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Constitutionalism: A Critical Appreciation and an Extension of the Political Theory of C.H. McIlwain

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I. INTRODUCTION

The reputation of constitutionalism has not remained unsullied over the past several decades for reasons both theoretical and practical. For one thing, there has been a major shift in the dominant concerns of political analysis in the West. Institutional analysis has generally given way to behavioral analysis, and it is now said that the real forces governing political processes are economic, social or even psychological. From this perspective, laws and constitutions are not without some influence on patterns of human behavior, but they are basically pawns, exploited by and operating in the service of other more determinative factors of human intercourse. In this sense, constitutionalists are either hypocrites or, if sincere, miserably lacking in realism.

For another thing, the political situation of the last 50 years has led the man of practical politics to seek out alternatives to constitutionalism. Constitutionalism, despite its long and venerable history, has been identified with the idea of a *laissez faire* state, a state which governs best by governing least, by doing only what is absolutely necessary to maintain peace and order and by permitting wide scope to freedom of individual and group action. But as such, so it is urged, constitutionalism cannot cope with the political needs of the twentieth century. The twentieth century is a time of massive organization, big power and complex technology which requires big government for the sake of social control. It is a period in which national emergencies and problems of security are part of the normal course of events. It is an epoch of social, economic and political development in which governments are called upon to use direct and forceful means to manipulate, mold, transform and direct the

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energies and activities of the people. It is, in brief, an era in which it seems necessary to press for centralization in government, for an increase in bureaucratic organization and control in public administration, for secrecy and security in governmental operation, for strength in positions of authority and obedience among the citizenry. It is not a time that can afford the luxury of weak, constitutional government.

Despite these strong countervailing tendencies, however, constitutionalism has not been without its champions, as evidenced in the writings of Carl Friedrich, Edward S. Corwin, Friedrich A. Hayek and, the man with whom this essay is concerned, the recently deceased Charles Howard McIlwain. Of course, these writings might possibly be construed as anachronisms or as the deathbed outbursts of an outmoded philosophy, except for two factors: first, the very stature of these men as scholars and theorists, and second, the fact that constitutionalism appears to be coming back into its own in some of the more recent expressions of modern political analysis. So, for example, it has been employed as an ideal type (in a Weberian sense) in empirical political theory;[1] it has been presented in substance, if not in name, as the final stage in a theory of political development;[2] and it has been proposed, again at least in substance, as of normative importance to contemporary political construction.[3]

This essay is prompted by both of these factors. Its primary purpose is to construct the basic form of C. H. McIlwain's notion of constitutionalism in its normative aspect, a dimension of his thought that, apparently, has never been subjected to systematic treatment either by McIlwain himself or by anyone else. But given his scholarly stature and his efforts to keep alive the idea of constitutionalism while its reputation was being disparaged, it is a dimension that deserves attention. In addition, given recent trends in modern political analysis, a second purpose of the essay is to suggest a recasting and extension of McIlwain's notion to increase its relevance to contemporary concerns and modes of thought.

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1. D. APTER, THE POLITICS OF MODERNIZATION (1965); J. NETTL, POLITICAL MOBILIZATION (1967).

2. G. ALMOND & G. POWELL, JR., COMPARATIVE POLITICS: A DEVELOPMENTAL APPROACH chs. X & XI (1966).

3. K. DEUTSCH, THE NERVES OF GOVERNMENT 254-56 (1966); W. LEWIS, POLITICS IN WEST AFRICA (1965); M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS especially ch. XII (1967).

Charles Howard McIlwain was both historian and political theorist. In his case this was a fruitful combination. He viewed political realities and political conceptions within their actual historical context and as having a past, present and future, and yet he had a particular political focus, indeed an openly avowed preferential bias, in his historical searchings. Thus while his historical writings are careful, cautious and scholarly, they are at the same time vigorous and lively at least partly because he understood historical scholarship as having contemporary relevance. His research into the past was that of a man concerned with the present. The issues of times gone were of crucial importance because of problems of the present.

In political matters, McIlwain was, of course, a constitutionalist. Constitutionalism was both the *leitmotif* of his historical and theoretical studies and the object of his polemical writings. But constitutionalism was not, in McIlwain's mind, a universal mental construct, a clear and distinct idea or a category with definite and absolute perimeters. His 1938-39 lectures[4] and his classic work on political theory, *The Growth of Political Thought in the West* (1932),[5] are evidence that, to McIlwain, constitutionalism is an historical conception; or, more accurately, constitutionalism is itself a history, a developmental process. Thus, to understand constitutionalism is to understand an historical process, with all of the attendant difficulties and uncertainties.

To say that constitutionalism is an historical process is to say that it is a style, a mode, a direction in the pattern of government. New times create the possibility for new insights into and novel understandings of the meaning of constitutionalism. Constitutionalism is a tradition in the proper meaning of that term. It is not tradition in the sense of something fixed once and for all in times past, to be retained in its pristine form, permitting of no change and not the slightest qualification. It is rather tradition in the sense of a living, usable, adaptable heritage.

In this way constitutionalism is, perhaps not surprisingly, comparable to the common law of the Anglo-American legal tradition, at least as the common law has been conceived by the jurist. The common law lawyer eschews black-letter law pre-

4. C. McIlwain, Constitutionalism: Ancient and Modern (Rev. ed. 1947) [hereinafter cited as CAM].

5. C. McIlwain, The Growth of Political Thought in the West (1932) [hereinafter cited as GPT].

cisely because he understands law to be a process. The attempt to define the law or some area of the law once and for all is a mistake, if not a subversion of the judicial process, for the content of the common law grows and changes. The doctrine of stare decisis, within this understanding, is a counsel of caution and a principle of fairness and not an iron band of mechanical jurisprudence. However, the factor of change and growth does not mean that there is no reality or substance to common law. It means only that the boundaries are fluid, not fixed; that definitions are *pro tempore* and not *in aeternum.* What the law is cannot be said with perfect assurance a priori, for what it is depends in part upon the peculiar circumstances of the instant case. Thus, the search for certitude and predictability in common law is futile.

Constitutionalism as history and as tradition is much like the common law, and new circumstances will require new formulations. That is why, given the spirit of McIlwain's approach, it is valuable once again to inquire about the meaning of, and justification for, constitutionalism in a time of radical political change and acute political crisis.

But, if the meaning of constitutionalism changes and shifts with the times, how is one to recognize it? Is the term empty, purely formal, to be assigned any meaning one wishes? Is there no constancy or continuity in its possible usage to make it useful for purposes of communication and political construction?

As McIlwain employed the term, there is an *essential core of meaning*, a dimension that persists through all the changes, a minimal continuity that gives intelligible form to the tradition: "in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government."[6] The key term, "limitation," recurred throughout McIlwain's writings. Thus "[a]ll constitutional government is by definition limited government."[7] And elsewhere, "[c]onstitutional government is and must be 'limited government' if it is constitutional at all."[8] Moreover, the limitation of government is a limitation by law. The law establishes a line beyond which it is improper for government to intrude. It circumscribes an area that is to be free from governmental action. It establishes definite terms of

6. CAM, *supra* note 4, at 21.
7. *Id.*
8. C. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 244 (1939) [hereinafter cited as CCW]. This book is a collection of essays published elsewhere during the years 1913-37.

proper political rule. But, it must be noted, the terms are negative just as the core definition of constitutionalism is basically negative. The terms indicate not what government must do, ought to do or may do. Instead, they indicate what government may *not* do; they set the limit to governmental action.

At this level of definition, there is virtually no difference between McIlwain and Friedrich, Corwin or Hayek. These four theorists do differ significantly, however, on questions of which economic structures and political forms are compatible with or necessary to the fulfillment of constitutionalism. For example, Hayek's argument that constitutionalism is clearly inconsistent with socialism, the welfare state and the administrative state is not shared by the other three. And McIlwain's strong reservations about the compatibility of constitutionalist government with the doctrines of separation of powers and checks and balances are not found, at least in nearly the same degree, in the writings of Corwin, Hayek or Friedrich. But on the most elemental level, all four understand constitutionalism as the antithesis of autocracy and tyranny and as consisting of effective legal restraints on government action.

II. THE HISTORICAL DEVELOPMENT OF CONSTITUTIONALISM

But this definition of constitutionalism as a legal limitation on government is a minimal one. The more complete outlines of McIlwain's conception emerge only after consideration of those successive historical stages of constitutionalism that he isolated and studied. It should be emphasized that the purpose in characterizing these stages below is to isolate only what appeared to be important to McIlwain. The actual historical or logical adequacy of the delineation of each stage is relatively unimportant.[9] Whether Plato can indeed be interpreted as McIlwain interpreted him is much less significant here than the interpretation itself. Thus, while I shall first set forth the gravamen of his five successive stages of constitutionalism, this is only to provide the foundation. The outlines of McIlwain's own normative conception of patterns of political existence may thereafter be constructed.

9. Incidentally, McIlwain observed that "[t]he history of constitutionalism remains to be written," (CAM, *supra* note 4, at vii), thus in effect conceding the incompleteness and inadequacy of his own historical sketches.

This procedure raises a host of methodological questions about the relation of history and theory, fact and value, and the like, whose consideration is out of place here given the limited purposes of this essay. The procedure is adopted because it seems to have been a basic assumption of McIlwain's work. That is, the principles that informed his normative, constructive and polemical writings rest on historical bases. Whether the disproof of an historical conception would perforce require an alteration in normative stance is a nice puzzle, but a puzzle with which McIlwain unfortunately did not deal.[10]

A. Ancient Constitutionalism

McIlwain used the term "ancient constitutionalism" to refer variously to Platonic and Aristotelian, to Greek and Roman, and exclusively to Roman conceptions of constitutionalism. For purposes of clarity, I am reserving the term to refer only to his rendering of Plato's political thought. However, it is only with some hesitation[11] that McIlwain discovered a kind of constitutionalism in the works of Plato.

Plato was greatly concerned about the proper relation between government and law. His initial judgment, recorded in the *Republic*, was to reject law and, therefore, to reject constitutional government. The reason is clear and has a familiar and modern ring to it.

> For laws by their definition are *general* rules: their generality is at once their essence and their main defect, because generality implies an average, and such rules can never meet the exceptions that are always arising, as can the unfettered discretion of an all-wise ruler. At best these rigid rules are a rough make-shift far inferior to the flexibility of that wisdom which alone meets the test of true justice, by rendering unerringly to *every* man *his* due, not the due of some "average man" who never existed nor can exist.[12]

Men differ, circumstances change, the actions of individuals and societies are irregular. How can justice be done if a government is constrained by laws, which by their very nature are general? This is exactly the kind of question that led Locke to provide for discretionary power in government.[13]

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10. A similar issue, formulated in terms of the relationship between faith and history, has been widely argued in the Western theological tradition. It is an issue that is crucial in any theology or theological ethics that is presumed to rest on a scriptural base.

11. *See* CCW, *supra* note 4, at 246-47.

12. GPT, *supra* note 5, at 27.

13. J. Locke, The Second Treatise on Civil Government ch. XIV, "On Prerogative" (T. Cook, ed. 1947).

Even recently, a similar view provoked Samuel H. Beer, a modern political scientist, to assert at the conclusion of a conference on "government under law" that rule of law imposes

> the crude generalities of law upon this infinitely various, complex, shifting, changing, human material of society where each individual is not a case under a general rule, no matter how complicated you make the rule, but an individual.[14]

Thus Beer urged that rule of law be supplemented by "personalism," "meaning by this the existence of wide opportunities for judgments which do not follow strictly from the existing rules, but which serve justice by considering the exceptional circumstances."[15] And it is the same basic judgment that permeates Georg Cohen's thesis "that all real Law (*wirkliche Recht*) is bound to the moment, and must result from a judgment on the concrete situation, and cannot be found through analysis of one or more laws (*Gesetze*), juristic concepts or principles."[16]

Thus, from a Platonic view, the perfect political order is that in which an all-wise, all-good man makes decisions, formulates policy and solves disputes by attending to the particular circumstances at hand, and thus he must be granted absolute discretionary power.

But, according to McIlwain, Plato was abundantly aware of the problems inherent in such a proposal. Where is one to find an all-wise, all-good man? Who can be trusted to do justice in every circumstance without any guidance save his own wisdom and benevolence? What is to assure that discretion will always be used for the common good of the society and the particular good of the citizen? Under the authority of an all-wise man, despotism—that is, rule by unhampered discretion—is the best form of government. But in the absence of an all-wise man, unlimited discretionary power would result in the worst possible form of government. Thus Plato, according to McIlwain, "while admitting that the rule of law is inferior as an ideal to the unhampered justice of a true philosopher, is led to make it the necessary basis of all good forms of actual government and by its presence or absence to pronounce them good or bad."[17] While law, because of its generality and its rigidity, does not yield perfect justice, it may nonetheless be an imitation of perfect justice, and preferable to the sheer arbitrariness of ignorant and

14. Comment by S. Beer in GOVERNMENT UNDER LAW 545, 549 (A. Sutherland ed. 1956).
15. *Id.* at 548.
16. G. COHN, EXISTENTIALISMUS UND RECHTSWISSENSCHAFT 5 (1955).
17. GPT, *supra* note 5, at 28.

vicious men. It is in this sense that Plato espouses a form of constitutionalism as the only decent *viable* pattern of political existence.

At this stage in McIlwain's conception, constitutionalism means government of law, or more precisely, government according to general rules that approximate some ideal of what is good and proper. There are thus two forces of ancient constitutionalism: legal rules and moral ideals. The antithesis of ancient constitutionalism as found in Plato is arbitrariness, absolute discretionary power and absence of standards.

But ancient constitutionalism is defective in three respects. It fails to distinguish clearly between society and the state, so that there is in principle no human activity that is beyond governmental rule. It fails to provide any remedy short of total revolution when government itself violates the rule of law. And its standards of good government, even though they are a measure of the relative worth of political forms, do not in themselves possess the binding or obligatory character of law and are therefore ineffectual in disputing the legitimacy or authority of government.

B. Roman Constitutionalism

To some extent these deficiencies are overcome in Roman constitutionalism. The difference lies in the definition and the implications of natural law. "True law," wrote Cicero, "is right reason consonant with nature, diffused among all men, constant, eternal."[18] This means that the foundation and source of law resides in the nature of things, and therefore in the nature of mankind, for right reason is the constitutive principle of the world as a whole and of the people in particular. Thus, to Gaius, a *lex* "is what the people orders and has established."[19] And the state, as a bond of law, is a construction of the people. It is here, in McIlwain's judgment, that the nub of Roman constitutionalism is found:

> The central political principle of . . . Roman jurisprudence is . . . the doctrine that the people [are] the ultimate source of all legitimate political authority in a state.[20] [And] the true essence of Roman constitutionalism . . . lie[s] in the . . . principle that the *populus*, and none but the whole *populus*, can be the ultimate source of legal authority.[21]

18. Quoted in GPT, *supra* note 5, at 111.
19. Quoted in CAM, *supra* note 4, at 44.
20. CAM, *supra* note 4, at 62.
21. *Id.* at 57.

A radical distinction is here effected between fundamental law and ordinary law. Fundamental law is an expression of the consent, or at least consensus, of the people and is the source of sovereignty—that is, the highest legal and political authority within society. In one sense, sovereign authority is above the law (*Princeps legibus solutus est*), but only in the sense that the sovereign may create, alter or repeal ordinary law. The sovereign is at the same time subject to the law, since sovereignty is constituted by fundamental law, and one who acts contrary to or in violation of fundamental law cannot truly be sovereign. This is the proper meaning of the maxim that the king can do no wrong.[22] The point is that fundamental constitutional rules are not subject to the will of the sovereign.

To McIlwain, this means that in the Roman conception of constitutionalism there is a radical distinction between society and the state. Society is the more inclusive category. Man, by virtue of his nature and in his basic association with all men, is more than a mere participant in a body politic and a subject of political rule. Since he has the power of authority to create the state, he is, in that sense, independent of the state.

Moreover, the Romans, in "undoubtedly one of their greatest permanent contributions to constitutionalism," made a distinction "between the *jus publicum* and the *jus privatum*—a distinction that lies to this day behind the whole history of our legal safeguards of the rights of the individual against encroachment of government."[23] This distinction constitutes another level of man's independence of the state. Public law (*jus publicum*) contains the rights and powers of the state as the body of citizens acting as a whole. Private law (*jus privatum*) contains the rights and powers of citizens as individuals, thus delineating a sphere not subject to governmental action. Both public and private law have their origin in the people, both relate to the rights of the people either as a whole or as individuals, and both contain obligations and responsibilities that apply to the people. But the distinction limits government in two ways. First, the legitimacy of government rests on the consent of the people and depends upon its conformity to fundamental law. Second, the scope of governmental activity is limited by an area of law that protects the interests and liberties of private individuals.

A final note McIlwain added to his sketch of Roman consti-

22. CCW, *supra* note 8, at 44.
23. CAM, *supra* note 4, at 46.

tutionalism deals with the issue of discretion with which Plato was concerned. Within the actual operation of Roman law, a means of liberalization may be discerned by which the lines of strict law or formal law were relaxed in order to take account of the uniqueness of particular circumstances. The magistrates possessed the discretion (or the arbitrary authority) to invoke principles of equity as they saw fit in order that justice might be done, even if this required contravening the letter of the law.

At this stage, therefore, constitutionalism means government subordinate to and constituted by a fundamental law which consists of both public and private components and whose foundation is the consent of the people. It means as well a sensitive administration of the law through magistrates who may use their discretionary power to modify the rigidity of formal laws, but only in order to realize the purposes of law. From the Roman stage of the development of constitutionalism, the three factors that are most important in McIlwain's final construction are the principle of consent, the notion of a fundamental law and the distinction between *jus publicum* and *jus privatum.*

C. Medieval Constitutionalism

The heart of medieval constitutionalism is found in the concepts of government (*gubernaculum*) and law (*jurisdictio*), particularly as expressed by Bracton and later by Fortesque. Government, in brief, is a matter of prerogative. Acting on the basis of his governmental authority, a monarch may do what he sees fit. His discretionary power is complete. There is no legitimate limit to what he may do. Within the sphere of government, he has no superior and no standard to which he must conform.

But government is strictly qualified by its coexistence with law (*jurisdictio*). In the medieval conception, *jurisdictio* meant *consuetudo*, immemorial custom, the allegedly age-old expectations and habitual actions of the people. The king is not permitted to act outside the bounds of the law. It is positive, coercive and not subject to the king's discretion. Laws appear to be enacted, but enactment is only an explicit affirmation of what already had the force of law in the customs of the people. Moreover, binding enactment requires the participation of the people affected by the law, for in medieval theory the Roman maxim applies: what touches all must have the approval of all, and what touches some must have the assent of those concerned. Within this dyadic conception, the monarch was an absolute ruler

only within the realm of government; he was at the same time limited by the liberties of the people as incorporated in the "living law"[24] of the society.

In general terms, some of the areas assigned to each category were clear. The maintenance of peace and the survival of the realm were matters of the absolute authority of the king.[25] On the other hand, the rights and liberties of property were matters of law. But, as might be expected, the line of demarcation was far from clear. Indeed, McIlwain suggested it may be impossible "to set up permanent markers bounding the respective fields of liberty and authority."[26] Certainly it must be acknowledged that the tension between these two spheres has not been reduced in modern times. It in fact constitutes one of the major sources of contention in contemporary politics throughout the world.

According to McIlwain, the major defect in medieval constitutionalism was the absence of any effective means of enforcing the rights of the people against the arbitrary will of the ruler, or even of deciding, in instances of dispute over the line of demarcation, which party was in the right. The only means of maintaining the law were the coronation oath, excommunication and "legalized rebellion"[27]—but the success of these limited means depended almost entirely on the good faith of the king who might very well, if he possessed sufficient power, violate his promises without apology, or might, if he wished to give the appearance of acting properly, justify his action by an appeal to "reasons of state" or "national emergency."

D. Transitional Period

In McIlwain's periodization of the stages of constitutionalism, the sixteenth and seventeenth centuries in English history comprise a transition between the medieval and the modern conceptions of constitutional government. The transitional period is crucial largely because English common law proved to be a staunch defense against the attempts of government to eliminate the sphere of law (*jurisdictio*). This was, of course, the

24. E. Ehrlich, The Fundamental Principles of the Sociology of Law 493 (W. Moll transl. 1936).

25. It is instructive to note that these responsibilities are still assigned to executive office, accompanied with the same delegation of wide discretionary power for their fulfillment.

26. GPT, *supra* note 5, at 370.

27. *Id.* at 371.

age of absolutism and the divine right of kings. But the theory and practice of English law continued to provide judicial mechanisms and legal procedures to protect the private rights of the citizens against the acquisitive designs of the king. Thus the transitional period is important for its defensive character. It was a strain merely to preserve the delicate balance of medieval constitutionalism between *gubernaculum* and *jurisdictio*.

This is the period in which it became obvious that a king was able to shrink the area of law by various appeals to "reasons of state," "national emergency," "present or probable dangers," and the most elemental requirement of the body politic—survival. Constitutionally, there was no person and no office to whom one could appeal if he judged certain acts of royal prerogative harsh, unjust or unwise. It was Philip Hunton's genius[28] to see that, given the prevailing form of constitutionalism, there was no legal remedy against royal prerogative. Admittedly, governmental action was in principle limited by law, and in ordinary cases a government might be restrained by "due process of law" in the courts, but there was nothing to prevent a government from justifying any action by appealing to the absolute, unqualifiable, unconditional aspect of its authority. The king has his reasons, so to say, of which law cannot know. Constitutionally, the courts were stymied. McIlwain repeatedly asserted that the fundamental weakness of medieval constitutionalism was this lack of any means of enforcing the "legal limits to arbitrary will."[29] "Though the king was under the law in theory," said McIlwain, "there was little effective machinery in existence to make this theory a practical reality."[30]

This persistent pressure against encroachment upon the rights of the Englishman as embedded in immemorial custom provoked awareness of the need to provide a new dimension to constitutionalism. And since there was, within the framework of the constitution itself, no provision for constitutional change, a revolution was required, a revolution in effect overturning, or more accurately, transforming medieval constitutionalism. The revolution was *dehors* the constitution, but for the sake of the con-

28. Philip Hunton is christened "a forgotten worthy" by McIlwain, CCW, *supra* note 8, ch. IX, and subsequent to McIlwain's rediscovery of his genius, Hunton has been given his due by other historians of political thought. *See, e.g.*, M. JUDSON, THE CRISIS OF THE CONSTITUTION ch. 10 (1949).

29. CAM, *supra* note 4, at 91; *cf. id.* at 93.

30. GPT, *supra* note 5, at 197; *cf. id.* at 285 *et seq.*

stitution. It was embarked upon as a means to create a new and more effective form of constitutionalism, a form in which legal procedures are augmented by political methods.

E. Modern Constitutionalism

McIlwain characterized modern constitutionalism as contributing both a legal and a political factor to the constitutional tradition. The legal factor is the extension of the jurisdiction of courts of law to include acts of government. The political factor is the institutionalization of political responsibility in the procedures of government. On the first point, the exercise of governmental prerogatives came under judicial review. Ministers of the government became accountable at law, and disputes over the legal propriety of governmental action became matters for the decision of the courts. Of course, this accountability was rather flaccid so long as judicial appointments were held at the will of the sovereign. This is why McIlwain considered the independence of the judiciary vital to the effectiveness of legal remedies against government. That independence was secured in England by the Act of Settlement of 1701, according to which salaries of judges remained fixed and tenure was held during "good behavior."

But even this, according to McIlwain, was not enough.[31] Modern constitutionalism adds to the strictly legal protection of the rights and liberties of the people a positive political *control* of government, a means by which the people, through representatives, may "dismiss a minister merely because they disapproved of his policies, without waiting for an actual breach of law or inventing one."[32] Although the concept of political responsibility is unique to modern constitutionalism, it in fact reincorporates a principle found in the constitutionalism of Rome:

> In modern times, as in ancient [i.e., Roman], governments are generally limited practically in a much more positive way, by the actual infusion of a popular element among the organs of government themselves. In the middle ages, in short, government was *limited*, in modern times it is also *controlled*; and a fruitful source of later constitutional struggles is to be found in the attempt positively to prove or to disprove a traditional right of *control* of government on the basis of medieval precedents which themselves contemplate nothing beyond its *limitation*.[33]

Thus, in modern constitutionalism government is *by* the

31. CAM, *supra* note 4, at 133.
32. *Id.*
33. GPT, *supra* note 5, at 362-63.

people as well as *for* the people. An official organ is created that is sensitive to the needs and interests of the people, and that in response thereto maintains constant surveillance of and control over the ministers of state. But at one point McIlwain more modestly stressed that the principle of political control provides simply a "means to make 'constitutional limitations' more practical and effective" so "[if] we have been able to improve on the middle ages in political matters it is rather through the availability of more effective means; not the existence of nobler ends."[34]

III. THE BASIC PRINCIPLES OF CONSTITUTIONALISM

There is nothing to be found in McIlwain's writings to indicate that he thought of modern constitutionalism as a fully adequate or sufficient stage in the growth and development of this normative conception of political organization. Nonetheless, McIlwain did seem to think he had sketched the general outlines of an intelligible pattern of government that, to his mind, was the only proper, decent and humanly tolerable form of political existence. Combining the minimal but essential definition of constitutionalism as a "legal limitation on government" with what McIlwain stressed in each of the stages in the development of constitutionalism, we can see perhaps five principles in McIlwain's normative conception.

A. LAW

Constitutionalism is government according to law. The antithesis of constitutionalism is *despotism*—government that is arbitrarily, without legal limitation. McIlwain distinguished tyranny from despotism, for *tyranny* is found only where there is law. That law, however, is ignored or violated without good reason or proper authority. On the other hand, despotism is not violation of law, for there is no law to violate. While despotism is the antithesis of constitutionalism, tyranny is its subversion by government. McIlwain conceived *totalitarianism* to be a latter day form of despotism. It is rule according to will and without law, and as such is the primary modern antagonist of constitutionalism. McIlwain used the term *autocracy* to refer to "unmixed" government, *i.e.* government without popular or political control. Autocracy can be constitutional if limited and

34. *Id.* at 199-200.

directed by law, tyrannical if it violates those limits and despotic or totalitarian if without any legal restraint.

B. POPULAR CONSENT

Constitutionalism is government according to a fundamental law that expresses the consent of the people. This is one of the strands that is woven through McIlwain's controversial but stimulating "constitutional interpretation" of the American Revolution.[35] Here again I avoid the ticklish question of the historical accuracy of McIlwain's work. But it is my firm impression that in his interpretation of both the English and the American revolutions, the principle of consent as the proper foundation of government and law is crucial, and this appears to echo a fundamental motif of both Roman and medieval constitutionalism. Thus:

> [I]t is significant that Cicero's state is founded in consent, and that this, to be effective, must be the consent of the whole people *(populus)*, a theory which formed the central principle of the Roman republican constitution and survived the establishment of practical despotism in the Empire to pass into the common thought of Europe in later centuries.[36]

And subsequently, in medieval theory, it was held that " 'what touches *all* should be approved by *all.*' And what touches all is the law common to all."[37]

To McIlwain, the terms revolutionary and constitutional are mutually exclusive.[38] But what is first revolutionary, because an attempt to overthrow the existing fundamental law, may become constitutional once the people affected acquiesce, because consent is the basis of legitimacy of fundamental or constitutional law.[39] Much of McIlwain's argument rests on the question of whether the people in the American colonies consented to the constitutional principles in Great Britain that resulted from the English Revolution of 1688-89. Whether or not McIlwain's answer to that question is tenable, it does seem clear that in his understanding of constitutionalism, consent of the people is the ultimate source of the authority and the legitimacy

35. C. MCILWAIN, THE AMERICAN REVOLUTION (1923) [hereinafter cited as AR].

36. GPT, *supra* note 5, at 117.

37. CCW, *supra* note 8, at 145.

38. AR, *supra* note 35, at 1.

39. It might be instructive to compare McIlwain's notion of consent with Hart's notion of acceptance as related to the "internal aspect of law" in H. HART, THE CONCEPT OF LAW (1961).

of fundamental law and of government, even if it is not clear in McIlwain's writings what constitutes consent or how consent is registered.

McIlwain's definition of sovereignty rests on this principle of consent. *Supremacy* means actual control of a people and as such commands obedience. But whether a supreme power is *sovereign* depends upon the presence of, and conformity to, fundamental law. Thus, sovereignty is legal power or authority; it is, by definition, legally right.[40] The fundamental law that determines who is sovereign is "a set of rules not made by the sovereign authority subsisting under that constitution, nor subject to his will."[41] It is, rather, created by the people.

To McIlwain this does not entail the notion of "popular sovereignty." Popular sovereignty would mean that the people and the government were one and the same. But since ultimately there are no legal limits on the people, and since sovereignty means lawful authority, popular sovereignty seems to McIlwain a contradiction in terms.[42] Moreover, since

> the people is not sovereign; the government is, [then if] the people set up a sovereign government, they must in their own interest also set up or keep up all the necessary barriers against its despotic action, and the only effective barrier short of actual resistance is the barrier of law.[43]

That leads us to the third component of McIlwain's conception of constitutionalism.

C. Distinction Between Public and Private Law

Constitutionalism is government according to a fundamental law in which there is a reasonably precise distinction between public and private law, or between the scope of governmental authority and the rights and liberties of the people who are subject to that authority. The line between public and private may be difficult to draw; in fact, its location may quite properly vary from time to time. In an observation strikingly appropriate today, McIlwain noted that

> [C]onstitutional history is usually the record of a series of oscillations. At one time private right is the chief concern of the citizens; at another the prevention of disorder that threatens to become anarchy. . . . [W]hen the rights of government are

40. *See* CCW, *supra* note 8, chs. II, III & IV.
41. CCW, *supra* note 8, at 279.
42. *Id.* at 291.
43. *Id.* at 264.

> unduly stressed, the rights of individuals are often threatened; when the latter are overemphasized, government becomes too weak to keep order.[44]

Indeed, "the preservation of the delicate balance between order and liberty" is still "the most pressing problem of modern government."[45]

Despite the difficulty, the fulcrum must be located and its location must assure both an effective government and the preservation of the rights of the individual. To discuss the latter point first, what *are* the rights and liberties that ought to be incorporated in the fundamental law? Although the answer to this rather important question is not fully explicated in McIlwain's writings, he did assert that

> [we] must retain those legal limits of governmental action which now exist in our bills of rights to protect the personal as well as the proprietary rights of the humblest and even the most hated of our citizens. Not only must we retain them; we must revive and revise, we must clarify and even extend them, for only so can we ever hope to give permanence to our needed reforms themselves. If they are to last, these reforms must have a better guarantee than the passing whim of any dictator; and the only guarantee that men have ever been able to devise, short of actual physical force, is the guarantee of constitutional limitations.[46]

Among the personal and proprietary rights and the institutional means of protecting those rights that McIlwain listed as the "hard-won gains" of constitutionalism against despotism are "[j]uries not answerable for their verdicts, writs of habeas corpus, the condemnation of *ex post facto* laws, judges with independent tenure, strict definitions of treason, rigid enforcement of the rights of accused persons."[47] In addition, McIlwain referred to the freedoms of thought and expression, and of immunity for accused persons, and the right to be free from arbitrary detention and from cruel and abusive treatment as illustrative of "all the rights of personality we hold dearest."[48] These, he noted, are threatened whenever "reasons of state" are invoked and deemed a proper basis for "prosecution *ex officio mero*, secret, arbitrary and irresponsible."[49] This, of course, is another expression of the dynamic tension and persistent struggle between *gubernaculum* and *jurisdictio*.

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44. CAM, *supra* note 4, at 136.
45. CCW, *supra* note 8, at 277; *cf.* CAM, *supra* note 4, at 139.
46. CCW, *supra* note 8, at 290.
47. *Id.* at 273.
48. CAM, *supra* note 4, at 139-40.
49. *Id.* at 140.

It might be argued that to McIlwain the rights of the individual that are *most* crucial and that should without question be cast into a formal bill of rights as part of fundamental law are procedural in character. So, at any rate, might one construe his statement that "[c]onstitutionalism is more a method than a principle. It is the method of law as contrasted with force and with will."[50]

Yet McIlwain did not contend that all rights once formalized in a written constitution or bill of rights are sacred, inalienable and unqualifiable. Consider, for example, his scattered comments on the right to property. On the one hand, the right to individual property "played a great part in earlier contests with a doctrine of the divine right of kings which placed both subjects and their goods at the absolute disposal of their sovereign."[51] Indeed, property laws constituted the bulk of *jurisdictio* in English common law and comprised the dominant lever of the people against the king. On the other hand, McIlwain referred to "[t]he questionable way in which the same arguments have sometimes been used in our day [1923] to defend all vested interests and the deserved contempt into which they have fallen."[52] Fourteen years later, he returned to this theme in attacking "psuedoliberalism," which he defined as sheer individualism, as the advocacy of "the extreme doctrine of *laissez faire*, surely one of the strangest fantasies that ever discredited human reason."[53] Psuedoliberals exploit constitutional guarantees for "the selfish interests of the few," neglecting the fact that constitutionalism means guaranteeing the rights of all. They do so by sanctifying the right of property and by relying on an "unhistorical definition" of the right of contract to justify the exclusion of all other rights. Repudiating the Roman law definition of contract, the psuedoliberals oppose all state interference in the formation of contractual relations. Thus "there is little or no safeguard for the weak against the strong; protection of the public against an adulterated product would be unthinkable." McIlwain rendered the harsh judgment that "[f]ew illusions have been more disastrous than the one arising from an uncritical acceptance of Sir Henry Maine's sweeping generalization that human progress has been a development from status to contract."[54]

50. CCW, *supra* note 8, at 290.
51. AR, *supra* note 35, at 161.
52. *Id.*
53. CCW, *supra* note 8, at 286.
54. *Id.* at 287.

This scathing denouncement of the psuedoliberals and their selfish drive to protect the "sacred right of property" was written in 1937, the year of President Franklin Roosevelt's "court-packing plan," which was designed to overcome the Supreme Court's rejection of the social reforms of the New Deal. McIlwain thought it crucial to the preservation and healthy existence of constitutionalism both to maintain the integrity and independence of the courts and to strive for effective government and social reform. However, in his critical discussion of the psuedoliberals (who in that day had the constitution on their side), McIlwain acknowledged the agonizing difficulty of sustaining both goals. Thus, "the surest safeguard of a proper balance between the *jurisdictio* and the *gubernaculum* . . . would seem to consist in . . . [a] constitution containing . . . [a] distribution" of various political matters and activities, classifying some as legal rights of the people and leaving others to the free discretion of government. But as McIlwain's statements on the rights of property and contract illustrate, "the distribution of these matters . . . is . . . in constant need of revision by interpretation or by amendment." Moreover, with reference to the American constitution he averred that "it may . . . be that the mode of that amendment is somewhat too slow and cumbersome for the best interests of all."[55] At the same time, constitutional laws are meant to be fundamental "not merely because they are basic, but because they are also unalterable by ordinary legal processes."[56] The conclusion is that change in the fundamental law should be more difficult in some sense than change in ordinary law, but not so difficult that revisions cannot be made when necessary to re-establish the precise balance between rights of individuals and prerogatives of government.

Whether the fundamental law should be written (or the extent to which there should be an attempt to make it explicit in writing) depends upon the durability and depth of the traditions and customs of a country. To McIlwain, the only reason that the principle of the omnipotence of Parliament has been unchallenged is that its edge has "been blunted by conventions whose operation has been practically as invariable as that of the law itself."[57] But he warned:

> As the restraining influence of tradition grows weaker, the

55. CAM, *supra* note 4, at 145.
56. *Id.* at 21.
57. *Id.* at 18.

> danger of a tyranny of the majority comes nearer, and the time may arrive when convention must give way to law if the rights of minorities are to be respected and safeguarded as they have been in the past. A popular despotism must result if the omnipotence of parliament ever becomes in practice what it now is in law.[58]

D. JUDICIAL REVIEW BY INDEPENDENT COURTS

Constitutionalism is government in which a legal method is incorporated to ensure the rights and liberties of the people. That legal method which ensures the people's rights and liberties is judicial review by an independent judiciary. Thus McIlwain wrote that the only means by which a constitutional system can endure is "a judicial review which makes sure that no act of the 'sovereign' shall exceed the legal authority conferred upon it by the people in the constituent law, or constitution."[59] Elsewhere he insisted that the "chief reliance" against the "insidious encroachments of despotism" is "a fearless and impartial interpretation of law by a free and independent judiciary."[60]

At first blush, it might appear that McIlwain was guilty of a chauvinistic or parochial exaltation of a uniquely American institution, and an institution that was produced by judicial fiat at that.[61] But McIlwain himself insisted that judicial review is not an American invention, but existed in the legal traditions of France and England. Indeed, it "is really as old as constitutionalism itself, and without it constitutionalism could never have been maintained."[62]

Judicial review involves three factors—"first, that there is a fundamental constitution [whether written or not]; second, that its interpretation rests with the judiciary; and third, that judges have an authority only, in the words of Lord Bacon, 'to interpret Law, and not to Make Law, or Give Law.' "[63] Regarding the last of these three factors, it is difficult to imagine that McIlwain was unaware of the problems of judicial interpretation and the virtual inevitability of some degree of judicial creativity. But his insistence that proper judicial behavior requires the declaration of law and not the creation of new law is an understandable reaction in light of the way in which the Nazis were

58. *Id.* at 20.
59. CCW, *supra* note 8, at 291.
60. *Id.* at 282.
61. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
62. CCW, *supra* note 8, at 278.
63. *Id.* at 278-79.

abusing the legal process.[64] This situation also led him to be somewhat critical of sociological jurisprudence. Presumably he feared that justification might be found to soften the legal structures and to subordinate legal principles to "social needs" and "political ideals." The end result of such a trend could only be sheer despotism and, with Plato, McIlwain doubted that any man could be trusted to use despotic power wisely for the genuine good of all men.[65]

To restate McIlwain's point, constitutionalism does not in itself entail rigidity, social backwardness and resistance to change and economic reform. It does entail a disciplined adherence to methods and procedures that will support and advance the rights of people, and this means guarding against the erosion of legal and judicial processes. Thus "[o]ur problem to-day, in a word, is to make needed changes in the laws, but always to keep them law."[66] In fact, reforms are not only needed in and for the sake of social and economic order, but are needed in the judicial process as well since "it is far too slow and cumbersome."[67] But whatever changes and reforms are effected, the courts must be kept free from governmental control and the institution of judicial review must be maintained.

E. Governmental Responsibility and Popular Control

Constitutionalism is a government in which a political method is incorporated which will result in effective rule but also maintain popular control over governmental officials. In McIlwain's constitutionalism there are two methods for setting the line of demarcation between the public and the private spheres and thereby shielding the liberties and rights of men against arbitrary government. The first is the method of legal limitation analyzed above. The second is the method of political responsibility which conjoins governmental effectiveness and popular control.

It is in this connection that McIlwain's disdain for the doc-

64. *See id.* at 268 *et seq.*

65. McIlwain justified the notorious *Schechter* case on exactly these grounds. He understood the case to illustrate that even Supreme Court justices with liberal sympathies in social and economic policy properly felt bound to maintain strict adherence to law and to declare any legislative action invalid if unconstitutional. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

66. CCW, *supra* note 8, at 282.

67. CAM, *supra* note 4, at 141.

trines and institutions of separation of powers and checks and balances must be seen, for he contended that political responsibility was "utterly incompatible with any extended system of checks and balances," and he generally identified checks and balances with separation of powers.[68] He did assert that the principle of separation of powers is "valid and necessary if restricted so as to mean merely the independence of the judiciary,"[69] but when extended so that it permeates the legislative and executive spheres of the governmental process it leads to corruption and constitutes an open invitation to despotism and perhaps revolution.

His supportive argument involved a manifest rejection of the "legislative struggle" pattern that characterizes the American lawmaking process. McIlwain apparently interpreted the doctrines of separation of powers and checks and balances as meaning a governmental system in which there are multiple and overlapping circles of power and a diversity of competing semi-autonomous groups, formal and informal, all involved in the legislative and administrative process, and each playing some decisive role in the formation and implementation of policies. Thus, no single identifiable group is responsible for the results and the inability to fix responsibility "has fostered the growth of 'pressure groups', with all their attendant corruption" and "has led to 'log-rolling' and every other form of crooked politics; for under any system of balances run wild the result is sure to be government for private interests or groups instead of government for the whole people."[70] The failure to be able to precisely locate the responsibility of legislative action leads as well to the absurdity of "one branch of . . . government, under pressure from a selfish minority, passing a bill they know to be vicious in the secret hope that another branch may nullify their action."[71] Consequently, within such a system, much legislation and administration tends to favor special interest groups and to

68. CAM, *supra* note 4, at 142. For two studies which view the separation of powers and checks and balances as two quite different mechanisms of government, see W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (Tulane Studies in Political Science, vol. IX 1965) and M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

69. CCW, *supra* note 8, at 282.

70. CAM, *supra* note 4, at 143. While McIlwain's position on interest and pressure groups was typical of the time, the emergence of the group theory of politics, stimulated particularly by D. TRUMAN, THE GOVERNMENTAL PROCESS (1951), completely altered the interpretation of the significance of interest groups in politics.

71. CCW, *supra* note 8, at 281.

grant special privileges; bills that are originally designed to serve the public interest are twisted and compromised into irrelevancy; needed reforms are avoided; the effectiveness of government is stymied.

McIlwain asserted that the feebleness of government is one of the major causes of both the modern rejection of constitutionalism and the related "tidal wave of despotism" that was sweeping the world in 1937.[72] The reasoning is that people become weary of awaiting social and economic reform; resistance to existing injustices and dissatisfaction with governmental inaction increases; the sluggishness of governmental processes is ascribed to their constitutional form; and people are led to seek the quick and seemingly easy solution of strong, arbitrary government, unhampered by law. But, McIlwain rejoined, sluggishness and corruption in government cannot be ascribed to constitutionalism per se, but rather, at least in part, to separation of powers and checks and balances. The proper alternative to sluggishness and corruption is responsible government—a solution which is not at all incompatible with constitutionalism.

Responsible government requires power; more precisely, it requires concentrated, centralized power. When the power of formulating and administering public policies is concentrated in the hands of an identifiable group of public servants, then responsibility may be clearly fixed. And, of course, with the same concentration of power, governmental action is also more effective, prompt and decisive, and social and economic reform is not impeded by the compromises of a system in which power is diffused and responsibility dissipated.

When viewed in isolation, concentration of political power and centralization of political responsibility may seem to imply arbitrariness in government and an excessive extension of the prerogatives of the *gubernaculum*.[73] These are indeed the implications of the doctrine of the omnipotence of Parliament as understood by McIlwain. But when centralization is set within the context of constitutionalism, judicial review and popular control take on significant roles. The courts can assess the validity of governmental action relative to the fundamental law, which should incorporate the rights and liberties of the individual person. And governmental officials are held accountable to the

72. *Id.* at 257.

73. "[D]emocratic government must have something of the strength, the decision, and the independence that a dictator enjoys" in order to serve the vital necessities of the people. *Id.* at 281.

people, subject to removal from office if a certain proportion of the people are displeased with their policies. In this way, the responsibility of government is directed to the people—"and to all the people, and at all times."[74]

Of governments that approach this constitutional ideal of responsibility, McIlwain names parliamentary government as "probably the most developed form of representative institutions now known; in advance even of the 'presidential' form evolved . . . in America."[75] He most likely had the British cabinet system in mind, for he asserted that no one who knows it "would venture to say that it is a system of checks and balances, and what little check survived to the beginning of this century was in large part swept away by the Parliamentary Act of 1911 in taking from the Lords the legal right permanently to block an action of the cabinet approved by the House of Commons."[76] On the other hand, the United States Constitution would have to be amended to approach the constitutionalist ideal of responsibility; it would have to shed its system of checks and balances to provide for the "legal means of securing what men believe that justice demands" in a modern industrial society.[77]

This view was expressed during the constitutional crisis of 1937:

> Anyone interested in the constitutional guarantees of religious belief, free speech, immunity from arbitrary arrest or imprisonment, to mention no more, must be alarmed by any proposal that might touch these guarantees; and the liberal most of all. The long painful history of the securing of these safeguards ought to make him of all men most fearful of any proposal that could enfeeble them. He should be afraid that any judge compliant enough to read into our constitution a beneficial power patently not there, might at another time be compliant enough to read out of it any or all of these guarantees of his liberty which are there; for a judge willing to take orders from a benevolent despot might be equally subservient to a malevolent one . . . . [T]he liberal . . . ought to strive for the maintenance of an effective judicial review by an independent judiciary. This is the lesson of the whole history of modern constitutionalism . . . . If so, let us forget our little differences and unite to get our needed reforms by constitutional means. Let us remember that to have our rights defined by existing law not by "healthy public

74. CAM, *supra* note 4, at 144.
75. AR, *supra* note 35, at 57.
76. CCW, *supra* note 8, at 257. McIlwain's idealization of parliamentary government was widely shared at the time. For a recent study rejecting this characterization, see S. BEER, MODERN BRITISH POLITICS: A STUDY OF PARTIES AND PRESSURE GROUPS (1965).
77. CCW, *supra* note 8, at 281.

> sentiment" [78] is far more important for us than the temporary prejudices of one or two judges, or even the temporary postponement of some much needed reforms. If we can get these reforms in this way, we shall know when we have them; they will not be dependent on the changing whims of any *duce* or *fuhrer*. There are undoubtedly strong arguments for improving our judiciary, but these are not arguments for weakening it.[79]

Unfortunately, McIlwain apparently did not provide any full analysis of the issue to which he is referring. Indeed, it might be pointed out that the proposals for the change in the Court were fully within the constitutional powers of Congress.

Moreover, McIlwain quite properly seemed to admit that the "prejudices" of some of the Supreme Court justices were actually influential in obstructing social reforms even though they attempted to hide the fact of prejudice by the invocation of constitutional grounds. But if in fact prejudices of judges do play a decisive role in the judicial process, what are the implications for constitutionalism? How are the "integrity" and "independence" of the court to be maintained? As early as 1912, McIlwain affirmed his disbelief in the recall of judges.[80] But then why was the Roosevelt proposal of 1937 not a serious attempt to effect constitutional change in the judicial system precisely in order to make the way clear for social reform and to maintain the institution of judicial review—and all that without removing the existing forms of popular control of governmental officials? McIlwain obviously thought the proposal ill-advised, but one can only speculate about the exact course of his reasoning. Indeed, as he noted in the same address from which the long citation above comes: "You may come to particular conclusions far different from mine on this fundamental issue of the court. That is not the important matter. It is that you should care and should think about it."[81] Perhaps McIlwain saw the possibility of reasoned arguments on both sides of the proposal, and his overriding concern was not so much that the court not be altered in size or transformed for a time in its character by new appointments as that there be a deliberate attempt to preserve the principles and institutions necessary to constitutionalism through all efforts at social and economic reform, even efforts requiring constitutional change.

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78. McIlwain here alludes to a statement by a Nazi official.
79. CCW, *supra* note 8, at 264-65.
80. *Id.* at 294.
81. *Id.* at 265.

IV. A PROPOSED EXTENSION: AFFIRMATIVE CONSTITUTIONALISM

Thus, in sum, there are five principles that fill out the minimal definition of constitutionalism as "legal limitations on government"—the principles of law, popular consent, the distinction between public and private law, judicial review by independent courts, and governmental responsibility and popular control. In each of these five areas, however, McIlwain left unresolved and unanswered issues and questions that should be dealt with in any fully adequate and operational definition of constitutionalism as a normative category in political theory.

First, what exactly does the term "law" mean? If constitutionalism is the rule of law, does this mean the rule of *Recht, Droit*, or merely rule according to *Gesetz, loi*? Are law and discretion always incompatible? If not, should the use of discretionary power nonetheless be controlled? If it should be controlled, by whom, how and according to what principles?

Second, what does "consent" mean? How does it differ, if at all, from obedience, acquiescence, deliberate acceptance or approval? What is the justification for the principle of consent? How may the principle of consent be given practical political effect and expression? Is it ever possible for the consensus of a people to be wrong, evil or incorrect?

Third, what principles, if any, should guide a people in deciding where to draw the line between public and private in varying circumstances? Are any rights "inalienable" or even "preferable?" Is there a specifically constitutionalist "reason of state?" Are *all* rights expendable when the issue of the survival of body politic is at stake?

Fourth, on what grounds, if any, can judges be trusted more than legislators, administrators or the people generally to preserve the fundamental law? Are cultural, psychological, social and economic factors equally as important as legal institutions in the maintenance of a constitutionalist pattern of politics? Is judicial creativity always undesirable? Is it unavoidable? If it is unavoidable, what principles, if any, should guide a court's decisions?

Fifth, is there a variety of ways to institutionalize popular control? What is the meaning of "representation" in political organization? Do the people ever have the right to revolt? Do separation of powers and checks and balances necessarily result in irresponsible and ineffective action? Are there forms of

informal, social checks and balances that may in fact help maintain constitutionalism?

Moreover, there are two major issues completely neglected in McIlwain's writings: first, what is the economic, social, psychological and cultural side of constitutionalism; second, why is constitutionalism desirable? The first is an issue that pertains to the behavioral sciences, a primary focal point in modern political analysis. The second, a question of justification, is an issue that pertains to moral philosophy, which in turn relates to the normative aspect of political theory.

All told, McIlwain's normative conception of constitutionalism is not only exceedingly general, but also basically negative. The fundamental assertion underlying the entire conception is that whatever a government is and whatever a government does, it ought not to meddle in *all* aspects of the lives of the people; there ought to be institutions especially designed to assure, so far as possible, the maintenance of distance between government and the individual.

However, there is a positive side to this assertion which, if explicitly formulated and fully developed, might constitute a response to the question of justification and a basis for solving some of the issues unresolved in McIlwain's conception. I suggest this positive side, or "affirmative constitutionalism,"[82] as a sixth principle and as perhaps an emerging stage in the development of constitutionalism.

Constitutionalism is the type of government that provides possibilities for the active participation of all citizens in the continuing process of communal decision-making and goal-attainment. The reason for considering this principle the positive side of McIlwain's negative assertion is related to the manner in which the rights of the individual actually function *when effective* in the political process. These rights—such as the right to freedom of expression through all media of communication, the right of free association, the right of assembly—are indeed *negative* in the sense that they specify limits to the legislative and administrative powers of government. At the same time, however, they are *positive* in the sense that by limiting government they protect means whereby the people may

82. The term "Affirmative Constitutionalism" was inspired by the title of Charles E. Wyzanski's excellent paper, *Constitutionalism: Limitation and Affirmation*, which is published in GOVERNMENT UNDER LAW, at 473 (A. Sutherland ed. 1956).

dissent from or support it, but in any event may actively and continually participate in it.

Thus, the image of the fundamental law of constitutionalism as a barrier or a boundary line is perhaps less appropriate than its image as a channel or a conveyance. The fundamental law limits in order to enable; it limits the powers of government for the purpose of maintaining a form of government in which, and through which, all the people are enabled to act.

Thus, it is possible to conceive of government not only as a potential enemy of the people (although, to be sure, it is that), but as an instrument of the people. There is no denying the evils and injustices effected by past and present governments, even governments that presume and pretend to be constitutionalist, and it would be foolhardy not to expect similar experiences of a profoundly tragic character in the future. But constitutionalism is a normative conception; it is intended to be an image of the proper form of government and a basis for evaluating existing forms. And as such it conceives of government as a means of communal creativity, as a mechanism for social planning and social action, and as a positive force for coordinating human efforts in the attainment of social goals.

Underlying this principle, as I conceive it, is an understanding of the human person, both individually and communally, as most essentially creative freedom. According to this understanding, there is an open-endedness to man; he is incomplete, and by virtue of what he decides and what he does, he continually makes and remakes himself. He is in a constant process of becoming. Thus, we speak of man as an historical being. And, I emphasize, this open-endedness and historical essence is true of man both individually and communally. It is, of course, possible to treat persons or groups of persons in a more or less nonhuman manner, in a manner that stifles or minimizes the possibilities of their creative action or their participation in communal action. But from this perspective, such a manner of treatment is to deny or to violate man's humanity.

The rights, procedures and institutions of constitutionalism are intended to give expression to man's creative freedom. They are designed to give consideration to all citizens as human persons in the process of social decision-making. The concept of the rights of the human person has been extended by the United Nations Declaration of the Rights of Man, the European Charter of Rights, and the various declarations of the meaning of Rule

of Law by the International Commission of Jurists. The extensions include economic, social and cultural rights as well as political, religious and intellectual rights. They are an effort to indicate what is necessary to realize affirmative constitutionalism, for, it is said, without certain economic and cultural resources, all the proclaimed political rights in the world are not worth a tuppence.

Liberty has long been the fundamental purpose and value of constitutionalism. In affirmative constitutionalism, the centrality of *creative* freedom, both for the individual and the community, is a point of continuity with the past. But the difference is marked, for creative freedom is not simply freedom *from* government, but freedom *expressed in and through* government. This motif is in keeping with an age where government has assumed a major role in social, economic and cultural development, in stimulating and directing forces of mobilization and modernization. It is in keeping with the cry of minority groups and deprived peoples for participation in political processes. And it is in keeping with a form of thought that is emerging dominant in the minds of many men, a form in which process and relation are key categories. Consequently, affirmative constitutionalism is an attempt to conjoin an old but developing tradition with a new historical situation, and to do so in such a way that man's humanity, conceived as creative freedom, has opportunity for its fullest expression in the sphere of politics.

I do not pretend that the principle of affirmative constitutionalism provides answers to all of the questions listed above, but I do assert that it provides a possible and fruitful base for their consideration. It might, for example, be considered the fundamental substance of law, (as *Recht* or *Droit*) in the notion of "rule of law"; it might provide a justification for the principle of consent and may be of assistance in deciding what particular rights are to be preferred in cases of conflict; and it might offer both a principle to guide judges and administrators in the use of discretionary power and a measure of evaluating the relative propriety of revolutionary movements. These and other issues remain to be fully explored.[83] At this point I merely wish to propose that the principle of affirmative constitutionalism may indicate a direction for their exploration.

83. Many of these issues, of course, have been explored at some length in the writings of Carl Joachim Friedrich.

V. CONCLUSION

In effect, McIlwain seems to have understood constitutionalism throughout its development as a humanistic, or in more modern parlance, a personalistic doctrine of law and politics. The proposed extension of his conception is an effort to retain this perspective, and to urge that, in the midst of political revolution, social unrest, economic change and international conflict, the common man have a rightful role in the processes which make decisions and effect policies. Further, it is to urge that, if political and legal institutions are in some respects epiphenomenal, the proper conclusion is not that constitutionalism is irrelevant or unrealistic, but that the basic perspectives and principles of constitutionalism should be brought to bear on whatever realities—social, economic, psychological or cultural—do in fact determine the communal fortunes of mankind.