70 (Stephen L. Elkin & Karol Edward Soltan eds., The U. of Chi. Press 1993).

35. See e.g. Yack, *supra* n. 6; Toulmin, *supra* n. 29.

36. Toulmin, *supra* n. 29, at 107.

ceased to be of concern to natural philosophers alone. From then on, it played a major role in social and political thought as well.<sup>37</sup>

This, then, is the crucible of what has been called modern constitutionalism.<sup>38</sup>

### III. THE CORNERSTONES OF MODERN CONSTITUTIONALISM

Modern constitutionalism, as I use the term throughout the rest of this project, refers to a set of formal legal and political concepts that were developed in Western Europe during the enlightenment.<sup>39</sup> These concepts, which serve as cornerstones of liberal political and legal theory (and evolved to support that theory), are the division and limitation of governmental power, the recognition and protection of certain individual rights, the protection of private property, and the notion of representative or democratic government.<sup>40</sup> These concepts are the backdrop against which the modern constitutionalist enterprise is judged. The extent to which a system recognizes, legitimates, and entrenches these fundamental principles of social and political organization marks it as either liberal (in those systems which do recognize, legitimate, and entrench these concepts) or illiberal (in those that do not). The history of the twentieth century has shown us how stark this demarcation can be, and the ghastly results that can occur when the division yields totalitarian results.<sup>41</sup> Nonetheless, the trend that has developed during the last two centuries or so seems to be that these liberal values can only truly be protected by the development and institution of a certain sort of constitutionalist model.<sup>42</sup>

This does not explain, however, why contemporary political and legal theorists assume that a formal constitutional document will suffice. In other words, even if we accept the fact that the values that are inherent in liberalism are of enduring and universal value, and are therefore worthy of protection, why must we accept that a formalist constitution is the best (or, indeed, the only) way to accomplish these goals? Further, even if we accept the argument that a constitutional document along modernist lines is necessary (or just even useful), it by no means follows that it is sufficient

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37. *Id.*

38. Lane, *supra* n. 1, at 25-50.

39. McIlwain, *supra* n. 4, at chs. 3-4.

40. *Infra* pts. III-VII.

41. See Franz Neumann, *Behemoth: The Structure and Practice of National Socialism 1933 - 1944* (Harper & Row 1942) (discussing totalitarianism).

42. Gordon J. Schochet, *Introduction: Constitutionalism, Liberalism, and the Study of Politics*, in *Constitutionalism: Nomos XX* 1-15 (J. Roland Pennock & John W. Chapman eds., N.Y. U. Press 1979).

to accomplish the goals of protecting liberal values.<sup>43</sup> In fact, this is precisely the problem. Contemporary theorists assume (either unconsciously or with some willful blindness) that a formal constitutional document will suffice to protect liberal values and inscribe them upon the society being constituted.<sup>44</sup> I would even go so far as to maintain that this is precisely why and how the international community (both governmental and non-governmental) operates vis-à-vis incipient nation-states.<sup>45</sup> As Bernard Yack has acknowledged, “written constitutions are often attempts to establish . . . what are seen as rational principles of government.”<sup>46</sup> The sense seems to be that if a formal constitution that incorporates liberal concepts is instituted, the rest will take care of itself in time. On its face this seems an unwarranted and faulty conclusion. Yet this is precisely what passes for most constitutionalist discourse today.<sup>47</sup>

In what follows I will briefly discuss the four cornerstones of modern constitutionalism, tracing their development and entrenchment in an attempt to substantiate my claim that their application has frequently led to the sort of conflation and formalism that I critique above. I begin by looking at the notion of divided and limited government. This concept, made popular during the Middle Ages in Europe, sets the stage for a particular conception of civil society; a conception which sets the individual in opposition to society in an antagonistic way.<sup>48</sup> This view, of course, was developed most fully during the seventeenth century by John Locke.<sup>49</sup> I then move to the dependent concepts of individual liberties and property rights. These expectations further cordon off the individual from civil society in a way that (perhaps forever) solidified our notions of individuals against the state.<sup>50</sup> The constellation of ideas surrounding individual rights and liberties has molded (if not contorted) modern constitutionalism in an unmistakable way. In a similar way, the modern notion of property ownership, with its restrictions against state intervention and the expectation of invio-

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43. See *Constitutionalism and Democracy: Transitions in the Contemporary World* xix (Douglas Greenberg et al. eds., Oxford U. Press 1993).

44. See Schochet, *supra* n. 42.

45. Viktor Mayer-Schonberger, *Into the Heart of the State: Intervention Through Constitution-Making*, 8 *Temp. Intl & Comp. L.J.* 315, 317 (1994).

46. Yack, *supra* n. 6, at 100.

47. This is particularly true amongst the work of political scientists. See *The Constitution of Good Societies* (Karol Edward Soltan & Stephen L. Elkin eds., The Pa. St. U. Press 1996); *A New Constitutionalism: Designing Political Institutions for a Good Society* (Stephen L. Elkin & Karol Edward Soltan, eds., The U. of Chi. Press 1993); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *Va. L. Rev.* 771 (1997) (showing legal theorists are not immune to this impulse).

48. Hayek, *supra* n. 8, at 119-23.

49. Locke, *supra* n. 25, at 77-133.

50. *Id.*



lability, has left an indelible mark on modern constitutionalism.<sup>51</sup> Finally, I briefly look at the rise of representative democracy in the context of constitutionalist discourse. It has been frequently noted that democracy and constitutionalism are concepts that may in fact be contradictory.<sup>52</sup> They are, in any event, at least in tension with one another.<sup>53</sup>

It is important to note that none of the concepts that I identify as cornerstones of modern constitutionalism are intrinsically problematic. Indeed, countless works devoted to these ideas have been penned during the last four hundred years that show their importance in certain contexts.<sup>54</sup> What I mean to suggest here is that these ideas, as they developed and have been implemented during the last century or more, are honored more in the breach than in their actual application. Essentially, watered-down and moribund approximations of these concepts have been articulated and employed in the context of constitution-making.<sup>55</sup> The commitment to the ideals is undermined by the superficiality and merely formalist move to try and implement these political concepts in a universalizing and totalizing way.<sup>56</sup> Nothing can illustrate this better than the development of limited government.

#### IV. CONSTITUTIONALISM AND GOVERNMENT STRUCTURE IN MODERN NATION-STATES

Constitutionalism, in virtually all of its formulations, plays on the concept that there are two levels of legal and political discourse. The first is the fundamental law (or sometimes “higher” law) of a political entity.<sup>57</sup> This is the constitution, proper. Below this is a second, subservient set of

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51. F. A. Hayek, *The Constitution of Liberty* 124-27 (The U. of Chi. Press 1960).

52. See e.g. Robert A. Dahl, *A Preface to Democratic Theory* (The U. of Chi. Press 1956); Lane, *supra* n. 1, at 243-44.

53. Ronald Dworkin, *Constitutionalism and Democracy*, 3 *Eur. J. Phil.* 2 (1995); Lane, *supra* n. 1, at ch. 11; Habermas, *supra* n. 28.

54. The corpus of Western liberalism is filled with such discussions. Theorists from Aristotle to Unger have discussed these ideas in various contexts.

55. See ButleRitchie, *supra* n. 16.

56. It may be claimed, then, that I am really not taking issue with the concepts *qua* concepts, but with their application. Fair enough. Being the legal realist that I am, however, leads me to cling to the idea that a concept is only as good as it performs in application. Since the last century (at least) has shown us that high ideals often yield despicable results, I am convinced that we must start with the ideals and work forward to the results. Admittedly, this bucks the trend of starting with the undesirable results and working back to the concepts. Such a procedure never seems to yield the proper effects, though. As a result, I begin this examination of the sketchy application of these important constitutionalist concepts with the concepts in order to see if the problem lies not just in their incomplete and superficial application, but in the heart of the concepts themselves.

57. Grey, *supra* n. 3, at 189-95.

laws that are seen as derivations from the first.<sup>58</sup> This hierarchy is what gives modern constitutionalism its basic structure, and is why many (perhaps most) people see constitutionalism as a necessary step in the founding (or re-founding) of a polity. This structure serves as a legitimation of government authority and is the basis of the rule of law. This institutional structure is probably second nature to most of us. It is completely dependent, however, on the idea that government can, and should, be limited by structural constraints contained in this fundamental or “higher” law; the constitution.<sup>59</sup>

The idea that a constitution is designed to limit the power of the sovereign is quite old. Francis Wormuth has traced the concept back through Jean Bodin in the sixteenth century,<sup>60</sup> Thomas Aquinas in the thirteenth,<sup>61</sup> and finally to the Germanic tribes of the very early medieval period.<sup>62</sup> Charles McIlwain disputes the claim of Teutonic heritage, instead maintaining that the idea arose first in Roman thought.<sup>63</sup> He says, for instance:

[O]ne of the greatest contributions to constitutionalism was the distinction [made by the Romans], more clearly than it had been made before, or was to be made for long afterwards, between the *jus publicum* and the *jus privatum* – a distinction that lies to this day behind the whole history of our legal safeguards of the rights of the individual against encroachment of government.<sup>64</sup>

McIlwain’s argument is persuasive, but ultimately the exact derivation of the concept matters little for our present discussion. It was certainly the case that Locke had accepted this dichotomy between state and the individual by the seventeenth century,<sup>65</sup> and the notion that this split necessitated protections of the individual from the power of the state in the form of limitations on governmental (or, more properly, sovereign) action was firmly entrenched by the eighteenth century.<sup>66</sup>

As we can see here, there is a link between the hierarchical nature of constitutional government and the split between public and private realms of action. It is because individuals are seen as existing against the state

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58. Michelman, *supra* n. 19, at 298.

59. Grey, *supra* n. 3, at 189-95.

60. See Jean Bodin, *Six Books of the Commonwealth* (Blackwell Press 1955).

61. See Question XC, *On the Question of Law*, in *Summa Theologica* in *Introduction to St. Thomas Aquinas* (Anton C. Pegis ed., Modern Library 1948).

62. Wormuth, *supra* n. 4, at chs. 1, 4, 5. Lane seems to accept this view. See Lane, *supra* n. 1, at 19-21. Otto von Gierke also apparently endorsed this view as well. See McIlwain, *supra* n. 4, at ch. 3.

63. McIlwain, *supra* n. 4, at 40-46.

64. *Id.* at 46.

65. See Locke, *supra* n. 25.

66. As evidenced, for example, by the work of Alexander Hamilton, et al., *supra* note 26. See also Wormuth, *supra* n. 4, at 1.

that limitations on government are needed.<sup>67</sup> The two entities need to forge a workable relationship allowing both to serve their proper ends. The fundamental law (the constitution) then, is seen as a compact between private actors and the public power of the state.<sup>68</sup> Key to this account is the notion of sovereignty. While this is not the place to develop or trace a fully-fledged account of sovereignty,<sup>69</sup> a little must be said here in order to show how the notions of limited government and the public/private split on political actors intersect.<sup>70</sup> In some ways, the notion of sovereignty may be seen as a keystone holding this entire liberal conception of state and individual together.<sup>71</sup>

During the early modern period, the notion of state power was seen as residing in a single individual, the monarch or sovereign. This is undoubtedly another legacy of imperial Roman practice. Sovereignty was the exercise of this power by the rightful authority of the state entity.<sup>72</sup> As Thomas Hobbes put it, “[a]nd he that carryeth this person, is called Sovereaigne, and said to have Sovereaigne Power; and every one besides, his Subject.”<sup>73</sup> This consolidation of sovereign power in one individual was endorsed and espoused by Jean Bodin in his *Six Books of the Commonwealth*, and was widely practiced by the monarchs of medieval Europe.<sup>74</sup> Wormuth acknowledges this when he says, “[t]o Bodin, as to the whole school of politiques, it appeared that the very existence of society was possible only if there were some overriding power capable of exacting complete obedience from all subjects.”<sup>75</sup>

The arbitrary exercise of this power, however, was seen as a transgression against individual members of the state.<sup>76</sup> Absolute power of the sort espoused by Bodin and others necessarily meant that the sovereign was above the law.<sup>77</sup> For reasons obvious to us today, this was troubling for many in medieval Europe. In fact, there existed an alternative view to the one advanced by Bodin. This alternative view has been traced to the thir-

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67. Locke, *supra* n. 25, at §§ 77-131.

68. Locke, *supra* n. 25, at §§ 113-14.

69. See J. Bartleson, *A Genealogy of Sovereignty* (Cambridge U. Press 1995); Georges Bataille, *The Accursed Share, Vols. II and III* (Zone Books 1991); F.H. Hinsley, *Sovereignty* (2d. ed., Cambridge U. Press 1986); S.D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton U. Press 1999).

70. For an interesting discussion that problematizes the public/private split, see Otto Kirchheimer, *In Quest of Sovereignty*, 6 J. Pol. 139 (1944).

71. See Krasner, *supra* n. 69, at ch. 1.

72. See generally Thomas Hobbes, *Leviathan* (Everyman's Library 1965).

73. *Id.* at 90.

74. Lane, *supra* n. 1, at 44-50.

75. Wormuth, *supra* n. 4, at 29.

76. *Id.*

77. *Id.*

teenth century British jurist, Henry of Bracton.<sup>78</sup> Bracton maintained that a King above law was like a horse without a bridle.<sup>79</sup> Indeed, McIlwain attributes directly to Bracton the very modern idea that a sovereign may only exercise power legitimately when he does so according to law.<sup>80</sup> He even goes so far as to claim that the notion of sovereign power flowing from the people to the sovereign, and that this relationship checks the power of the sovereign to act arbitrarily in matters pertaining to the common good, was first devised by Bracton.<sup>81</sup>

McIlwain describes this divorce as a division between *jurisdictio* and *gubernaculum*.<sup>82</sup> This is the division between the formal offices of government and the actual management of state. He traces the evolution of this rift throughout the middle ages by examining the English common law developments that limited the absolute power of the sovereign.<sup>83</sup> During this period, the British judiciary assumed an ever more powerful social role. This increased stature gave judges the power to challenge the King on issues concerning the governance of English society. In effect, the English judiciary bridled the sovereign between the thirteenth and sixteenth centuries.<sup>84</sup> The idea that a sovereign may only exercise his power legitimately when acting according to delimited powers under law was developed over several centuries.

Thomas Hobbes picked up this concept during the seventeenth century.<sup>85</sup> Francis Wormuth identifies this as a direct result of the English civil war.<sup>86</sup> In any event, Hobbes' famous *Leviathan*<sup>87</sup> was aimed at addressing the arbitrary abuse of power, and constructing the proper ordering of the public sphere.<sup>88</sup> Here, we see the first real move to formalize constitutionalist principles. Hobbes was a materialist and formalist by temperament, and saw the relationship between state and the individual in rationalist terms.<sup>89</sup> According to his view, the sovereign and his subjects maintain a legal relationship, one of agency.<sup>90</sup> While the legal characterization of this relationship was an important one for Hobbes, he did not suppose that the nature of the relationship itself was sufficient to cast the rights and re-

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78. McIlwain, *supra* n. 4, at 67-68.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at ch. 5.

83. *Id.*

84. *Id.*

85. See Hobbes, *supra* n. 72.

86. Wormuth, *supra* n. 4, at 57, 59.

87. Hobbes, *supra* n. 72.

88. See *id.* at chs. 17-25.

89. See e.g. Michael Ridge, *Hobbesian Public Reason*, 108 *Ethics* 538 (1998).

90. See generally Hobbes, *supra* n. 72, at ch. 18.

sponsibilities of both parties in stone.<sup>91</sup> This is why limitations on the power of the state were so important. Limitation on state power was accomplished by constructing a contractual relationship between the sovereign and the individual - the social contract.<sup>92</sup> The social contract was a fiction designed to orient the terms of state limitation.<sup>93</sup> This notion of the social contract would play a pivotal role in the development of the modern state system, a notion that was picked up by (among others) John Locke.<sup>94</sup>

As I have said, the idea of a social contract was developed to explain and describe this rationalist vision of state ordering along formalist lines.<sup>95</sup> The nature of political ordering was seen, in this formulation, as nothing more than a natural and logical legal relationship.<sup>96</sup> The sovereign acts as agent for his subjects. This agency relationship justifies the continued maintenance of the social contract. In other words, the power of the sovereign is dependent on the recognition and protection of private ends.<sup>97</sup> Constitutions are important in this account because they explicitly set forth the terms by which the agency relationship can be exercised.<sup>98</sup> The social contract is, after all, a contract. As Locke puts it:

Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.<sup>99</sup>

While Locke did not develop a fully formed notion of the social contract,<sup>100</sup> as did other liberal theorists,<sup>101</sup> he relied on the idea heavily in his conceptualization of the proper relationship between the state and its subjects. In fact, it may reasonably be said that the entire corpus of Locke's political work was devoted to justifying the restraint of sovereign power.<sup>102</sup>

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91. *Id.*; McIlwain, *supra* n. 4, at 125.

92. *See generally Social Contract Essays by: Locke, Hume, Rousseau* Intro (Ernest Barker ed., Oxford U. Press 1976).

93. *Id.*

94. *See* Locke, *supra* n. 25.

95. *See generally* Yack, *supra* n. 6; Toulmin, *supra* n. 29.

96. *See generally* Yack, *supra* n. 6; Toulmin, *supra* n. 29.

97. *See generally* Lane, *supra* n. 1, chs. 2, 3.

98. *Id.*

99. Locke, *supra* n. 25, at 164.

100. Franz Neumann, *The Democratic and the Authoritarian State* 23 (The Free Press 1957).

101. *See Social Contract Essays by: Locke, Hume, Rousseau, supra* n. 92.

102. *See generally* Leslie Armour, *John Locke and American Constitutionalism*, in *Constitutionalism: The Philosophical Dimension, supra* n. 34, at 9.

The state was, for Locke, a necessary condition to the full actualization of the individual, but as an institution it should be constrained and narrowly confined to providing the conditions for liberty.<sup>103</sup> Confining the state to its limited role, according to Locke, is what creates room for liberty to flourish. This has been identified as Locke's notion of constitutionalism; a theory which is deeply tied to his metaphysics and epistemology.<sup>104</sup>

The next major player in this tale is Charles-Louis de Secondat, Baron de Montesquieu.<sup>105</sup> Montesquieu accepted the Lockean notion of limited government.<sup>106</sup> He said, for example, that:

[C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse it is necessary from the very nature of things that power should be a check to power. A constitution may be such that no man shall be compelled to do things which the law does not oblige him, nor forced to abstain from things which the law permits.<sup>107</sup>

Montesquieu also began his analysis of constitutionalist ideas from a rationalist stance.<sup>108</sup> At the very beginning of *The Spirit of the Laws*, Montesquieu said “[t]here is, then, a prime reason; and laws are the relations subsisting between it and different beings, and the relations of these to one another.”<sup>109</sup> Guy Lafrance has said that for Montesquieu, “[t]here is fundamentally a concern for *scientificity*, a concern for positive knowledge which is constantly expressed in the desire to link up the law with sociohistorical data.”<sup>110</sup> There is evidence to suggest that Montesquieu was much closer to Jean-Jacques Rousseau concerning his views on the connection of a form of government to a specific people,<sup>111</sup> but his rationalist tendencies are relevant here. So what does Montesquieu's rationalism add to this constitutionalist picture? It is Montesquieu who introduces the concept of further diluting the notion of sovereignty by separating the powers of gov-

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103. Locke, *supra* n. 25, at 164, 189, 190; see Lane, *supra* n. 1, at 51-53.

104. See Armour, *supra* n. 102 (detailed account of what motivates Locke to adopt this set of positions).

105. See Robert Shackleton, *Essays on Montesquieu and the Enlightenment* (Voltaire Found. 1988).

106. Guy Lafrance, *Montesquieu and Rousseau on Constitutional Theory*, in *Constitutionalism: The Philosophical Dimension*, *supra* n. 34, at 55.

107. Montesquieu, *The Spirit of the Laws* bk. XI, ch. 4, 150 (Thomas Nugent trans., Hafner Publ. Co. 1949) (originally published 1773).

108. Lafrance, *supra* n. 106, at 55.

109. Montesquieu, *supra* n. 107, at bk. I, ch. 1, 1.

110. Lafrance, *supra* n. 106, at 55.

111. *Id.*

ernment into different departments.<sup>112</sup> This is a further compartmentalization and limitation of the structure and role of government, reductions further carried out by the institution of a positivist constitutional text.<sup>113</sup>

The last major focus in this evolution is on the works of Thomas Paine<sup>114</sup> and James Madison.<sup>115</sup> It was the work of the American founders, more than any single theorist before, who unified previous rationalist visions into a coherent whole.<sup>116</sup> Paine captured clearly the founders' view on constitutionalism when he said that a written constitution is "to liberty, what a grammar is to language."<sup>117</sup> A vital part of Paine's view is that a constitution is a formal and antecedent document that necessarily precedes the institution of government.<sup>118</sup> To this, Madison added the notion that this compact that predates the formation of the state must incorporate the constraint of limited and divided government, accepting in whole cloth the views of Locke and Montesquieu.<sup>119</sup> He further developed these notions, however, by adding the proviso that the divided powers should be checked against one another, a further limiting device.<sup>120</sup> Madison also endorsed the view, derived undoubtedly from Locke,<sup>121</sup> that the people are the source of sovereign power, and that the constitution is a grant of that power to the government.<sup>122</sup> Limiting government through discrete mechanisms designed to diffuse and disperse power so that individuals in society can attain private ends was the goal of the American founders.<sup>123</sup> Richard Kay has explained this in the following way: "These two elements—first, that there is a proper and improper use of state authority and, second, that the means of confining its exercise to proper uses are the promulgation and enforcement of positive law [through a constitutional document]—remain the defining features of American constitutionalism."<sup>124</sup> There is a positivist and overly rationalistic impulse shot through most of the early Ameri-

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112. See Lane, *supra* n. 1, at 54; Lafrance, *supra* n. 106, at 61.

113. See e.g. David Spitz, *Some Animadversions on Montesquieu's Theory of Freedom*, 63 *Ethics* 207 (1953).

114. See e.g. Thomas Paine, *The Rights of Man* (E.P. Dutton & Co. 1951).

115. Hamilton, *supra* n. 26.

116. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* ch. 3 (Knopf Books 1996).

117. McIlwain, *supra* n. 4, at 2.

118. *Id.* at 9.

119. James W. Muller, *The American Framers' Debt to Montesquieu*, in *The Revival of Constitutionalism* 91 (James W. Muller ed., U. of Neb. Press 1988).

120. Lane, *supra* n. 1, at 55-56.

121. Richard S. Kay, *American Constitutionalism*, in *Constitutionalism: Philosophical Foundations* 18 (Larry Alexander ed., Cambridge U. Press 1998).

122. Hamilton, *supra* n. 26, at 294.

123. Rakove, *supra* n. 116, at ch. 3.

124. Kay, *supra* n. 121, at 19.

can constitutionalist discourse.<sup>125</sup> Michael Kammen has described this as the impulse to create “a machine that would go of itself.”<sup>126</sup>

We see throughout the modern period several interdependent concepts that have played key roles in the development of modern constitutionalism. Clearly the belief that government should be limited in its ability to use its power against individuals is the chief concern of modern political thinkers. In order for this concept to take hold, however, several related concepts needed to develop. First the dichotomy between state and subject had to take root. Then the idea that sovereignty can (and should) be divorced from an all-powerful monarch was needed. Once power was divested from the sovereign and deposited amongst the people, the mechanisms of divided government and checks and balances would ensure that it remained there. In theory, the division of powers can be seen as a sort of entropy that undermines any possibility of consolidating government power in the hands of a few. Finally, the notion that the proper relationship between the individual and the weakened sovereign was one of agency solidified the now widely held belief that the only legitimate end of the nation-state is to serve the needs of the individual so that she can attain private interests.

In making these moves, theorists like Hobbes, Locke, Montesquieu and the American founders continually delineated and redacted legitimate state functions, which posited ever smaller and confined areas of public action. The law and the constitution which enabled the law, are simply a means to an end—a very particular end.<sup>127</sup> The constitution is a charter. In this modernist formulation, writing a constitution is nothing more than reducing the contract between the state and the individual to a formal document.<sup>128</sup> This has had a tremendous impact on the history of constitutionalism, and I would go so far as to say that it dominates the conception that most constitutionalists have of founding acts today. Constitutions are, in important respects, foundational.<sup>129</sup> They certainly do set out the basic relationship between individuals and the state. This impulse cannot be resisted too fervently. But neither can we afford to turn this impulse into an ontology.

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125. Charles R. Kelser, *The Founders and the Classics*, in Muller, *supra* n. 119, at 62.

126. Michael G. Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* (Knopf Books 1986); *see also* Yack, *supra* n. 6, at 109.

127. Schochet, *supra* n. 42, at 8.

128. A manifestation of this can be found in the desire to quantify aspects of constitutionalism, and to design templates that can be used to write constitutions. For the former, *see* Hene Van Maarseveen & Ger Van Der Tang, *Written Constitutions: A Computerized Comparative Study* (Oceana 1978). Examples of the latter can be found in Albert P. Blaustein, *Framing the Modern Constitution: A Checklist* (Phila. Const. Found. 1993) and Bernard H. Siegan, *Drafting a Constitution for a Nation of Republic Emerging into Freedom* (2d ed., George Mason U. Press 1994).

129. Jacques Derrida, *The Laws of Reflection: Nelson Mandela, In Admiration*, in *For Nelson Mandela 13* (Jacques Derrida & Tlili Mustapha eds., Seaver Books 1987).



An important part of my critique is the setting in motion of a belief that these ideas are both necessary and sufficient. All throughout the work of Hobbes, Locke, and the American founders, we see an emphasis on the restraints and formalist conceptions of state and legal ordering. This is the often-noted focus on negative liberty.<sup>130</sup> In other words, there is an unstated presumption in liberal theory that creating the conditions for liberty by restraining state power is enough. We never see a deeper appreciation of the need for positive conditions that enable individuals to attain the sorts of private ends that liberal theorists champion.<sup>131</sup> Nor do we see any connection between the positivist constitutional structures and the cultural, social, and historical situation of states being constituted. It must be noted in the context of the present discussion that the liberal insistence on limited government, with its corollaries of popular sovereignty and the split between public and private actors, proceeds from the tacit assumption that such restriction is sufficient to create the conditions under which liberty can thrive.<sup>132</sup> In my view, it is the focus on these issues that has led directly to the sort of superficial and ineffectual constitutional documents we have seen during the last century.

A related, and perhaps dependent development in liberal political theory has had an enormous effect on the development of constitutionalism during the modern period - the institution of individual rights.<sup>133</sup> The development of individual rights regimes has dominated political and legal theories for centuries, and as will be seen in the next section, I believe that the way in which they are implemented mirrors the formulaic move outlined above.

## V. MODERN CONSTITUTIONALISM AND INDIVIDUAL RIGHTS

For the modernist political and legal project, structural constraints through divided and limited government only provided so much protection. These mechanisms, as has been said, diffused and enfeebled the institutions of government in a manner that created a space for individuals who strove for a place against the state and its power. It was widely feared that this would not be enough, and in the words of John Selden, "this little gap of man's liberty may in time go out."<sup>134</sup> This space needed a structure to maintain itself, a set of mechanisms that would support the weight of indi-

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130. Isaiah Berlin, *Two Concepts of Liberty* (Clarendon Press 1958).

131. *Id.*

132. Schochet, *supra* n. 42, at 4-8.

133. See *Rights* (Carlos Nino ed., N.Y. U. Reference Collection 1992).

134. Hayek, *supra* n. 51, at 205.

vidual claims against further state intervention and encroachment. This structure was provided by the concept of individual rights and liberties.<sup>135</sup> The attachment of rights to individuals who are poised against state authority provides some recourse against illegitimate governmental overreaching.<sup>136</sup> As Gary Bryner puts it, “[c]onstitutional governments are established primarily, in theory, to assure individual rights, and their constitutions are designed to assure governmental respect for those rights.”<sup>137</sup> Discussing individual rights has become a cottage industry amongst liberal political theorists.<sup>138</sup> “Rights talk,” as it has come to be known, is virtually synonymous with modern conceptions of constitutional government.<sup>139</sup>

Locke identified a narrow set of rights (“life, liberty and property”) as preconditions for civil society.<sup>140</sup> His conceptualization was derived from his notion of natural law and was distinctly imbued with the idea that the covenant between sovereign and subject was dependent on the maintenance of this moral pact.<sup>141</sup> This was an idea that was later to play an important role in the rhetoric surrounding both the American Declaration of Independence and the institution of the U.S. Constitution.<sup>142</sup> This natural law foundation for rights has lost its luster, however. During the last 150 years or so, most political and legal theorists have derived the foundation for basic conceptions of rights from the need to further protect individuals from arbitrary state power, not from any universal conception of natural law.<sup>143</sup> Again, the mechanisms employed to provide this protection are abstract and formal in nature. Seen in this way, they are little more than extensions of the basic liberal program of putting government in its proper place.<sup>144</sup> In short, they are rules restricting government action; simply put, positive protections against state encroachments.<sup>145</sup>

Joel Feinberg has said that a “man has a legal right when the official recognition of his claim (as valid) is called for by the governing rules.”<sup>146</sup> In this context, the constitutional text provides the governing rules. In or-

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135. See *Rights*, *supra* n. 133.

136. See Gary C. Bryner, *Constitutionalism and the Politics of Rights*, in *Constitutionalism and Rights* (Gary C. Bryner & Noel B. Reynolds eds., Brigham Young U. Press 1987).

137. *Id.* at 7.

138. See e.g. Ronald Dworkin, *Taking Rights Seriously* (Harvard U. Press 1977).

139. Dworkin says, for instance, that constitutionalism is “a system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise.” Dworkin, *supra* n. 53, at 2.

140. Locke, *supra* n. 25, at §§ 22-23.

141. Locke, *supra* n. 25, at §§ 22-23; Armour, *supra* n. 102, at 24-27.

142. Armour, *supra* n. 102, at 24-27.

143. See generally Schochet, *supra* n. 42.

144. Rakove, *supra* n. 116, at 18-19.

145. *Id.*

146. Joel Feinberg, *The Nature and Value of Rights*, in *Philosophy of Law* 304, 311 (Joel Feinberg & Jules Coleman eds., 7th ed., Wadsworth 2004).

der for an individual to have the opportunity to pursue private ends, the governing rules set out by the contract between the individual and the state must explicitly define and acknowledge basic rights.<sup>147</sup> In this formulation, rights are legal fictions that protect certain interests that are deemed to be important in the context of the political and social community.<sup>148</sup> This is a purely abstract and procedural conception that shuns the substance of rights bearing. This is contrasted with the more robust conception of rights based in moral discourse.<sup>149</sup> As Habermas explains, “the legal community, which is always localized in space and time, protects the integrity of its members precisely insofar as they acquire the artificial status of *rights-bearers*.”<sup>150</sup> Rights here, properly speaking “constitutional rights,” are positivist structures that give individuals certain claims to safe space in which to pursue their own visions of the good.<sup>151</sup> Roberto Unger explains it this way:

[This] cluster of entitlements creates an island of security against the predatory or reformist actions of the state, a haven in which some material or ideal interest, and the actual person who is its bearer, can hide. So long as it remains within its protected zone, the interest cannot be struck dead. Conversely, this operation immobilizes a parcel of the state’s capacity to move and shake the social world.<sup>152</sup>

To use Ronald Dworkin’s language, a right is a trump against the intervention into this vision of the good by government action.<sup>153</sup>

In forging the compact between individual and the state, it has become widespread practice to presume that the rights of individuals should be prominently guarded and entrenched.<sup>154</sup> But how do we know how big a space to carve out in order for individuals to seek their own ends? In other words, what rights should a constitutional document protect? This is the source of a good deal of debate, especially amongst contemporary constitutional founders.<sup>155</sup> The seat of contention seems to be between what have

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147. Dworkin, *supra* n. 138, at 184.

148. *Id.*

149. *Id.* at ch. 10.

150. Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, *supra* n. 28, at 14.

151. See Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* 131 (Verso 2001).

152. *Id.*

153. Dworkin, *supra* n. 138, at ch. 7.

154. *Id.*

155. See e.g. Albie Sachs, *Speech, Some Lessons from the South African Experience of Constitution-making: The Role of the Constitutional Court in Reconciling People in a Divided Society* (Mansion

been called “negative” and “positive” rights.<sup>156</sup> In order not to derail my focus on the effect that rights (in the broadest sense of the term) have had on the modern institution of constitutionalism, let me simply note that this distinction concentrates on the difference between protecting individuals from encroachment and enabling them to achieve their ends by providing the conditions necessary for them to achieve these ends, the difference between form and substance. I believe this debate is overly Manichean,<sup>157</sup> focusing too much on what defines the good.<sup>158</sup> In any event, for our purposes here, it is enough to say that constitutional founders invariably attempt to enumerate certain types of rights: rights to political participation,<sup>159</sup> rights to the freedoms of thought and speech,<sup>160</sup> rights to engage in certain types of relationships (particularly economic relationships),<sup>161</sup> and rights to exist and thrive in the community<sup>162</sup> are all common in constitutional documents.

I maintained at the outset of this paper that all four of the cornerstones of modern constitutionalism (of which liberal conceptions of rights is the second) serve to lead constitutional founders to a superficial understanding of their task. Positivist conceptions of individual rights are perhaps the clearest example of my point. By embracing a limited number of basic rights (the number fluctuates between a dozen or so, in the American version, to several dozen, in some European constitutions), contemporary founders presume that the conditions for creating a healthy and robust civil society are satisfied. Scant discussion is had, however, concerning the ability of individuals to effectively use these enumerated rights.

Rights have become the boilerplate of the modern constitution.<sup>163</sup> In order to be accepted as legitimate by other actors, invariably governmental and nongovernmental actors on the international stage, an incipient consti-

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House, Dublin, Oct. 21, 1996) (copy of text of this lecture can be found online at: <http://rcswww.urz.tu-dresden.de/~schrenk/research.htm> (last viewed Oct. 20, 2004)).

156. Berlin, *supra* n. 130.

157. For a good discussion taking a similar stance, see Richard L. Lippke, *The Elusive Distinction Between Negative and Positive Rights*, 33 S. J. Phil. 335 (1995).

158. Hayek, *supra* n. 51, at ch. 1.

159. Examples include Article II of the Constitution of the French Federal Republic of 1958; Article 21 of the German Basic Law; and Article 50 of the Constitution of Norway.

160. Examples include the First Amendment to the U.S. Constitution; Article 5 of the German Basic Law; and Article 10 of the 1789 Declaration of the Rights of Man and the Citizen, incorporated into the Constitution of the Fifth French Republic of 1958 through Article 2, paragraph 1.

161. Examples would be the Fifth and Fourteenth Amendments to the U.S. Constitution; Articles 14 and 15 of the German Basic Law; Article 17 of the Declaration of the Rights of Man and Citizen; and Articles 104-107 of the Constitution of Norway.

162. See Article 12 of the German Basic Law; Articles 6, 7 and 11 of the Constitution of the Fourth French Republic of 1946.

163. Lane, *supra* n. 1, at 137-42.

tution must contain an enumerated list of certain rights.<sup>164</sup> If the document contains those rights, it is accepted as a legitimate attempt to incorporate liberal notions of liberty. This judgment is made regardless of the connection of these rights to the actual conditions on the ground in a forming or re-forming polity. In other words, just because the language of rights is incorporated into a founding document, founders (and others) presume that liberty will flow as a natural and invariable consequence. One need only look at the recent history of modern constitutionalism to see the scrapheap of constitutional texts which contained such enumerated lists of rights that failed to either protect the members of the society, or establish an enduring polity to substantiate this position.<sup>165</sup>

An excellent illustration of this is the specific guarantees that are invariably incorporated into modernist constitutional documents protecting the right to own property. While these particular sets of rights<sup>166</sup> are somewhat contentious in contemporary discourse,<sup>167</sup> they have always played an important role in the conception of modern constitutionalism that I have developed above. I next turn to a discussion of these rights, focusing further on how their entrenchment has further formalized the positivist enterprise of the enlightenment.

#### VI. THE IMPORTANCE OF PRIVATE PROPERTY OWNERSHIP IN THE SCHEMA OF MODERN CONSTITUTIONALISM

As I noted at the outset of the last section, John Locke identified the right to own property as central to his notion of liberal society.<sup>168</sup> This identification of private property ownership with liberal conceptions of the relationship between sovereign and citizen runs deep in the West.<sup>169</sup> It has been identified as one of the primary motivating factors of the American founders, who thought that “the protection of private property . . . is conducive of progress, order and justice.”<sup>170</sup> Jefferson, among others, seemed

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164. *Id.*

165. *Id.*

166. I characterize private property protections as “a set of rights” because the notion of private ownership hinges on a panoply of interdependent concepts. Without the correlative rights of contract and other economic protections the right to own property would be meaningless. For a good discussion of this see Anthony Ogus, *Property Rights and Freedom of Economic Activity*, in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* 125-50 (Louis Henkin & Albert J. Rosenthal eds., Columbia U. Press 1990).

167. See e.g. *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (David S. Caudill & Steven Jay Gold eds., Humanities Press 1995).

168. Locke, *supra* n. 25, at §§ 26, 31, 34, 37, 41, 42.

169. Hayek, *supra* n. 8, at 123.

170. Gotfried Dietz, *In Defense of Property* 199 (Henry Regnery, Co. 1963).

to believe that protecting private ownership of property is a prerequisite of freedom.<sup>171</sup> Liberalism hinges in large part on society recognizing and protecting private property rights.<sup>172</sup> The recognition of this right, often in absolutist terms, drives and reinscribes the alienation of the individual from the state.<sup>173</sup> In other words, this is a concrete manifestation of the public/private dichotomy discussed above. Positing a right to own property, though, does not lead to the inevitability that individuals in the state can or will be able to own property. Like the notions of divided and limited government, and the more general concept of individual rights discussed above, the private property rights enunciated in most constitutional documents are merely positivist ideals of a strictly formal sort.<sup>174</sup> I will briefly outline the arguments that many supporters of such rights advance. Once this is accomplished, I will examine the presumption that purely positive protections contained in a constitutional text can affect the sort of connection between concept and reality that many constitutionalists assume. As I maintain throughout, I believe this to be unlikely at best.

The story that Locke tells about the relationship between the individual and the state is a compelling one. He builds upon the space created for individual action (by wresting political power away from the sovereign) by vesting the newly liberated individual with certain inalienable attributes.<sup>175</sup> Principle among these is the right to own and maintain property.<sup>176</sup> In fact, the primary role of the state is to ensure that others do not encroach upon this right. If this right is protected, in Locke's account, industrious individuals could pursue their own ends with the assurance that their labor would be secure.<sup>177</sup> The contract between state and the individual made the sovereign the protector of the individual's property.<sup>178</sup> This is the foundation of an economic system that is independent of state control or governmental apparatus.<sup>179</sup> For Locke, as for many who followed him, the zone of individual action created by the constitutionalist structure would be filled by the private economy of free and autonomous individuals seeking

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171. Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* 259 (4th ed., Blaisdell Publishing Co. 1968). James Madison agreed. See Bryner, *supra* n. 136, at 12. Alexander Hamilton was apparently of this opinion as well. See Paul Eidelberg, *The Philosophy of the American Constitution: A Reinterpretation of the Intentions of the Founding Fathers* 126 (The Free Press 1968).

172. Unger, *supra* n. 151, at 21.

173. Louis Althusser, *Montesquieu, Rousseau, Marx* 140-41 (Verso 1982).

174. Lane, *supra* n. 1, at 60.

175. Locke, *supra* n. 25, at §§ 22-23.

176. *Id.* at §§ 25-51.

177. *Id.*

178. *Id.*

179. *Id.*

an ever larger part of the available resources.<sup>180</sup> This economic account was accepted and expanded upon by Adam Smith, who maintained that this sort of system created the conditions for a healthy social system.<sup>181</sup> There is another more basic justification for such a system, however, one that focuses more clearly on the autonomy of the individual.

The conservative constitutional theorist Friedrich Hayek has maintained that private property is the primary protection against coercion.<sup>182</sup> More than checking the power of government through structural mechanisms, or the more diffuse political liberties associated with general grants of individual rights, then, the institutionalization of property protects the individual as autonomous political actor from arbitrary political power.<sup>183</sup> He draws this from a Kantian conception of individual autonomy that further entrenches the individualism inherent in modern constitutionalism.<sup>184</sup> Important in this particular formulation is not that individuals actually control property (as one might presume), but that the instrumentality of its possible control is divested from public actors.<sup>185</sup> Autonomy means the ability to possibly control one's own ends through the accumulation of private wealth. The private space becomes larger, and the sphere of legitimate state action continues to shrink.

This account was incorporated whole cloth into the American constitutional scheme.<sup>186</sup> The American founders were preoccupied with the protection of a property ownership regime that vested nearly absolute authority in individuals who had property.<sup>187</sup> Here a tension arises between the selfish and the institutional reasons for implementing private property protections.<sup>188</sup> Many of the founders were, of course, holders of vast amounts of personal and private wealth and property.<sup>189</sup> Many were also idealists, however.<sup>190</sup> When Madison wrote in *The Federalist*, No. 10 that the constitution should protect "different and unequal faculties of acquiring property" he was certainly attempting to justify the economic status quo, but he

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180. Russell Hardin, *Liberalism, Constitutionalism, and Democracy* 210 (Oxford Univ. Press 1999); Unger, *supra* n. 151, at 21-22.

181. See Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* 277-78 (Clarendon Press 1976); Hardin, *supra* n. 180, at 70.

182. Hayek, *supra* n. 51, at 140.

183. *Id.*

184. Ogus, *supra* n. 166, at 127.

185. Hayek, *supra* n. 51, at 140-41.

186. Rakove, *supra* n. 116, at chs. 1-3.

187. Walter Berns, *The 'New' Science of Politics and Constitutional Government*, in *Constitutionalism and the Politics of Rights*, *supra* n. 136, at 63-77; Bryner, *supra* n. 136, at 69.

188. *Id.*

189. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* ch. 5 (Macmillan 1986).

190. Rakove, *supra* n. 116, at 15.

was also attempting to give expression to the ideas expressed by Locke (and later by Kant and Hayek) that protecting this sort of scheme was the best way to assure both the individual's autonomy and the social space within which the autonomous individual can seek the good.<sup>191</sup> This space would become, in modern parlance, "the market."<sup>192</sup>

An important consequence of this scheme cannot be overlooked. Theoretically, the private property regime developed to support the arguments in favor of a constitutionalist system advancing the freedom of individuals against the state, freedom in the form of individual autonomy and a space of action (the market) for these autonomous individuals.<sup>193</sup> But these justifications are normative theories that suggest a connection to natural rights that attach to all individuals. Private property regimes had a more selfish justification, however. To guard against state intervention, minimal formal (or negative) mechanisms designed to entrench property rights were required. Protecting against governmental encroachment but maintaining a certain type of market necessitated un-tethering the mechanisms of protecting property from the natural law theories supporting the rhetoric of Locke and Smith. Positivist mechanisms guarding against intrusion by the sovereign (or others) on an already developing market were placed aside by, and in fact justified by, the rhetoric of universal normative ideals.<sup>194</sup> This is, in my estimation, the root of the fundamental incoherence that makes constitutionalism so frail as an institution today.

Protecting private property is, in an ideal sense, a rational way of maintaining the autonomy of individuals against arbitrary action by the state, and theoretically creates a market in which these individuals can seek their own visions of the good.<sup>195</sup> This ideal must confront the realities of a market that is already in development, however. The idealist rhetoric must give way to the positivist realities of constitution building. Positing a specific regime of property ownership certainly guards against state intervention, but more importantly it entrenches the status quo in a concretizing way.<sup>196</sup> Such protections, as we can clearly see from Madison's view, protect as much (perhaps more) against uncontrolled private redistributions of

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191. See e.g. Schochet, *supra* n. 42.

192. Hardin, *supra* n. 180, at 69.

193. Rakove, *supra* n. 116, at 314-16.

194. Michael Walzer seems to recognize this tension. He suggests that the focus on property rights undermines the more normative ideal of conscience. See Michael Walzer, *Constitutional Rights and the Shape of Civil Society*, in *The Constitution of the People: Reflections on Citizens and Civil Society* 116 (Robert E. Calvert ed., U. of Kan. Press 1991).

195. Hayek, *supra* n. 51, at 222-28.

196. As Unger explains, "[t]he legal rights and governmental institutions sustaining them made possible a basic continuity of the elites. In their historical setting, the engrossment of leaseholds and the factory system represented advances in the degree of command over large pools of land, capital, and labor that could be exercised by large-scale enterprises." Unger, *supra* n. 151, at 288.



property during or after regime change as they do against arbitrary state action. In Roberto Unger's words, "the constitution [is] a device by which to exhibit and sustain some determinate scheme of social division and hierarchy."<sup>197</sup> In this context (and perhaps others as well) the aspirations of modern constitutionalism are supported by normative imperatives but put into action by positivist mechanisms. This tension is not accidental. Constitutional texts are not political and social ideals made concrete. They are imperfect approximations at best, and given the fact that they are implemented mid-stream in the historical and cultural circumstances of a forming (or re-forming) polity, it is no wonder that the positivist nature of these texts often have the effect of entrenching prevailing power structures (economic and political).

Here again this entrenchment is directly related to the rationalist impulse.<sup>198</sup> By attempting to make universal a certain conception of property ownership and protection, enlightenment theorists advanced a positivist and formal constitutionalist structure that simplified and conflated the ideals contained in their rhetoric. As David Lea has said:

Modern constitutionalism's preference for inflexible uniformity has meant a constitution of equal citizens who theoretically are treated identically, but not necessarily equitably. In actuality, identical treatment has justified the abrogation of earlier accords and the refusal to accept cultural and legal diversity, entailing the ultimate denial of equitable treatment, as distinct cultural communities are pushed to assimilate within one dominant system.<sup>199</sup>

The enlightenment rationalism that I have discussed above, with its attendant focus on the positivist mechanisms employed in constitutional texts, has a totalizing effect on political and social structures. The reductive move and the universalistic impulse of rationalist political and social theory confines and impoverishes innovative ideas about political and legal structure.

This account would seem to run in direct contradiction to the last cornerstone: democracy. Much of the critical literature on constitutionalism suggests that it acts as a protective device for certain interests.<sup>200</sup> I think there is something profoundly true about this position. Constitutionalism, modern constitutionalism in any event, is an inherently entrenching device. If it is the case, then, that the theoretical confines of modern constitutionalism are delimited by rationally defined positivist mechanisms that entrench

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197. *Id.* at 573.

198. Toulmin, *supra* n. 29, at ch. 3.

199. David Lea, *Tully and de Soto on Uniformity and Diversity*, 19 J. Applied Phil. 55, 57 (2002).

200. Unger is of this opinion, for example. See generally Unger, *supra* n. 151.

the political and economic status quo, would not the masses be able to affect this entrenchment through the democratic process? Perhaps. This is one reason why some maintain that constitutionalism and democracy are, at a theoretical level, contradictory concepts.<sup>201</sup> I include democracy as the last major element of modern constitutionalism because it rounds out the narrative of modern constitutionalist discourse. Its practice, like the practice of implementing rights regimes, is far different than the rhetoric of idealist constitutional discourse. As will be seen in the next section, democracy helps sell the idea of constitutionalism, but the constraints built into the democratic process by the typical modernist constitutional system limits the effect of popular opinion.

## VII. DEMOCRACY AS A TENET OF MODERN CONSTITUTIONALISM

The relationship between constitutionalism and democracy is more tenuous and complicated than any of the other cornerstones that I have identified. Some have maintained that the two concepts are complimentary, each enabling the other to flourish.<sup>202</sup> Others, however, suggest that the constraining and restricting nature (*i.e.*, the positivity) of constitutionalism runs counter to democratic concepts.<sup>203</sup> This debate is lively and active, showing some promise concerning the vitality of political theory in the new millennium. My intention is not to play out the parameters of this discourse, although I will set forth the basic positions as they are currently articulated. Instead, I will attempt to show how a version of democracy has frequently been sold as a corollary to the modernist vision of constitutionalism.<sup>204</sup> If this perception is correct, democracy is seen as an outgrowth of constitutionalism. It is this relationship that allows for the confinement of democratic institutions that entrench power structures in certain ways. This confinement, if it is true, follows the other three major aspects of constitutionalism that I have identified and discussed above.

A word of caution is necessary here. Democratic theory is rich and varied. The debates surrounding what constitutes democracy, and how democratic reforms can and should be structured, are perhaps the most vibrant and vigorous of any in contemporary political theory.<sup>205</sup> It would

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201. Dworkin, *supra* n. 53, at 2.

202. See Dworkin, *supra* n. 53.

203. Dahl, *supra* n. 52, at 90.

204. See Dworkin, *supra* n. 53.

205. See Noam Chomsky, *Chomsky on Democracy and Education* (C. P. Otero ed., RoutledgeFalmer 2003); Brook Manville, *A Company of Citizens: What the First Democracy Teaches About Creating Great Organizations* (Harvard U. Press 2003); *Social Movements and Democracy* (Pedro Ibarra ed.,

be impossible for me to do much justice to this debate here. I will confine my analysis to the relationship between modern constitutionalist theory and democratic concepts that implicate and intersect with the terms of constitutionalism.<sup>206</sup> In so doing, I will focus primarily on the way that democratic reforms, as a corollary to constitutionalist structures, exhibit the sort of rationalist, formalist and positivist impulses that I have developed throughout this paper.

Democracy was a late addition to the idea of constitutionalism.<sup>207</sup> The incipient stages of modern constitutionalism (growing out of medieval and renaissance structures related to rationalism) did not address the notion that people can (or should) have a say in the affairs of state, either directly or through representatives.<sup>208</sup> As the notion of sovereignty was displaced, however, it came to reside—in theory anyway—in “the people.”<sup>209</sup> But how would “the people” yield such important power given their diffuse and scattered nature? This is, of course, the concept of popular sovereignty that serves as the foundation for many articulations of democracy.<sup>210</sup> The answer to the question of how citizens in whom sovereignty is vested can exercise that power is the principle locus of discussion amongst democratic theorists.<sup>211</sup>

Even if the idea that sovereignty either resides with or emanates from the people is accepted, it is by no means the case that it necessarily leads to the conclusion that democracy is the form of government that should be employed. Nonetheless, modern constitutionalism is frequently posited in the context of discussions concerning democracy.<sup>212</sup> One needs an independent rationalization for the adoption of a democratic system.<sup>213</sup> During the eighteenth century such rationalizations came from natural law theories regarding the relationship of free and equal citizens in a rational civil society.<sup>214</sup> The American founders placed a great deal of stock in this account.<sup>215</sup> The implications of this sort of view could be far reaching, but as

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Palgrave MacMillan 2003); L. Ali Khan, *A Theory of Universal Democracy: Beyond the End of History* (Kluwer Publ. 2003); Habermas, *Between Facts and Norms*, *supra* n. 28; Hardin, *supra* n. 180.

206. Hardin, *supra* n. 180; *see also* *Constitutionalism and Democracy: Studies in Rationality and Social Change* (Jon Elster & Rune Slagstad eds., Cambridge U. Press 1988); *Constitutionalism and Democracy: Transitions in the Contemporary World*, *supra* n. 43.

207. Wormuth, *supra* n. 4, at 9.

208. *Id.*

209. Hardin, *supra* n. 180, at 152-56.

210. *Id.*

211. *Id.*; *see also* *Key Concepts in Critical Theory: Democracy* (Philip Green ed., Humanities Press 1993).

212. *See* Dworkin, *supra* n. 53.

213. Habermas, *supra* n. 28.

214. *See* Otto Friedrich von Gierke, *Natural Law and the Theory of Society 1500 to 1800* (Ernest Barker trans., Cambridge U. Press 1934).

215. James Madison, *Notes of Debates in the Federal Convention of 1787-90* (Ohio U. Press 1987).

with the other elements of constitutionalism the effect was truncated by the restrictive and limited notions that were built into the idea as it was employed in practice. Democracy is an ideal, but from an institutional point of view there have to be ways of employing it.<sup>216</sup> The natural law notion that “the people” are supreme is conflated and reduced to an institution (or set of institutions) through which the will of the people (to use the eighteenth century terminology) can be yoked and determined. These institutions create the appearance of control by the people, but frequently insulate the structures of state from actual democratic control. Democratic institutions, then, were built into the apparatus of modern constitutionalism.

The right to vote and have a say in the affairs of state were seen to be granted by the charter between state and citizen.<sup>217</sup> The natural law rhetoric provided a justification, but in practice democracy was in effect an element of constitutionalism. As I just hinted, democratic institutions were nothing more than positivist structures that allowed for the determination of popular sentiment. Such determinations were never seen to be controlling, however. They were always seen (and this is true even today) as informational rather than formational. This is clearly illustrated by the checks on democracy that the American founders built into the American constitutional system.<sup>218</sup> The American founders were, by and large, distrustful of “the masses.”<sup>219</sup> Democracy, in the sense of radical democratic participation and will formation, was seen as destructive and troublesome. But if democratic participation is seen as a structured institution that can effect—yet not control—the state apparatus, it can be subsumed under the positivist, formalist and institutionalized system of constitutionalism. Seen in this way, democracy is a corollary of constitutionalism.<sup>220</sup> Democracy is a device designed to invest people in the institutions of constitutionalism.<sup>221</sup> Ronald Dworkin has recently endorsed this position, claiming that “constitutionalism is essential to creating a democratic community – to constituting ‘the people’ – and there can *be* no communal, collective freedom without it.”<sup>222</sup> Democracy, in this view, is dependent on constitutionalism.

There is another version of the relationship between constitutionalism and democracy, however. This alternative view, espoused by—among

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216. Hardin, *supra* n. 180, at ch. 7.

217. *Id.* at 157-59.

218. See George P. Fletcher, *The Separation of Powers: A Critique of Some Utilitarian Justifications*, in *Constitutionalism: Nomos XX*, *supra* n. 3.

219. Hardin, *supra* n. 180, at 123, 144.

220. Lane, *supra* n. 1, at ch. 11.

221. Dworkin, *supra* n. 53, at 10.

222. *Id.*

others—the political scientist Robert Dahl,<sup>223</sup> maintains that democracy and constitutionalism are contradictory concepts.<sup>224</sup> The basic argument is that constitutionalism limits and constrains the actions of individuals in the state (as I have maintained throughout).<sup>225</sup> These constraints are not just upon the state actors in government positions. All members of society are constrained by the terms of the constitutionalist organs. For instance, individuals are constrained from infringing upon one another's rights. Democracy, on the other hand, is majoritarian in principle. One commentator has said that “[t]he positive ideals of democracy, popular participation, the rule of public opinion, and the glorification of the common man all run up hard against modern commitments to rationalism, efficiency, and the distrust of mere opinion.”<sup>226</sup> Dworkin explains it this way, “a strong objection has been pressed against constitutionalism: that it subverts or compromises democracy, because if a constitution forbids the legislation to pass a law limiting freedom of speech, for example, that diminishes the democratic right of the majority to have the law it wants.”<sup>227</sup> In this view, which Dworkin ultimately rejects,<sup>228</sup> constitutionalism and democracy cannot both be taken as fundamental and absolute. One must predominate; we can see from the quote just above which Dworkin prefers.<sup>229</sup>

There have been attempts to reconcile this perceived conflict between constitutionalism and democracy, most notably by Jürgen Habermas.<sup>230</sup> Habermas views democracy and constitutionalism as being what he calls “co-original.” By this he means that democracy and constitutionalism are both fundamental, each necessary for the other to work properly but neither deriving from the other.<sup>231</sup> There is a reciprocal relationship between democracy and constitutionalism in this account. Democracy depends on a robust notion of constitutionalism (note I have not said modern constitutionalism) and this robust notion of constitutionalism depends on a radical democratic project.<sup>232</sup> As Habermas puts it, “[t]he interdependence of constitutionalism and democracy comes to light in this complementary rela-

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223. See e.g. Dahl, *supra* n. 52; see also Lane, *supra* n. 1, at 243-44.

224. *Id.*

225. Dworkin, *supra* n. 53, at 10.

226. Yack, *supra* n. 6, at 107-08.

227. Dworkin, *supra* n. 53, at 2.

228. *Id.*

229. *Id.* at 10.

230. Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union or Contradictory Principles?* 29 *Political Theory* 766 (William Rehg trans., 2001).

231. *Id.*

232. See e.g. Chantal Mouffe, *Radical Democracy or Liberal Democracy?* 20 *Socialist Rev.* 57 (1990) (The article can be found in *Socialist Rev.* 90-2, the second publication of that year.).

tionship between private and civic autonomy: each side is fed by resources it has from the other.<sup>233</sup>

I need not delve too deeply into Habermas' formulations of private and civic autonomy to point out that his project, which includes this reunification of democracy and constitutionalism, is a radical departure from the traditional modernist conceptions of both constitutionalism and democracy.<sup>234</sup> He is talking about a form of communicative democratic theory that beefs up the merely formal and positivist legal structures in contemporary societies far beyond anything we have thus far seen historically, and probably far beyond what most people can even conceptualize.<sup>235</sup> Others have discussed and constructed similar radical projects.<sup>236</sup> The problem is that no such radical democratic theories have taken hold. Habermas' logic, in this particular interest, necessitates a historical element that can be traced to the method of G.W.F. Hegel. His reliance on this Hegelian<sup>237</sup> device makes his account attractive for my purposes, but has been criticized for mistaking normative constitutionalist practice with a robust notion of moral justification for a particular political worldview.<sup>238</sup> As a result, Habermas's view would necessitate a much more complex conceptualization of the relationship between citizen and society than is currently in fashion.

Let me return then to the first relationship that I set out in this section, the account that articulates the relationship between constitutionalism and democracy in derivative terms; the account proffered by Dworkin above. This is the version that modern constitutionalism relies on. In order for the constitutionalist state to assume its proper place, the terms of democratic action cannot be absolute. Democratic institutions, like rights regimes, play an important part in the equation, but only a part. This is why the American founders went to such lengths to curb the power of majorities.<sup>239</sup> Representative democracy is an acknowledgement that constitutionalism is prime and the institutions of popular sovereignty must assume a formal and narrowly defined character.

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233. Habermas, *supra* n. 230, at 780.

234. *Id.*

235. See e.g. Jürgen Habermas, *On the Pragmatics of Social Interaction: Preliminary Studies in the Theory of Communicative Action* (Barbara Fultner trans., MIT Press 2001).

236. See e.g. Unger, *supra* n. 151.

237. Jürgen Habermas, *Knowledge and Human Interest* ch. 3 (Jeremy J. Shapiro trans., Beacon Press 1971).

238. See e.g. Alessandro Ferrara, *Of Boats and Principles: Reflections on Habermas's "Constitutional Democracy"*, 29 *Political Theory* 782 (Dec. 2001); Bonnie Honig, *Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy"*, 29 *Political Theory* 792 (Dec. 2001).

239. Hardin, *supra* n. 180, at 123, 144.

This narrow notion of sovereignty is important in the context of the present discussion because it illustrates here again the impulse behind the theory of modern constitutionalism. The relationship between the state and citizen is a rational one in which the individual has a certain role to play: private actor seeking private ends. The interface between the state and this private actor is the representative democratic apparatus. Through this apparatus, the views of the citizens can be ascertained, but not always (perhaps very rarely) acknowledged and complied with. In this version the subservient institutions of democracy play a legitimizing role. If the constitutional structures are rational and individuals in the state have input into (certain) decisions, how could the state not be legitimate? This view is, at least, deductively attractive. Like the other cornerstones of constitutionalism, however, I believe this account of democracy is too feeble and hamstrung to accomplish the goals that many founders hope to accomplish; a healthy civil society in a multicultural and pluralist world.

#### VIII. CONCLUSION

Modern constitutionalism has played an important part in the development of our understanding of the political and legal environment. The concepts associated with modern constitutionalism, divided and limited government, individual rights regimes (particularly property ownership regimes), and representative democracy, moved political and legal structures from more rudimentary forms to those we recognize as distinctly modern. The nation-state would not be possible without these conceptions. The modern impulse has driven political and legal theorists to delineate the structures of state in distinctly rationalist terms, and set these structures against what was seen to be retrograde forms of political organization. William Connolly describes this well when he says:

[M]odernity is the epoch in which the destruction of the world followed the collective attempt to master it. . . . Even if modernity is not unique (it is too early to tell), it is at least distinctive. In its optimistic moments it defines itself by contrast to earlier periods which are darker, more superstitious, less free, less rational, less productive, less civilized, less comfortable, less democratic, less tolerant, less respectful of the individual, less scientific and less developed technically than it is at its best.<sup>240</sup>

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240. William Connolly, *Political Theory and Modernity 1* (Cornell U. Press 1993).

The impulse behind modern constitutionalism is to break with the past, redefine governmental structures along more rational and more scientific lines. In short, modern constitutionalism is a positivist enterprise. This positive move, with its rationalist motivations, constricted the bounds of political and legal discourse. It totalized the notion of the state and its structure. Modern constitutionalism is anti-pluralist and rests on a foundationalist core. For Hobbes, Locke, Madison and Jefferson, the move to memorialize the structures of government in a constitutional text was a move to universalize those structures in a normative way. The only “good” notion of constitution is one that conforms to the narrow conception discussed above.

The presumption that such a project is possible is astonishing. The fact that this presumption has been so widely accepted is all the more so. The problematic thing about this “success” is that it hinders and makes static the dynamism contained in political communities. It freezes structures in place. It is explicitly designed to do so. Roberto Unger puts it best when he says:

The founding liberal myth of a constitutional mechanism and a system of rights that tower above the hierarchical and communal divisions of society has since become true in an unacknowledged and embarrassing sense. Liberal-democratic politics and the society in which it is practiced have indeed become separate: a social order that consists largely of groups entrenched in fixed niches within the division of labor and occupying stable places in the established scheme of social hierarchy coexists with a political practice that plays up to shifting coalitions of interest formed by groups with crisscrossing and unstable membership.<sup>241</sup>

The mechanisms of modern constitutionalism fragment and stifle social discourse. They undermine political progress instead of promoting them. The machine may “go of itself,” but can never exceed its own limitations. Modern constitutionalism confines our social and political possibilities.

This is particularly troubling today. The world is becoming increasingly complex. Societies are not homogeneous. They are multicultural and pluralistic.<sup>242</sup> Interests that were not recognized (or more properly were subsumed and negated) in the development of modern constitutional-

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241. Unger, *supra* n. 151, at 454-55.

242. Stanley N. Katz, The Jefferson Lecture, *Constitutionalism and Civil Society*, 24 (U. of Cal. at Berkeley, Apr. 25, 2000) (copy of transcript available at <http://www.wws.princeton.edu/snkatz/papers/JeffersonLecture.pdf>) (accessed Dec. 5, 2004).



ist institutions are becoming manifest.<sup>243</sup> The demands of oppressed minorities and groups without a voice in traditional political discourses are suing for recognition and accommodation.<sup>244</sup> Many presume that the terms of modern constitutionalism can provide an outlet for such calls. I am convinced, however, that the confines of modern constitutionalism make that possibility unlikely at best.<sup>245</sup>

There is a track record on this. Constitutionalist governments are prone to fail. Constitutions based on western liberalism are no exception.<sup>246</sup> There are plenty of examples of modern constitutionalist concepts imploding in practice, and how the rationalism and positivity of liberal conceptions of law and society can affect terrible results. Because of this dismal track-record, there has been a call, in contemporary discussions of constitutionalism, for an expansion of the horizons concerning the way politics can be formed and structured. People like James Tully<sup>247</sup> and Stanley Katz<sup>248</sup> have called for more pluralistic conceptions of constitutionalism. These calls have not yet come to dominate the debate (as I hope they may well do some day), and it is not exactly clear what alternative notions of constitutionalism might look like. Nonetheless, it is clear that we need to escape the confines of modern constitutionalism so that a narrow, formalist conception of state organization that fosters the spread of McDonald's franchises and Nike shoes more than sound social organization can be escaped by cultures and societies that value principles other than the cult of consumerism.

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243. See e.g. *Constitutionalism and Democracy: Transitions in the Contemporary World* (Douglas Greenberg, Stanley Katz & Melanie B. Oliviero eds., Oxford U. Press 1993); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge U. Press 1995); Ulric M. Killion, *China and Neo-liberal Constitutionalism*, *Global Jurist Frontiers* 3, no. 2 (2003) (available at <http://www.bepress.com/gj/frontiers/vol3/iss2/art3/>); Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction*, 14 *Cardozo L. Rev.* 497 (1993); Robert Braun, *Identity in Transition: Central/European/Self after Modernity* (unpublished article on file with the *Pierce Law Review*).

244. Yack, *supra* n. 6, at 107.

245. See *Constitutionalism and Democracy: Transitions in the Contemporary World*, *supra* n. 243 (introduction).

246. Lane, *supra* n. 1, at 197-98.

247. See Tully, *supra* n. 243.

248. See Katz, *supra* n. 242.