

The Silences of Constitutions

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1. Introduction

Constitutions are seldom made by the will of men. Time makes them. They are introduced gradually and in an almost imperceptible way. Yet there are circumstances in which it is indispensable to make a constitution. But then do only what is indispensable. Leave room for time and experience, so that these two reforming powers may direct your already constituted powers in the improvement of what is done and the completion of what is still to be done.

Benjamin Constant, 1814.¹

Constant's reflections eloquently express the main themes of the argument I will make about the silences of constitutions. He recognizes that political circumstances may require a constitution to be written but that, properly understood, a constitution is an evolutionary achievement. This forces us to consider what is omitted when a constitution is enacted: its silences and the abeyances sanctioned by the injunction to do 'only what is indispensable'. That constitutions are not made 'by the will of men' also causes us to think about appropriate methods of their interpretation. And his last point - that constitutions must incorporate silences in order to permit 'time and experience' to 'improve' and 'complete' their work - is more challenging still. Constant requires us to reflect on the significance of recent attempts to fill those constitutional silences so as to 'improve' and 'complete' the constitutional project.

2. Modern Constitutions

2.1 Making a Constitution

There comes a time in the history of nation-states when it is deemed necessary to 'make' a constitution. The modern practice arises from the late-eighteenth century American and French revolutions whose intellectual driving force was the European

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¹ Benjamin Constant, *Réflexions sur les constitutions, la distribution des pouvoirs et les garanties dans une monarchie constitutionnelle* (1814): Constant, *Political Writings* (1988), 172.

Enlightenment. The belief that individuals have natural rights, that government acquires its authority from the people, and that the purpose of government is to promote the common good could only be realized by devising a new concept of constitution. Until then, political constitutions were inchoate expressions of a nation's culture, manners, and practices of governing. In its new conception, a constitution is drafted in the name of the people, defines the powers of the main institutions of government, and delineates the relationship between government and its citizens. This new sense of constitution yields a new understanding of 'fundamental law': no longer a set of historic practices sanctified by tradition, the term now confers on enacted constitutional law the status of 'higher-order' law that regulates the processes of 'ordinary' law-making.

A written constitution is the product not only of political enlightenment but also of technological innovation. The invention of mass printing techniques and the consequent growth in literacy enhanced the power of the printed word.² Its impact had already been seen in Britain's North American colonies which were established at a considerable distance from the sovereign centre. There, the Crown charters founding the colonies provided the authoritative basis of their governing arrangements. The practice of writing constitutions built on that reality. Following the US Federal Constitution of 1789 and the various constitutions of the French republic of the 1790s, by 1820 almost fifty written constitutions had been produced across Europe and between 1820 and 1850 a further 80 or so had been drafted worldwide.³

The growing use of written constitutions also coincides with a profound change in political structures. The American and French revolutions had overthrown imperial powers,⁴ asserted the claims of national sovereignty, and set in train a transition from a world of empires to nation-states.⁵ Thereafter, the founding of any new nation-state became a constitutional moment.

The pivotal significance of the American and French revolutions might, at first glance, suggest that constitution-making is a liberal, progressive undertaking that establishes regimes that limit governmental authority, guarantee civil rights, and institute democratic accountability. The suggestion is implicit in Constant's use of the terms

² Linda Colley, 'Empires of Writing: Britain, America and Constitutions, 1776-1848' (2014) 32 *Law & History Review* 237-266.

³ Zachary Elkins and Tom Ginsberg, *The Endurance of National Constitutions* (2009), 215-21.

⁴ This is a more ambiguous statement with respect to the French Revolution but the point is that, as Furet notes, 'France had been a kingdom of subjects; it was now a nation of citizens': François Furet, *Interpreting the French Revolution* E. Forster trans. (1981), 25.

⁵ Sanjay Subrahmanyam and David Armitage (eds.), *The Age of Revolutions in Global Context, c.1760-1840* (2010)

‘improvement’ and ‘completion’. But although written constitutions are distinctive expressions of modernization, modernization is itself an ambivalent process. National liberation there may be, but there is always an underside of constraint.

2.2 The Silences Imposed by Constitutions

The modern constitution both empowers citizens and controls and disciplines subjects. By defining competences and entrenching rights, the constitution limits powers and protects liberties, but it also strengthens the authority of the central government vis-à-vis sub-units,⁶ marginalizes or subjugates certain groups,⁷ or bolsters the hegemony of the dominant power.⁸ The constitution projects a particular understanding of political authority. In making the political worldview intelligible it empowers, and by classifying and setting boundaries it ‘normalizes’ and constrains.⁹ The written constitution privileges particular types of speech but also imposes certain silences.

The most significant type of imposed silence arises from the circumstances of their earliest formation. Commonly drafted against a backdrop of revolutionary upheaval or imperial collapse, what many regarded as liberation others experienced as defeat. Since authority depends on achieving civil peace, the constitutional challenge was to find a common framework for moving forward in the face of evident differences.

Such a framework cannot be established without drawing a distinction between public and private matters. Certain questions, notably those of religious belief, needed to be relegated to the private sphere. Having done so much to erode the authority of states during the intense religious wars of 17th century Europe, the question of life’s ultimate meaning had to be treated as a matter of individual belief not delegated to the sovereign.¹⁰ This resulted in the protection that modern constitutions accord to the citizen’s right of free exercise of religion. Another way of explaining this is to see the imposition of a regime of silence with respect to matters of religion as a precondition for establishing the authority of the modern state.¹¹

⁶ On US example, see M.M. Edling, *A revolution in favor of government: origins of the US Constitution and the making of the American state* (2003).

⁷ On the example of aboriginal populations and colonial powers, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995).

⁸ On the case of the Napoleonic Europe, see Stuart Woolf, *Napoleon’s Integration of Europe* (1991), ch.3.

⁹ Peter Wagner, *A Sociology of Modernity: Liberty and Discipline* (1994), 27.

¹⁰ Samuel Pufendorf, *On the Nature and Qualification of Religion in Reference to Civil Society* [1687] J. Crull trans (2002), §§2-7.

¹¹ On the ‘by-passing religion and philosophy’s profoundest controversies’, see John Rawls, *Political Liberalism* (1993), 29, 151-2.

This is just one illustration of the way that constitutions, for functional reasons, silence certain types of speech. Since a broad-based consensus on fundamental issues cannot be assumed, constitutions must try to establish a relatively even-handed way of negotiating political conflicts. They do so by gaining consensus not on matters of substance but on certain procedural arrangements, a solution not without its difficulties. If a constitution merely establishes formally neutral procedures then, as the Weimar experience demonstrates, it may not be able to secure its own survival. It is not possible, suggested Carl Schmitt, ‘for a state to be neutral on the question of its own existence’ and ‘it is equally hard for a constitution to remain neutral on the political decisions which constitute its fundamental (positive) substance’.¹² Without substantive normative commitments, a constitution will have difficulty in establishing any authoritative meaning and that is tantamount to constitutional suicide.¹³

Responding to this weakness, after the Second World War some states sought to establish constitutional regimes founded on what has been called ‘militant’ – meaning ‘constrained’ - democracy. Since liberal democracies may not be able to maintain their authority against anti-liberal forces if their constitutions express neutrality over ends, certain types of political organization and political speech that challenge constitutional authority had to be silenced.¹⁴ This technique was adopted, for example, in the Federal Republic of Germany, which established an electoral threshold of 5 per cent before a party could be represented in the Bundestag. The rule operates to prevent political fragmentation but, by prohibiting the participation of radical parties in parliamentary debate, it also silences extremist views.

Other instances of imposed silences include the formal use of ‘gag rules’ to prohibit the discussion of certain intensely-contested political issues that threaten to disrupt constitutional order.¹⁵ Another, sometimes adopted in constitutional settlements

¹² C. Schmitt, ‘Hugo Preuss: His Concept of the State and his Position in German State Theory’ (2017) *History of Political Thought* forthcoming (n.49).

¹³ This type of argument had specific implications for the interpretation of the limit of the power of constitutional amendment in Art 76 of the Weimar Constitution. The standard accounts considered that the only limits were those laid down in the text: see G. Anschütz and R. Thoma, *Handbuch des deutschen Staatsrechts* (1932), vol 2, p. 154. In *Legality and Legitimacy* (1932) Schmitt, by contrast, argued that there must be substantive limits to the amendment power.

¹⁴ K. Loewenstein, ‘Militant Democracy and Fundamental Rights’ (1937) 31 APSR 417-32 (Pt.I); 638-58 (Pt.II).

¹⁵ The classic illustration, though it involves a legislative rather than a constitutional rule, is the gag rule that the US House of Representatives adopted in 1836, which stated that no action will be taken on any resolutions relating to the subject of slavery. It was imposed because the intensity of the controversy over the issue of slavery was so dominant that it was preventing the House’s ability to conduct normal legislative business. The rule was therefore felt to be necessary to try to preserve the Union. See S. Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (1995), 213-218.

as part of a peace process that breaks from authoritarianism and establishes democracy, is the immunity offered to the old ruling elites – a vow of silence about past conduct – felt to be needed to secure their compliance in making the transition to the new constitutional order.¹⁶

The form that is assumed by constitutional democracies, Stephen Holmes notes, ‘is undoubtedly determined by obligatory silences, by the strategic removal of certain items from the democratic agenda’ and in certain situations it may even be the case that ‘issue suppression is a necessary condition for the emergence and stability of democracies’.¹⁷ Constitutional democracies, in short, commonly devise rules which, for the purpose of protecting their regime, silence some types of political utterance.

2.3. Constitutional Abeyances

Whenever it is necessary to make a constitution Constant suggests that it should include ‘only what is indispensable’. Following extensive deliberation and adoption by popular acclamation, the constitution may have acquired the status of a symbol of the nation’s collective values, but it will invariably contain silences and abeyances. These exist not only because of linguistic indeterminacy or an inability to predict the future; they are often the result of a tacit agreement to keep certain contentious political questions in a state of irresolution. Consequently, such silences and abeyances ‘can only be assimilated by an intuitive social acquiescence in the incompleteness of a constitution’.¹⁸ Constitutional silences are functional.

Tacit constitutional silences do not arise because the issue has been overlooked: they express the need ‘to condone, and even cultivate, constitutional ambiguity as an acceptable strategy for resolving conflict’.¹⁹ Rather than signifying constitutional immaturity, they ‘denote an advanced constitutional culture adept at assimilating diverse and even conflicting principles of government within a political solidarity geared to manageable constitutional ambiguity’.²⁰ Through a comparative study of Britain and the USA, Michael Foley shows that the fact that the US Constitution is written is not the critical distinction. Maintaining that the US Constitution works through similar customs

¹⁶ See Ruti G. Teitel, *Transitional Justice* (2000), ch.6.

¹⁷ Holmes, above n.15, 207.

¹⁸ Michael Foley, *The Silence of Constitutions: Gaps, ‘Abeyances’ and Political Temperament in the Maintenance of Government* (1989), 10.

¹⁹ *Ibid.* xi.

²⁰ *Ibid.* 60.

and understandings to those of the British, he argues that American constitutional culture seems in fact 'to be far better equipped for keeping deep and unsettled issues at bay through its structures of abeyances'.²¹

Constitutions maintain their authority, in part at least, by virtue of their uncertain character and ambiguity. Their authority is bolstered by silences that keep at bay political issues that must remain unresolved. This is the point of Constant's dictum that they contain only what is indispensable: they establish a structure of government but they must 'leave room for time and experience'. Of necessity, constitutions are unfinished. What is explicit in the text rests on implicit understandings; what is stated rests on what is unstated.

2.4. Constitutional Interpretation

Constitutions present themselves as devices of settlement but in reality are arrangements that thrive on evasion. And a constitution is able to perform its function only if it maintains its ambiguous meaning. This explains the complexity of constitutional interpretation: a constitution must necessarily be subject to continuous re-interpretation.

This message has recently become obscured. The extension of constitutional jurisdiction has resulted in scholars expending a great deal of energy generating theories on what they conceive to be the authoritative way of interpreting the constitution. For reasons revealed by Hans-Georg Gadamer, this is a Sisyphean task. Gadamer shows how the interpretation of any text alters according to the nature of the questions being asked of it. At different times and in different circumstances 'people read the sources differently' and they do so 'because they [are] moved by different questions, prejudices, and interests'.²² In truth, objective interpretation cannot exist.

Gadamer's analysis reinforces Constant's claim that the constitutional text is 'improved' through continuing re-interpretation by what he called the 'reforming powers'. But Gadamer also reveals why 'the completion of what is still to be done' can never be fully realized. This is because constitutional interpretation necessarily operates through the dialectic of ideology and utopia. Ideological interpretation seeks to bridge the gulf between text and context, while utopian discourse requires subversively creative interpretation that accentuates ideals implicit in the text. And constitutional

²¹ Ibid. 74.

²² Hans-Georg Gadamer, *Truth and Method* [1960] J. Weinsheimer and DG Marshall trans (1989), xxxii.

interpretation becomes practical only by maintaining the creative tension between the integrative function of ideology and the subversive function of utopia.²³

Can the integrative function of constitutional ordering ever be accomplished through a process of interpretation? If constitutional integration is assumed to entail constitutional subversion – in the sense that it erodes some of the ideals expressed in the text - this is unlikely. But it has not stopped many attempts at a solution, an endeavour to which we now turn.

3. Filling Constitutional Silences

3.1. The promise of constitutionalism

Constant aspires to realize the promise of constitutionalism, a state of affairs in which the constitution not only regulates, but becomes constitutive of, the exercise of political power. No political actor – not even ‘the people’ - would then have the pre-constitutional power to represent ‘the sovereign’: the only sovereign would be the constitution itself. In this respect, constitutionalism envisages the elimination not only of an active sovereign operating behind the text but also of constitutional silences.

If, as I suggested in Part 2, constitutional silences are functional, then constitutionalism is an unrealizable - and undesirable - ideal. But the question remains of how efforts have been made to fill those silences. I will address it by contrasting three modern conceptions of constitutions: the constitution as a framework for continuing political negotiation (*Rahmenordnung*), the constitution as an order of values (*Werteordnung*), and the constitution as facilitator of an evolving administrative order (*Verwaltungsordnung*). The first recognizes the importance of political practices and the deliberative role of the legislature, the second accentuates the moral dimension and highlights the judiciary’s role as guardian of constitutional values, and the third emphasizes technical efficacy and the key role of the executive in promoting a governmental agenda. Each is addressed in turn.

3.2 The constitution as framework

The idea of the constitution as a framework for regulating political conflicts reflects Constant’s sense that the constitution is a bargain struck by political forces at a particular

²³ See Martin Loughlin, ‘The Constitutional Imagination’ (2015) 78 MLR 1-25, esp. 11-16.

historical moment. In that process, agreement on ultimate values is unlikely and the best the constitution can achieve is to establish a procedure through which differences can be negotiated. This generally leads to the division between legislative, executive and judicial tasks. Respecting the coordinate status of these tasks, the constitution provides an arrangement of checks and balances, within which the various gaps and silences avoid imposing a resolution on contentious matters.²⁴

In political regimes with this type of constitution, legality becomes the operating principle and legislation the normal working tool. But if the constitution functions just as a legal framework that ‘we the people’ have given ourselves, can it ever be elevated above the continuing consensus of the people? Constant’s pithy answer to that problem is that supremacy is achieved only through the effects of ‘time and experience’. In other words, a constitution’s authority is strengthened through the cultivation of a tradition. Tradition is the silent communion between contemporary political actors and the regime’s founders: it discreetly connects what it sanctioned today with what was initiated at the foundation. Tradition, then, is that which conserves what continues to work while sloughing off that which is no longer of practical value. This active sense of tradition is conceivable because tradition ‘itself is in part constituted by silence’.²⁵ Constitutional authority, faith in constitutional ordering, is engendered through the cultivation of a constitutional tradition.

What, then, does this idea of the constitution as a framework tell us about the ‘filling’ of constitutional silences? The main point is that the elimination of silences in the constitutional framework comes about through political judgment, and this is a point that the judiciary implicitly acknowledges. Judges promote a strict sense of legality, confining governmental bodies to the bounds of their lawfully conferred powers. But the corollary of this is that they must not get too involved in trying to fill these constitutional silences. That is, it should not be assumed that courts have the capacity to provide authoritative answers to contentious constitutional questions. Courts assume the mantle

²⁴ Dicey and Rait offer a specific illustration with respect to the Treaty of Union between England and Scotland of 1707. Recognizing that the question of English appellate jurisdiction over Scottish courts was highly sensitive, they note that the terms of Article 19 excluded the possibility of causes arising in Scotland being tried in English courts, but remained silent on the possibility of an appeal from the Court of Session to the House of Lords. They then comment: ‘Did the Commissioners, one asks, intentionally leave a difficult question open and undecided? The most obvious, and possibly the truest reply is that such was their intention, and that prudence suggested the wisdom of leaving to the decision of future events the answer to a dangerous inquiry which after all might not arise for years. There must have seemed much good sense in leaving a curious point of constitutional law practically unsettled until by the lapse of twenty years or more everyone should have become accustomed to the workings of the Act of Union’: AV Dicey and RS Rait, *Thoughts on the Union between England and Scotland* (1920), 192-3.

²⁵ B.P. Dauenhauer, ‘Discourse, Silence, and Tradition’ (1979) 32 *Review of Metaphysics* 437-451, at 451

of ‘guardian of the constitution’ in cases of clear breach of legal rules, but they should be reluctant to get involved in political matters, not least because the constitution is not a system of norms: it is an intrinsically political framework.

The judiciary performs a critical role in the enforcement of constitutional norms, but its authority is enhanced only by maintaining silence on constitutional questions that engender political controversy. The judiciary has thus devised a number of strategies to avoid being dragged into this contentious arena, including doctrines of non-justiciability, ripeness, standing, and refusal to determine moot questions. It is this type of strategy, for example, that led the US judiciary to formulate a ‘political question’ doctrine and, as its Supreme Court noted in *Baker v Carr*, ‘the non-justiciability of a political question is primarily a function of the separation of powers’.²⁶

In this conception of the constitution, silences are devices of political management. The judiciary performs a constructive role in strengthening this framework but, recognizing that its authority is increased when its jurisdiction is constrained, it has also devised a range of techniques to avoid having to decide on matters that might undermine its status. If these silences are to be filled, it is a task for political negotiation and accommodation.

3.3 The constitution as an order of values

This notion of the constitution as a framework document has recently been placed in question. The challenge is closely associated with a shift in the foundations of legal thought. For many contemporary jurists, law is not a set of promulgated rules; it is an arrangement of norms of an intrinsically ethical character. Law is not an expression of will, whether the will of the people that enacts the constitution or the will of the majority formalized in legislation; it is an elaboration of reason. Law is not *voluntas*; it is *ratio*. When law is conceived as a type of public reason, a shift in constitutional understanding occurs. The constitution is

²⁶ *Baker v. Carr*, 369 U.S. 186, at 210 (1962). The doctrine is a consequence of the Article III provision confining the role of the federal courts to determining ‘cases’ and ‘controversies’. In *Baker* the Court outlined six circumstances in which the issue of political questions might be raised: ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question’ (at 217).

conceptualized as a system of higher-order law that governs all legitimate political activity. The constitution establishes an inherently legal - rather than a political - framework.

In this conception, there can be no political question on which the constitution remains entirely silent, and all are answered in the language of law. There may, of course, be interpretative ambiguities, but no gaps or silences. The task of providing authoritative answers to these political-constitutional questions – filling the constitutional silences – falls to the judiciary.

The emergence of the constitution as an order of values runs in tandem with the rights revolution that has occurred since the Second World War. Much of the pioneering constitutional work was done by the German Federal Constitutional Court established to oversee the development of its postwar constitution, the Basic Law. The Basic Law includes a catalogue of fundamental rights which take effect as ‘directly applicable law’ (Art.1, s3), but the standing of those rights was considerably enhanced as a result of the Court’s ruling in the *Lüth* case of 1958.²⁷ Supplementing the orthodoxy that fundamental rights provisions confer rights on individuals and impose duties on public bodies, the Court asserted that these provisions also express the regime’s basic values. It held that, far from expressing ‘a value-neutral order’, the Basic Law erects ‘an order of objective values’ which permeate the entire legal order. This ruling transformed the status of the Basic Law, not only through its ‘horizontal effect’ on matters of private law and the imposition of positive obligations on public bodies, but also through its general ‘radiating effect’.²⁸

The changes promoted by the German Constitutional Court signal a more basic shift in legal thinking. Law as a system of rules to be interpreted and applied according to their plain meaning is replaced by a philosophy that requires each rule to be interpreted against the background of an overarching constitutional order. The effect is that each rule must be interpreted ‘as an expression of values’ and this may be ‘far removed from a literal interpretation of the constitution’.²⁹ It also assumes that the ‘goal of constitutional interpretation is to give the greatest possible effect to these values and to the function which constitutional norms are supposed to play in society under changing conditions’.³⁰

Once the constitution is treated as a value order, all governmental action is subject to the principle of objective justification. The tests devised across jurisdictions

²⁷ BVerfGE 7, 198.

²⁸ See, eg, the *numerus clausus* case: BVerfGE 33, 303 (1972) [Currie 20-24; Kommers 34-36, 241-3; Dorsen et al. 1244-47]

²⁹ Dieter Grimm, *Constitutionalism: Past, Present and Future* (2016), ch.7 (161-81) at 180.

³⁰ *Ibid.*

may vary but they amount to variants on a common theme: are the measures adopted capable of being justified as necessary and proportionate in accordance with a constitutional order founded on the values of liberal democracy?³¹ The silences that once were filled by political judgment after legislative or executive deliberation are now resolved by a judiciary which explicates the value order implicit in the constitution. Constitutional authority ‘shifts from a supposedly binding text to a structure for reviewing the rationality and reasonableness of governmental action’ and a form of ‘superlegality’ emerges which ‘governs the choice of conflicting interpretations and the closing of gaps’.³²

This conception of constitution as an order of values leads inexorably to a coalescence of meaning across national boundaries. Each constitution comes to be seen as a system giving effect to a universal order of values. The distinction between public and private is blurred, and so too is that between national and international.³³ Evidence of this can be seen across the world in the remarkable expansion in the constitutional role of courts, the erosion of doctrinal restrictions on jurisdiction (ripeness, mootness, justiciability, etc), the growing influence of international courts, and the growing trade in jurisprudence between national constitutional courts.³⁴ In the words of former Israeli Chief Justice, Aharon Barak, ‘nothing [now] falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable’.³⁵ There are no gaps, no silences, only a world order of values awaiting interpretation and application by constitutional courts.

The emergence of the constitution as an order of values signals a ‘paradigm shift’.³⁶ In place of the separation of powers between bodies of coordinate jurisdiction, the judiciary presents itself as the ultimate guardian of a values-based constitution. Whether it can fill the silences of the written constitution and sustain a viable order remains debateable. Trading in abstract principles requires an exercise of political judgment,³⁷ and this trade is

³¹ See Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (2012).

³² Alexander Somek, *The Cosmopolitan Constitution* (2014), 106-7, 115.

³³ Grimm, above n.29, ch.15.

³⁴ Ran Hirschl, ‘The Judicialization of Mega-Politics and the Rise of Political Courts’ (2008) 11 *Annual Review of Political Science* 93–118.

³⁵ Cited in Hirschl, *ibid.* at 95.

³⁶ Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009), 258-324.

³⁷ Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings* M. Künkler & T. Stein ed. (2017) ch.6: ‘The juristic problem of the value-centric understanding of the constitution ... lies in the fact that a rationally controllable cognition of “values” and a “value system” does not exist. Similarly, there is no rationally justified system weighing and choosing among the competing claims by different, often

creating a new type of political engagement which is the exclusive preserve of intellectual elites. Strong on abstract theorizing but weak on the transformation of general principles into actual change, it remains uncertain whether this conception of constitutional ordering is able to sustain a robust structure of political authority.

3.4. The constitution as administrative order

How can the exercise of governmental power be compatible with the protection of individual liberty? The answer given in modern constitutionalism is found in the doctrine of the separation of powers. The problem is that that solution assumed that government would undertake a limited range of tasks, an assumption confounded by the facts of modern political life. As government's role in the regulation of social life has expanded, the powers of the so-called executive branch considerably have increased. The result is that many gaps and silences in constitutional frameworks are now being expediently filled by extending the powers of the administration.

Early evidence of this process can be seen in the disputes in 1860s Prussia between Crown and Parliament over ultimate budget-making responsibility. The constitution being silent on the question, Bismarck maintained that the dispute could not legitimately be adjudicated by the courts since that would give them decision-making power over political questions. The 'holes' in the constitution could only be filled by the government.³⁸ To varying degrees, Bismarck's *Lückentheorie* has since been implicitly adopted in many regimes. A leading scholar of American government, for example, has noted that the President 'claims the silences of the Constitution'.³⁹ Modern constitutions have increasingly become governmentalized, by which I mean that they perform the function of legitimating this considerable extension in the powers of the executive branch.

How the modern constitution accommodates this development remains contentious, but it is worth noting that the issue was recognized at the moment constitutions were constructed. Consider the argument presented in *The Federalist Papers*

clashing "values." Freedom, equality, justice, security, self-realization, solidarity, protection of life: today these are all placed side by side as "values" contained in the constitution, without any explanation of why they are "values," and how they – and the practical legal demands that are supposed to arise from them – relate to one another within a hierarchical system.⁷

³⁸ See Otto Pflanze, 'Juridical and Political Responsibility in Nineteenth-Century Germany' in L. Krieger and F. Stern (eds), *The Responsibility of Power: Historical Essays in Honor of Hajo Holborn* (1968), 162-182, esp. at 179-180

³⁹ R.M. Pious, *The American Presidency* (1979), 333.

suggesting that extensive executive powers are required because individual liberties are most threatened by weak and fragmented government. Publius argued specifically that since Article II of the US Constitution, which vests executive power in the President, is couched in general terms that permit a variety of meanings, that power must be given a generous interpretation. He rested his argument on proportionality, that ‘the means ought to be proportioned to the end’.⁴⁰ The impact of this principle was considerable. Since the government is entrusted with the safety and well-being of the state and the factors that endanger this are infinite, Publius claimed that ‘no constitutional shackle can wisely be imposed on the power to which the care of it is committed’.⁴¹ Failure to confer ‘a degree of power commensurate to the end’, he elaborated, ‘would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigour and success’.⁴² Whether Publius was justifying an extensive executive prerogative or referring to national government in general is debateable, though the evidence suggests his argument applies to both.⁴³ Being silent on the matter, the Constitution neither grants nor denies an executive prerogative power; it may not authorize executive prerogatives but it implicitly allows them. This silence, then, is one that the government fills.

With the growth of governmental power, the constitutional imagery of checks and balances is marginalized; it is supplanted by the idea that government must evolve according to political necessities and this is something that the constitution must accommodate. The 1787 document remains the US Constitution, noted Woodrow Wilson in 1885, ‘but it is now our *form of government* in name rather than in reality’.⁴⁴ The ‘irresistible power of the federal system’, he explained, has relegated ‘some of the chief balances of the Constitution to an insignificant role in the “literary theory” of our institutions’.⁴⁵ Wilson later argued that government had outstripped its constitutional forms and the office of the President had become the crucial pivot on which the will of the people is converted into effective governmental action.⁴⁶ The key contemporary challenges, he suggested, are not constitutional but administrative, to be met with strong, centralized and united executive action. Here, then, the silences of the Constitution are

⁴⁰ *The Federalist Papers* [1787] Kramnick ed. (1987), no 23, p.185.

⁴¹ *Ibid.* no. 23, 185

⁴² *Ibid.* 186.

⁴³ Leonard R. Sorenson, ‘The Federalist Papers on The Constitutionality of Executive Prerogative’ (1989) 19 *Presidential Studies Q.* 267-283, esp. at 274-6.

⁴⁴ Woodrow Wilson, *Congressional Government: A Study in American Politics* (1885), 5-6.

⁴⁵ *Ibid.* 23.

⁴⁶ Woodrow Wilson, *Constitutional Government in the United States* (1908).

filled by executive power and constitutional interpretation must respect that administrative reality.

Wilson was writing at a time when governmental growth was closely linked to a progressive political agenda. But continuous growth in governmental regulatory powers has since made it a more contentious factor, especially among those who claim we are now living through a permanent ‘state of exception’.⁴⁷ Irrespective of political disagreements, it is recognized that administrative agencies work with such a broad delegation of power that this provides a platform for their claim to an independent authority, and they are established in this form not only because they remain best placed to respond to contemporary risks but also because legislatures and courts simply lack the capacity to exercise effective oversight.⁴⁸

Somek calls this phenomenon ‘empowering proportionality’, though perhaps it might more accurately be labelled ‘proportionate empowering’. Government’s powers, he suggests, must be proportionate to the magnitude of the threats that society faces. When dealing with the unknown, the powers of existing executive offices must implicitly be extended. Empowering proportionality is ‘the iron law of an ever more expansive executive branch.’⁴⁹ This is a contentious development, but it had from the outset been implicitly incorporated into the structure of modern constitutions. These silences are, arguably, now being exploited in a more systematic fashion,⁵⁰ and they lead to the principle of strict legality, which was adopted in the idea of constitution as a framework, now being replaced by a facilitative method in which normativity ‘is thrown into an expressive mode’.⁵¹

4. Conclusion

Written constitutions have become the standard instruments to establish and regulate the governing relationship of the state. That there are silences in the general framework is clearly understood, though the function of these silences is less well appreciated.

⁴⁷ From different traditions of thought see Giorgio Agamben, *State of Exception* (2005); Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

⁴⁸ Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (2010); Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (2016).

⁴⁹ Somek, above n.32, 216-7.

⁵⁰ One recent illustration of the principle of ‘empowering proportionality’ can be seen in the way in which the legality of the institutional arrangements established to deal with the Eurocrisis have been upheld by the Court of Justice of the EU: see Martin Loughlin, ‘The Erosion of Sovereignty’ (2016) *Netherlands Journal of Legal Philosophy* xxx, at xxx.

⁵¹ Somek, above n.32, 222.

Sometimes they are there simply to be filled through subsequent constitutional interpretation,⁵² but often they are the consequence of a conscious determination to leave unresolved certain matters on which consensus is not possible. Whatever the reason, it is generally accepted that the constitution establishes a framework within which – and over which – further political deliberation takes place. And for much of the modern period of constitution-making it has been understood that filling these silences is a political task on to which the judiciary’s authority to offer solutions is distinctly limited.

This conventional understanding has recently been challenged in thought and practice. That challenge has come from two main sources. It comes first from constitutional lawyers who, pursuing the implications of a paradigmatic shift in legal thought, assert that the constitution expresses an order of values that permeate the entire social order. This implies that there are no gaps and no silences to be filled through political negotiation; there are only interpretative ambiguities on which judges, as guardians of that order, are well-equipped to generate the ‘right answer’. This shift from constitution as ‘framework order’ to ‘values-order’ reveals a significant contrast in the otherwise fruitless debate in the Anglo-American literature over ‘political constitutionalism’ versus ‘legal constitutionalism’. The differences between these conceptions can more accurately be expressed by drawing a distinction between legality and legitimacy. In modern practice, the distinction between legal authority and political legitimacy was clearly understood but in the ‘values-order’ conception legality and legitimacy have become blurred.

There is a second source of challenge to the idea that the constitution establishes a political framework. This alternative maintains that in the light of the contemporary workings of government, legitimacy is a product of effectiveness. Rather than through some abstract appeal to ‘justice’, legitimacy is established through the demonstrable material benefits that governments provide. Constitutions acquire legitimacy, it is maintained, by virtue of enabling governments to deliver collective goods efficiently, effectively and proportionately. In this alternative conception, the constitution sanctions administrative action whenever it is needed to meet the risks its citizens face. The silences of written constitutions are filled in accordance with administrative necessities operating through a principle of proportionality.

These two recent movements now threaten to supplant Constant’s reforming

⁵² See Rosalind Dixon, ‘Constitutional drafting and distrust’ (2015) 13 *ICON* 819-46 (comparative study of implications of variations in length and specificity of constitutions).

powers of 'time and [political] experience' with the principles of 'superlegality' and 'technical efficacy' respectively. The silences that were once seen as functional, and which enabled constitutions to carry forward an uncertain political project, are now being filled by lawyers through juridification and administrators through bureaucratization. When 'law's empire' in one conception is countered by 'law's abnegation' in the other then a perplexing state of affairs is reached. And if constitutional silences are no longer tolerated and the role of political prudence in negotiating those silences is jettisoned, we might also say that that condition is pathological.