

## (Political) Constitutions and (Political) Constitutionalism

By Paul Scott\*

### Abstract

*This paper responds to the conceptual inflation of constitutionalism in recent years by considering the relationship between constitutions and the specific concept of constitutionalism, seeking to establish the limits to the identification of the latter outside its traditional province. It considers both constitutions and constitutionalism in general terms, but seeks in particular to elucidate the relationship between the political constitution and political constitutionalism. This task requires an explanation of the law/politics divide and the paper argues for an institutional distinction between the two concepts, as opposed to one based upon the supposedly distinctive rationalities associated with law and politics. It grafts these categories onto a concept of constitutionalism characterized by a specific functional logic, whereby the same mechanisms that constitute power also limit that power. As such, it argues that to identify constitutionalism in contexts in which constitution and limitation occur separately—as in different layers of a multi-layered constitutional order—is mistaken. Constitutionalism is defined by this distinctive dualism, which in turn grants it its legitimating potential.*

*In light of this definition of constitutionalism, the paper considers the relationship between law and politics within the constitutional order, offering three potential accounts of the connection between them. Amongst these, it endorses the idea that law and politics are necessarily linked: Within the democratic constitution, each frames the other such that legal requirements are the outcome of a political process which itself takes a form determined by law. The two phenomena are therefore inseparable; in a certain sense, all law is politics and all politics is law. The piece ends by suggesting that this claim is true where, and only where, the conditions laid down for constitutionalism hold true. Constitutionalism is a dualist phenomenon which, where it occurs, brings with it a highly particular melding of the legal and the political.*

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### A. The Conceptual Spread of Constitutionalism

The concept of constitutionalism has recently taken on something of a life of its own within constitutional theory literature.<sup>1</sup> It was once largely tied to the nation-state; the primary locus of public power and the site of operation of the constitution which was, in its singular and discrete form, the artifact which embodied the concept. In that context it was used to make sense of, for example, the relationship between constitutions and government; to distinguish lawful rebellion from revolution.<sup>2</sup> But constitutionalism has broken free from its moorings within the discrete constitution. No longer is the link between the abstract concept and the concrete phenomenon a necessary one. Instead, the concept—like all the great successes of the modern constitutional project, amongst them the rule of law and fundamental rights—has come to exist as a self-standing and transferable ideal. But where the rule of law, for instance, is transferable in the sense that it is not tied to any specific constitutional order, and so not dependent upon a particular set of institutions for its achievement, as Dicey once claimed it to be,<sup>3</sup> constitutionalism does not seem to depend upon the existence of an identifiable constitutional order at all. It has spread to an ever-expanding and remarkably diverse range of contexts.

### B. Sites of Constitutionalism

These “new” sites of constitutionalism are not, however, all of one type. One principal factor distinguishes those continuous with the traditional concept from those which are not: The nature of the power which is located there, and whether it is, in its essence, public or private.<sup>4</sup> The traditional concept, we have said, is a feature of constitutions and

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<sup>1</sup> For a representative body of literature, see, e.g., *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (Martin Loughlin & Neil Walker eds., 2008); *THE TWILIGHT OF CONSTITUTIONALISM?* (Petra Dobner & Martin Loughlin eds., 2010); *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004). Little of the analysis in these works is explicitly conceptual: It mostly presupposes, rather than argues for, a specific understanding of the term. For an attempt to identify the essence of the concept as it is used in UK constitutional scholarship, see Jo Eric Khusnal Murkens, *The Quest for Constitutionalism in Public Law Discourse*, 29 OXFORD J. LEGAL STUD. 427 (2009). Murkens’s conclusion is that “[h]inting at constitutionalism as a new but hollow vessel is constitutionally inaccurate, analytically fallacious, and explanatorily vacuous,” and so “[e]ither entire new chapters expounding the concept of constitutionalism need to be written and inserted into public law textbooks, or its usage should be purged from the discussion.” *Id.* at 454–55.

<sup>2</sup> See, for example, the accounts of the questions posed by “ancient” and “modern” constitutionalism, respectively, in CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* ch. 1–2, at 3–40 (1940).

<sup>3</sup> A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1st ed. 1885).

<sup>4</sup> The use of such labels inevitably confronts the vast critical literature which deprecates their underlying logic and, in particular, the stability of the distinction. See, for example, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). Such deprecation applies both at the level of power generally understood, and in the more specific context of legal power. Nevertheless, as long as it is emphasized that the label “private” does not imply that whatever is so labeled is of no political significance—that the divide

constitutions relate to the exercise of public power in the broadest sense. At times, the concept of constitutionalism is applied outside of the constitution strictly understood, but in the context of a site of power which is similarly public, in that it can be understood as either arising from a delegation of constitutional authority, or as resulting from the contingent and reversible transfer of power therein constituted. In such cases, constitutionalism may be identified below the state,<sup>5</sup> or above it,<sup>6</sup> in an international or transnational context.<sup>7</sup> This multiplication of the logic and language of constitutionalism is largely unproblematic. The link between constitutionalism and constitutions is maintained to the extent that constitutionalism separated from the constitution is nevertheless an offshoot of a constitution, or an interaction or overlap between multiple constitutions. New sites of public power—or old sites given newly constitutional form—give rise to a need for new applications of the existing organizing concept, but do not unduly upset or undermine its original logic. Constitutionalism, understood as an aspect of the specific rationality which governs constitutions, persists and insofar as these other sites of power can be explained according to that rationality, then they too would seem amenable to description in the language of constitutionalism. Accordingly, the spread of constitutionalism can be understood as nothing more than a corollary of the multiplication of the examples of the phenomenon to which it is inextricably linked.<sup>8</sup> Conceptual inflation is a by-product of the complication of the formal modes of exercise of public power.<sup>9</sup>

The concept of constitutionalism has also, however, been invoked in the context of sites of power which lack a strictly public dimension—the most important example being societal

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between public and private is not and cannot be a Chinese wall—then such identification is not in itself harmful and captures an analytically useful distinction, which performs a central function in, for example, determining the applicability of human rights norms. See, for example, Human Rights Act, 1998, c. 42, § 6 (Eng.).

<sup>5</sup> See, for example, STEPHEN TIERNEY, *CONSTITUTIONAL LAW AND NATIONAL PLURALISM* 4 (2004), which posits a category of multi-national, multi-level states that defy “the standard classifications and categorisations prevalent in traditional analytic frameworks of liberal constitutionalism.” *Id.*

<sup>6</sup> See generally Rachel A. Cichowski, *Women's Rights, the European Court and Supranational Constitutionalism*, 38 *LAW & SOC'Y REV.* 489 (2004).

<sup>7</sup> See generally *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES* (Nicholas Tsagourias ed., 2007).

<sup>8</sup> See Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *VA. L. REV.* 771 (1997). The term “world constitutionalism” seems to mean the spread of constitutionalism around the world (albeit in occasionally adapted forms) rather than the emergence of a distinct form of that phenomenon.

<sup>9</sup> The qualifier “formal” is offered in recognition of the fact that an account of globalization, in its multitude of forms, which paints it as a specific feature of the late 20th century and beyond, overlooks the interaction and mutual dependence of many nation states in times gone by; what seems true, however, is that in late modernity, the multiplications of sites of power is accompanied by a largely novel formalization of those sites and the frameworks through which power is exercised.

constitutionalism<sup>10</sup>—in the sense that they are far removed from the constitution as traditionally understood, though without necessarily entering into the discourse of exclusively private power; something which might act on public power but forms no part of it. Constitutionalism, it seems, might be identified not just beyond the state itself,<sup>11</sup> but beyond any of the multifarious structures of which it forms part. If so, the necessary connection between constitutionalism and the power located in the constitution itself would be at an end. In that case, however, the ability of the term to say anything meaningful risks being compromised; the explanatory value of the concept, originating in an undeniably “public” context, is undermined. If publicness is a necessary condition of constitutionalism, then where there is no publicness there can be no constitutionalism. If it is not, then what is? If wherever there is power there is, or could potentially be, constitutionalism, then perhaps the phenomenon has no prerequisites beyond the undifferentiated fact of power. This would imply that the seemingly necessary link between public power and constitutionalism was a failure of imagination; a mistaken artifact of a belief in the qualitative distinction between public and private power which the twilight of the Westphalian nation-state has revealed as a chimera. This essay aims to separate the different “moments” of constitutionalism, so as to identify the outer limits of the concept’s utility as an analytical tool and, in turn, to shed light on constitutionalism as it relates to the specific idea of a political constitution, past and present. It proceeds on the assumption that by making clear(er) our presuppositions at the broadest level, it becomes possible to say something useful at the level of particular debates. It is to that extent a corollary of the belief that the debate on political constitutionalism is hampered by the under-theorized state of constitutionalism as a broader concept.

### C. Power

Constitutionalism is a concept pertaining to power and an understanding of how power is conceptualized becomes a prerequisite for the making of any meaningful claim about the nature of constitutionalism. Power, for present purposes, can be understood as an action-theoretic concept; as nothing more sophisticated than the ability to do things, to achieve goals, and effect change on the world. Such ability does not imply the necessary overcoming of resistance as it does, for example, for those more concerned with a “power-

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<sup>10</sup> For the original language of societal constitutionalism, see DAVID SCIULLI, *THEORY OF SOCIETAL CONSTITUTIONALISM: FOUNDATIONS OF A NON-MARXIST CRITICAL THEORY* (1992). For a more recent texts, see Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM*, *supra* note 1, at 3; Gunther Teubner, *Fragmented Foundations: Societal Constitutionalism Beyond the Nation State*, in *THE TWILIGHT OF CONSTITUTIONALISM*, *supra* note 1, at 327. The “characterization” offered here refers to the latter rather than the former.

<sup>11</sup> See generally Neil Walker, *Taking Constitutionalism Beyond the State*, 56 *POL. STUD.* 519 (2008); Gavin Anderson, *Beyond ‘Constitutionalism Beyond the State,’* 29 *J. LAW & Soc’y* 359 (2012).

over” than a “power-to,”<sup>12</sup> nor the acquisition of consent, though where such consent is lacking, power will be limited, and where active resistance exists power may not. Consensus is as much a part of power as is coercion, but neither is indispensable to it.<sup>13</sup> Nor does it necessarily imply acting in concert, as it does for Arendt.<sup>14</sup> Further, there is no specification as to the legitimacy of what it is one intends to do, nor the legitimacy of the means by which one intends to do it; the capacity to bring about an outcome which is contrary to law is an example of power in the current sense, as is that to achieve an immoral end. Lastly, there is no implied contrast between power and authority: Constitutionalism is conceptualized here as contributing to the legitimacy of power; the power to which it relates need not, however, be independently recognized as legitimate.

#### D. Stipulation and Definition

A conceptual analysis of this sort is necessarily stipulative. It is not sufficient merely to catalogue the senses in which the term constitutionalism is used and then attempt to identify as its essence whatever is sufficiently broad as to include all of them. Similarly, the analysis presumes a relationship between constitutions and constitutionalism which is something other than one of direct correspondence, which would make it possible to define constitutionalism as simply a feature of constitutions and thereby postpone or obscure the definitional task. Neither approach satisfies: The first is over inclusive, giving equal weight to those whose concerns and context differ radically from our own, and is undermined by the failure of those who employ the term to take seriously the question of its definition. To whittle down the senses, however—to choose some uses of the term as more important or more representative than others and therefore identify them with the essence of constitutionalism—is to begin, already, to impose our unspoken presuppositions upon the endeavor. A neutral definition proves impossible. The second approach neglects that constitutionalism is both something more and something less than what a constitution does, as the rush to invoke the concept elsewhere suggests. This

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<sup>12</sup> For example, Weber who defined power as “the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests.” MAX WEBER, 1 *ECONOMY AND SOCIETY* 53 (Guenthe Roth & Claus Wittich eds., 1968).

<sup>13</sup> It is to this extent analogous with the Hobbesian definition of power of a man as being “his present means, to obtain some future apparent Good,” paraphrased by Parsons as “the generalized capacity to attain ends or goals in social relations, independently of the media employed or the status of ‘authorization’ to make decisions or impose obligations.” THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL* 54 (Cambridge Univ. Press 1904) (1651); Talcott Parsons, *On the Concept of Political Power*, 107 *PROC. AM. PHIL. SOC’Y* 232, 232 (1963).

<sup>14</sup> Arendt therefore ties up her conception of power with her insistence that “men, not Man, live on the earth and inhabit the world,” stating that “human power corresponds to the condition of plurality.” HANNAH ARENDT, *THE HUMAN CONDITION* 7, 201 (Univ. Chicago Press 1958).

additional aspect has been variously identified as an ideological<sup>15</sup> or legitimating aspect,<sup>16</sup> but it is submitted instead that the correct approach is functional. Constitutionalism speaks not to what a constitution does, but to a mode of doing it—a particular functional logic—of which the constitution is paradigmatic and which has, as an indispensable secondary effect, the legitimation of exercises of power which accord with that logic. The ideology of constitutionalism, like its legitimating effect, is parasitic upon its particular functional logic: It follows from rather than defines it.

### E. Legal and Political Rationality

Central to much of the discourse of constitutionalism, at least at the national level, is a distinction between law and politics. Conceptual analysis, if and where it occurs, is often a mere precursor to the application of those labels to different instances of constitutionalism.<sup>17</sup> One method of elaborating this distinction, particularly favored by those whose preference is for the legal, is to focus upon the distinctive rationalities inherent in the practices of law and politics. Seen in its best light, law deals with rules which are neutral,<sup>18</sup> whose validity derives from some combination of their place in a larger system and their adherence to higher moral principle,<sup>19</sup> and so ostensibly independent of the identity of those who invoke them. The principled form of legal rationality is secured, in turn, at a higher level by the fact that the domain of ordinary law is, or should be, bounded by human rights norms which are valid at all times and for all persons, usually trumping even the considered democratic will of the electorate as transposed, via their representatives, into law. Disputes are resolved by a neutral third party who can retain legitimacy only where this distinctive legal rationality is respected; where she restricts herself to that pool of reasons recognized by the law as adequately “legal”, and no room is left for the individual’s politics, nor crude majoritarianism: The outcome is defined by law whose validity is independent of its consequences for the immediate dispute. It is no coincidence that the political constitution as a phenomenon was identified by Griffith in part as a response to, among others, Ronald Dworkin.<sup>20</sup>

<sup>15</sup> See, e.g., Nicholas Tsagourias, *Constitutionalism: A Theoretical Roadmap*, in TRANSNATIONAL CONSTITUTIONALISM, *supra* note 8, at 1.

<sup>16</sup> See Poul F. Kjaer, *Legitimacy Through Constitutionalism*, in LEGITIMIZATION IN WORLD SOCIETY 99 (Aldo Mascareño & Kathya Araujo eds., 2012).

<sup>17</sup> For important works relying upon this distinction, see RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007); ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005).

<sup>18</sup> In the sense that term is used by Herbert Wechsler, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>19</sup> The different specific positions are represented by positivism on one hand and natural law perspectives on the other and, within the former, the distinction between hard and soft, or exclusive and inclusive, positivism.

<sup>20</sup> J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1, 10–11 (1979) (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978)).

Dworkin's claims about the principled nature of legal interpretation feature heavily in legal constitutionalist discourse.<sup>21</sup> Where some see the introduction of moral rights into legal discourse as collapsing the (already fragile) distinction between law and politics, Dworkin offered an account in which moral rights, already embedded in the law, buttressed that gap, so that enforceable moral rights might be introduced without reducing legal reasoning to the preferences of the individual judge.<sup>22</sup> By contrast, seen in its worst light, politics reflects a rationality that is largely devoid of principle. In politics no reason is *a priori* excluded from the decision-making process and a picture can be painted whereby political rationality is nothing other than the logic whereby each tries to get as much as he can for himself. Legal rationality is easily portrayed as not merely different from political rationality, but as self-evidently superior to it.<sup>23</sup>

Attempts to sustain a hierarchical relationship between law and politics which are founded upon differential legal and political rationalities are problematic. They presuppose a minimum of agreement as to the nature of legal rationality, and not only is such agreement difficult to achieve, but where its nature is disputed, not merely the superiority but often also the distinctiveness of legal rationality is called into question. Those theories which debunk by emphasizing the political content of the supposedly distinctive legal rationality are able to make the claim that, in carrying on politics through law, law takes on an obfuscating or ideological nature—it is not merely a form of politics, but one which, in resisting attempts to identify it as such, denies both its biases, hiding the contingent political and economic values embodied in the law, and its radical potential: the fact that where law is oppressive it might still become emancipatory.<sup>24</sup> Griffith's claim that law is not separate from the conflicts of politics, but instead merely "one means, one process"<sup>25</sup> by which those conflicts are pursued and, later, that "law is politics carried on by other means"<sup>26</sup> aligns him with those who deny to law a distinctive rationality and necessitates the identification of some other distinguishing feature. This is not to say, however, that political constitutionalists are, as a rule, committed to the strongest of realist claims about the relationship between legal and political rationality. Attempts to cut generally across the categories of law and politics have mostly been absent from resistance to the

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<sup>21</sup> See, for example, T.R.S. ALLAN, *LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* (1993).

<sup>22</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 225–76 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

<sup>23</sup> Adam Tomkins identifies this portrayal of the law/politics relationship as the first of six "tenets" of legal constitutionalism. See TOMKINS, *supra* note 17, at 11–14.

<sup>24</sup> In a general sense, the claim that law cannot be wholly separated from politics is a commonplace of both legal realist thought and of the critical legal studies movement which to a point built on its insights.

<sup>25</sup> Griffith, *The Political Constitution*, *supra* note 20, at 20.

<sup>26</sup> J.A.G. Griffith, *The Common Law and the Political Constitution*, 117 *LAW Q. REV.* 42, 64 (2001).

juridification of the United Kingdom's constitution. Instead, claims as to the unacceptably political dimension of law have focused upon fundamental rights, the conflicting moral dimension of which is argued to make them peculiarly unsuited to judicial rather than democratic determination.<sup>27</sup> Even that, however, is sufficient to call into question claims as to the superiority of legal rationality and to collapse the liberal-legal edifice by pulling out of it the rights keystone. Further, even accepting that a key feature of political rationality is its openness to a broader range of reasons than its permitted by legal argument, to speak of it as a unitary phenomenon is to promote a reductive perspective of the question of what political rationality looks like in practice: Are high-minded appeals to the public good legitimately conflated with interest-group pluralism and the bare aggregation of self-serving individual preferences? If not, can one make a judgment as to the essence of political rationality merely because both are *potentially* permitted by it? This is particularly problematic if untested assumptions about the base quality of political discourse are used to remove from democratic purview the control of interests closest to the hearts of both a judicial elite and the political class which entrusts that elite with dominion over the property rights on which the latter's hegemony is based.<sup>28</sup> The same openness of political rationality which permits appeals to base motives makes room for the invocation of principles and moral considerations to which the law is usually deaf. From the point of view of principle, politics is both better and worse than law, often simultaneously.

#### F. An Institutional Distinction

To give the distinction between law and politics an objective footing, it is therefore preferable to emphasize the institutional elements of each. On one side, politics describes the sort of debate and discussion that takes place in legislatures; its procedures allow for participation, discussion, and, potentially, compromise. Political processes are suited to the consideration of all potentially relevant aspects of a decision; a question can be divorced from the immediate context in which it arises and asked instead from a point of view that places it in its historical, social, and economic context. Perhaps most crucially, the exponents of politics are "people who are removable."<sup>29</sup>

On the other side, law is the preserve of courts, of an adversarial system with independent decision-makers who enforce by rules of standing and evidentiary burdens. Here, decisions are made only when a party with the right combination of standing, patience, and financial resources to litigate does so, and without consideration, for reasons of principle and

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<sup>27</sup> Even within this distinction, Tomkins has recognized that some rights are less problematic from this point of view than are others. See Adam Tomkins, *The Role of The Courts in the Political Constitution*, 60 U. TORONTO L.J. 1 (2010).

<sup>28</sup> RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

<sup>29</sup> Griffith, *The Political Constitution*, *supra* note 20, at 16.

practicality, of the wider socio-political context of the issue at hand. The courts can only be asked, and can only answer, a legal question. The limitations imposed by the range of available remedies make it impossible for courts to rectify anything more than the immediate wrong, even if it were constitutionally appropriate for them to do so;<sup>30</sup> lacking the power of the purse and their own coercive apparatus, they might not manage even that.

Notwithstanding the symbiotic relationship of law and politics, it seems impossible to deny the quite stark contrasts between their respective fora and procedures and, thus, far more plausible to claim that the relationship between law and politics is complementary rather than hierarchical: Fulfilling very different functions, neither is able to claim a general superiority over the other, but must instead apply its own strengths to its own tasks. The ground for disagreement left open therefore relates merely to the placement of the line between what is for the courts to do and what is for political institutions to do. Though the waters may be muddied by the rise of alternative mechanisms of justice, the court and the debating chamber are very different places. An institutional perspective permits the of a divide between the legal and the political that is capable of feeding back into a typology of constitutionalism, provided that this latter concept is itself adequately defined.

### G. The Limiting “Moment” of Constitutionalism

In its traditional form, constitutionalism is presented, we have said, as a concept pertaining to public power: specifically, to limits upon such power.<sup>31</sup> By virtue of the historical process whereby constitutional states developed from or replaced orders in which power was functionally unlimited, this limiting ‘moment’ of the concept of constitutionalism is by far the predominant one; Hayek claims that “the whole history of constitutionalism, at least since John Locke, which is the same as the history of liberalism, is that of a struggle against the positivist conception of sovereignty and the allied conception of the omnipotent state.”<sup>32</sup> The relevant limits may take the form of absolute boundaries beyond which public

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<sup>30</sup> For the way in which the respective strengths of courts and legislatures have influenced the interpretation of the section 3 interpretive duty under the Human Rights Act 1998, see *In Re S & In Re W*, [2002] UKHL 10, [2002] 2 A.C. 291; *Bellinger v. Bellinger*, [2003] UKHL 21, [2003] 2 A.C. 467.

<sup>31</sup> See, e.g., Howell A. Lloyd, *Constitutionalism*, in *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450–1700* 254 (J. H. Burns ed., 1994) (noting that “the term signifies advocacy of a system of checks upon the exercise of political power”). See also Wil Waluchow, *Constitutionalism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2008) (“Constitutionalism is the idea . . . that government can and should be limited... and that its authority depends on its observing these limits.”), available at <http://plato.stanford.edu/entries/constitutionalism/>.

<sup>32</sup> F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY, VOL. 2: THE MIRAGE OF SOCIAL JUSTICE* 61 (1978). Murkens takes Hayek’s claim as one of the two seemingly opposed descriptions of the concept which demonstrate the pervasive disagreement that the topic attracts; the other is Maurice Vile’s claim that “the history of Western constitutionalism has been the history of the constant pressure to maintain the ultimate authority of the legislature.” See MURKENS, *supra* note 1, at 430.

power may not go—such as when a domain of freedom is identified by a series of enumerated rights afforded to the individual by virtue of his status as, variously, man or citizen—or divisions of competence between different tiers in a system of multi-layered governance.<sup>33</sup> The emergence of substantive limits on power—the point at which it is accepted that the sovereign (body) does not enjoy the absolute power of a Divine Monarch or a Hobbesian Leviathan—is the modern triumph of constitutionalism. The limits also take the form of procedural requirements which provide that certain conditions must be met for its exercise to be constitutional, regardless of the substance of the exercises of power.<sup>34</sup> The most important such requirement, one which has transcended the ‘procedural’ label so as to become an aspect of rights-based limitations over and above their substantive requirements, is the criterion of legality: Even a substantively unimpeachable exercise of public power is rendered illegitimate by the absence of lawful authority.<sup>35</sup> This requirement of legality stands at the core of the rule of law ideal and represents the clearest link between that ideal and the larger constitutionalist project. The fact that lawful power can be exercised without any substantive limits however—subject only to the limits implied by the latent paradox of this logic, as in the power possessed by the Westminster Parliament seen through a Diceyan lens<sup>36</sup>—demonstrates the extent of the gap between the bare formality of some rule of law conceptions and the concept of constitutionalism in its broadest sense. To make law, of course, will normally require that more demanding procedural requirements than that of legality are met, but legality’s virtue is not contingent upon the presence of democratic mechanisms.<sup>37</sup> Standard liberal-democratic orthodoxy demonstrates both substantive and procedural limits forms of such limiting constitutionalism: Where power can be exercised it must receive the imprimatur of the democratic process and take certain prescribed forms. Even where it is procedurally sound,

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<sup>33</sup> These latter limits are of obvious importance within federal systems. In the United Kingdom, their previous relevance in the context of Irish Home Rule, of various sorts, has been revived as a result of the New Labour project of devolution.

<sup>34</sup> The relationship between procedural and substantive limits is complex, as demonstrated by debates in the United Kingdom about Parliamentary Sovereignty. Can a body that, on many readings, remains substantively unlimited nevertheless be bound procedurally? Or does any possibility of such procedural limitation segue inexorably into the substantive and undermine the claim as to the supposed absence of substantive limitation? ‘Manner and form’ theorists such as Jennings believe that Parliament can bind itself as to the manner and form of its future legislative process and that such binding is compatible with the ongoing sovereignty of the Parliament. See, e.g., IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 151–68 (5th ed. 1959).

<sup>35</sup> This is an aspect of the qualified rights under the ECHR, reflected in the requirement that any interference with those rights must, as a minimum condition, be ‘prescribed by law’ or ‘in accordance with law.’

<sup>36</sup> Exemplified by debate between continuing and self-embracing variants of Parliamentary sovereignty. See H. W. R. Wade, *The Basis of Legal Sovereignty*, 13 *CAMBRIDGE L.J.* 172 (1955).

<sup>37</sup> The view that the rule of law is a good in itself—indeed, an “unqualified human good”—is most famously found in E.P. THOMSON, *WHIGS AND HUNGERS: ORIGIN OF THE BLACK ACT* 266 (1975).

there are certain individual rights which must be respected, and laws which fail to do so are liable to be struck down by a court empowered by the constitution to do so.<sup>38</sup>

The limiting dimension of constitutionalism, therefore, comes to the fore with the constitutionalization of power that was previously either irregular (in being exercised without any application of procedural standards) or absolute (in that there was no area of life it could not reach). The notion that power as constituted *must* encounter such limits accounts for one of the paradoxical element of constitutionalism.<sup>39</sup> The moment at which constituent power, the unrestrained form of popular sovereignty, is exercised results in a constituted power which, by definition, lacks the scope and radical potential of its progenitor; but such limitation is the only method of ensuring the on-going and effective exercise of that same sovereignty.<sup>40</sup> A second paradox derives from the need to make sense of the act of constituent power within the system in which the power thus constituted will be exercised: Constituent power is “an act that creates the first constitution without being empowered to do so; but because the law can only think of power as legal power, an act can only initiate a legal order if it is *retroactively* interpreted as an empowered act.”<sup>41</sup> The order created provides the standards according to which its creation is deemed legitimate. The constitution is constitutional because the constitution says it is, and the constitution necessarily imposes limits upon the continuing exercise of the unlimited power that produced it.

#### H. Political Limits and Political Constitutionalism

To talk about political constitutionalism in light of this limiting moment of constitutionalism is to refer to the ways in which political actors, institutions, and processes limit the exercise of public power, either absolutely or through the imposition of conditions upon its exercise: It is visible in that subset of a larger whole to which the label of *political* might be applied. The implied comparator in identifying such a mode of limitation as political is with one which is legal and, as we have noted, any attempt to distinguish these categories upon an objective basis is likely to demand a consideration of

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<sup>38</sup> See, for example, the discussion in MARTIN LOUGHLIN, *SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS* 187–92 (2000).

<sup>39</sup> See generally LOUGHLIN & WALKER, *supra* note 1. The absolute minimum of limitation derives from the need to distinguish an exercise of the relevant power from something which resembles it, but is in fact different. So, for example, even if we say that laws are whatever the sovereign commands, we nevertheless require a means to distinguish a command from other pronouncements.

<sup>40</sup> Martin Loughlin & Neil Walker, *Introduction*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 1* (Martin Loughlin & Neil Walker eds., 2007).

<sup>41</sup> Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 11* (Martin Loughlin & Neil Walker eds., 2007).

primarily institutional features. Political constitutionalism, therefore, encompasses the back and forth of Parliamentary processes, the debates and disagreements between political actors which characterize politics in its frequently pejorative sense, and the ultimate question of whether or not the political organs will agree to do whatever is proposed. Political institutions exercising political limits upon the exercise of public power exemplify political constitutionalism. But these intra-institutional limits are only part of the story, and the extra-institutional limits must be considered in order to fully understand political constitutionalism: Rules of electoral law—how are the political organs populated?—should be of at least as much importance from the political constitutionalist point of view as what happens once they are so populated.

Therefore, political constitutionalism should be understood as including, at its most basic level, politics in the very ordinary sense of having to convince the electorate to vote for you periodically. Such a requirement can be distinguished from the informal limitations imposed by the need to convince the media to support your measures (or at least not oppose them) and to work within the realities of what is acceptable to the public, both at home and abroad.<sup>42</sup> Each of these things acts to place a limit upon the exercise of public power that is political in nature. That the former (formal) limitations exemplify constitutionalism in action and the latter (informal) limits do not, is a distinction to which we shortly attempt to add a difference. It will very often be the case that these politically limiting factors are primary, in that, whatever other limits might exist on power (e.g., legal or fiscal), the point at which any particular initiative stands or falls is when these political hurdles must be surmounted as, where the relevant political limits are overcome, many legal and fiscal limits will fall like dominos.

### I. Legal Limits and Legal Constitutionalism

In any given constitutional order, these political limits stand alongside—and are, in modern constitutional discourse, frequently eclipsed by—whatever legal limits exist upon public power. Most constitutions have as their centerpiece rights-based legal limitations, which stand in the public mind as the final barrier to the descent into tyranny.<sup>43</sup> These are not the only legal limits: they are usually accompanied by non-rights-based but otherwise constitutional limits,<sup>44</sup> and those which derive from the particular division of competences

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<sup>42</sup> See, *i.e.*, TOMKINS, *supra* note 17, at 2, suggesting that the “reality of government” is that “those in political office are liable to try to do whatever they can politically get away with.”

<sup>43</sup> The extent to which this describes the actual effect of rights-based constitutional limitations is beyond the scope of this paper; suffice it to note that to believe the judiciary will be both willing and able to resist a tyrannical act that has already overcome the existing political barriers seems to demonstrate a certain complacency, and is difficult to square with much of what we know about past judicial responses to illiberal action, particularly in wartime.

<sup>44</sup> This category of non-rights-based, but nevertheless constitutional, limitations is frequently neglected in the consideration of political constitutionalism, perhaps because such non-rights-based constitutional limits do not

in federal and non-unitary orders.<sup>45</sup> Where the legal limits are entrenched, requiring super-majorities to amend (or being ostensibly unamendable), then they, rather than political limits, will likely be the rock upon which the most visible failed exercises of power founder. An ability to win the political battles of “ordinary” politics does not imply the ability to jump the higher hurdles of ‘constitutional’ politics. Not all constitutions, however, incorporate this kind of legal limit; the sort of political processes mentioned, and the concept of political constitutionalism more generally, take on a heightened importance in those contexts in which, ultimately, the only limits are political ones—where we are dealing with political constitutionalism in what is frequently described as a political constitution.<sup>46</sup>

The political constitution having been reconfigured as an explicitly normative project, the United Kingdom constitution has taken on the status of its ideal-type, a role it is particularly suited to play due to the thematic linkages between the idea of political constitutionalism and the doctrine of Parliamentary Sovereignty.<sup>47</sup> If that doctrine as described by Dicey remains true, and the Crown-in-Parliament can still “make or unmake any law whatever,” then an executive which can overcome the relevant political limits, represented in final analysis by the need to achieve the support of a majority in both houses of Parliament,<sup>48</sup> will see its will become law, not being bound by any other (higher) legal rules—whether or not in the form of rights.<sup>49</sup> This identification of political

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possess a moral dimension comparable to that possessed by those involving rights; their relatively technical nature makes them less likely to feature in the discourse of laymen, and discussion of them makes little room for the sort of grand rhetoric associated with human or fundamental rights.

<sup>45</sup> The division of powers between the federal government and the states is an eternal feature of constitutional discourse in the United States. In the United Kingdom, notwithstanding that the devolution settlements do not subtract from the legislative competence of the Westminster Parliament, there has been a revival of the relevant jurisprudence in recent years as a consequence of devolution. See, e.g., *Imperial Tobacco Ltd v. Lord Advocate* [2012] UKSC 61, [102]–[125] (appeal taken from Scot.) (noting particularly the distinction between single and dual enumeration in the judgment of Lord Reed).

<sup>46</sup> GRIFFITH, *supra* note 20. The ambiguity in Griffith’s account between superficial descriptivism and a sort of crypto-normativity is explored in Graham Gee and Gregoire Webber, *What is a Political Constitution?*, 30 OXFORD J. LEGAL STUD. 273, 280–81 (2010).

<sup>47</sup> Implicit in my identification of Britain’s political constitution as an ideal type is the suggestion that similar, but somehow diluted, arrangements exist elsewhere. It is not, however, entirely clear that this is the case. In his category of constitutions exhibiting “legislative supremacy,” Gardbaum includes the Netherlands and Luxembourg, but the presence in each system of a written constitution means that these might fall to be treated as qualitatively different. In that case, it would seem fairer to treat the United Kingdom as wholly *sui generis* and unsuited to useful comparison for any other system. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 715 (2001).

<sup>48</sup> Or, where the parliament Acts 1911 and 1949 are employed, only the Commons—though, of course, the use of this process brings with it new extra-institutional political obstacles.

<sup>49</sup> *But cf.* Nick Barber, *The Afterlife of Parliamentary Sovereignty*, 9 INT’L J. CONST. L. 144 (2011); AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 310–37 (2009).

constitutionalism with, in turn, the political constitution generally and the British constitution specifically,<sup>50</sup> goes some way to explaining the mistrust of the concept: Conventional wisdom holds that the executive dominates Parliament as a matter of course; thus, political constitutionalism within the political constitution is too weak to found meaningful limitations on the exercise of public power and must be augmented by legal limits.<sup>51</sup>

### J. The Insufficiency of the Political Constitution?

There are some problems with this critique of political constitutionalism within the United Kingdom's political constitution insofar as it suggests that limits that are merely political are *by virtue of their political nature alone* weaker than those legal limits that work to the same end. In fact, some of the relevant political limits can be very strong indeed, particularly where consideration is given to what I have here called *extra-institutional* but nevertheless *constitutional* limits: An executive that dominates Parliament has to have first formulated a program that is sufficiently appealing to the electorate in order to achieve a majority in Parliament or, where none is achieved, to allow for the construction of a coalition; but it must also retain the support of its own elected members (the Parliamentary party) and the cabinet, in particular.<sup>52</sup> All of these facts are political limits upon what can be achieved within the constitutional framework and, viewed in their totality, they usually constitute a significant hurdle—more so, certainly, than fearful talk of a “*complaisant* House of Commons” might suggest.<sup>53</sup> And where such political limitations as do exist show themselves to be insufficient in practice, it does not follow that they must be augmented by legal limits upon public power in order for that power to be meaningfully restrained. One might seek to impose more effective limits on the exercise of constitutional power without renouncing the institutional advantages ascribed to political limits: Why, for example, do legal constitutionalists not promote proportional representation or the reform of party funding as a solution their constitutional dissatisfaction? Why is the insufficiency of the political considered to be absolute, rather than system-specific and contingent?

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<sup>50</sup> That is, orders considered to be distinctive for the reason that, in final analysis, the only limitations are political.

<sup>51</sup> This idea has a long history and maintains a vibrant existence amongst the judiciary in particular. For Lord Hailsham's remarks on the creation of an “elective dictatorship,” see LORD HAILSHAM, *THE DILEMMA OF DEMOCRACY: DIAGNOSIS AND PRESCRIPTION* (1978). For the claim that this belief has motivated the evolution of principles permitting greater judicial scrutiny of executive action, see Jonathan Sumption, F.A. Mann, Lecture: Judicial and Political Decision-Making: The Uncertain Boundary (Nov. 8, 2011), available at <http://www.pem.cam.ac.uk/wp-content/uploads/2012/07/1C-Sumption-article.pdf>. Empirical work suggests, however, that the executive cannot take Parliamentary support for granted to the extent that this trope claims. See, i.e., PHILIP COWLEY, *THE REBELS: HOW BLAIR MISLAID HIS MAJORITY* (2005).

<sup>52</sup> Cabinet loyalty to the executive is, in large part, guaranteed by the doctrine of collective responsibility, whereby a member of the Government must publicly defend its policies or, if he cannot, must resign.

<sup>53</sup> *Jackson v. AG*, [2005] UKHL 56, [2006] 1 A.C. 262 (H.L.) [102] (appeal taken from Eng).

There is something quite remarkable about the fact that, when something approaching a consensus developed as to the need to curb the powers of majority governments at Westminster, the solution was found not in a set of reforms that would reduce the likelihood of strong majorities or empower Parliament to better hold the executive accountable, but in a set of legal rights on the basis of which legislative and executive action could be challenged, leaving the deeper constitutional problems largely unresolved.<sup>54</sup> The common law taste for incremental change and muddling through has denied the political mechanisms within the constitution the opportunity to effectively demonstrate that, suitably reconfigured, they could prevent the illiberal ends that human rights law is supposed to preclude, while at the same time improving the democratic quality of the system as a whole.<sup>55</sup> A political solution to the problems of elective dictatorship would be more thoroughgoing than is the liminal solution offered by human rights norms, as well as more easily legitimated within a democratic order. That it was not sought is in keeping with Unger's oft-quoted observation that a "discomfort with democracy" is one of the "dirty little secrets of contemporary jurisprudence."<sup>56</sup> It seems that a belief in the *a priori* superiority of law over politics, identified in the context of their supposedly distinctive rationalities, lingers within constitutional thought.

#### K. Informal Politics

Further, the denigration of the relevant political limitations focuses upon those that have been given formal existence. But, unlike legal limits, political limits arise from and function not just within well-defined institutions, but also through informal frameworks; limits which are outside the constitutional order strictly understood and so no part of what I am calling constitutionalism, but which must nevertheless be incorporated into an understanding of how power is limited and how those limits on its exercise might be strengthened.<sup>57</sup> So, in recent years, the need to achieve the tacit consent of certain

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<sup>54</sup> The exception is House of Lords reform, the completion of which is frequently opposed for exactly the reason that a fully elected Chamber will exacerbate the problems of insufficient accountability supposedly inherent in the operation of the House of Commons. This need not be the case; what is true is that to avoid this eventuality would require a fundamental rethinking of the relationship between Commons and Lords of a sort from which proposed reforms have generally shied away.

<sup>55</sup> In this sense, the project fails to stay true to Lord Hailsham, who declared the entrenchment of minority rights in the constitution the "the least important part of the whole package" he was recommending: the true evil, he declared, "lies not in an excess of democracy, but in too little," in accordance with which he also recommended a fully federal constitutional structure for the United Kingdom. See Hailsham, *supra* note 51, at 226.

<sup>56</sup> ROBERTO UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 72–73 (1996).

<sup>57</sup> The opposite is, of course, also true. Extra-constitutional political factors are as likely to permit or encourage the intensification of public power rather than its limit, directing its exercise to their own ends rather than providing a brake upon it.

newspaper barons to policy has demonstrated itself to be as effective a barrier to some policy aims as will be found within the formal political process: An observer concerned with the failure of politics broadly understood to temper the excesses of recent governments might, therefore, reasonably conclude that part of the answer to the problem lies in greater promotion of media plurality. An account of the insufficiency of the political constitution must be attentive to the multiplicity of its forms if the claim is to be substantiated.

Not only, though, does the idea of political constitutionalism as a political limit on public power flatten out the rich systemic complexity of actually existing constitutions and the practical difficulties associated with navigating that complexity, but its identification with the British constitution means that it resists generalization. It is to be remembered that not all constitutional orders take a parliamentary form, and that even where they do, not all are so frequently dominated by a single party executive.<sup>58</sup> The first-past-the-post system acts to enhance the peculiarity of a system that is already peculiar, to the extent that the only limits upon the Parliament are political.<sup>59</sup> There is, in short, excessive identification of political constitutionalism with British parliamentary democracy and a lack of consideration for those instantiations of political constitutionalism which are common to all democratic constitutions or are entirely alien to the British system: What might be described as the crypto-normative elements in Griffith's article has facilitated a process by which the rejection of the specific historical contingencies of the United Kingdom constitution has been understood as the rejection of the political constitution generally. The forms in which political institutions act to limit the exercise of public power are many and done a disservice by merely considering how likely the executive is to win any given vote in the Westminster Parliament. As a concept, political constitutionalism deserves this more generous consideration before it is either dismissed out of hand or deemed inferior to the implementation of counter-majoritarian mechanisms whose institutional nature is legal rather than political.<sup>60</sup>

#### **L. The Constitutive 'Moment' of Constitutionalism**

But many attempts to make sense of and critique political constitutionalism in this way are hampered by a more fundamental error; these attempts too readily accept a partial understanding of the concept of constitutionalism, treating one part of it—what we have

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<sup>58</sup> The current Conservative/Liberal Democratic coalition being very clearly exceptional when compared against 20<sup>th</sup> century trends.

<sup>59</sup> And the rather brutal failure of the ill-conceived Alternative Vote referendum in May 2011—by 67.9 to 32.1%—suggests that, regardless of whatever merits proportional representation in general, the first-past-the-post system is likely to remain in place for the foreseeable future.

<sup>60</sup> Of course, in the absence of a more proportionate electoral system, the sense in which exercise of power is founded on a majority in the first place might be called into question.

called its *limiting role*—as the whole. To concentrate on the limiting aspect of constitutionalism is to put the cart before the horse; to neglect the role played by constitutions in constituting, and then facilitating the exercise of, the very power which may then be limited.<sup>61</sup> Constitutionalism must be understood as relating also to this fact of constitution and facilitation of power if the specificity of its functional logic is to be understood.

Constitutions constitute the institutions through which the power to which they give existence is exercised. They identify what might otherwise be merely a building full of middle-aged men as a locus of public power and invest another such group with the authority to arbitrate disputes as to the true meaning of those enactments which put that public power to use. They make rules permitting the exercise of legislative and executive power: The former may be used to determine the specific content of the latter, as well as determine—in relation to private parties—the identity of those on whose behalf, and the conditions under which, public power will be deployed. They regularize instances of public power within a framework that provides it with legitimacy, while themselves deriving some minimum of legitimacy from the act of founding and/or the ongoing possibility of renewal and amendment.

Consideration of constitutionalism in this sense or senses (its constitutive and facilitative dimensions) must logically precede constitutionalism as limitation, though their effect is simultaneous: In the constituent moment, power is both brought into being and ‘locked down’ as one and the same action, subject to the limits which the constituent act—itsself without limit—places upon them. It is constitutionalism in this second sense that means that there exists a power, the limitations upon which we can now concern ourselves with.

### M. Constitutive and Facilitative Politics

In this constitutive sense, therefore, political constitutionalism refers to those processes, actors, and institutions which, formally or informally, are recognized by the constitution as part of the legitimate, constitutional exercise of power; they constitute power and identify it as “public,” permitting its exercise and providing fora for decision making and for the

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<sup>61</sup> Murkens recognizes this, summarizing the term as “shorthand for the creation, carrying out, and control of public power.” Murkens, *supra* note 1. He also quotes Turpin and Tomkins’ view of constitutionalism as an idea of “a constitutional order which acknowledges the necessary power of government while placing conditions and limits upon its exercise.” *Id.* at 431 (quoting COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION* 34 (2011)). Murkens calls this “ahistoric,” but for present purposes, the main problem is that it is too weak: If constitutionalism only acknowledges the power of government, then we are still left in need of an account of where that power comes from and why, and what particular form of it should be acknowledged. Better in this regard is Graham Gee’s suggestion that Griffith’s work on political constitutionalism should be understood as proposing “a political model of constitutionalism” which, like all such models, “must include an account of the norms creating, structuring and defining the authority of the governing institutions.” Graham Gee, *The Political Constitutionalism of J.A.G. Griffith*, 28 *LEGAL STUD.* 20, 28 (2008). See also LOUGHLIN, *supra* note 38, at 192–95.

identification of the individuals who will exercise it. In the United Kingdom, this would include the Westminster Parliament and its devolved counterparts, their internal rules and decision making processes, as well as the electoral rules by which they are populated: Without these features or equivalents, it would not be possible either for power to be exercised at all, or to identify legitimate exercises of public power. What is vital to the account being presented, however, is that these political process, which constitute and make possible the exercise of power, are not in some sense distinct or separate from those aspects upon which discussions of limiting constitutionalism focus; in fact, they are exactly the same processes as are considered under the heading of limitation, but here, they are seen in the light of the prior 'moment,' not as limiting power but as constituting it, regularizing its exercise so as to render constitutional what might otherwise be bare power. These processes and institutions are valuable both for their ability to solve coordination problems, but also for their ability to answer questions arising from what Waldron has called the circumstances of politics: The "felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be."<sup>62</sup> They satisfy the need to act—a need often neglected by those more concerned to prevent the state from acting.

#### **N. The Duality of Constitutionalism**

This dual nature of constitutionalism—the regularization of power, whereby it is both constituted and limited by the same apparatus—is of greater significance, however, than for its ability to ground calls for the necessity of taking a rounded view of the matter; it also permits the identification of the relevant limits to the process of analogizing which has seen, as noted, constitutionalism identified far beyond its original locus. This is because constitutionalism's duality distinguishes it from other, external limitations on power and gives such limitations as are governed by its functional logic a form of legitimacy within the system of power which is unavailable to external limitations upon that same power. Take, for example, the limitations on individual conduct which derive from the criminal law. Here, the strictures which exist upon conduct have no role in constituting the power upon which they act—they are external and experienced as such by the individual, acting to disincentivize conduct from which the individual might otherwise have no reason to refrain, over and above that which his status as a moral agent serves to exclude. They exemplify the possibility of an external limitation, one which is not imposed as part of the process of constituting the power upon which it acts. The opposite is not true, however: Though there can be limitation without constitution, there cannot also be constitution without limitation. The very act of constituting power—regularizing its exercise in certain forms—implies that the power may be exercised only within the framework which makes it possible; to institute the power to do *x* through law is to place a limit on attempts to do *y*,

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<sup>62</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* 102 (1999).

or to do *x* other than in accordance with the procedures laid down. The exercise of constituent power cannot but result in a power which is constrained.

To repeat then, the distinctive feature of constitutionalism—the concept exemplified most obviously by the working of a constitution—is its dual nature, whereby the mechanisms which constitute power, that bring it into being and render its exercise possible, are one with those which limit it, determining the mode of and limits to its permitted exercise. The truth of this account is self-evident, it is submitted, in the context of written constitutions which act as the source of the authority of the various institutions of public power to which they give existence. It is, however, more difficult to square with an order in which no moment of simultaneous constitution and limitation is identifiable: Nothing which reflects, however palely, the contractarian model that the Framers, so Lockean in outlook, employed in the ratification of the constitution under which they were agreeing to live. In the context of the United Kingdom, then, this proposition as to the necessary duality of constitutionalism is problematic: The exercise of constituent power to which, elsewhere, the written constitution stands as a testament, is not identifiable there. We cannot point to any act or document that gave or gives to the Crown-in-Parliament the legislative power which it undoubtedly possesses: The analogy with a model such as the United States Constitution, Article 1 Section 8 of which, for example, grants Congress certain ‘enumerated powers’—areas of activity in which it is explicitly permitted to legislate—breaks down. At first glance, this lacuna implies that the absent (written) constitution excludes the possibility of a systemic constitutionalism. This is not the case: The recognition by the courts of the legislative authority of Parliament is itself sufficient to constitute Parliament as the law-making body within the United Kingdom.<sup>63</sup> And, as suggested above, this constitution of power is simultaneously a limitation of power: By recognizing an Act of Parliament as the highest form of law, the courts rule out the possibility of that power being exercised in any lesser form. As would be expected in the archetype of the political constitution, the relevant limit is weak as compared with substantive, usually rights-based, limitations, but it nevertheless exists. And if it turns out to be, or becomes, true that Parliament is not sovereign in the old sense, but in fact legislates subject to certain fundamental common law rights, then alongside the inevitable procedural limit, we will be able to number various substantive limits.<sup>64</sup> In the meantime, the political institutions through which public power is exercised provide their own limits: The power recognized to the Crown-in-Parliament limits legislative competence to situations in which both Commons and Lords assent or the Parliament Act procedure is employed. That these limits are not stronger is not, we have suggested, a function of their political nature: Reform of these institutions and their processes might strengthen the

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<sup>63</sup> This is the Hartian rule of recognition, the allegiance to a particular political fact which must prevail amongst officials within a legal system must be agreed. H.L.A. HART, *THE CONCEPT OF LAW* 94–110 (2d ed. 1994).

<sup>64</sup> The most obvious candidate is the right to administrative justice in the form of judicial review. See, e.g., *Jackson v. AG*, [2005] UKHL 56, [2006] 1 A.C. 262 (H.L.) [102] (appeal taken from Eng.)

limits on the exercise of power without shifting the balance any further away from the political than reforms such as the Human Rights Act have already done.

### O. Constitutionalism and Public Power

We have noted that the spread of constitutionalism discourse has taken it outside of its original context—the use of and limitation on public power—and that this development seems to threaten the coherence of the concept by putting it to work in a context in which the analogy may not hold. The foregoing discussion gives reason to believe, however, that the question of public-ness is not determinative of the effective limits of the analogy; it is not the case that public power can be described in the language of constitutionalism while that which is private cannot. Instead, it is the necessary duality of constitutionalism that determines the limits of the concept's application elsewhere, and the breadth of the analogy based upon it. Only where the same framework both constitutes and limits do we strike at the heart of what makes constitutionalism distinctive. A framework which does both—as does the traditional constitution of the nation-state; the treaty of a supra-national organization such as the European Union; or even the 'constitution' of many private organizations—is amenable to description in the language of constitutionalism insofar as the power therein constituted encounters limits which it gives to itself. On the other hand, any limitation on power experienced as external to the system which constitutes it is not, on this account, usefully described in the language of constitutionalism—it misses this necessary duality and the legitimacy which limits on power derive from their 'internal' status. This is not to say such limitations cannot be good or normatively desirable—theories of societal constitutionalism in particular tap into an important insight about the location of effective power in modern society and the means by which the misuse of that power is to be resisted<sup>65</sup>—but limits are not a good in themselves: In current circumstances, the problem of government from the point of view of the average citizen is often not that it will over-reach, but that it will be overly restrained. In particular, limitations which derive from economic forces which resist and restrict the exercise of public power from outside it are not to be celebrated nor to be described in the language of constitutionalism; their principal orientation is to prevent public power from being exercised for the public good.<sup>66</sup> The indiscriminate application of the language of constitutionalism to public power has the unfortunate effect of legitimating the inability of public power to disturb certain hegemonic interests.

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<sup>65</sup> See *supra* text accompanying note 10.

<sup>66</sup> The concept of economic constitutionalism has also been used to describe a separate phenomenon, whereby economic matters are determined at the constitutional level, rather than as part of the ordinary law. This, too, evinces a laxness in the use of the terminology.

## P. Constitutionalism in a Multi-layered System

This conclusion has certain consequences too for discussions regarding constitutionalism in a system of multi-layered governance, in which there are multiple points of constitution and limitation. If it is correct, as I suggest, that constitutionalism is exemplified only where the framework which limits is identical with that which constitutes the very power being limited, then where the constitution of power at one level in a multi-layer system acts to limit its exercise at another one, the limit is experienced as an external one. It is the work of the constitution, but not subject to the specific functional logic that gives constitutionalism its distinctive nature and upon which its legitimacy depends. So, for example, the European Union treaties bring into existence a supra-national institution of vast power. Nevertheless, that power is not without limit, and the treaties set boundaries for what the Union can and cannot do. The same instruments which constitute it also limit it; these limits are internal to the framework and so the requisite duality of constitutionalism is evident. Elsewhere, however, constitution and limitation are detached, and the 'constitution' of the EU acts to limit the power of those nation-states which through their collective action brought it into being—if not by merely existing, then at least following the articulation by the European Court of Justice of the various constitutional principles, which are necessary in order to make sense of the relationship between domestic legal orders and the "new legal order" that is EU law.<sup>67</sup> These new limits on the exercise of power by member states, however, do not result from the very constitution of power at their own level, but from a separate 'higher' exercise of constituent power by member states acting jointly. Deriving from a supranational order, from an act of constitution other than that which creates the power being limited, they are experienced by the domestic order as alien and therefore potentially as illegitimate. Despite being subject to the logic of constitutionalism in one system, they lack its legitimating cover when considered from within another. The definition offered in this way explains some of the inter-systemic tensions which are characteristic of law in a globalized world.

## Q. Politics and Law

### *I. The Exclusionary Approach*

In light of this augmented account of what is distinctive about the concept of constitutionalism, it falls to reconsider the relationship between its political and legal variants, from which consideration of the concept began. Those accounts which predominate contrast one aspect of the constitution to another, talking not of the marriage of the political and the legal within the constitution, but instead contrasting the one to the other. The issue is framed in terms of the political *versus* the legal.<sup>68</sup> This kind of

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<sup>67</sup> Van Gend en Loos v. Nederlandse Administratie der Belastingen, CJEU Case C-26/62, 1963 E.C.R. 1.

<sup>68</sup> See, for example, BELLAMY, *supra* note 17, and TOMKINS, *supra*, note 17.

exclusionary understanding—exclusionary in the sense that the fact of being legal is presented (explicitly or implicitly) as a denial of the political—derives not merely from the partial approach to constitutionalism previously mentioned, wherein the (limiting) part is mistaken for the whole, but from a second and related error, whereby the rich variety of the limits which exists is reduced down to the categorizing question of who within the system has the ‘last word,’ i.e., is the final limit upon the exercise of power one which is legal or one which is merely political, and in the event of a clash between political and legal actors, which will triumph? It is a logically heightened version of a variety of a zero-sum approach to constitutionalism, whereby the greater the political element, the lesser the legal (and vice versa), but with both nevertheless present.<sup>69</sup>

This dichotomy in its strictest form pits against each other models based upon the constitution of the United Kingdom, which we have previously described as lacking formal codification and not resulting from any exercise of constituent power, against the post-enlightenment model of codified documents enacted in the name of the people, which explicitly fulfill both the constitutive/facilitative and limiting functions previously alluded to. In the former, the absence of formal legal limits (rights-based) or otherwise, results in what Gardbaum has described as legislative supremacy where, traditionally at least, the last word belongs to the Crown-in-Parliament and no distinction between constitutional and ordinary norms is recognized.<sup>70</sup> In the latter, the last word goes to the constitution as interpreted by the courts, a model replicated throughout the world ever since, with particular growth spurts as part of the de-colonization movement and subsequent to the fall of the Soviet Union. The laws enacted by the political organs are valid only insofar as compatible with the courts’ interpretation of the constitutional text and so the last word goes to a legal rather than a political institution. On the exclusionary approach, each order falls into either one or the other category and each constitution is either political or legal.<sup>71</sup> The rise of the ‘New Commonwealth Model’ and other forms of so-called “weak review” challenge this dichotomy but can be reconciled within it to the extent that even where a

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<sup>69</sup> The terminology of the zero-sum game in this context is used by Graham Gee. Gee, *supra* note 61, at 21, 29 (citing Ian Leigh, *Secrets of The Political Constitution*, 62 *MOD. L. REV.* 298, 308 (1999)).

<sup>70</sup> Such account is, it is submitted, still accurate in its generality, but must be made subject to a now-familiar series of caveats regarding the possibility that sovereignty is not the exclusive province of the Parliament but is instead bipolar (*e.g.*, Sir Stephen Sedley, *Human Rights: A Twenty-First Century Agenda*, 3 *PUB. L.* 1995, 386, 389); that Parliament’s legislation is controlled by rule of law requirements emanating from the common law (*e.g.*, Jackson v. AG, [2005] UKHL 56, [2006] 1 A.C. 262 (H.L.) [102] (appeal taken from Eng.)); and that the traditional account has been rendered invalid by the decision in *Factortame (no. 2)*. R v. Sec’y of State for Transp. *ex parte* Factortame Ltd. [1991] 1 A.C. 603 (appeal taken from Eng.). It is further complicated by the decision in *Thoburn v. Sunderland City Council*, [2003] Q.B. 151 (Eng.), in which Lord Justice John Laws posited a category of ‘constitutional statutes’ to which ordinary rules of implied repeal do not apply.

<sup>71</sup> These are the two poles Gardbaum considers to have been shown as not exhaustive by the ‘New Commonwealth Model.’ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *AM. J. COMP. L.* 707 (2001).

relatively dialogical model is chosen, someone within the system must have the last word in the case of a dispute.<sup>72</sup>

## *II. The Compatibilist Approach*

On the basis of the overview provided above, however, and the concept of constitutionalism proffered there, we can reject this dichotomy and suggest instead a compatibilist account, which rejects both a zero-sum and exclusionary understanding. If politics and law are the two parts of every constitutional whole then each constitutional order will evince a mixture of political and legal institutions and processes in both the constitution of power and in its limitation—in short, the constitution is by definition an instrument which functions through the simultaneous leveraging of institutions and processes having a political and a legal character. This stipulation is true at least in the case of a democratic constitution: While it is possible to conceive of a constitution which makes no space for institutionalized politics in facilitating and limiting the exercise of constitutional power—though the fact that law is not self-executing necessitates a thin, hollow form of politics, of the sort visible in one-party regimes—it is not simultaneously realistic to exclude the law and still declare what is found there a ‘constitution.’ Without law to fulfill the functions Hart identified for his secondary rules, it is difficult to determine which power is constitutional and which is not, as well as who is to exercise it.<sup>73</sup>

Accordingly, this account suggests that what is sometimes presented as a choice is better understood, at least where the democratic imperative is accepted, as a kind of perspectivism: When we talk about legal constitutionalism or political constitutionalism, we simply mean the constitution seen from a certain angle, one which renders visible or makes prominent the political aspects, but which does not seek to deny the existence of the legal, or vice versa—it is a matter of relative emphasis and no more. A political constitutionalist is nothing more than one who focuses upon or esteems most highly the political aspects of the order and desires, perhaps, that the balance of competencies within any given order be slanted as far as possible in favor of its political institutions, accepting all the while that the legal coexists with the political and as such cannot be entirely eliminated. What we end up with is a non-rivalrous conception of the political and the legal which sees them as necessarily compatible and which is consequently very difficult to

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<sup>72</sup> For accounts of weak review, see Mark Tushnet, *Weak-Form Judicial Review and “Core” Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1 (2006), with emphasis on pages 3 through 11; MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2009). The New Commonwealth Model has been identified by Stephen Gardbaum. Gardbaum, *supra* note 70; Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT’L J. CONST. L. 167 (2010). On dialogic models of constitutionalism, see Peter Hogg & Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights isn’t Such a Bad Thing After All)* 35 OSGOODE HALL L.J. 75 (1997), and, for a recent survey of the topic, Yap Po Jen, *Defending Dialogue*, PUB. L., Jul. 2012, at 527.

<sup>73</sup> HART, *supra* note 63, at 79–99.

translate into the language of 'the legal/political constitution,' with its exclusive and totalizing connotations.

### *III. All Politics Is Law*

These two perspectives—compatibilist and exclusionary—do not, though, exhaust the potential accounts of the relationship between legal and political constitutionalism. A third suggests itself: One which paints the relationship in a very different light, as something unstable and eternally unresolved; as something approaching an infinite regress; a spiral in which each of politics and law continually reasserts itself over the over, without ever achieving a final resolution.

Consider what we have said are the key political aspects of a liberal democratic constitution, remembering that we are working from an institutional definition of politics within the constitution. Among these, we might start from the need to convince the electorate to vote for your party in sufficient numbers and to achieve a majority in however many chambers of parliament. Institutionally, these are very much political and to the extent that they constitute and limit the exercise of power, there seems nothing controversial about highlighting what is found here as an example of political constitutionalism. And yet the picture is complicated by any inquiry into what it is that governs these political aspects? Where do we find the rule that in order to become the elected representative of any given constituency, an individual must receive a plurality of votes? It is a rule of law.<sup>74</sup> Similarly, what is the source of the rule that a bill must receive the consent of the House of Commons (along with that of the Monarch and Lords) in order for it to become an Act of Parliament? That too is a rule of law.<sup>75</sup> And, consequently, the specific political hurdles which need be overcome if a bill is to become law can be altered by law.<sup>76</sup> It is the law which frames and imposes the specific political requirements which must be met in order for one to exercise power constitutionally and therefore, to the extent that political constitutionalism takes its specific requirements from the law, all constitutions are legal. This is not to say that other political requirements do not exist

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<sup>74</sup> Representation of the People Act 1983, c. 2, sch. 1, para. 50 (Eng.).

<sup>75</sup> See, for example, *The Prince's Case*, [1606] EWHC (Ch) J6 (Eng.): "If an Act be penned, that the King with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament for three ought to assent to it scil. The King, the Lords and the Commons." The extent of the investigation that courts will undertake into the process by which legislation was enacted is, however, limited by the enrolled bill rule, as adopted in *R v. The Countess of Arundel*, [1616] EWCH (Ch) J11 (Eng.), and confirmed in *Edinburgh & Dalkeith Railway Co. v. Wauchope*, [1842] UKHL 710 (appeal taken from Eng.), where it was stated by Lord Campbell that "All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode of its passing."

<sup>76</sup> The Parliament Acts 1911 and 1949 permit a bill to become "an Act of Parliament," notwithstanding that it has never received the consent of the House of Lords. Parliament Act 1911, 1 & 2 Geo.5, c. 13 (Eng.); Parliament Act 1949, 1 & 2 Geo.5, c 13 (Eng.).

within a system—merely that those which are formalized owe their formalization to law and so even the political is in that sense legal. This is visible in the way in which Acts of Parliament determine the length of a Parliament,<sup>77</sup> the means by which the two Houses are populated,<sup>78</sup> and even the means by which they can legislate.<sup>79</sup> That Parliament—the principal political institution within the UK’s constitution—governs itself is clear: “Both Houses retain the right to be the sole judge of the lawfulness of their own proceedings [under the doctrine of exclusive cognizance] and to settle—or depart from—their own codes of procedure.”<sup>80</sup> It does so, however, according to rules, and within limits, laid down for it by law—by (Crown-in-) Parliament itself. The constitution and limitation of public power through the political process in any given order is underpinned by law, and everything which is political is to that extent legal.

From this point of view, neither our compatibilist nor zero-sum approaches seem to adequately describe what we are seeing. We are left with a vision of a constitution made up of a mixture of politics and law where the political is, under the surface, similarly legal. Its framing effect, once understood, reveals law to be the dominant feature of all constitutionalism, even that which is superficially political.

#### *IV. All Law Is Politics*

Except that such a fillip might be just as convincingly executed in reverse: All law might be shown to be itself derivative of politics. Take the core case of legal constitutionalism, whereby an entrenched right limits the legitimate province of action of the political organs. This is a legal limit and yet it is not eternal; in almost all cases, such rights will be subject to amendment, whether by some sort of supermajority<sup>81</sup> or on the basis of a process which builds in a delay so as to frustrate amendment motivated by short-term passions.<sup>82</sup> Stepping back, we see that the democratic will prevails eventually, when expressed through the correct political mechanisms and processes. We are limited by law, but the

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<sup>77</sup> *E.g.*, Fixed-term Parliaments Act 2011, c. 14 (Eng.).

<sup>78</sup> See, for example, Life Peerages Act 1958, 6 & 7 Eliz.2, c. 21 (Eng.); Parliamentary Voting System and Constituencies Act 2011, c. 1 (Eng.).

<sup>79</sup> See, again, the example of the Parliament Acts 1911 and 1949. Parliament Act 1911, *supra* note 76; Parliament Act 1949, *supra* note 76.

<sup>80</sup> ERSKINE MAY: PARLIAMENTARY PRACTICE 227 (Malcolm Jack et al. eds., 2011).

<sup>81</sup> As in Article 5 of the U.S. Constitution which lays down a mix of two-third and three-quarter super-majority requirements for the proposing and ratification of amendments. U.S. CONST. art. V.

<sup>82</sup> Scholars have long considered the question of whether some amendments might in fact be unconstitutional and therefore not possible without overhauling the entire order. For examples of such doctrines as developed in Ireland and India, see Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006).

continued existence of those legal rules is contingent upon a failure to mobilize the necessary political processes against them. It is in this sense in which politics wins out in the long run—our political will is limited by law, but the law can be changed by a sufficiently determined political will. Ultimate popular sovereignty is maintained even where in the short term the constitution is supreme and so, in this sense, all law is founded upon the exercise of political power, including, in the last resort, a return to the radical openness of constituent power—the only form of political power not subject to pre-defined limits, either legal or political. This fact also explains the political constitutionalist attitude towards the idea of legal rights as the primary mechanism for the protection of the individual against an overbearing state—those legal rights are available in law only until the view that they be removed wins out within the political process. The continued presence, for example, of the UK's Human Rights Act 1998 is contingent upon no government possessing sufficient political capital to pay the price (at home and abroad) of repealing it. Those who wish to see rights protected, therefore, are obliged to concern themselves, in the final analysis, not with what the courts are doing, but with the political process.

#### **R. The Intertwining of Law and Politics**

The legal and political in any given constitution are therefore not merely compatible and certainly not mutually exclusive, but in fact frame and depend upon each other; institutionalized politics is given its specific form by law, while that law itself is the contingent outcome of political processes. The legal and political thus co-exist within the constitution but in an unstable form. Each threatens constantly to collapse into the other when viewed through a wider lens, or over a longer time span: Where we see one, we need only rub our eyes for the other to come into view once again. An institutional account of the political and the legal, preferred for its ability to give the distinction a certain objectivity, demonstrates that, as formalized, politics and law are mutually dependent, so as to take their relationship beyond mere co-existence. It therefore precludes the possibility of ever discussing one or the other as a discrete phenomenon. The law is the product of, and can be changed by, the political institutions; what laws those institutions can make, and the requirements which must be met to do so, is in (re)turn determined by law. The status of the constitution as a dualist phenomenon is reaffirmed and the legal and political constitutions reconnected.

#### **S. Law, Politics, and Constitutionalism**

This second conclusion—as to the mutual framing of law and politics within the constitution—is not, however, additional to our first—that of the necessary duality of the concept of constitutionalism—but can be seen merely to restate it. In both of its aspects—constitutive and limiting—law contributes to the existence of constitutionalism in a manner which is determined by the outcome of a political process, while the formalization of the political process is an artifact of law and subject to amendment by law. The truth of

this proposition extends to all those situations, but *only* those situations in which the limits that exist are examples of what we have called constitutionalism—wherever the limits on public power are imposed by the same instruments which constitute that power. Where they are not, it is no longer true that we can re-configure the institutionalized forms of politics by changing the law, nor can we remove these legal barriers through an appropriate political mobilization. So, to return to the example of the European Union, the domestic law of the United Kingdom cannot alter the political institutions of the Union, nor can British politicians acting unilaterally alter the legal limitations placed by the Union upon the exercise of public power at the domestic level. That those limits are external to a given constitutional order gives them, from the perspective of that order, a stability which its own limitations lack; not being examples of constitutionalism, they are not just alien to it, but unreachable. One system's politics cannot change the other's law; neither can its law change the other's politics. At most, one system can seek to detach itself from the other and attempt to arrive at a situation where the only limits are self-imposed, where constitutionalism is (once again) the sole functional logic.

#### **T. Conclusion**

Constitutionalism is, in sum, a dualist phenomenon involving the simultaneous constitution and limitation of power which, where it exists, brings with it a highly particular melding of the legal and the political. One should take care not to use too freely the language of constitutionalism where its specific functional logic does not prevail, at risk of offering legitimation to phenomena which must seek it elsewhere and of ignoring the means by which different systems interact. Law and politics co-exist within every system, but interact in a highly particular fashion—each frames and is contingent upon the other—wherever there takes place the simultaneous constitution and limitation of power which defines constitutionalism.