The constitutional imagination refers to the way we have been able to conceive the relationship between thought, text and action in the constitution of modern political authority. The lecture seeks to demonstrate how modern constitutional texts come to be invested with a ‘world-making’ capacity. The argument is advanced first by explaining how social contract thinkers have been able to set the parameters of the constitutional imagination (thought), then by showing that constitutions are agonistic documents and their interpretative method is determined by a dialectic of ideology and utopia (text), and finally by examining the degree to which constitutions have been able to colonise the political domain, thereby converting constitutional aspiration into political reality (action). It concludes by suggesting that although we seem to be entering a constitutional age, this is an ambiguous achievement and whether the power of the constitutional imagination can still be sustained remains an open question.

INTRODUCTION

The American Revolution would have been of no great moment if it had been only a struggle by colonists to achieve their independence from the British Crown. Empires rise and fall, territories are acquired and lost: this has been the story of the will to power down the ages. But the American Revolution is of world-historical significance because it achieved ‘a revolution in the principles and practices of governments’. The American colonists made a stand not only for themselves but for the world. Until then, governments had assumed a monarchical form whose driving principle was militarism. The Revolution established a system of government ‘on a moral theory, on a system of universal peace, on the indefeasible hereditary Rights of Man’. It marked the moment when government could be established on ‘the principles of universal reformation’.¹

By the time Paine expressed these sentiments in 1792, events in America had been overshadowed by the dramatic unfolding of the revolution in France. In the three years since Louis XVI had summoned the Estates-General, monarchical

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government had been overthrown, the feudal system and its order of nobility abolished, the Church removed from its privileged status and, in September 1792, the Republic proclaimed. Its permanent intent was then sealed in blood on 21 January 1793 by the execution of the king. Republican government, Paine contended, ‘is now revolving from west to east, by a stronger impulse than the government of the sword revolved from east to west’.

These events, the republican revolutionaries asserted, signalled the emergence of a new era of humanity. The old system of government had meant the taking of power for its own aggrandisement, but the new system operated by delegating power for the common good. The former promoted war, the latter peace; the former encouraged national prejudice, the latter universal society.

A central feature of this new era of government was the establishment of the altogether novel idea of a constitution. Political constitutions were no longer to be conceived as some ideal expression of a nation’s culture, manners and traditional forms of rule. A constitution in the modern sense was to be a document drafted in the name of the people to establish and regulate the powers of the main institutions of government, to specify the relationship between government and citizen, and to take effect as fundamental law.

Since the late eighteenth century, these documentary constitutions have been adopted throughout the world at critical moments in a nation’s history. During the twentieth century, a lingering conservative distrust of ‘paper constitutions’ and mere constitutional machinery gave way to a general acceptance of the need to draft constitutions that fixed the basic terms of a nation’s political compact. And in the last 30 years or so, the distrust many on the left had often exhibited about the way written constitutions might be used to halt the continuing social revolution has apparently waned. The claim that constitutions specify the authoritative ground rules of politics is today more widely accepted than at any other point in modern political history. Whether the matter involves an assertion of a nation’s right to self-determination, a challenge to the legitimacy of an exercise of governing power, a plea to be treated with equal dignity and respect, or even a basic struggle for justice in distribution, that political demand is now invariably cast in the form of a constitutional claim. In this sense, we live today in a constitutional age.

This is a recent phenomenon. It was neither a prominent issue for the founders of The Modern Law Review in the 1930s, nor the subject of Chorley Lectures in the early years after their establishment in 1972. Yet the role of constitutions in shaping the nature of political engagement now excites interest across the world. This invites reflection. Under what conditions can a written

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2 ibid, 213.
4 John Griffith’s 1978 lecture was the first to consider constitutional issues, but his was a critique of an emerging tendency to elevate political demands into constitutional language: J. A. G. Griffith, ‘The Political Constitution’ (1979) 42 MLR 1. Only after Nicole Questiaux’s 1989 lecture reflecting on the bicentenary of the French Declaration do constitutional issues assume a greater salience: N. Questiaux, ‘Bicentenary of a Declaration: A Time for Challenge’ (1990) 53 MLR 139.
constitution organise an association of people into a common agent, one that acquires a collective identity and modes of collective action through that text? What leads us to believe that those who acquire governing power will constrain themselves to act in accordance with those constitutional rules? How does a constitution drafted at a particular moment in history maintain its authority over time as social and political conditions change? What are the legal and political implications of entrusting authoritative interpretation of the constitution to a judiciary which is insulated from accountability to the people in whose name it acts? Questions like these, I suggest, cannot be adequately answered before addressing a prior question. How are we to conceive the relationship between thought, text and action in the constitution of modern political authority? It is for the purpose of opening up this prior question that I invoke the idea of ‘the constitutional imagination’.

The constitutional imagination refers to the manner in which constitutions can harness the power of narrative, symbol, ritual and myth to project an account of political existence in ways that shape – and re-shape – political reality. The phrase draws our attention to the capacity of constitutions to offer alternative perceptions of reality, revealing new ways of conceiving the boundaries of practical political action.

THE TRANSITION TO MODERNITY

This power of the imagination to create a political world – its ‘world-making’ capacity – is a modern phenomenon. The medieval image of the world as a fixed, unitary, cosmic order had first to be effaced. Expressing a moment in thought rather than of historical time, modernity is signalled by the emergence of discrete domains of thought and belief that operate according to their own autonomous laws and regularities. These domains include those of science, aesthetics, morality and economics, but here I am concerned specifically with the political domain. In this political domain we moderns imagine ourselves to be free, equal and sociable beings and, in order to protect that liberty, equality and sociability, we draft a constitution to confer on a governing regime authority to make the laws by which we live.

Unable any longer to rest its claims on the charismatic power of a ruler or the unreflective acceptance of traditional practices, a constitutional mode of thinking founds its legitimacy on some notion of consent. This explains the central importance of the motif of ‘social contract’ in modern political thought. Beyond the actual historical practices and experience of government, we discover the source of political authority neither in history nor in nature but in some underlying scheme of intelligibility. This ‘ideal’ or ‘intelligible’ constitution expresses a basic shift in thought, one whose ambition is ultimately to persuade us to view the political domain entirely through the prism of a constitutional

text, so that ‘the sovereign acts of will and reason become the constitutional practices of writing and reading’.6

This is the shift that takes place in the transition from pre-modern regimes to modern forms of government. In pre-modern regimes, the critical task had been to establish the incontestable authority of the ruler, and the surest way of achieving this was by instilling the belief that kingship is a divinely-ordained magistracy. A huge intellectual effort was invested in bolstering the sacred character of this office, exhibited through a variety of ceremonies, insignia, and rites and the inculcation of associated beliefs. The overriding purpose was to promote a cult that placed the king above the people, thereby making it easier to subject them to royal will.7

It is true that a contrasting image of the community as an organism emerged alongside this transcendental notion of kingship. But this too was harnessed for the purpose of bolstering royal authority. Borrowing from the symbol of Christ’s two bodies expressed in theological doctrine, medieval jurists devised the notion of the king’s two bodies.8 Although the metaphor of ‘the body politic’ reinforces the principle of the unity of the organism, by maintaining that the organism is necessarily represented by its head, it was also invoked to strengthen the king’s standing.9 Since it is not without question that the head alone speaks for the body, such organic imagery could be taken to convey a more ambiguous message; it is therefore not surprising that many early-modern constitutional disputes came to be explained in terms of a caput–corpus struggle.10 But the general point is that, whether focused on the ruler’s standing or the community’s identity, the issue of political authority remained fixed within a symbolic frame.

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9 See eg, Sir John Fortescue, De Laudibus Legum Anglie (In Praise of the Laws of England) [1468–1471] S. B. Chrimes (trans) (Cambridge: CUP, 1942) ch 13: ‘the physical body grows out of the embryo, regulated by one head, so the kingdom issues from the people, and exists as a body mystical (corpus mysticum), governed by one man as head’.
10 In 1543, Henry VIII famously proclaimed that ‘we at no time stand so highly in our estate royal as in the time of Parliament; wherein we as head and you as members are conjoined and knit together into one body politic’: G. R. Elton (ed), The Tudor Constitution: Documents and Commentary (Cambridge: CUP, 1960) 270. See further Kantorowicz, n 8 above. Even Henry had been obliged to acknowledge that in the exercise of many of the most important governmental powers the head was obliged to work through the members, and the subsequent history of English constitutional disputes in the seventeenth century was commonly seen through this frame of thought: see J. L. Malcolm (ed), The Struggle for Sovereignty: Seventeenth Century English Political Texts (Indianapolis: Liberty Fund, 1999) 2 vols; A. Cromartie, The Constitutionalist Revolution: An Essay on the History of England, 1450–1642 (Cambridge: CUP, 2006). This can again be seen as a borrowing from theological sources: see B. Tierney, Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism (Cambridge: CUP, 1955).
The question now to be asked is whether, in making the transition to modernity, we have been able to jettison such tropes and commit ourselves to Paine’s conviction that constitutional government, established through the draft- ing of a constitutional text, now rests its authority purely on the power of reason.

THE PARAMETERS OF THE CONSTITUTIONAL IMAGINATION

This question can be simplified by first focusing on the relationship between thought and text. In doing so, I propose to contrast three early-modern scholars whose work has helped to shape the constitutional orders of Britain, the United States and France. In each of these cases, the old regime had been destroyed by revolutionary upheaval. Seeking to re-constitute governmental authority for the modern era, the new political elites drew inspiration, respectively, from the writing of Hobbes, Locke and Rousseau. My objective will be to show that their works present us with three contrasting visions of constitutional order; that, notwithstanding the rationalistic overlay, their schemes demonstrate that political authority can be established only when set into a symbolic frame; and that their ideas continue to set the parameters of the modern constitutional imagination. Each writer provides powerful rational arguments in support of his particular account. Nevertheless, if the symbolic aspects of their arguments are overlooked then, along with Geertz, I would suggest that ‘a great deal of the public life of our times is going to remain obscure’.  

Hobbes’s *Leviathan* brings us to the threshold of modernity. In this great work, he jettisons the rhetoric of divine kingship and the imagery of organic order and replaces it with a new ‘civil science’ which derives its method from the emerging natural sciences. Hobbes accepts that what we today call ‘the state’ is created purely by an act of imagination, and he offers compelling reasons why we should subject ourselves to the rule of an absolute sovereign by presenting us with a dramatic fable of life without government in a state of nature. Only by virtue of an (imaginary) political pact do the many (the multitude) become a unity (a people), and only by virtue of this pact is the office of the sovereign,


13 Hobbes, *ibid*, ch 13: explaining how conflicts arise precisely because nature has made us so relatively equal in strength and intelligence, Hobbes shows that life in a state of nature becomes one of perpetual warfare in which ‘the life of man [is] solitary, poore, nasty, brutish, and short’ (89).

14 T. Hobbes, *On the Citizen* [1647] R. Tuck and M. Silverthorne (eds) (Cambridge: CUP, 1998) 137: ‘men do not make a clear enough distinction between a people and a crowd. A people is a single entity, with a single will; you can attribute an act to it. None of this can be said of a crowd. In every commonwealth the People reigns . . . in a Monarchy the subjects are the crowd, and (paradoxically) the King is the people’.
which acts as the representative of the will of the people, created.\textsuperscript{15} Hobbes gives us a modern definition of law: law is the command of the sovereign. But the scheme through which he establishes the office of the sovereign is produced entirely through symbolic representation, and it is bolstered by skillful use of iconography.\textsuperscript{16}

Hobbes has little to say about the constitution of government: since all law-making authority and all rights of government vest in the sovereign, the frame of government is established only by the sovereign act of delegating competences to subordinate magistrates and judges.\textsuperscript{17} Here is the rationale for those who claim that the British constitution can be reduced to a mere eight words: what the Crown-in-Parliament enacts is law.\textsuperscript{18} More precisely, he presents a purely juristic account of the state. To the extent that there are restraints on the sovereign, they are not legal but merely conventional.\textsuperscript{19} This is the scaffolding that sustains the constitutional imagination of the modern British state. The twin principles of the absolute authority of the Crown-in-Parliament and the strict conception of law-bound rule, especially when they are in a structural relationship formed by prudential restraints on the power of rule, take

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\item \textsuperscript{15} Hobbes, \textit{Leviathan}, n 12 above, 120: ‘The only way to erect such a Common Power . . . is, to conferre all their power and strength on one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will; which is as much as to say, to appoint one Man, or Assembly of men, to beare their Person; and for every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgments, to his Judgment.’ See generally P. Pettit, \textit{Made with Words: Hobbes on Language, Mind and Politics} (Princeton, NJ: Princeton University Press, 2008) 4: ‘Human beings are distinguished from other animals by the transformation that occurred as a result of the invention of language. This gave people three positive capacities, associated with ratiocination, personation and incorporation’.

\item \textsuperscript{16} In a now famous image, the frontispiece to \textit{Leviathan} sketches a huge image of a kingly figure holding sword and crozier (symbols of earthly and spiritual power) and whose body comprises a multitude of people. Among many glossators/interpreters see H. Bredekamp, \textit{Thomas Hobbes Der Leviathan: Das Urbild des modernen Staates und seine Gegenbilder, 1651–2001} (Berlin: Akademie Verlag, 3\textsuperscript{rd} ed, 2006), which traces the production process and also shows how this iconographic technique has been used to bolster the authority of modern rulers. See also P. Gorski, \textit{The Disciplinary Revolution: Calvinism and the Rise of the State in Early Modern Europe} (Chicago: University of Chicago Press, 2003) 1–3, arguing that the drawing might be read not only from top-down but from bottom-up (in which the ‘picture now appears as a metaphor for the constitution of civil government out of the institutions of civil society’) and also not just from right to left (temporal to religious power) but from left to right (‘the fact that the word \textit{matter} is placed next to the symbols of worldly authority, while the word \textit{form} is set beside the symbols of spiritual authority, suggests that the relationship between sword and crozier is one of matter to form, or force to law, and that spiritual authority is thus ultimately superior to worldly authority’).

\item \textsuperscript{17} See Hobbes, \textit{Leviathan}, n 12 above, ch 18, esp 122: ‘Because the Right of bearing the Person of them all, is given to him they make Soveraigne, by Covenant onely of one to another, and not of him to any one of them; there can happen no breach of Covenant on the part of the Soveraigne; and consequently none of his Subjects, by any pretence of forfeiture, can be freed from his Subjection. That he which is made Sovereign maketh no Covenant with his subjects before-hand, is manifest . . .’

\item \textsuperscript{18} V. Bogdanor, \textit{The New British Constitution} (Oxford: Hart, 2009) xii.

\item \textsuperscript{19} Hobbes, \textit{Leviathan}, n 12 above, ch 29, where he recognises the importance of ‘the art of making fit Lawes’ and the necessity of having ‘a very able Architect’ to ensure that the commonwealth is not erected as ‘a crasie building, such as hardly lasting out of their own time, must assuredly fall upon the heads of their posterity’ (221).
\end{itemize}
us to the core of British constitutional understanding. Hobbes lays down a
scheme of what might be called conventional constitutionalism, which is revealed
not only in the British constitution but also, more problematically, in those
regimes which, resting their claims on the foundation of state authority, adopt
what have been called either nominal, façade or aspirational constitutions.20

Hobbes’s scheme is the direct, if implicit, point of departure for John Locke.
In his Second Treatise of Government, Locke follows Hobbes in presenting a fable
of life in a state of nature, though his objective is to offer a rather different
justification for civil government.21 For Locke, society evolves before the for-
mation of political order and people enter into a social contract only to ensure
the effective enforcement of natural law and for the better protection of their
natural rights. These purposes determine the limits of governmental authority.
The ‘chief end . . . of men’s uniting into Commonwealths, and putting them-
selves under Government’, he says, ‘is the preservation of their property’.22
The social contract does not involve the alienation of natural rights; it is a covenant
of delegation, by which only that portion of a person’s natural rights, those that
need to be pooled in furtherance of the public good, is relinquished. Since this
covenant is made between rights-bearing individuals and for the purpose of
preserving those rights, it is likely to be recorded in a formal written text. The
covenant takes form as a modern type of constitution.

Locke’s account inspired the American colonists in their struggle against the
British crown: their Declaration of Independence may have been drafted by
Jefferson but the ideas, and many of the actual words, were those of Locke.23
The subsequent constitutional settlement of 1787–1791 fits Locke’s scheme: govern-
ment is established by the fundamental law of the constitution, its powers are
divided so each agency checks the others and none may exceed the terms of their
delegation, and the Bill of Rights enumerates those rights that are preserved unto
the people and form no part of the scheme of delegated governmental author-
yty.24 Locke provides an account not only of government according to law, but

20 G. Sartori, ‘Constitutionalism: a preliminary discussion’ (1962) 56 American Political Science Review
853, 861. A nominal constitution is one in which the rules are operative but simply reflect the
existing power relations and work for the exclusive benefit of existing power-holders. A façade
constitution is one that presents itself as a constraint on governing power but which is disregarded
in practice. An aspirational constitution may have similar features to a facade constitution but has
an educative effect. See also T. Ginsburg and A. Simpser (eds), Constitutions in Authoritarian
Regimes (New York: CUP, 2014) 5–10 (re-labelling Sartori’s terms as operating manuals, bill-
boards, blueprints and window dressing).
treatise is a critique of Sir Robert Filmer’s patriarchal view of the nature of government founded
on the conviction God had ordained a social order of gradations which placed fathers over sons,
men over women, elders over the young, and kings over everyone. Since Filmer uses the
authority of the bible to defend his argument, Locke seeks to refute it through detailed biblical
analysis.
22 ibid, II, § 124.
23 C. Becker, The Declaration of Independence: A Study in the History of Political Ideas (New York:
Harcourt, Brace & Co, 1922) 27: ‘Most Americans had absorbed Locke’s works as a kind of
political gospel; and the Declaration, in its form, follows closely certain sentences in Locke’s
second treatise on government.’
24 See Paine, n 1 above, 122–123.
also of government subject to law. This is the template of the modern liberal constitutional settlement. Since its objective is to impose enforceable limitations on government for the purpose of protecting pre-political liberties, it is an expression of what I call negative constitutionalism.\(^{25}\)

Locke, it might be noted, avoids the organic metaphor of the body politic and also rejects the absolute concept of sovereignty. He replaces such unitary notions with a dualism between society and government. Once the organic imagery is replaced by the mechanical metaphor of ‘checks and balances’, government begins to lose its mystique. Through the differentiation between society and government, Locke asserts that property is a pre-political category.\(^{26}\) Further, it is towards society rather than government that we turn for the elevation of mankind.\(^{27}\) A written constitution becomes the pivotal means by which the social order is protected and political power contained.

Locke’s influence over the American Revolution and the form of its constitution is mirrored by Rousseau’s influence in France. Rejecting these earlier accounts, Rousseau conceives the social contract as an imaginative device of human renewal. Seeking man in a state of nature, Rousseau argues that Hobbes finds only bourgeois man, man corrupted by property, competition and social striving. Locke fares no better under Rousseau’s pen: since a right is a relation between citizens under a governmental order, no right to property can exist in a state of nature. Locke’s concept of property acquired through labour is merely an act of appropriation, one invariably achieved through force or fraud. Locke’s social contract is therefore nothing less than an elaborate trick devised by property-holders to protect their interests: claiming that the establishment of a law-governed regime provides security and liberty, ‘all ran towards their chains in the belief that they were securing their freedom’. Rousseau ridicules Locke’s negative constitutionalism as a product of bourgeois individualism. The written constitution, he asserts, imposes new fetters on the poor, confers new powers on the rich and transforms ‘a skilful usurpation into an irrevocable right’.\(^{28}\)

In *The Social Contract*, Rousseau outlines the conditions for reconciling liberty and law, thereby establishing the basis of legitimate constitutional order.\(^{29}\) His solution is presented in stages. First, contra Hobbes, he argues that the sovereign cannot be a single person or a representative office: it must be the people themselves who, by an act of association, form a collective body. The sovereign is the public person formed by the union of all: it is the nation or state. This is

\(^{25}\) Sartori, n 20 above, refers to this as a *garantiste* constitution, or ‘constitution proper’; it is ‘a frame of political society, organised through and by the law, for the purpose of curbing arbitrary power’ (860).


\(^{27}\) This argument is made more explicitly in Paine, n 1 above, Pt II, ch 1, ‘Of Society and Civilization’.


the principle of solidarity. Secondly, Rousseau argues that, rather than substituting a *natural equality* for subjection to rule, the social contract replaces *natural inequality* with *political equality*. This is the principle of equality. Thirdly, this political equality is the precondition for the formation of a single will: each acquires the same rights over others as are granted to him. That is, all people must be acknowledged as equals and under such conditions all must work to promote the greatest good of all. This is the principle of equal liberty, otherwise known as the ‘general will’ or the will of the sovereign.

The general will is an expression of political freedom: it elaborates the principle of equal liberty in conditions of solidarity. This principle constitutes the fundamental law of the political domain. By rejecting the legitimacy of an inherited social formation and accepting the sovereign authority of the state as the foundation of legitimate constitutional ordering, Rousseau specifies the essential elements of a scheme of *positive constitutionalism*.

Rousseau’s influence over the French revolutionaries is evident not only in their clarion cry of ‘liberty, equality, fraternity’. His influence is also exhibited in claims that the basic pact establishes the constitution not just of government but also of society, that the sovereignty of the people is unlimited and cannot be represented, and that the pact is one of association only and does not extend to a pact of submission. Such ideas inform the Jacobin belief that this ‘fundamental law’ of the political domain generates a revolutionary impetus without institutional limitation. Constitutions that seek to freeze this emancipatory dynamic must therefore have only a provisional status; at the very least they must remain open to the aspirational objectives of this fundamental law.

The narrative schemes of Hobbes, Locke and Rousseau present contrasting accounts of an imaginary past – life without governing order in a state of nature – for present and future purposes. Their common objective is to generate a compelling account of the conditions of legitimate governmental order. These are schemes with a practical intent; they serve performative purposes or, as linguistic philosophers would say, they are forms of speech act that possess an illocutionary force. Their objective is to open up new ways of conceiving political reality for the purpose of motivating us to accept the authority of a particular type of constitutional order. This is a call to action formulated in the realm of the imagination.

These accounts, I have argued, shape British, American and French political thought about constitutional ordering. But I also want to suggest that they have had such a powerful influence on modern constitutional thought that they now fix the parameters of the constitutional imagination.

The question is: have these modern schemes managed to move us beyond the forms of symbolic representation underpinning pre-modern order? Those who deny the need for the symbolic dimension claim that constitutional ordering is

adequately expressed in the concept of ‘the rule of law’ or the principle of ‘constitutional supremacy’. That is, they maintain faith in the rational intent expressed in the written document. Is this plausible? Hobbes felt the need to draw on a transcendent power, invoking the image of the sovereign as a ‘mortal God’. Locke placed his faith in the natural law of a divine creator. And Rousseau was obliged to invent the remarkable figure of the Lawgiver as a surrogate for a divine source of authority, thereafter advocating the necessity of instilling a ‘civil religion’ among the people.

The common problem they face is that once constitutional schemes come to rest their authority on ‘the people’, then the people must begin to step out of ‘the king’s shadow’ and take on a more active role. The concept of the people then becomes much more difficult to represent as a unity. One reason for this is that there is no easily identifiable figure of mediation analogous to Hobbes’ sovereign who can fix symbolic meaning elsewhere and thereby give unity to the regime.

32 The classic formulation is the syllogism offered by I. Kant, Metaphysical Elements of Justice (Part I of the Metaphysics of Morals; known as the Rechtslehre) J. Ladd (trans) (Indianapolis: Hackett, 1999) 118: ‘Every state contains within itself three authorities, that is, the general united Will is composed of three persons (trias politica). The sovereign authority resides in the person of the legislator; the executive power resides in the person of the ruler (in conformity to law); and the judicial authority (which assigns to everyone what is his own by law) resides in the person of the judge. These three parts are like the three propositions in a practical syllogism: the law of the sovereign Will is like the major premise; the command to act according to the law is like the minor premise, that is, it is the principle of subsumption under the Will; and the adjudication (the judicial sentence) that establishes the actual Law of the land for the case under consideration is like the conclusion.’


34 Hobbes, n 12 above, x. See also Rousseau, n 29 above, 146: ‘Of all Christian authors the philosopher Hobbes is the only one who saw the evil and the remedy, who dared to propose reuniting the two heads of the eagle, and to return everything to political unity, without which no State or Government will ever be well constituted.’

35 Rousseau, ibid, Bk II, ch 7. See S. Johnston, Encountering Tragedy: Rousseau and the Project of Democratic Order (Ithaca, NY: Cornell University Press, 1999) 52: ‘Delicately Rousseau tries to carve out a place for the Legislator in each of two worlds while obscuring his presence in both. Neither human nor divine, the Legislator can thus be read as a textual device mediating the gulf between Heaven and Earth.’

36 Rousseau, ibid, 142–151, esp 146: ‘no State has ever been founded without Religion serving as its base’. Cf Hobbes, Leviathan, n 12 above, 233: ‘the Common-people minds . . . are like clean sheets of paper, fit to receive whatsoever by Publique Authority shall be imprinted in them’. For analysis see R. Beiner, Civil Religion: A Dialogue in the History of Political Philosophy (Cambridge: CUP, 2011) esp Pt I.

37 P. Manow, In the King’s Shadow: The Political Anatomy of Democratic Representation P. Camiller (trans) (Cambridge: Polity, 2010).

38 See eg, B. Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (London: Verso, rev ed, 1991) 7: ‘The nation . . . is imagined as sovereign because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm’ and ‘it is imagined as a community, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship’. For a philosophical analysis of the issue see H. Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in M. Loughlin and N. Walker (eds), The Paradox of Constitutionalism (Oxford: OUP, 2007) 9, arguing that since someone has to claim the initiative to speak in the name of the people, there can be no inclusion (a ‘we’), without an exclusion (a ‘they’).
This is the specific challenge of the modern constitutional imagination: the transcendent figure of the sovereign is effaced and, in Claude Lefort’s words, we are left with ‘an empty place’. It may indeed be empty, but the place remains.

THE STRUCTURAL FEATURES OF THE CONSTITUTIONAL IMAGINATION

Can a compelling account of political reality be given when the symbolic dimension is no longer able to obtain its affirmation from a sacred source? Without this affirmation, it would appear that the political domain has to try and locate the symbolic in some notion of collective self-representation. This idea of collective self-representation, I suggest, is situated at the core of the constitutional imagination and its meaning is determined by an interaction between the concepts of ideology and utopia.

To develop this argument, I first need to extricate the concept of ideology from its common polemical usage. This derives primarily from Marx, who uses the term to explain the way reality is obscured and distorted. Marx conceives reality as the world of production, circulation and exchange and argues that this productive human activity (praxis) has a determinative impact on what are regarded as the superstructural aspects of social life: religion, culture, art, politics and law. The claim that the realm of ideas constitutes an autonomous reality — idealism — is equated to ideology. Ideology is false representation. This distortion stands opposed to reality or, as in later Marxist accounts, in opposition to science.

This Marxist conception of ideology has had a significant impact on constitutional thought. In a celebrated lecture in 1862 on the nature of constitutions, for example, Ferdinand Lassalle argued that the modern written constitution is an ideological device masking what he calls the ‘material’ constitution of society, that which expresses the actual power relationships in society. This type of argument has since been commonly adopted by realist constitutional scholars. The problem with it does not lie in the identification of a distinction between the formal and material constitution: Marx is obviously right to say that the

40 C. Geertz, ‘Ideology as a Cultural System’ in his The Interpretation of Cultures: Selected Essays (London: Fontana, 1973), 193, 193: ‘It is one of the minor ironies of modern intellectual history that the term “ideology” has itself become thoroughly ideologized.’
44 See eg, C. A. Beard, An Economic Interpretation of the Constitution of the United States (New York: Macmillan, 1921); C. Mortati, La Costituzione in Senso Materiale (Milan: Guiffrè, 1940); Griffith, n 4 above.
ruling ideas of an era are those of its ruling class. The problem arises because of the assumption that economic forces act on ideas in a purely causal fashion.

Weber gets to the crux of the matter with his claim that relations of domination are not primarily causal but motivational. He argues that a governing regime functions not only – and not primarily – by force; it also operates on the basis of acquiescence and consent. Invoking the concept of legitimacy, he shows that a tension invariably exists between the ruling body’s claim to legitimacy, and the belief in the regime’s legitimacy held by its subjects. Ideology situates itself in the gulf that exists between the ruling body’s claim and the people’s response; its specific function is to bridge that credibility gap between claim and belief. Here, ideology operates not only as distortion, it also acts as legitimation.

Ricoeur takes Weber’s analysis one stage further by showing how, within the political domain, action is already mediated and expressed in symbolic form. Consequently, there can be no pre-ideological reality with respect to the constitution of political authority. The phenomenon we are considering is that of symbolic action, action shaped by cultural patterns that provide the coding of political reality. It follows that ideology not only has a distortive or legitimatory role: it also has a constitutive function. In its most elementary sense, ideology orders a pattern of action; ideology is an expression of the fundamental symbolic structure of the association. Consequently, the base-superstructure distinction is obliterated and the political domain is conceived as symbolically constituted. Once this is recognised, it is evident that the main function of ideology within the political domain is to perform the integrative role of maintaining its identity.

It is in this sense that we can say that the schemes of Hobbes, Locke and Rousseau are ideological. Each offers an account that strives to become constitutive of political reality. Each provides a distinctive scheme of symbolic representation of the constitution of collective existence. Ideology becomes the central concept of the constitutional imagination, the concept on which our understanding of the constitution rests.

We get a more rounded sense of the role of ideology by relating it to the concept of utopia. The primary function of utopia is to present an imaginative

45 Marx, n 41 above, 47–50.
46 M. Weber, Economy and Society: An Outline of Interpretive Sociology G. Roth and C. Wittich (eds) (Berkeley: University of California Press, 1978). In his conceptual exposition (ch 1.1), Weber defines social action as meaningful behaviour which is mutually orientated and socially integrated; the motivational aspect is explained at 8–9.
47 P. Ricoeur, Lectures on Ideology and Utopia (New York: Columbia University Press, 1986) 8: ‘Unless social [sc. political] life has a symbolic structure, there is no way to understand how we live, do things, and project these activities in ideas, no way to understand how reality can become an idea or how real life can produce illusions; these would all be simply mystical and incomprehensible events.’
48 Geertz, n 40 above, 218: ‘The function of ideology is to make an autonomous politics possible by providing the authoritative concepts that render it meaningful, the suasive images by means of which it can be sensibly grasped’.
49 For an important statement of the importance of ideological analysis in understanding politics (albeit one that does not examine the phenomenon of constitutions) see M. Freeden, Ideologies and Political Theory: A Conceptual Approach (Oxford: Clarendon Press, 1996).
variation of the prevailing interpretation of constitutional order. Utopia is the ‘view from nowhere’. Its role is to highlight the contingency of the existing order by offering a vision of what might be. But a utopia is not a mere dream. Although its determining characteristic is not its ‘realisability’ but ‘the preservation of opposition’, it still aspires to be a scheme that seeks actualisation. Crucially, it is only through this imaginative aspect of discourse that we are able to extract what seems implicit in an inherited constitution. Utopia is to constitution what invention is to science.

In the constitutional imagination, then, ideology is a technique of integration and utopia primarily a technique of subversion. Ideology conceals the gap in legitimacy claims, whereas utopian thought exposes it. Ideology ‘is the surplus-value added to the lack of belief in authority’, while utopia unmasks this as surplus-value. Ideology legitimates the surplus of governing power (ie domination) secreted within constitutional arrangements. Within utopian thought, by contrast, the constitution is either regarded as persistently falling short of its implicit ideals or, if conceived as an ideal, is founded on a vision of a political domain free from domination. It is within this polarity of ideology and utopia that the constitutional imagination does its work.

50 Mannheim was the first to bring the two concepts into a common framework as related expressions of a certain distance from existing reality: K. Mannheim, Ideology and Utopia: An Introduction to the Sociology of Knowledge L. Wirth and E. Shils (trans) (New York: Harcourt, Brace, 1936). But he concludes by claiming that ideology and utopia stand in a paradoxical relationship and suggests we must continue to search for a value-free position from which to evaluate it. By contrast, Ricoeur, n 47 above, 172–173, argues that ‘the only way to get out of the circularity in which ideologies engulf us is to assume a utopia, declare it, and judge an ideology on this basis. Because the absolute onlooker is impossible, then it is someone within the process itself who takes the responsibility for judgment . . . [A] certain solution to the problem might be found, a solution . . . itself congruent with the claim that no point of view exists outside the game. Therefore, if there can be no transcendent onlooker, then a practical concept is what must be assumed.’.

51 Ricoeur, n 47 above, 180.


53 Ricoeur, n 47 above, 298. Ricoeur also asks whether ‘all utopias are not in some sense secularized religions that are also always supported by the claim that they found a new religion. The spiritual location of utopia is between two religions, between an institutionalized religion in decline and a more fundamental religion that remains to be uncovered. The utopian element is the argument that we may invent a religion based upon the remnants of the old religion’ (ibid, 305–306).

54 The interaction of ideology and utopia is evident in the social theory of Habermas, whose distinctions between the technical, the practical and the critical (and especially between instrumental and critical reason) can be mapped on to the ideological (technical-practical) and the utopian (critical): ‘The approach of the empirical-analytical sciences incorporates a technical cognitive interest; that of the historical-hermeneutical sciences incorporates a practical one; and the approach of critically oriented sciences incorporates the emancipatory cognitive interest’: J. Habermas, Knowledge and Human Interests J. J. Shapiro (trans) (Boston: Beacon Press, 1971) 308.

Constitutional scholarship is today driven by a desire to discover an authoritative method of constitutional interpretation. Is the interpretative frame to be drawn from legal positivism or natural law? Should it privilege textualism, proceduralism, or structuralism? Should its political orientation be republican or liberal, or can it remain resolutely agnostic? Is the overriding objective the protection of fundamental rights or the promotion of democratic deliberation? Such inquiries entail a search without end. My point is that, whatever the scholarly stance adopted, its advocacy is invariably framed in accordance with the ideology-utopia dialectic. Constitutional scholarship assumes a practical intent only once the integrative function of ideology and the subversive function of utopia are held in creative tension.\(^{56}\)

It is at this point that we begin to relate thought and text to action. But immediately an additional layer of complexity is added. This is because ideology and utopia each have positive and negative attributes. There is a double dichotomy at play. The positive role of ideology is to achieve social and political integration through constitutional ordering,\(^{57}\) while for utopian thought the positive role seeks to elaborate and promote ideals that are implicit within a constitutional text.\(^{58}\) But on the negative side, ideology can operate primarily to mask the various forms of domination within constitutional arrangements,\(^{59}\) and,

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in striving for constitutional perfection, utopianism might simply amount to a flight from political reality.  

This positive-negative dichotomy considerably complicates any assessment of constitutional practice. Is constitutional practice able to overcome conflicts of interest and promote political unity or does it only establish a new site of political conflict? The Weimar Constitution offers one prominent example of the latter tendency, while Germany’s post-war constitutional experience of achieving integration around certain basic constitutional values provides a notable illustration of the former. Do the aspirational dimensions of a constitution protect and promote fundamental values or, owing to their unrealisable nature, do they simply foster a culture of bad faith? With respect to this question, the recent practice of incorporating charters of social and economic rights in new constitutional documents provides an important field for further research and evaluation. Among the many uncertainties in constitutional method, one claim that can be made with some conviction is that neither the technical brilliance of its design nor its efficacy as law offers much guidance on a constitution’s integrative capacity. That quality rests not on a constitution’s status as law but on its symbolic power. Its integrative capacity is a product of political culture.

This intrinsically cultural orientation explains why constitutional interpretation remains an open and fluid practice. Constitutions are agonistic texts that contain within them the seeds of dissonance. Consequently, with respect to interpretation and application, it might be said that there can be no constitutional integration without constitutional subversion. The tensions within the constitution between identity and possibility, between conservation and innovation, between ideology and utopia remain ineradicable. Yet they are also entirely functional.

It follows that, in a strict sense, there can rarely be a correct answer in law to any important constitutional question. One reason is that, in Dieter Grimm’s

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61 See A. J. Jacobson and B. Schlink (eds), Weimar: A Jurisprudence of Crisis (Berkeley: University of California Press, 2000); P. C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism (Durham, NC, Duke University Press, 1997). cf J. Habermas, ‘A Kind of Settlement of Damages: the Apologetic Tendencies in German History Writing’ in J. Knowlton and T. Cates (eds), Forever in the Shadow of Hitler? (Atlantic Highlands, NJ: Humanities Press, 1993) 30 (arguing that, having had a liberal democratic constitution imposed by the Allies after the war, the challenge for the Federal Republic was that of developing a political culture that could sustain the institutional framework and that Germany’s success in rising to this challenge has been ‘the greatest achievement of the post-war period’ (at 43)).  


63 Burke, n 55 above, 357: ‘Constitutions are agonistic instruments. They involve an enemy, implicitly or explicitly . . . In all such projects, the attempt is made, by verbal or symbolic means, to establish a motivational fixity of some sort, in opposition to something that is thought liable to endanger this fixity.’
words, ‘a constitution’s symbolic power increases with its interpretative ambiguity, although its legally determinative power decreases to the same degree’. It might be going too far to assert that the constitution’s symbolic authority varies in inverse proportion to its legally-determinate character, though this aphoristic formulation does at least highlight the inextricability of this conjunction between the symbolic and the instrumental. But there is also a structural reason for the lack of legal predictability. The question of whether or not that conjunction has an integrative effect can invariably be made only in retrospect, since it is only after the fact that a judgment can be reached on whether the discordances, and the attempts at their reconciliation, are sterile or creative. This suggests that constitutional interpretation, as philosophers would say, forms a hermeneutical circle and that it achieves a positive, integrative effect only by virtue of this circle becoming a spiral.

**CONSTITUTIONS IN MODERN POLITICAL PRACTICE**

This account of constitutional method has been rather abstract. It might therefore be helpful now to change tack. I suggested initially that the basic question to address concerned the relationship between thought, text and action in the constitution of political authority. I then proceeded to focus primarily on the relationship between thought and text with a view to explaining the parameters of the constitutional imagination, its structural features and its method. Rather than trying to explicate those aspects further, it might be more productive to switch focus and consider how constitutional texts have been perceived in modern political practice. So far, I have concentrated on the relation between thought and text. I want now to consider the relation between text and action.

The first point to note is that Paine was undoubtedly right: the American Revolution has indeed given us a new concept of constitution. It has provided the impetus for the formation of a new type of political practice, that of drafting political constitutions. And this practice of constitution-making has led, in turn, to the emergence of a new type of political engagement: that of striving to convert constitutional aspiration into political reality.

In this endeavour to translate thought and text into action, Americans have undoubtedly achieved the greatest degree of success. Not only was the US Constitution the world’s first modern constitution; it has also become the most permanent and the most fetishised in history. Today, its ideological power is...
immense. It has achieved a remarkable success in having fixed the co-ordinates of American political thought. The US Constitution comes closest to having colonised the entire political domain. It is now commonly believed, for example, that the Constitution created the American state; even its bloody civil war of the 1860s is generally viewed not so much as a conflict over the nature of the state but as a dispute over conflicting interpretations of the meaning of its Constitution.69

The American experience is, however, thoroughly exceptional. Elsewhere, the success of this attempt to conceive political reality through the lens of a state’s constitution has been rather mixed. One reason is that throughout the modern era constitutions have been conceived primarily as vehicles for the expression of negative constitutionalism. Constitutions have been adopted mainly to impose institutional constraints on the exercise of governmental power and, by instituting a distinction between public and private, to establish zones of private autonomy that operate to protect the interests of dominant property owners. This was, indeed, a feature of the early experience in the United States where, it has been suggested, the founding ideals of republicanism came to be suppressed and were supplanted as the dominant ideology by the liberal ideals of negative constitutionalism.70 Thereafter, negative constitutionalism was exported from the USA to Latin America, where written constitutions have bolstered regimes of ‘authoritarian liberalism’71 and, at least until recently, have served as instruments to protect private property interests.72

The prevailing influence of negative constitutionalism, especially during the nineteenth century, meant that the practice of drafting constitutions came to be treated by many progressives as a technique for bolstering either authoritarian or bourgeois interests. Constitution-making was seen a practice that was designed to bridge the gap between the claims of rulers and the beliefs of subjects. It is therefore perhaps not surprising that many political activists seeking radical reform or maintaining revolutionary (sc. utopian) aspirations acquired a jaundiced view of the practice.73

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70 This tension is evident in the schools of constitutional history that have grown up around the positions of Wood and Hartz respectively: see G. S. Wood, The Creation of the American Republic, 1776–1787 (Chapel Hill, Univ of North Carolina Press, rev ed, 1998); L. Hartz, The Liberal Tradition in America (New York: Harcourt, Brace & World, 1955).
Robespierre may not be the archetypal political actor but his view on constitutions expressed the sentiments of many. Drawing a clear distinction between revolutionary and constitutional government, he argued that the aim of constitutional government was merely to conserve the Republic, whereas that of revolutionary government was to establish it. Constitutional government, he explained, sought to protect the individual from the abuses of public power while revolutionary government needed to be able to deploy public power to the full in order to overcome those forces that would seek to topple it. Constitutions generally instituted a separation of governmental powers, and progressive governments felt the need to retain the capacity to harness the entirety of political power to their cause. Robespierre may have expressed the point starkly, but the distinction he makes enables us to understand the ambivalence that progressive forces across the world have often felt towards the practice of constitution-making.

This ambivalence is most clearly illustrated by considering the limited authority of written constitutions throughout the history of the modern French state. Since their revolution in 1789, the French have adopted all of twelve constitutions. And during this period, they have experienced dictatorship, restored the monarchy and established no fewer than five republics. The critical issue for the French, and for many states grappling with similar political questions, has been to determine who should hold power, rather than what form it might take. Modern political struggle has not primarily been concerned with the meaning of the established constitution. It has arisen from something more profound: the meaning of the ongoing revolution.

In modern political practice, constitutions have been devised mainly to bolster the values of negative constitutionalism; those embracing the more utopian ideals of positive constitutionalism have been more likely to place their faith in

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75 Declaration of the Rights of Man and of the Citizen (1789) Art 16: ‘A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.’
76 The classic study on this is J. L. Talmon, The Origins of Totalitarian Democracy (London: Secker & Warburg, 1952) 1–2: ‘This study is an attempt to show that concurrently with the liberal type of democracy there emerged from the same premises in the eighteenth century a trend towards what we propose to call the totalitarian type of democracy... The tension between them has constituted an important chapter in modern history, and has now become the most vital issue of our time... The essential difference... is in their different attitudes to politics. The liberal approach assumes politics to be a matter of trial and error... The totalitarian democratic school... is based on the assumption of a sole and exclusive truth in politics. It may be called political Messianism in the sense that it postulates a preordained, harmonious and perfect scheme of things, to which men are irresistibly driven, and at which they are bound to arrive.’ Although constitutional thought does not figure in Talmon’s account, the implications of his thesis are obvious.
77 This has been the major theme of Rosanvallon’s works on post-revolutionary French political history, in which he argues that the pursuit of equality and social unity has produced a ‘democracy of integration’ which has not been interested in pluralist institutional design: discussed in Jennings, ibid, 25–26. cF S. Holmes, Benjamin Constant and the Making of Modern Liberalism (New Haven: Yale University Press, 1984) ch 5, ‘Constitutional Design’.
vanguard political movements than in constitutional documents. Nevertheless, for a variety of reasons concerning the extending rationalisation of social life, the practice of drafting written constitutions has contributed to the erosion of authority of what I have called conventional constitutionalism. This is especially manifest in the progressive loss of authority during the latter half of the twentieth century of the evolutionary practices of the British constitution,78 and in the growing conviction that renewal can be undertaken only through the enactment of formal institutional safeguards.79 But continuing rationalisation has also had a significant impact on the standing of constitutions in states whose constitutions have commonly been perceived to be of the nominal, façade or aspirational variety.80 And these latter developments throw up certain more general issues about the constitutional imagination.

In considering the influence of constitutions on political practice, it should be borne in mind that constitutions are commonly drafted by authoritarian as well as liberal regimes. Generally, these authoritarian constitutions have been classified as nominal, façade or aspirational constitutions, constitutions that offer no reliable guide to the manner in which governmental power is exercised. This is indeed one reason why political scientists have since the 1960s largely abandoned the field of constitutional analysis. Nevertheless, certain recent studies have shown that many of these authoritarian constitutions do perform vital regime tasks, especially in acting as co-ordination and commitment mechanisms. Such constitutions can help to augment an autocrat’s political authority and, by stabilising their regime, co-opt threats to their position.81 Even in authoritarian regimes, constitutions are commonly conceived as more than empty rituals; they are increasingly recognised as establishing ‘operating manuals’ of governmental action. This evolving practice expresses a fundamental political power-building precept. As Bodin was the first to explain, for the purpose of promoting the stability of their regime, rulers need to establish institutions: the authority of rulers is strengthened when their powers

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81 See N. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany: SUNY Press, 2002); M. Albertus and V. Menaldo, ‘The Political Economy of Autocratic Constitutions’ in Ginsburg and Simpser (eds), *ibid*, 53 (using data sets on Latin American dictatorships between 1950 and 2002 the authors show that the enactment of a constitution ‘can enable an autocratic coalition to co-opt threats to their rule and last longer in office’ (at 54)).
are constrained.\textsuperscript{82} Now, more than ever before, it is being widely recognised that constitutions are critical state-building instruments.

\textbf{THE AGE OF CONSTITUTIONALISM?}

Constitutions, it appears, have never before occupied such an important role in political practice: there is a closer than ever relation between text and action. Can the relation between thought, text and action now be brought together and the claim be made that we are now living in the age of constitutionalism?

This is not self-evidently the case. The status of conventional constitutionalism may have waned and, as we have seen, the utopian claims of positive constitutionalism have primarily been expressed through political movements rather than constitutional settlements. But it cannot be assumed that the ideals of negative constitutionalism have triumphed. The reason is that we do not live today in a world of limited government, that is, in governing regimes that maintain a clear private-public divide, organise their systems of government in accordance with a classical sense of the separation of powers, and which uses the constitution as a cordon to protect pre-political rights.\textsuperscript{83} Whatever the political character of the regime, government today is ubiquitous: there is scarcely an area of private – let alone social – life in which governmental agencies do not have significant involvement. With this growth in nature and scale, government increasingly presents itself as an administrative modality such that no clear differentiation between legislative, executive and judicial tasks can be sustained.\textsuperscript{84} Constitutions may now be beginning to colonise the political domain, but the scheme is not that of negative constitutionalism. The claims made for negative constitutionalism today are ideological in the negative sense.\textsuperscript{85}

The growing influence of constitutions, I am suggesting, can be understood only as a product of the rise of positive constitutionalism. But the form that positive constitutionalism now takes remains a matter of contention. Put succinctly, positive constitutionalism’s power has grown as its utopian aspects have declined; its momentum has increased in inverse proportion to the ability of governments to demand sacrifice from its subjects in the name of future rewards.


\textsuperscript{85} Although this point applies equally to the US Constitution, it might be noted that although the American model was influential up until the 1960s its influence is now on the wane: see D. S. Law and M. Versteeg, ‘The Declining Influence of the United States Constitution’ (2012) 87 New York Univ Law Rev 762.
This is a significant variation on Rousseau’s scheme. The force that drove his promotion of a civil religion, for example, was the striving for human emancipation; this was a philosophy of salvation with a religious dimension. But it is only once it loses its utopianism that it becomes fit for institutionalisation. Only when it loses that dimension can the emerging positive constitutionalism accommodate itself to government’s administrative modality.

The impact of this development on the constitutional imagination had been clearly signalled in the early twentieth century by the French constitutional lawyer, Léon Duguit. Duguit maintained that the modern constitutional imagination was in ‘a condition of dislocation’. This was because it had drawn its strength from the metaphysical principles of social contract thinking whose power had been dissipated as a result of basic changes to the edifice of government. The constitutional imagination, he suggested, rests on two fundamental principles: the natural, imprescriptible rights of the individual subject and the sovereign right of the collective person of the state. It worked on the assumption that, as the agent of the sovereign nation, government was entrusted with the right to make law, though this right was subject to the fundamental law of constitutional ordering: that the state must organise itself so as to secure the maximum protection of individual rights. The state therefore ‘submits itself to an objective law based on the subjective right of the individual’.

Duguit argued that this entire metaphysical system of subjective right was anachronistic. It had been undermined by the emergence of a new science of government that rests its foundations on a social fact, that of a growing social interdependence. Subjective right was dead, and was being replaced by a system of objective law. In this new order, rulers exercise power ‘not by virtue of the rights they possess but of the duties they must perform’. Those duties derive from the new fundamental law of this order: the promotion of social solidarity. Duguit claimed that the entire basis of constitutional thought resting on a foundation of subjective will-formation must now be overturned; it was to be replaced by a public service orientation under which governmental authority derived from the end at which it is aimed. Modern government now derives its authority not from a theory of sovereignty but from the idea of public service. The foundation of constitutional law ‘is no longer command but organization’ and, since government exists to fulfil a social function, constitutional ordering no longer rested on subjective right, but on objective law.

Duguit’s thesis specifies the nature of the transformation that has taken place in the scheme of positive constitutionalism. It remains a scheme of positive constitutionalism because it acknowledges the autonomy of the political domain and recognises that its conceptual categories must be constructed within that autonomous frame. But it replaces the utopianism of the general will (the ideal expression of equal liberty) structured through subjective right with a more

88 *ibid*, xxxix.
89 *ibid*, xlii.
90 *ibid*, 49.
functional alternative (the promotion of social solidarity) constituted through objective duty. This is positive constitutionalism as an integrative mechanism.

Duguit’s thesis has a profound impact on the idea of the constitutional imagination. Some of its implications can be highlighted by reflecting on the character of the recent so-called ‘constitutional rights revolution’.91 This movement is certainly not founded on the negative constitutionalist aim of protecting the pre-political character of individual rights of autonomy, of imposing negative duties on government, and of enforcing a distinct public-private divide. The emerging ‘global model of constitutional rights’ operates on altogether different premises. Far from conceiving rights as a limited category of human interests deserving special protection, it asserts that the entire range of human interests can be expressed in the form of a rights-claim. But the status of those rights-claims is not based on transcendent moral and metaphysical foundations; rights acquire force only within the particular institutional conditions of a governing regime. Instead of treating rights as trump cards that are above politics, they become political claims to be weighed and balanced.92

In this way, the contemporary rights movement transforms all political claims into the language of rights, but rights acquire recognition only through a practice of justification organised within the frame of an ‘objective system of values’ that must ‘direct and inform legislation, administration and judicial decision’.93 Subjective rights are converted into objective law: far from being a set of negative claims against government, they constitute an arrangement of positive duties that shape the contours of political society. Despite its claims of objectivity, this value-order, which balances general principles of liberty and equality against the public good, remains negotiable throughout. And the language of negotiation is that of rights.94

This juridical revolution has the potential to colonise the entire political domain.95 The notion of a separation of powers, which formed a central plank of negative constitutionalism and which implicitly recognised the bounded nature of legal authority, is displaced. It is replaced by the pervasive commitment of all government agencies to engage in a form of deliberation and dialogue,96

92 See K. Möller, The Global Model of Constitutional Rights (Oxford: OUP, 2012). In addition to the inflation and balancing of rights claims, Möller notes the breakdown of a sharp public-private divide through horizontal effect and the recognition that rights are now acknowledged as capable of imposing positive obligations.
95 A. Barak (former President of the Supreme Court of Israel): ‘nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable’. Cited in R. Hirschl, ‘The Judicialization of Mega-Politics and the Rise of Political Courts’ (2008) 11 Annual Review of Political Science 93, 95.
96 M. Ignatieff, Human Rights as Politics and Idolatry (Princeton, NJ: Princeton University Press, 2001) 84: ‘The fundamental moral commitment entailed by rights is not to respect, and certainly not to worship. It is to deliberation.’ On dialogical constitutionalism see: R. Gargarella, “‘We the People’ Outside of the Constitution: The Dialogic Model of Constitutionalism and the System
which is expressed in the universal constitutional language of subsidiarity, rationality, proportionality and the balancing of rights claims.\textsuperscript{97} The language is liberal, but it is of a piece with Duguit’s sociological realism.\textsuperscript{98} This is positive constitutionalism as ideology. Its driving objective is not emancipation but integration.\textsuperscript{99}

Government today acquires its legitimacy not through transcendent claims but through its regulatory functions in seeking to improve the life and health of its citizenry.\textsuperscript{100} This role retains certain aspirational, even utopian, elements, not least because, in accepting the autonomy of the political domain, positive constitutionalism has the potential to escape the limits of nature and history.\textsuperscript{101} But its utopianism, expressed primarily through the promotion of equality of opportunity, is now directed towards individual empowerment rather than social emancipation.

The pressing question is whether this type of regime is able to sustain the power of the constitutional imagination. Some argue that it is impossible to devise a constitutional order on the foundation of rights without invoking a religious or sacred conception of humanity.\textsuperscript{102} As we have seen, this is far from the way in which rights are now deployed in recent constitutional deliberation. But if rights discourse has been transformed into a technique of governing, then the threat is that its underlying individualistic ethos and predominant instrumental rationality will fail to achieve civic integration and is likely to lead only to further political fragmentation.\textsuperscript{103} And without a sense of common


\textsuperscript{98} cf Beatty, ibid, 163: ‘On this model of judicial review, it is the formulation of minor premise, where the facts and details of the government’s behavior are scrutinized and probed, that all the hard work is done’. Cohen-Eliya and Porat, ibid, 487–490 explain the development as involving a shift towards an administrative model of constitutional law, ‘the “administritzation” of constitutional law’.


\textsuperscript{101} A prominent illustration has been the impetus to remove gender as a relevant constitutional/political category. Following extensions of the franchise a century ago and prohibitions on sex discrimination 50 years ago (both consonant with negative constitutionalism), there has been a departure from formal state neutrality, as is evidenced in the establishment of parental (as distinct from maternity) leave, in positive efforts to promote gender balance in public office, and in gender-blind marriage laws. cf J.-L. de Lohme, The Constitution of England, or an Account of English Government [1784] David Lieberman (ed) (Indianapolis: Liberty Fund, 2007) 101: ‘it is a fundamental principle with the English Lawyers, that Parliament can do every thing, except making a Woman a Man, or a Man a Woman.’


purpose – without Duguit’s overarching principle of solidarity – it is difficult to see how the constitutional imagination can be sustained.\textsuperscript{104}

**CONCLUSION**

My objective has been to try and explain how constitutions are able to relate thought to action in ways that create political reality. I have suggested that this capacity rests on an ability to portray a symbolic structure of collective political association that its subjects have, in varying degrees, come to accept. Unable any longer easily to draw on the power of some transcendent figure, the constitutional imagination is required to maintain an uncertain compromise between freedom and belonging. This is managed through a method of constitutional interpretation that operates according to the dialectic of ideology and utopia.

In developing this argument I have tried also to show how we might begin to grasp the ambivalence of the claim that we are living today in a constitutional age. There is no doubt that the influence of constitutional arguments in modern political practice has grown, but the characteristic features of this constitutionalism remain puzzling. Throughout modern political history, the influence of what I have been calling negative constitutionalism has been dominant, though that influence now has waned. Instead, we are seeing the emergence of a form of positive constitutionalism, but this is positive constitutionalism shorn of most of its utopian features. Although built on a rights foundation, it has become highly attuned to what has been called the ‘governmentalisation of the state’; this is positive constitutionalism as a functionally-integrative scheme. Whether such a scheme is able to sustain a sense of collective self-identity on which the modern constitutional imagination has been founded remains an open question.

To the extent that utopianism remains part of the constitutional imagination, its primary attachment is no longer to the nation.\textsuperscript{105} Utopianism seeks realisation today mainly through the claims of cosmopolitanism and universal human rights. But the prospects here do not look good. The attempt in the early years of the new millennium to establish a constitutional foundation of the European Union offers a textbook illustration of the difficulties: the movement had the effect only of exposing the size of the gulf that existed between claims made by governing authorities and beliefs held by subjects and it led inexorably to the collapse of the

\textsuperscript{104} This is the concern, first expressed by de Tocqueville, that a constitutional order underpinned by popular sovereignty and operating under the fundamental law of ‘equal rights’, no longer contains restraint. He talked of the emergence of ‘an immense and tutelary power’ watching over the fate of its citizens and exercising a power that is ‘absolute, minute, regular, provident and mild’. In this vein, government, as the essential arbiter of the people’s welfare, would gradually cover ‘the surface of society with a network of small complicated rules, minute and uniform’. It ‘does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd’ A. de Tocqueville, *Democracy in America* [1835] H. Reeve (trans), D. J. Boorstin intro (New York: Vintage Books, 1990) vol 2 [1840], 318–319.

\textsuperscript{105} Although constitutional renewal undoubtedly remains a vehicle of national aspiration, nation-building has today become a more ambiguous project: see eg, M. Bánkuti, G. Halmai and K. L. Schepele, ‘Hungary’s Illiberal Turn: Dismantling the Constitution’ (2012) 23 J of Democracy 138.
Euro-constitutional project. More generally, the human rights movement owes its recent flourishing primarily to the collapse of emancipatory political schemes. The human rights movement might accurately be labeled ‘the last utopia’, but only if this is understood ironically: the movement acquires its momentum only when it shifts its orientation from the utopian to the ideological, from subversion to integration, and from vision to governance technique.

We live today in an age marked simultaneously by the widespread adoption of the idea of constitutionalism, of ambiguity over its meaning, and of anxiety about its continuing authority. Far from being an expression of limited government, constitutionalism is now to be viewed as an extremely powerful mode of legitimating extensive government. Where this form of constitutionalism positions itself on the ideology-utopia axis – and whether it exhibits positive or negative variants – has rarely been more indeterminate. Paine may therefore have been right in his prediction that the American Revolution would bring about a universal reformation but, notwithstanding the liberal gains that have since been made, the significance of the idea of ‘the constitutional imagination’ has never exhibited a greater degree of uncertainty.

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