

‘Steering the Ship of State: Fundamental Rights, State Power and Janus-faced Constitutionalism’

Colm O’Cinneide

UCL

WG Hart Workshop 2010: Conceptualisations of the Purposes of Constitutions

**VERY MUCH A DRAFT – PLEASE APPROACH WITH GREAT CAUTION
AND CITE ONLY WITH PERMISSION!**

Introduction

This paper makes three arguments.

Firstly, the rights-based constitutionalism that has emerged in the wake of cases such as *Brown v Board of Education* and the ‘Rights Revolution’ is formally analogous but substantially different to earlier, more ‘classical forms of negative constitutionalism: it can be seen as a mutated form of the earlier template.

Secondly, a key element of the difference between classical negative constitutionalism and rights-based constitutionalism (which sits alongside rather than fully displacing other forms of constitutionalism in contemporary constitutional systems) is the ‘Janus face’ that it adopts to state power: it combines elements of classical negative constitutionalism with the periodic positive embrace of state power where necessary to deliver on its professed ambitions. This means that treating this mutated form of constitutionalism as similar to classical negative constitution in focusing on limiting state power is likely to be misleading.

Thirdly, this form of constitutionalism aims towards the achievement of a ‘total constitution’, whereby the exercise of state power is steered in all its aspects towards rights-friendly goals. These aspirations are reined in by the inherent indeterminacy of rights review, its inevitably limited impact and ultimately by its complex and contested relationship with popular sovereignty. However, perhaps ironically, these

limitations ultimately serve to lend strength to rights-based constitutionalism. By steering the exercise of state power towards giving effect to human rights, it places a considerable burden of justification on those who wish to push back against this direction of travel.

Fred Vinson's Heart and the Origins of the 'Rights Revolution'

This paper could be subtitled 'The Persisting Legacy of Fred Vinson's Heart and Its Implications for Constitutional Theory'. When the seminal case of *Brown v Board of Education of Topeka Shawnee County, Kansas, et al.*¹ reached the US Supreme Court in early 1952, the then Chief Justice, Fred Vinson, was concerned that a decision by the Court to find educational segregation in conflict with the Equal Protection Clause of the 14th Amendment would be regarded as constituting an usurpation of the Court's limited constitutional role within the US system of separation of powers. However, the situation changed dramatically following Vinson's death from a sudden heart attack on September 8, 1953. The former Republican Governor of California and newly-appointed Chief Justice, Earl Warren, patiently won his colleagues around to the view that the time was ripe to reverse *Plessy* and declare segregation unconstitutional.² Warren was so successful in his patient coalition-building that all his colleagues finally joined in the Chief Justice's opinion, and when the final decision in *Brown* emerged on May 17, 1954, it was the product of a unanimous court.³

The subsequent impact of *Brown* has been the subject of sustained debate since 1952.⁴ However, from the perspective of constitutional theory, the *Brown* judgment at first

¹ (1954) 347 U.S. 483.

² The changing landscape of American politics can nicely be illustrated by considering the response of any attempt by a President to nominate a state governor to the Supreme Court, let alone the current Governor of California: it should be noted that Warren's nomination by President Eisenhower and subsequent appointment to the Court was largely uncontroversial, even if Eisenhower later was reputed to have described it as the 'worst mistake' of his Presidency. See E. De Grazia, 'Human Law and Humanistic Justice' (1988) 10 (1 & 2) *Cardozo Law Review* 25-35, fn. 6

³ (1954) 347 U.S. 483.

⁴ For a sample of the vast literature on *Brown*, see D. Bell, *Silent Covenants: Brown Board of Education and the Unfulfilled Hopes for Racial Reform* (Oxford University Press, 2004); R. Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (revised ed.) (Knopf, 2004); C. J. Ogletree Jr., *All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* (Norton, 2004); D. Rhode & C. Ogletree (eds.), *Brown at 50: The Unfinished Legacy* (American Bar Association, 2004). Many scholars have questioned the extent

glance would appear to be of limited significance. The US Supreme Court had carved out a role for itself decades previously as a protector of individual rights, even if the *laissez-faire* libertarian jurisprudence of the *Lochner* years had become thoroughly discredited by 1937: insofar as *Brown* can be seen as a significant departure from existing constitutional practice, it appeared to many at the time (and also to many commentators today) to mark the re-emergence of a modified form of negative constitutionalism, of different substance perhaps to that of the *Lochner* years, but of similar formal properties when viewed as an element of an overall constitutional framework.⁵ Nevertheless, this analysis, while not wholly inaccurate, glosses over key elements of the ‘new constitutionalism’ that has emerged in the wake of *Brown*, and of which it remains a potent symbol.

To begin with, the Supreme Court’s judgments in *Brown* and other early civil rights cases conferred new impetus to the idea of constitutionalism. Their fusion of the hitherto largely formalistic and libertarian negative rights protection established within the US constitutional architecture with wider normative engagement with contested, divisive and fundamental questions of social justice touched a nerve. In particular, they opened the door to the possibility that constitutional control mechanisms could be detached to some degree from its historic emphasis on libertarian counter-democratic controls: perhaps for the first time, the tools of liberal constitutionalism appeared capable of being put to some use in remedying gaps between the abstract constitutional promises of equality, justice and democracy and the reality of oppressive power structures.

to which the decision actively contributed to ending segregation in the southern US states: in many ways, despite the Court’s attempt to ensure the effective implementation of its judgment in *Brown* (*No. 2*), the Court’s judgment had at most limited impact in the educational sphere. Others have been critical of the common view that *Brown* represented a major step forward in the judicial protection of rights, suggesting that the Court’s judgment merely reflected the emerging state of elite opinion and was influenced by the background of the by-then intense Cold War propaganda battle as to the comparative merits of the Western and Soviet systems: see e.g. M. Dudziak, ‘Desegregation as a Cold War Imperative’ (1988) 41 *Stanford L.R.* 61. However, given the scale and intensity of the reaction in the southern states against the Court’s decision, it is perhaps excessively revisionist to portray *Brown* as a passive confirmation of an emerging consensus. As many of the texts above so argue, *Brown* does appear to have had a substantial impact in beginning the process of dismantling segregation.

⁵ *Brown* was not even the Court’s first significant civil rights decision: in 1948, attempts by the Texas Democratic party to maintain a colour-bar had been overturned by the Court, while in the same year the Court in *Shelley v Kraemer* 334 U.S. 1 (1948) had refused to enforce racially restrictive covenants. *Shelley* is generally viewed as the furthest the US Supreme Court has been willing to go in giving horizontal effect to constitutional rights, although debate goes on the scope of constitutionally controlled ‘state action’: see S. Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 *Michigan Law Review* 388-459.

In practice, *Brown* and its civil rights siblings had a limited if not insignificant effect in generating social change, as Mark Tushnet and others have noted.⁶ Nevertheless, they demonstrated how constitutionalism could through the use of self-reflexive interpretative techniques generate a framework of legal norms which was able to reflect and echo the emerging post-war politico-philosophical normative vocabulary of human rights, non-discrimination and equality. In addition, these cases opened up sufficient apertures within existing politico-legal power structures to make progressive legal activism a meaningful endeavour.⁷ Rawlings argues that the ‘classic functionalist question to the purveyor of elegant principles of habeas corpus should never be forgotten: “yes, but how many got out?”’⁸ The answer that *Brown* and its siblings gave to the equivalent questions applicable to them was qualified, but sufficiently positive to open up new directions within the existing constitutionalist frameworks and to excite the enthusiasm of those pressing for social change.

As a consequence, and in interesting contrast to the bulk of the US Supreme Court’s jurisprudence over 200 years of existence, *Brown* has come to represent constitutionalism in its best light, marching hand-in-hand with best contemporary accounts of social justice to reinforce a deeper concept of democracy. In addition, *Brown* has both helped to trigger and become a symbolic marker of the dawning of what Charles Epp famously described as the ‘rights revolution’,⁹ namely the shift in constitutional thinking that has generated the expectation that state constitutional frameworks at large should provide substantive and effective protection for what post-1945 are described as ‘human rights’.¹⁰ Constitutions serve multiple purposes, being

⁶ See e.g. the excellent discussion in M. Tushnet, ‘Implementing, Transforming, and Abandoning Brown’, in D. Rhode & C. Ogletree (eds.), *Brown at 50: The Unfinished Legacy* (American Bar Association, 2004).

⁷ ‘Progressive legal activism’ here is used in its widest and most abstract sense, to indicate the use of legal routes to generate some form of social change: it is not intended to exclude legal activism directed towards libertarian, socially conservative or other non-liberal/left political objectives, which within its own terms is striving for progressive change just as much as liberal/left activism, despite the latter’s rhetorical claim to the language of ‘progress’.

⁸ R. Rawlings, ‘Modelling Judicial Review’ (2008) *Current Legal Problems* 140-185, 158.

⁹ C.R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998).

¹⁰ I have used quotation marks here to emphasise the status of the current lexicon of human rights as the product of a particular historical process of development.

expected to discharge a range of symbolic, norm-generating and structural functions.¹¹ Within this array of expectations, the assumption that a constitution must speak of fundamental rights is now very strong: in particular, it is expected to both give symbolic recognition to rights and also generate legally-applicable norms that enhance individual and group protection against abuse of rights.¹²

Brown and its civil rights siblings may have had relatively little influence on the emergence of this mutated constitutionalism in Europe and the decolonising wider world, notwithstanding the dominant intellectual influence exercised by US constitutionalism and US law schools over the last few decades and the importance of *Brown* within US constitutional narratives.¹³ However, at the very least, *Brown* has become a useful milestone to mark the point at which the ‘rights revolution’ in constitutionalism took hold. In addition, it has become a touchstone which is regularly invoked by courts and commentators across the globe to justify the regularly-expanding exercise of rights review through constitutionalist processes.¹⁴ As such,

¹¹ See J. Prihan, ‘The Time of Constitution-Making: On the Differentiation of the Legal, Political and Moral Systems and Temporality of Constitutional Symbolism’ (2006) 19(4) *Ratio Juris* 456-78: Prihan adopts a different classificatory approach than used above, choosing to distinguish between a constitution’s symbolic, norm-imposing and normative functions.

¹² In this context, the debate between Kelsen and Schmitt as to whether abstract constitutional norms could be given any credible substance as *legal* norms remains pointed: however, it has been sidelined by the acceptance within most constitutional systems of the legally binding status of the concrete interpretation given to abstract rights norms by constitutional courts, and in many cases as well by the interpretation of such norms adopted by regional and international counterparts, such as the European Court of Human Rights. Whether courts, tribunals or ombudsmen are performing a purely legal role when they carry out this interpretative role may interest legal theorists, but this question appears to resonate much less outside the academy than debates as to whether a justifiable interpretation has been adopted in a specific given case, or whether the system of concrete norms which emerges from this interpretative process is legitimate when taken as a whole.

¹³ It is interesting to speculate whether the ‘Rights Revolution’ would ever have swept contemporary constitutional design if a re-affirmation of *Plessy* had nipped civil rights litigation in the bud in 1953. In continental Europe, the emergence of rights review appears to have had its primary roots in the post-war resurgence of natural law theory in the work of Radbruch, Maritain and others, combined with the residual memory of the pre-war examples of constitutional review to be found in Austrian constitutional law and the debates on the enforceability of the fundamental rights provisions of the Constitution of the Weimar Republic. (In this respect, it should be noted that the provisions of the European Convention on Human Rights which make provision for the establishment of a human rights court predate *Brown* by four years.) Also, the emerging rhetoric of human rights as set out in the text of the Universal Declaration also played a role, both within Europe and across the wider world, as doubtless did the influence of the earlier US constitutional jurisprudence. As a result, the ‘Rights Revolution’ may have taken place even if *Brown* and its siblings had been decided differently. However, it could be argued that at a minimum the scope and impact of the *Brown* decision and its civil rights siblings conferred impetus and even glamour on rights-based constitutionalism that it might otherwise lack.

¹⁴ The most interesting recent manifestation of this tendency to cite *Brown* in support of constitutionalist-style rights review can be found in the judgment of the European Court of Human Rights in *DH v Czech Republic* (2008) 47 EHRR 3, where the Grand Chamber of the Court cited key

this mutated rights-based constitutionalism can be seen at least in part as the bequest conferred by Fred Vinson's heart.

This legacy appears to keep on giving. No recently drafted constitution is now complete without a resonant list of fundamental rights guarantees, while transnational quasi-constitutional systems such as the EU are often criticised as half-formed on the basis that they lack a convincing 'rights dimension', resulting in the insertion of texts such as the EU Charter of Fundamental Rights and the generation via judicial creativity of legally-applicable rights norms via judgments such as those adopted by the European Court of Justice in *Nold*¹⁵ and *Kadi*.¹⁶

The UK has recently succumbed to this trend, initially the common law constitutionalism of the 1990s and now more directly through the Human Rights Act 1998 (HRA):¹⁷ significantly, recent Conservative proposals to replace the HRA have assumed that some form of judicial rights protection is desirable, and have been based on the assumption that a healthy constitutional system should say something about fundamental rights, even if only in the form of symbolic rhetoric.¹⁸ Similarly, Stone-Sweet has traced how rights review has become a crucial vector for the expansion of judicialisation and constitutional controls throughout Western Europe.¹⁹ The recent

passages in *Brown* to support its conclusion that the Czech educational system was discriminating against Roma children by effectively segregating them in special needs schools. The reference to *Brown* here is not just explicable by the similar subject matter in both cases: it is apparent from the context and wording of the judgment in *DH* that the Grand Chamber was consciously citing *Brown* to support and bolster its decision to deepen and extend the reach of its existing anti-discrimination case-law, notwithstanding objections from dissenting judges that in so doing it was uncritically adopting an 'Anglo-Saxon' jurisprudence alien to continental European legal traditions.

¹⁵ Case 4/73, *Nold v. Commission* [1975] E.C.R. 985; [1974] E.C.R. 491; [1974] 2 C.M.L.R. 338; see also Case 29/69, *Stauder v. City of Ulm* [1969] E.C.R. 419; [1970] C.M.L.R. 112; Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] E.C.R. 3727; [1980] 3 C.M.L.R. 42.

¹⁶ *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2008] 3 CMLR 1207, ECJ.

¹⁷ For an empirical analysis of the impact of the HRA on the work-load of the UK House of Lords, see T. Poole and S. Shah, 'The Impact of the Human Rights Act on the House of Lords' (2009) *Public Law*, Apr, 347-371.

¹⁸ See the outline of Conservative proposals for a Bill of Rights for the UK by Dominic Grieve M.P., 'Can The Bill Of Rights Do Better Than The Human Rights Act?', 30 November 2009, available at <http://www.dominicgrieve.org.uk/record.jsp?type=speech&ID=82>. Note also the similar assumptions underpinning Labour and Liberal Democrat proposals for a Bill of Rights: see in general, C. O'Connell, 'The New Human Rights Culture', in R. Hazel and M. Glover (eds.) *Constitutional Futures Revisited* (London: Palgrave, 2008), 159-177.

¹⁹ See e.g. A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: OUP, 2000).

French constitutional reforms could be seen as exemplifying this tendency.²⁰ Even the Nordic countries, hitherto relatively immune to the enthusiasm for rights review that has swept most legal systems, are showing some signs of following the trend.²¹

The progress of the ‘Rights Revolution’ is even more pronounced outside the slower-moving (arthritis?) European constitutional systems. The manner in which the South African Constitutional Court was not alone given responsibility to adjudicate on issues of socio-economic rights and the death penalty, but also asked to comment on the validity of the Interim Constitution of 1994 from *inter alia* a fundamental rights perspective, is striking. The assumption of sweeping constitutional powers by the Indian Supreme Court post-Emergency in the name of fundamental rights is also noteworthy, while recent developments in Latin America make the South African experiment look tame: the recent reform of the Ecuadorian Constitution confers courts with powers to enforce a wide range of fundamental rights and principles, including concepts of biodiversity, while the Brazilian Constitution recognises more than 80 judicially enforceable rights, whose numbers have recently been added to by the insertion of a right to food. Within the group of states recognised as ‘democratic’ within a broad meaning of that term, Australia alone remains largely immune to the charms of the ‘Rights Revolution’, with the exception of the introduction in Victoria and the ACT of state charters of rights.

Post-Brown Rights Constitutionalism – A Mutant Strand

This sweeping embrace of rights-based constitutionalism has happened notwithstanding considerable academic scepticism. It has also caught fire despite the reasonably miserable record of this form of constitutionalism in the United States, where the well-meaning liberal activism of the Warren and Burger Supreme Courts

²⁰ The perceived incompleteness of the existing French constitutional system stemming from the absence of *a posteriori* constitutional review has been remedied by the grant of jurisdiction to the *Conseil constitutionnel* to assess the constitutionality of enacted laws. This expansion of the *Conseil*'s role goes beyond rights review, but many commentators have noted that the primary impact of this constitutional reform will be felt in the sphere of individual rights, not least when it comes to the relationship between the scope and content of rights recognised within the French constitutional order and those protected by the European Convention on Human Rights. See M. Hunter-Henin, ‘Additional Constitutional Review for France: A valuable addition to human rights protection?’, paper on file with the author, 10 June 2010.

²¹ The partial judicialisation of socio-economic rights in Finland represents an example of this: see Section 15 A of the Constitution Act of Finland 1995.

recedes into distant memory. It remains to be seen whether enthusiasm will abate, and be replaced with a new focus on the possibilities inherent in popular constituent power, as has occurred in US academic and political circles.²² However, at present, the post-*Brown* infiltration of rights into the mainstream of constitutionalism has become perhaps the pre-eminent trend of our current constitutional era. If, to paraphrase Martin Loughlin, constitutions establish the ‘architecture’ or structural framework through which state power is exercised,²³ then contemporary constitutions are now in the post-*Brown* era increasingly expected to shape and steer the exercise of state power in a manner that ensures that it accords with legal norms which in turn echo the language of rights.

In general, there are various reasons to explain the popularity of the mutated form of constitutionalism represented by *Brown*. In advanced capitalist societies with ever-increasing differentiation, technocratic determinism, population mixing and eroded communal bonds, rights-based constitutionalism appears to provide a super-regulatory framework that is sufficiently open-ended, malleable and abstract to be applied across a wide range of social interaction: it also draws upon a relatively deep well of legitimacy because of its link to the normative human rights framework, which remains the nearest thing in contemporary discourse to a shared ‘civic religion’. In addition, the exercise of the constituent power or even constituted electoral power by popular majorities as a vehicle for achieving social change has become severely attenuated since its heyday in Western states from 1870 to 1960: as electoral choice becomes increasingly hemmed in by the pressures exerted by competitive market forces, shifting patterns of global economic and political power and the inescapable demands of trans-national co-operation, alternative methods of governance inevitably appear comparatively more attractive for those seeking to steer the power of the state in what they consider to be a desirable direction.²⁴ Other reasons may exist for the impressive sweep of the ‘rights revolution’: however, it is apparent that much of its

²² See e.g. the analysis in M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999).

²³ M. Loughlin, ‘Constitutional Theory: A 25th Anniversary Essay’ (2005) 25 O.J.L.S. 183

²⁴ This is not to deny the continuing importance of national constitutional frameworks, and indeed the importance of a constitutional science that maintains a focus on the nature of the state. Loughlin’s criticism of an excessive emphasis on multi-level constitutionalism at the expense of *Staatslehre* is well made: M. Loughlin, ‘In Defence of *Staatslehre*’ (2009) 48(1) *Der Staat* (Berlin: Duncker und Humblot) pp. 1-28.

appeal lies in the moral charge given to constitutionalism by its linkage in *Brown* and elsewhere to the potent rhetoric of human rights and equality. This gave it an apparently transformative dimension that other forms of power-steering mechanisms lack.

As a result, the mutated form of constitutionalism represented by the ‘Rights Revolution’ can be seen as representing the first element of the legacy bestowed by Fred Vinson’s heart. While it resembles in formal terms the constitutionalism of Guizot, Mill and De Tocqueville (not to mention *Wednesbury* and *Fair Fares*) and its substantive concerns and the scope of its vaulting ambition differ greatly.

Constitutionalism has partially mutated into a new and more potent form, whereby controls on the exercise of constituted power are shaped not just by the formal demands of separation of powers and *ultra vires* doctrines, but also now by a range of normative concepts linked to often inchoate but far-reaching human rights values. Aspirations of achieving some form of social justice, of creating a fairer and better society, are now part of the mission statement, whereas classic constitutionalism was arguably more concerned with the limited objective of restraining the abuse of state power. What is expected of constitutionalism has expanded, even while alternative power-steering mechanisms have begun to stall. This is not to say that classic constitutionalism has disappeared: it remains vigorous and potent. However, a new dimension has been attached via the sweep of the ‘rights revolution’, which can both complement and come into conflict with the classic variant.

The Relationship with Negative Constitutionalism and the Exercise of State Power

This legacy has some very ambiguous elements. The mutated form of constitutionalism represented by *Brown* is usually exercised through the conventional channels of pre-established constitutionalism, and often overlaps with more classical elements.²⁵ In addition, its primary focus is on the control and steering of state power. As a consequence, it is often analysed in constitutional theory as a form of ‘negative constitutionalism’, i.e. focused on limiting state power, to be contrasted with ‘positive constitutionalism’, i.e. the elements of constitutionalism that help to ensure the ability

²⁵ Significant exceptions exist, in particular in India with its tradition of public interest litigation.

of the state to make effective use of its constituted power.²⁶ This means that rights review is often conceptualised (at least in Anglo-American liberal constitutional theory) as a form of power-blocking mechanism, umbilically linked to mainstream classical liberal constitutional theory and sharing its concern to protect the individual against the excessive and unfair exercise of state authority.

This assumption is clearly present in the writing of legal theorists closely associated with the ‘rights revolution’. For example, Dworkin conceptualises legal rights as protecting individuals against unjustified state interference through ‘reason blocking’ analysis.²⁷ Indeed, a host of commentators adopting Dworkinian or Rawlsian positions have offered accounts of rights-based constitutionalism that emphasise the protective shield it throws around individuals, which march in step with the presuppositions of classical liberal ‘negative’ constitutionalism.

Within these analytical frameworks, the central focus is on the role of the courts in protecting individuals against external interference. Rights are conceptualised as a form of immunity, which when applied by courts insulated against the tidal surges of democratic contestation serves to protect the ‘negative liberty’ of individuals against the power of the state. In contrast, aspects of the emerging rights jurisprudence of national and international courts that deviate from this model, such as the development of the concept of positive obligations, the extension of the horizontal effect of rights or the protection of socio-economic entitlements, tend to be marginalised: as they constitute deviations from the standard template of negative constitutionalism involving the extension or active directing of state power to achieve definite ends, these aspects of the post-*Brown* constitutionalism sit uncomfortably with the classic template.²⁸

Tim Macklem, for example, has argued that the negative protection of rights by courts acting to block state action is intrinsically more legitimate and less concerning from the point of view of the counter-majoritarian difficulty than when courts act to impose

²⁶ Note the excellent analysis of negative and positive constitutionalism in S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995)

²⁷ R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

²⁸ See e.g. the analysis in G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007).

positive obligations upon the state.²⁹ This presumes that the imposition of negative constraints upon state action is clearly distinguishable from the imposition of positive obligations, an assumption which is unsustainable when one considers, for example, the positive role of the state in providing the essentials of a fair trial. Nevertheless, the emphasis placed by Macklem on the negative/positive distinction despite twenty years of human rights scholarship calling the distinction into question shows the persisting force in liberal jurisprudential analysis of the assumption that rights review is and can be essentially only concerned with immunities.

Commentators who adopt a more sceptical approach towards the post-*Brown* constitutionalism also tend to analyse it in terms of negative constitutionalism. Thus, Martin Loughlin in his work tends to treat rights review as a form of negative constraint upon the state which is largely predicated upon a stance of distrust towards the exercise of state power. He echoes Schmitt and others in critiquing the inability of negative constitutionalism at large to engage adequately with the constituent power of a self-governing people, and views it as contaminated by the tendency of much liberal constitutionalism to assume the existence of shared communal norms whose contents can be defined by a jurisprudential ‘priesthood’ of philosophers and ‘Herculean’ judges.³⁰ Similar views have been adopted by other ‘rights sceptics’, who often emphasise the power-constraining focus and counter-democratic bias of post-*Brown* rights-based constitutionalism.³¹

Rights protection therefore is often viewed as perhaps the ultimate embodiment of power-constraining ‘negative constitutionalism’, by both enthusiasts and sceptics alike. However, when one examines how rights are conceptualised and protected in constitutional practice, a more variegated picture emerges. To begin with, the role in practice played by constitutional courts in protecting rights is often different than is suggested by the metaphor of ‘blocking’ state action. Courts may restrict, divert or re-direct the legal avenues through which state power is exercised, but rarely completely dam its flow. Governments may be forced by the exercise of rights review by courts into using alternative and less convenient legal routes to achieve their aims, or may

²⁹ T. Macklem, ‘Entrenching Bills of Rights’ (2006) 26 *Oxford Journal of Legal Studies* 107.

³⁰ M. Loughlin, *The Idea of Public Law* (OUP, 2004), at p. xxx.

³¹ See the essays in T. Campbell, K.D. Ewing and A. Tomkins, *Sceptical Essays on Human Rights* (Oxford: OUP, 2001).

even be forced into attempting to make use of the available forms of political override that are available within the relevant constitutional system such as referendum procedures, court-packing or super-majority amendment. However, rights-based constitutionalism, despite many of the claims made by both its supporters and its critics, tends to result in the redirection or deflection of state power, not its paralysis.³²

Furthermore, the relationship between the exercise of state power and the manner in which constitutional rights are protected in constitutional systems is also more complex than a 'negative constitutionalist' analysis suggests. The constitutional rights jurisprudence of the US Supreme Court is still at least in theory built around the concept of rights serving as immunities to protect individual freedom against the illegitimate exercise of state power. However, the approach adopted in the fundamental rights jurisprudence of European courts (including the quasi-constitutional ECHR and EU frameworks), as well as in the Canadian and South African courts, is much closer to the 'balancing' analysis developed by Robert Alexy, or the 'priorisation' approach described by Steven Greer.³³ In other words, rights tend by and large to be treated as norms which should receive suitable priorisation in how state power is exercised, whose application is balanced against other legitimate public interest considerations by means of overt or occasionally hidden forms of proportionality analysis carried out by courts within the (flexible) parameters of legal reasoning.³⁴ Individual rights are not conceptualised as 'trumps', whose infinite value outweighs alternative goals of state activity, but rather as forces of attraction which should influence and guide the trajectory of state action unless it has sufficient justificatory force to escape their orbit.³⁵

³² See C. O'Conneide, 'Democracy and Rights: New Directions in the Human Rights Era' [2004] 57 *Current Legal Problems* 175-211. The much-abused concept of 'constitutional dialogue' is often wheeled out to try and capture this element of rights review: however, is problematic in many respects, not least because it soft-soaps the reality that rights review is conflictual in nature.

³³ S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006); S. Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) *Cambridge Law Journal* 412-434.

³⁴ Stone-Sweet and Mathews argue that proportionality analysis has 'emerged as a multi-purpose, best-practice, standard', in A. Stone Sweet and J. Mathews, 'Proportionality, Judicial Review, and Global Constitutionalism', in G. Bongiovanni *et al* (eds.) *Reasonableness and the Law* (Springer, 2009), 171-214, at 171.

³⁵ Apologies for the semi-developed astronomical metaphor being used here! A similar approaches appear to underlie much of the US case-law, albeit in distorted form and filtered through the lens of immunities analysis with its strong attachment to the tropes of negative constitutionalism. See A. Stone Sweet and J. Mathews, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing', available at [Yale Law School Legal Scholarship Repository](#).

As a result, rights protection in constitutional systems at least is best conceptualised not as involving the restriction or nullification of state power in the name of individual liberty, but rather as a mechanism that attempts to steer or orientate the exercise of state power in what is deemed to be a rights-friendly direction. The shift this represents from the immunities approach often generates some discomfort amongst commentators wedded to Dworkinian liberal philosophy, as it appears to abandon the idea of ‘right as trumps’ and pull individual rights down into the mud of balancing analysis.³⁶ However, it avoids the conceptual dichotomy between collective and individual well-being which underpins the immunity analysis: proportionality and balancing approaches are better able to recognise and accommodate the value of collective state action.³⁷

Janus-faced Constitutionalism

In addition, post-*Brown* constitutionalism is increasingly comfortable with deploying state power to achieve its goals of protecting individual rights even where the threat stems from private actors or from state inaction. Under the influence of international human rights law, which tends to be much less tied to a negative focus on state action than many national constitutional systems, rights review now is increasingly accommodating of the concept of state ‘positive obligations’. These have mainly emerged in the context of right to life obligations under the ECHR system, but the concept of positive obligations have been stretched to encompass a potentially broad socio-economic rights jurisprudence in India and Latin America. Similarly, national constitutional systems are increasingly giving horizontal effect to rights guarantees, and requiring private law to conform to objective constitutional norms in line with the German *Drittwirkung* approach.

This reflects the reality that attempting to deliver on the aims, ideals and ambitions of the post-*Brown* constitutionalism can require national constitutional systems to go

http://digitalcommons.law.yale.edu/fss_papers/30 (last accessed 20th June 2010).

³⁶ See Letsas, above at n. 28.

³⁷ Theories of balancing are open to criticism as being difficult to reconcile with key elements of the human rights normative architecture: see B. Cali, ‘Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions’ 29(1) *Human Rights Quarterly* 251-270.

beyond the classical limits of negative constitutionalism and embrace state power as a crucial instrument for implementing rights guarantees. Even in the United States, with its continuing strong attachment to the rights as immunities approach, this tendency is notable, especially at state level as evidenced by the education rights jurisprudence of the New York and Massachusetts Supreme Courts. The fall-out from *Brown* also neatly illustrates this ‘pull’ effect: the ineffectiveness of the Supreme Court’s initial tentative order for its decision to be implemented ‘with all deliberate speed’ generated pressure for the Court to beef up its response, a process which ultimately took the US federal courts into the terrain of school re-districting and compulsory bussing schemes. Similarly, combating segregation took the Court’s Equal Protection jurisprudence further into the private sphere than any other aspect of US constitutional law.³⁸

As such, a notable characteristic of the post-*Brown* constitutionalism has been the way in which it combines elements of classical negative constitutionalism with the periodic embrace of state power where necessary to deliver on its professed ambitions.³⁹ Constitutional rights jurisprudence therefore increasingly adopts a ‘negative’ and a ‘positive’ face: elements of both negative and positive constitutionalism (the latter understood in a broad sense as concerned with enabling the effective exercise of state power) are combined in what can be described as a ‘Janus-faced constitutionalism’, which both draws upon negative constitutionalism and embraces state action.

As a consequence, analysing post-*Brown* rights-based constitutionalism in terms of the classical dichotomy between negative and positive constitutionalism can be seriously misleading. Accounts of rights review that emphasise its immunity-conferring functions distort the manner in which it increasingly embraces the role of the state as the prime agent for ensuring meaningful enjoyment of rights: state power is not conceived as the enemy against which protection is required, but rather as a

³⁸ See e.g. *Shelley v Kraemer* 334 U.S. 1 (1948).

³⁹ In addition, it also at times acts to *enable* state action, with judicial interpretation of fundamental rights often clearing the way for states to legislate in favour of affirmative action and other forms of interventionist strategies, often in the face of private sector resistance or opposition from other governmental entities. The classic example from the US jurisprudence remains *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964).

tempestuous animal which must be steered towards the proper path before being given its head.

The 'Total Constitution'

This is not to underestimate the manner in which rights-based constitutionalism and classical negative constitutionalism run on parallel tracks, which is especially the case when expression, liberty and fair trial rights are at issue. However, its Janus-faced straddling of negative and positive stances towards the exercise of state power should be seen as a distinct type of constitutionalism. In its ambition to deliver social justice through the specific conceptual framework of human rights, it is best seen not as aspiring towards the control of a limited state, as per the aspirations of classical constitutionalism, but rather towards an end state similar to what Matthias Kamm has described as a 'total constitution', where the exercise of state power in all its regulatory and social control modes should both respect and be directed towards giving full effect to certain human rights norms.⁴⁰

Kamm suggests that this form of constitutionalism is a 'kind of juridical genome that contains the DNA for the development of the whole legal system. It establishes a general normative program for choices to be made by public authorities *vis à vis* individuals.'⁴¹ This definition acts as a neat encapsulation of the vaulting ambition of the post-*Brown* rights constitutionalism, except for one significant qualifier: the phrase 'total constitution' is misleading insofar as it implies that post-*Brown* rights constitutionalism occupies the complete constitutional imagination of countries which have embraced it. (This is why the metaphor of the 'Janus face' perhaps works better.) In reality, as already emphasised, post-*Brown* mutated constitutionalism has not supplanted the more classical negative strains of constitutionalism that remain embedded to varying degrees in national constitutional systems.

⁴⁰ M. Kamm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) *German Law Journal* 341-69.

⁴¹ *Ibid.*, 344. Kamm at 343 contrasts this 'total constitution' with Schmitt's 'total state', and suggests that if a total state is one in which 'everything is up for grabs politically, a total constitution inverts the relationship between law and politics... If in the total state law is conceived as the continuation of politics by other means, under the total constitution politics is conceived as the continuation of law by other means.' (Author's italics removed.)

Thus, for example, in European and North American systems, it is intermixed with other constitutionalist elements, both negative and positive. These elements often co-exist in a tense relationship, as illustrated by the persistent arguments made within UK constitutional debate that the Human Rights Act remains an alien transplant in the UK's constitutional landscape, dominated as it is still by its unique historical mix of very distinctive negative and positive constitutionalisms. These tensions can manifest themselves in the evolution of human rights case-law: note for example the tangible reluctance of the majority of the UK House of Lords in *YL v Birmingham City Council* to treat private care homes as 'public authorities' for the purposes of s. 6 HRA and therefore to expose private companies directly to the public law demands of the ECHR.⁴² At times, clear choices are made as to the presumptive priority of these different strands when they come into conflict: in the case of *DeShaney v. Winnebago County*,⁴³ the US Supreme Court clearly indicated its preference for an approach primarily rooted in negative constitutionalism,⁴⁴ while in contrast the *Bundesverfassungsgericht* could be seen to have in the *Mephisto* case to have embraced dual-facing constitutionalism.⁴⁵ Nor is this tension confined to national contexts: within the quasi-constitutional system of EU law, interesting tensions arise between the strand of rights DNA represented by the Charter of Fundamental Rights and the mainstream free movement and economic integrationist DNA of EU constitutionalism.

Rights-based constitutionalism perhaps finds its widest expression (and comes closer to serving as a 'total constitution') in the recent 'transformative' rights jurisprudence of the Latin American, South African and Indian constitutional systems, which in the name of redressing a tainted colonial past aim to orientate the exercise of state power across almost the full spectrum of public functions towards giving substantive effect to a multi-faceted and extensive catalogue of rights.⁴⁶ (An interesting argument could

⁴² [2008] 1 AC 153.

⁴³ *DeShaney v. Winnebago County* 489 U.S. 189

⁴⁴ For an interesting if optimistic argument that the US constitutional landscape contains all the ingredients to cultivate a European-style rights constitutionalism, see S. Gardbaum, 'The Myth and the Reality of American Constitutional Exceptionalism' (2008) 107 *Michigan L. Rev.* 391.

⁴⁵ BVerfGE 30, 173.

⁴⁶ For discussion of the 'transformative' dimension of the South African constitutional order, see Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; Dikgang Moseneke, 'Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309; and Pius Langa, 'The Vision of the Constitution' (2003) 120 *South*

be made that Germany could also be classified as a ‘transformative’ system.) In these jurisdictions, and in particular in the emerging ‘super-democracies’ of India and Brazil, the vaulting ambition of post-*Brown* constitutionalism becomes apparent, perhaps no better evidenced than by the recent decisions of the Indian Supreme Court requiring the state to provide free school meals for millions of school-children.⁴⁷

The Limits of Post-Brown Rights Constitutionalism

However, some of this jurisprudence also illustrates the difficulties that lie latent within the ‘Janus-faced’ post-*Brown* constitutionalism. Indian judicial activism has waxed and waned, and taken disparate and often unpredictable forms.⁴⁸ Octavio Ferraz has been very critical of the over-reach of the right to health jurisprudence of the Brazilian judiciary.⁴⁹ Closer to home, the sure touch of the European Court of Human Rights and its impressive jurisprudence over the last few decades has recently been overshadowed by its unconvincing intervention in *Lautsi v Italy* into church-state relations in Italy in the name of a completely underdeveloped notion of a right to a secular educational environment.⁵⁰

The problems with such judgments lie deeper than mere judicial fallibility. They relate to the vaulting ambition of post-*Brown* rights constitutionalism and the difficulties it faces in defining what exactly is required to ensure full and effective enjoyment of often open-ended rights guarantees. For all its narrowness of focus and hostile stance towards the collective dimension to state action, the ‘immunities’

African Law Journal 670. For a wider comparative and theoretical focus, see U. Baxi, ‘Preliminary Notes on Transformative Constitutionalism’, paper delivered at the BISA Conference, *Courting Justice*, New Delhi, April 27-29 2008: for its text, see <http://www.conectas.org/IBSA/UBNotesonTransformativeConstitutionalism.pdf> (last accessed 20 June 2010).

⁴⁷ *People’s Union of Civil Liberties (PUCL) v Union of India & Ors*, In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001.

⁴⁸ See the critique of judicial activism by Justice B. N. Srikrishna, ‘Skinning a Cat’ (2005) 8 SCC (Jour) 3: see also the ongoing discussion of the shifting attitudes of leading members of the Indian Supreme Court to public interest litigation on the excellent blog *Law and Other Things*, available at <http://lawandotherthings.blogspot.com/> (last accessed 20 June 2010).

⁴⁹ See O. Ferraz, ‘Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa’, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458299 (last accessed 20 June 2010).

⁵⁰ Space prevents detailed discussion of what is wrong with *Lautsi*: readers are directed to the excellent critique by Joseph Weiler in his editorial in 21(1) *EJIL*, also available at <http://www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/> (last accessed 20 June 2010), and also invited to consider exactly how the presence of a crucifix on a wall can *in itself* constitute a violation of religious freedom.

approach around which negative constitutionalism is built can at least rely on the tropes of liberal individualist philosophy to define its scope and reach. Post-*Brown* rights constitutionalism and the international human rights framework on which it draws is underpinned by a wide vision of human flourishing; however, it also consequentially lacks a clear sense of its limits, and how far it must go in giving effect to this vision. In aspiring to the state of a ‘total constitution’, it often lacks a clear sense of the direction in which it should steer the exercise of state power, and of the relationship between rights and other forms of social goods.

Its aspirations towards full and effective protection, and the promise it holds out of making constitutionalism an effective tool for achieving comprehensive social justice, also ensure that post-*Brown* rights constitutionalism often offers more than it can deliver. It generates the expectation that a comprehensively just legal and political order will come into being through the guiding influence of constitutional norms. However, legal norms in general lack the capacity to deliver on this promise, being tied to particular forms of procedure and redress that cannot begin to engage with many generative factors for social inequality and injustice. As systems theory makes clear, law can only speak eloquently within its own self-contained functional frameworks, and can only speak coherently of things it can articulate within its own tongue:⁵¹ despite the post-*Brown* promise, social justice and constitutionalism are not easy to fuse.

As a consequence, constitutional rights norms as they have evolved in national legal systems are often either too narrow in their scope to deliver on the promise of comprehensive justice, or else if interpreted too widely can cut across alternative accounts of justice and thereby may disappoint or enrage as much as they deliver. In addition, post-*Brown* constitutionalism can slip into technocratic instrumentalism, just like any other governing technologies, and also lacks the capacity to begin to engage with the deep economic and political currents that shape our lives. Therefore, in an era dominated by rejuvenated ordo-liberalism and global neo-liberalism,⁵² post-*Brown* rights constitutionalism may at best ameliorate some of the excesses of the dominant

⁵¹ See Prihan, above at n. 11.

⁵² For discussion of the persisting impact of ordo-liberalism with the structures of EU governance, see C. Joergens, ‘What is Left of the European Economic Constitution? A Melancholic Eulogy’ (2005) 30 *European Law Review* 461-489.

trajectory of state action, and at worse may fit nicely and unchallengingly into the governance modes of the state.

Rights Review and Popular Sovereignty

Post-*Brown* constitutionalism therefore aims to steer the exercise of state power, but runs the risk of falling foul of either or both the temptations of usurpation or abdication. It also remains embedded in an uncomfortable and contested relationship with popular sovereignty and the constituent power vested in the people by democratic theory: reliance is placed on top-down judicial control to steer the exercise of state power towards its desired ends, while simultaneously one of those desired ends is full, equal and non-hierarchical participation by all in the navigation of the ship of state.

Various theoretical frameworks offer ways of re-conceptualising this relationship, ranging from Habermas's comprehensive discourse-based theories of deliberative democracy to Ely's case-law focused approach. However, the tension between rights review and popular sovereignty is ultimately an expression of the dichotomy between the constituent and constituted powers, or constitutionalism at large and democratic self-governance, which De Tocqueville analysed as integral to the merging democratic state of the 19th century and which shows no sign soon of dissipating.

In fact, as Tom Hickman has noted,⁵³ the relationship between the principle of democratic self-governance and post-*Brown* rights constitutionalism can be seen as embodying the fundamental tensions that run through constitutional systems which Loughlin has identified by reference to the distinction made in the work of Michael Oakeshott between two modes of association, *societas* and *universitas*.⁵⁴ *Societas* is a mode of group association with rules of governance that do not prescribe any particular purpose or goal for the group's activity. In contrast, *universitas* describes a contrasting mode of association where a group comes together to pursue distinct and fixed common ends. As Loughlin notes, the manner in which these modes interact is

⁵³ T. R. Hickman, 'In Defence of the Legal Constitution' (2005) 55(4) *University of Toronto Law Journal* 981-1022

⁵⁴ M. Loughlin, *The Idea of Public Law*, 16-19.

generative of much of national public law, and the tensions that surround rights review are no different.

Post-*Brown* constitutionalism is predicated on the concept that human rights constitute end-point goals which collective social activity through the state should be directed towards achieving, and thus can be seen as orientated towards the mode of *universitas*. In contrast, democratic sovereignty can be seen as orientated towards *societas*, in the sense that it is founded on the assumption that a sovereign people are free via representative procedures and referenda to adjust and alter the course of the ship of state, and are not confined to a particular set of co-ordinates.

As such, even as rights review aims at the end-point of a ‘total constitution’, it cuts across the Rousseauian principle that the sovereign popular will should remain free to fix and if necessary alter the trajectory of the state. In certain constitutional systems, this tension will not present particular problems, especially where the exercise of comprehensive rights review is clearly rooted in democratic consent: this can be argued to be clearly the case in Brazil, for example, and South Africa, and it is no coincidence that judicial activism tends to flourish in such systems. In other states, the tension remains a source of constant irritation, and rights review, whether by constitutional courts or even by international courts such as the ECtHR, has to constantly earn its keep under the looming shadow of the often endlessly-deferred but nevertheless potent possibility of the overriding exercise of the popular will.

The Persisting Attraction of Post-Brown Rights Constitutionalism

Post-*Brown* rights constitutionalism therefore is confronted by a yawning gap between its ambitions and the more troubling reality both of its potential impact and its place within constitutional frameworks. However, these weaknesses show no sign of lessening the rolling-out of the Rights Revolution, or the vigour of this mutated form of constitutionalism.

Its impact may be largely confined to legal terrain: however, the expectation that law will be just is very potent, and rights-based constitutionalism offers a route to constantly re-work and challenge existing law so as to create the conditions for the

establishment of a more just framework of legal norms, which other forms of constitutionalism struggle at present to achieve. This in turn creates enough apertures in the fabric of existing political and socio-economic conditions to ensure that rights review can partially deliver on its promise to link legal governance with social justice. As a result, despite disappointments and mixed outcomes, its appeal remains strong.

The uncertain normative aims of rights review may even work in its favour: its link with the constantly-developing human rights normative framework ensures it possesses a mutability that allows it to adjust to changing values with relative speed, as evidenced by the rapid expansion of gay equality rights within both national and international human rights law. Its ability to adopt a Janus-faced stance towards the exercise of state power also strengthens its impact: unlike classical negative constitutionalism, its willingness to weave the necessity of state action into its approach means that it may succeed in avoiding the trap of attempting to tilt the balance too far between individualism and collectivism.

In addition, the matter in which post-*Brown* constitutionalism attempts to steer state action towards rights-friendly goals ensures that it retains a strong appeal, notwithstanding its difficult relationship with popular sovereignty. So long as human rights continue to dominate the value landscape of western democracies, rights review will inevitably be seen as a useful tool to orientate state activity, and attempts by politicians and pressure groups to push back against well-reasoned and normatively sound court decisions on fundamental rights will remain a difficult task. The shadow of popular sovereignty also can help to ensure that the exercise of rights review is undertaken with a degree of necessary prudence, an essential virtue given its inherent tendency towards open-ended rights absolutism and judicial imperialism. In this way, the constraints on the ‘total constitution’ ambitions of rights review help to shape its appeal and potency: in forcing it to constantly work to earn and retain its constitutional place, post-*Brown* constitutionalism is often steered away from its own inherent flaws.

Conclusion

Taken these factors together, it becomes apparent that the mutated form of rights-based constitutionalism that has emerged post-*Brown* differs in important respects in substance from classical negative constitutionalism. Through its Janus-faced stance towards state power, it adopts a different analysis of the relationship between the individual and the state, and in so doing aspires towards a form of ‘total constitution’. However, these aspirations are reined in by its potential for indeterminacy, its limited impact and ultimately by its complex relationship with popular sovereignty. Perhaps ironically, these limitations may serve at times to lend strength to rights review.

The problematic nature of post-*Brown* constitutionalism is obvious when one considers the apparent difference that the death of Fred Vinson made in 1953. Insofar as *Brown* played a role in helping to launch the ‘Rights Revolution’, it is unsettling that so much may have been contingent on the health of a single US judge. The inability of rights-based constitutionalism by itself to change the world is also illustrated by *Brown*’s mixed impact. However, *Brown* helped to change the landscape of constitutionalism, and given current conditions it is very difficult to envisage the genie of rights-based constitutionalism being put back into the bottle. It is too late to restart Fred Vinson’s heart, even if we wished to do so: today, we live with its legacy.