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ARTICLE

Constitutional Symbolism in the Shadow of the Common Good

George Duke

School of Humanities and Social Sciences, Deakin University, Melbourne, Australia
Email: george.duke@deakin.edu.au

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Abstract

This paper aims to clarify the concept of the symbolic constitution and to explain one of its most significant functions: the representation of political unity in complex societies. Section B briefly outlines the concept of the symbolic constitution which informs the arguments of the paper. The next two sections proceed "hermeneutically" through critical engagements with (i) Martin Loughlin's recent analysis of the symbolic constitution within an ideology-critique of neo-liberal constitutionalism (ii) Niklas Luhmann's account of the role of symbolic constitutionalism in concealing the function of the modern constitution as a structural coupling between the political and legal sub-systems. Section E then considers the relationship between the symbolic constitution and an alternative "traditional" concept for the representation of political unity: the common good. I argue that the symbolic constitution is both (i) a placeholder which speaks to the abiding relevance of the common good (ii) a symptom of the decline of its preconditions.

Keywords: Symbolic constitution; ideology; common good; constitutionalism; symbolic constitutionalization

A. Introduction

National constitutions, in addition to organizing and limiting political power, perform important symbolic functions.[1] Constitutional symbolism is, however, an ambivalent phenomenon. From a critical perspective, appeals to a symbolic constitution of values beyond the constitutional structures and competences set out in a written text or established by customs and conventions are susceptible to claims that they offer "a vehicle for the ideological legitimation of the political system."[2] Appeals to "the symbolic constitution" seem particularly apt to reproduce existing relations of power if they assert the universality of values that are not effectively "operationalized" in the political and legal systems. For some theorists, constitutional symbolism nonetheless offers an attractive source of shared political identity, which can substitute for more nationalistic or traditional variants of patriotism and marginally offset the effects of pluralism, disagreement on comprehensive doctrines, functional differentiation, and broader societal fragmentation. Advocates of constitutionalism as a civil religion or constitutional patriotism usually appeal to commonly accepted principles or values – dignity, autonomy, human rights, the rule of law,

[1]Zachary Elkins and Tom Ginsburg, *What can we learn from written constitutions?* (2021) 24 ANNUAL REVIEW OF POLITICAL SCIENCE 326.

[2]MARCELO NEVES, SYMBOLIC CONSTITUTIONALIZATION, Kevin Mundy trans. (Oxford: Oxford University Press, 2022) 5 (discussing Pierre Bourdieu and Jean-Claude Passeron on symbolic power). See also MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (Cambridge: Harvard University Press, 2022) 111–23.

democratic equality – rather than constitutional symbolism.[3] Yet such claims, I argue below, rest implicitly on the symbolic function of constitutions as representations of political unity.

Recourse to constitutional symbolism has not become less frequent in the face of well-known challenges to the material and structural conditions of modern constitutionalism; if anything, the opposite is true.[4] Since the second half of the twentieth century, the tension between expanded state responsibilities and the reduced capacity of the law effectively to direct social conduct in complex and functionally differentiated societies has become increasingly apparent.[5] Talk of the "twilight" of national constitutionalism reflects indisputable historical and structural trends. If one understands the central functions of modern national constitutions, following Zachary Elkins and Tom Ginsburg, as (i) limiting government, (ii) defining the nation and its goals, and (iii) defining patterns of authority, then it would seem hard to deny that both (i) and (iii) are undermined by globalization and the associated and exponential encroachment into state domains of human rights, international public and private law, transnational commerce, and non-governmental organizations. Such developments are often taken to entail a gradual erosion of Westphalian sovereignty and statehood, and to undermine the role of collective self-determination in the legitimation of national constitutions.[6] One is also confronted by more insidious tendencies of societal fragmentation, reflected in the spread of sectorial "constitutions" governing discrete social systems *within* nation-states.[7] The growth of the welfare state model after WWII and executive state power, particularly evident in recent responses to COVID-19, only make these factors more acute, especially if one concentrates on the historically privileged liberal model of constitutionalism.[8] Despite all these obstacles, however, there is evidence that constitutionalism remains on the ascendant, not only as a theoretical and practical model for governance but as a symbolic foundation for the projection and representation of political unity.[9]

These observations support the proposition that the continued ascendancy of constitutionalism as a governance model is partly reliant on the capacity for constitutional symbolism to offset the decreased efficacy of national constitutions in limiting government and defining patterns of authority. A complete defense of this thesis, however, would require a detailed comparative and

[3]See, for example, GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY (Cambridge: Harvard University Press, 2010); JACK BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (Cambridge: Harvard University Press, 2011); Ciaran Cronin, *Democracy and Collective Identity: In Defence of Constitutional Patriotism* (2003) 11 *European Journal of Philosophy* 1-28; JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS, Max Pensky trans. (Cambridge: MIT Press, 2001); JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM (Princeton: Princeton University Press, 2007).

[4]Loughlin, *Against Constitutionalism* 122.

[5]DIETER GRIMM, DIE ZUKUNFT DER VERFASSUNG (Frankfurt: Suhrkamp, 1990) and Neves, *Symbolic Constitutionalization* 19.

[6]Dieter Grimm, *The Achievement of Constitutionalism and its Prospects for a Changed World*, in Petra Dobner and Martin Loughlin (eds.), THE TWILIGHT OF CONSTITUTIONALISM (Oxford: Oxford University Press, 2010) 13–20; ALEXANDER SOMEK, THE COSMOPOLITAN CONSTITUTION (Oxford: Oxford University Press, 2014). See, however, Christopher Thornhill's argument that "transnational" constitutionalism has in reality enhanced state capacities in *On Misunderstanding States: The Transnational Constitution in the National Constitution* (2018) 16 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1186–98.

[7]GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (Oxford: Oxford University Press, 2012) 15–41.

[8]DIETER GRIMM, CONSTITUTIONALISM (Oxford: Oxford University Press, 2016) 41–64; Loughlin, *Against Constitutionalism* 38–50, supra note 2.

[9]In the last thirty years the majority of the world's constitutions have either been newly adopted or significantly amended. Since the late 1980's, the number of nations identifying as constitutional democracies has almost doubled, with the collapse of the Soviet Bloc, the fall of Latin American dictatorships, and ongoing processes of decolonization in Africa and Asia, all precipitating a sharp increase in constitution-making activity. Approximately two thirds of the 193 member states of the United Nations are now classified as constitutional democracies. See "Timeline of Constitutions" of the Comparative Constitutions Project, https://comparativeconstitutionsporject.org/chronology/, last accessed 28 February 2023, and the discussion in Samuel Issacharoff, *Populism versus Democratic Governance*, in Mark A. Graber, Sanford Levinson & Mark Tushnet (eds.) CONSTITUTIONAL DEMOCRACY IN CRISIS? (New York: Oxford University Press, 2018) 445.

sociological analysis. My focus here is theoretical rather than comparative and more limited in scope. In what follows, I seek to offer a precise characterization of the concept of the symbolic constitution and explain one of its most significant functions: the representation of political unity in complex societies. In Section B, I briefly outline the concept of the symbolic constitution that informs the arguments of the article. The following two sections proceed "hermeneutically" through critical engagements with (i) Martin Loughlin's recent analysis of the symbolic constitution within an ideology critique of neo-liberal constitutionalism and (ii) Niklas Luhmann's account of the role of symbolic constitutionalism in concealing the function of the modern constitution as a structural coupling between the political and legal subsystems. Section E then considers the relationship between the symbolic constitution and an alternative "traditional" concept for the representation of political unity: the common good. I argue that the symbolic constitution can be understood in one sense as a placeholder which speaks to the abiding relevance of the common good, but in another, as a symptom of the decline of its preconditions.

B. The Symbolic Constitution

Although references to "the symbolic constitution" are relatively common in the constitutional theory literature, its meaning is usually either assumed or illustrated by examples rather than precisely defined. Clearly enough, the symbolic constitution is a higher-order concept of constitutional theory and is itself an abstraction in relation to particular national symbolic constitutions. In a reversal of Thomas Paine's characterization of modern written constitutions, national symbolic constitutions have an "ideal," not a "real" existence.[10] They presuppose a "real" substrate. The most obvious substrate is the content (semantic and normative) of a modern written constitution (a "big C" constitution), although there is no reason in principle to exclude concrete relations of power, institutional forms, and social practices and conventions (the "little c" or even "the material" constitution) from forming part of the substrate of a national symbolic constitution.[11] As a concept of constitutional theory, then, the symbolic constitution refers to the set of properties "instantiated" by most or central instances of national symbolic constitutions.

As Marcelo Neves' important study of "symbolic constitutionalization" has demonstrated, the expressions "symbol" and "symbolism" have been employed with a vast array of sometimes incompatible meanings by different theoretical traditions.[12] My analysis in this article rests on the following premises regarding the meaning and scope of the concept of the symbolic constitution.

I. The Symbolic Constitution is an Ideal Representation Grounded in Real Constitutional Content

The symbolic constitution is a function of what the content (semantic and normative) of an "actual" constitution is taken to represent by relevant officials and citizens of a polity and other interested observers. As stated above, a "real" substrate is presupposed by the symbolic constitution, whether this be the express words of a written charter, broader constitutional principles and implications, institutional design, or even a set of well-established institutional practices. Constitutional texts are nonetheless privileged in their capacity to "preserve" and articulate ideas of social order, serving as a representation of the "guiding ideas and validity claims

[10]THOMAS PAINE, THE RIGHTS OF MAN (Oxford: Oxford University Press, 1995 [1791]) 122.

[11]Frank Michelman, *Constitutional Authorship*, in Larry Alexander (ed.) CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS (New York: Cambridge University Press, 1998) 64–98. On the "material constitution," see Michael A. Wilkinson and Marco Goldoni, *The Material Constitution* (2018) 81 MODERN LAW REVIEW 567–97. On the assumption that the intended meaning will be clear from context, I use "symbolic constitution" for both the higher-order concept and particular instances.

[12]Neves, *Symbolic Constitutionalization* 1–13.

of political action and communication" within a particular national context.[13] Obviously, the substrate of a symbolic constitution allows for varying interpretations and significant indeterminacy. This is consistent with a high degree of convergence of interpretation on principles and values, and the applicability of considerations of "fit" in a broadly Dworkinian sense. The symbolic constitution remains an "ideal" object and is completely contingent upon the discursive practices and conventional assumptions of a particular community of language-users.

II. The Symbolic Constitution Represents the Privileged "Values" of a Polity

As a representation, the symbolic constitution operates primarily at the level of "mediate and latent" meaning, or (equivalently) at the level of connotation rather than direct denotation.[14] When a representation is symbolic, it has "the power to evoke feelings or attitudes."[15] In the case of the contemporary symbolic constitution, it is pre-eminently the "values" of a polity that are represented. Whether explicitly or implicitly, recent appeals to constitutionalism as a civil religion and constitutional patriotism usually assume the conceptual frame of values, even if this falls short of an "objective order of values" in the sense of the German Constitutional Court.[16] The evocation of values of democratic equality and public autonomy through a Preamble expressing a commitment to the sovereignty of the people, or the evocation of abstract ideas of freedom or liberty through a charter of fundamental rights, are obvious examples of the type of representation that informs the symbolic constitution. The "aggressive" character of values discourse is partly concealed by a post-WWII "consensus" on human dignity and fundamental rights, inclusive of varying degrees of commitment to the political and social rights necessary to enjoy "negative liberties."[17] This reflects a shift from the idea of a constitution as a charter of freedom representing the collective self-determination of a people to a "cosmopolitan constitution" that embeds "universal" values at the national level.[18] In any case, while the symbolic constitution rests on "real" effective constitutional content, its articulation through the language of values supports the thesis that it reflects a type of "political-ideological meaning."[19]

III. The Symbolic Constitution is a Representation of the Unity of Political Order

The symbolic constitution can be characterized as the ideal totality of ideas and values imputed to, or indirectly associated with, the "actual" constitution, whether formal or material; what the express semantic and normative content of a constitution is taken to connote. Crucially, the reference to "ideal totality" signals the status of the symbolic constitution as a representation of the unity of a political and legal order.[20] A national symbolic constitution is not a mere congeries of values; it is their projected unity. This is consistent with the complexity of modern societies and the functional differentiation of social systems. Symbolization in this context denotes the communicative medium for the formation of a simplified unity in difference.[21] An impetus

[13]Hans Vorländer, *Constitutions as Symbolic Orders: The Cultural Analysis of Constitutionalism*, in Paul Blokker and Chris Thornhill (eds.) SOCIOLOGICAL CONSTITUTIONALISM (Cambridge: Cambridge University Press, 2017) 219

[14]Neves, *Symbolic Constitutionalization* 14–15.

[15]HANNAH F. PITKIN, THE CONCEPT OF REPRESENTATION (Berkeley: UCLA Press, 1972) 97.

[16]*Abortion I*, judgement of 25 Feb. 1975, BVerfGE 39, 1, 42.

[17]On the "tyranny" of values see CARL SCHMITT, DIE TYRANNEI DER WERTE (Berlin: Duncker & Humblot, 1967) and ERNST-WOLFGANG BÖCKENFÖRDE, RECHT, STAAT, FREIHEIT (Frankfurt: Suhrkamp, 1991) 67–91.

[18]Somek, *The Cosmopolitan Constitution* 79–133.

[19]Neves, *Symbolic Constitutionalization* 19.

[20]This formulation borrows the terminology of Charles S. Peirce, WRITINGS OF CHARLES S. PEIRCE. *A CHRONOLOGICAL EDITION* ed. Christian J.W. Kloesel Volume 2 (Bloomington: Indianapolis University Press, 1982-2009) 56.

[21]NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT (Frankfurt: Suhrkamp, 1997) 319 and Neves *Symbolic Constitutionalization* 12–13.

towards a unified symbolic representation of the political domain is hence at least in part a compensatory mechanism, which responds to both increased social complexity and functional differentiation.

It is important to recognize that the concept of the symbolic constitution as outlined need not rely on express value statements within constitutional texts. Constitutional symbolism can be derived from Preambles or other "declaratory" provisions that explicitly define the nation, its goals, and its aspirations.[22] It has been argued in this context that constitutions can serve as "mission statements" by providing a "statement of core values and commitments."[23] The absence of explicit "mission statements" is, however, no obstacle to the derivation of symbolic meaning from less inspiring constitutional texts. Clearly enough, the organization of institutions and competences can be taken to express a commitment to values such as the rule of law and democracy. There is also plenty of scope for the theoretical observer to derive normative implications from "constitutional silences" or "the invisible constitution."[24] A related option is to interpret a lack of express mission statements as itself expressive of a commitment to certain values, whether this be democratic agency or a classical liberal limitation of government action.[25] Considered from this perspective, a constitution is not merely a set of rules that limits power and defines powers and competences; it also indirectly signifies values that support a shared normative identity: the symbolic constitution offers a palatable representation of political unity.[26]

The symbolic constitution – as a value-laden mediate representation of the unity of the political – performs several functions for contemporary political and legal systems and for society as a whole. Neves provides an instructive platform for the identification of these functions in his analysis of symbolic legislation as a type of lawmaking where a "latent 'political-ideological' meaning" has taken prevalence over an "apparent normative-legal meaning."[27] First, symbolic law-making can confirm social values and consolidate associated normative expectations.[28] On a sociological level, this often involves the assertion of superiority by a dominant group or groups, which imposes normative standards upon society as a whole, regardless of the efficacy of particular legal norms.[29] Second, symbolic lawmaking can serve to enhance broad trust and confidence in the political and legal systems, insofar as it suggests to citizens that the state is sensitive to their demands.[30] Symbolic lawmaking hence provides an "alibi" that political elites are

[22]See MAARTEN STREMLER, WIM VOERMANS & PAUL CLITEUR, CONSTITUTIONAL PREAMBLES: A COMPARATIVE ANALYSIS (Cheltenham: Edward Elgar, 2017).

[23]Jeff King, *Constitutions as Mission Statements*, in Dennis J. Galligan & Mila Versteeg (eds.), SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Cambridge: Cambridge University Press, 2013) 73.

[24]THE INVISIBLE CONSTITUTION IN COMPARATIVE PERSPECTIVE, Rosalind Stone & Adrienne Stone (eds.) (Cambridge: Cambridge University Press, 2018).

[25]The 1901 *Commonwealth Constitution of Australia*, for example, is a notoriously "dry" and "technical" document, which is relatively reticent about fundamental principles and values, but recent scholarship has been far from shy in identifying a range of broader symbolic commitments or implications. See, for example, Elisa Arcioni and Adrienne Stone, *The Small Brown Bird: Values and Aspirations in the Australian Constitution* (2016) 14 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 60–70; Dylan Lino, *The Australian Constitution as Symbol* (2020) 48 FEDERAL LAW REVIEW 543–55.

[26]Cf. Elkins and Ginsburg, *What Can We Learn From Written Constitutions?* 326.

[27]Neves, *Symbolic Constitutionalization* 19. Neves (at 34–36) associates symbolic legislation with normative inefficacy, i.e., an inability to orient normative expectations in a generalized manner. In the strict sense, symbolic constitutionalization for Neves thus refers to circumstances where a "hypertrophy" of the politico-ideological functioning of the constitution "affects the foundations of the juridico-constitutional system" because the basic constitutional functions find no "generalised resonance in the praxis of state bodies or the conduct and expectations of the public" (68–69). This motivates a distinction between "symbolic constitutionalization" (the primary focus of Neves' analysis) and the symbolic function of "the normative constitution," where the latter is understood as able to regulate and guide conduct (65).

[28]Neves, *Symbolic Constitutionalization* 22.

[29]Harald Kindermann, *Alibigesetzgebung als symbolische Gesetzgebung*, in Rüdiger Voigt (ed.) SYMBOLE DER POLITIK, POLITIK DER SYMBOLE (Opladen: Leske & Budrich, 1989) 257–73.

[30]Neves, *Symbolic Constitutionalization* 24.

concerned with the "real problems" of society, even in cases where it is unrealistic to regulate the relevant social relations through law.[31] Third, symbolic legislation can offer a "dilatory compromise" that mitigates social conflict.[32] This might involve, for example, the enactment of a "progressive" law that remains acceptable to conservatives because of difficulties of application or enforcement.

All of these functions of symbolic legislation would seem transferrable to constitutional law-making and, by implication, to constitutional interpretation and public discourse on constitutional values.[33] The functions are, moreover, all consistent with the argument of the final section of this article that the symbolic constitution is a representation of the unity of the political which serves as an ambiguous *ersatz* for the common good. One obvious feature that unites the functions identified by Neves is the continued motivation to promote social integration or unity under conditions of social complexity and pluralism that push violently in the opposite direction.

C. The Symbolic Constitution as Liberal Ideology

The symbolic constitution is, on the conception just outlined, an obvious candidate for ideology critique.[34] If an ideology is a theory or doctrine that distorts social reality and fortifies "the stability of existing or emerging relations of power," then it is not hard to see how symbolic constitutionalism could serve ideological ends.[35] One well-known function of symbolic politics, for example, is to reduce social conflict and promote "political quiescence."[36] A valorization of democratic equality or human dignity imputed to a constitutional order based on an expressive statement in a Preamble is apt to be ideological in societies beset by economic inequality and structural disadvantage. This section elaborates on the above account of the symbolic constitution by reference to Martin Loughlin's deployment of the concept in his recent analysis of the ideology of liberal constitutionalism. This analysis, I contend, motivates a closer examination of the underlying structural and normative implications of the symbolic constitution.

Loughlin's analysis of the symbolic constitution is situated within his more general critique of the ideology of liberal constitutionalism. The basic principle of the modern constitution, Loughlin claims, is "that it is drafted by elected representatives of the people meeting in a constituent assembly to establish a regime of limited government that respects the fundamental rights of the individual."[37] This model of constitutionalism could not withstand the pressures of democratization and increased social complexity.[38] Yet, rather than precipitating the replacement of liberal constitutionalism with new modes of democratic governance, these tendencies have triggered ideological and self-legitimating defense mechanisms in support of the existing order, including the "free economy, strong state" of ordo-liberalism and the juristocracy of a liberal

[31]Harald Kindermann, *Symbolische Gesetzgebung*, in Dieter Grimm & Werner Maihofer (eds.) GESETZGEBUNGSTHEORIE UND RECHTSPOLITIK, JAHRBUCH FUR RECHTSSOZIOLOGIE UND RECHTSTHEORIE vol. 13. (Opladen: Westdeutscher Verlag, 1988) 234–48.

[32]Neves, *Symbolic Constitutionalization* 28.

[33]Neves, *Symbolic Constitutionalization* 68–71. Neves characterizes the main difference between symbolic constitutionalization and symbolic legislation as the "more comprehensive" reach of the former in social, temporal, and material dimensions while restricting symbolic constitutionalization in the strict sense to the "alibi" function above.

[34]An ideology is understood here as "a set of beliefs, attitudes, preferences that are distorted as a result of the operation of specific relations of power," where the distortion characteristically "takes the form of presenting these beliefs, desires, etc. as inherently connected with some universal interest," when in fact they serve "particular interests." See RAYMOND GEUSS, PHILOSOPHY AND REAL POLITICS (New Jersey: Princeton University Press, 2008) 52.

[35]Titus Stahl, *What (if anything) is Ideological about Ideal Theory?* (2023) EUROPEAN JOURNAL OF POLITICAL THEORY (online first).

[36]MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (Chicago: University of Illinois Press, 1985) 22–43.

[37]Loughlin, *Against Constitutionalism* 33.

[38]Loughlin, *Against Constitutionalism* 49.

elect.[39] Liberal constitutionalism has thus "become the primary medium through which an insulated elite while paying lip service to the claims of democracy, is able to perpetuate its authority to rule."[40] Associating the symbolic constitution with the idea of the constitution as a "civil religion," Loughlin argues that the constitution "was required to extend beyond its original role of establishing a comprehensive scheme of limited government to provide a symbolic representation of political unity."[41] Constitutions have increasingly been marshalled for social integration and are hence reliant on "social and cultural factors that lie beyond the realm of law."[42]

Loughlin elaborates on these claims by reference to the constitutional cultures of the United States and Germany.[43] Noting the long-standing status of the United States Constitution as a "sacred icon of American identity" with a "power of social integration," Loughlin selects Jack's Balkin's *Constitutional Redemption* (2011) as a recent exemplification of US idealization of constitutionalism as a civil religion.[44] Balkin provides, Loughlin insists, a "thoroughly ideological" account, insofar as his project to capture the "spirit" of the US Constitution is a mythical reconstruction, animated by an ideal of liberty and Protestant values, which conceals the need to pursue "social progress" through democratic or legislative means.[45] Loughlin offers a similar reading of German *Verfassungspatriotismus* and the idea of "an integration through constitution," which arose following the Allies' imposition of the 1949 *Grundgesetz* or Basic Law after World War II.[46] In reality, Loughlin argues, the Basic Law established a "constrained" or "managed" democracy; it was "an attempt to reconstruct democracy without the *demos*."[47] The Basic Law, Loughlin submits, was constructed "as a constitution for a postpolitical age," a conclusion arguably supported by the failure to pursue a new constitutional settlement following German reunification.[48] Loughlin offers a pointed gloss on Ernst Forsthoff's observation (made prior to German reunification) that the Basic Law had ceased "to be an instrument of unification": the instrumental function of the constitution becomes secondary when it is a *symbol* of unification."[49]

This strident commentary on the post-WWII tendency to establish constitutionalism as a civil religion or object for "values patriotism" raises the question as to the structural conditions underlying the prominence of the symbolic constitution. Loughlin's own answers to this question are suggestive, but not developed systematically. In the first instance, Loughlin notes that the idea of the constitution as a civil religion is far from a recent phenomenon in America. The tendency to

[39]Loughlin defines an ideology broadly, referring to Clifford Geertz, as "a method by which we shape a cluster of beliefs and cultural symbols into a meaningful arrangement, thereby making it available for purposive action." Loughlin, *Against Constitutionalism* 38. His analysis nonetheless suggests a more specific application of ideology to power relations.

[40]Loughlin, *Against Constitutionalism* x.

[41]Loughlin, *Against Constitutionalism* 112.

[42]Loughlin, *Against Constitutionalism* 113.

[43]Loughlin here frames the United States and German constitutions as "ideal types" or exemplifications. Cf. THILO RENSMANN, WERTORDNUNG UND VERFASSUNG: DAS GRUNDGESETZ IM KONTEXT GRENZÜBERSCHREITENDER KONSTITUTIONALISIERUNG (Tübingen: Mohr, 2007) 243. For the argument that the influence of the United States and German Constitutions has actually declined in the twenty-first century, see David S. Law & Mila Versteeg, *The Declining Influence of the American Constitution* (2012) 87 NEW YORK LAW REVIEW, 782–885.

[44]In the 1930's, Loughlin notes, Edwin Corwin had already suggested that the US Constitution had become "the instrument of the few," but a more effective instrument for holding itself out as a "symbol of the many." Loughlin, *Against Constitutionalism* 115 citing Edwin S. Corwin, *The Constitution as Instrument and Symbol* (1936) 30 AMERICAN POLITICAL SCIENCE REVIEW, 1076–80.

[45]Loughlin, *Against Constitutionalism* 117–18.

[46]Loughlin's discussion of the German Constitution and jurisprudence of the *Bundesverfassungsgericht* does not engage on a detailed level with the significance of the *Lüth* (BVerfGE 7, 198) decision and its suggestion that the constitution can serve as a source of "moral catharsis." See the discussion in Somek, *The Cosmopolitan Constitution*, 97–100.

[47]Loughlin, *Against Constitutionalism* 119 and PETER H. MERKL, THE ORIGIN OF THE WEST GERMAN REPUBLIC (New York: Oxford University Press, 1963) 172 and 176.

[48]Loughlin, *Against Constitutionalism* 120.

[49]ERNST FORSTHOFF, DER STAAT DER INDUSTRIEGESELLSCHAFT (Munich: Beck, 1971) 72 and Loughlin, *Against Constitutionalism* 120.

"sacralize" the Constitution, already evident in the Enlightenment rhetoric of the Founding Fathers and later exemplified in Abraham Lincoln's reference to the "political religion" of the Constitution as an important unifying force, received further impetus following the Civil War of 1861–1865.[50] From this perspective, the attribution of symbolic significance to the constitution would seem, like constitutionalism itself, to be initially an American phenomenon, which was subsequently exported to the rest of the world through a combination of hard and soft power. While certainly instructive, however, appeals to the complex American constitutional experience and its Enlightenment and religious influences still demand a further level of systematic explanation.

The closest one gets to such a systematic explanation in Loughlin's discussion is his analysis of the tension between modern constitutionalism's instrumental and symbolic aspects. As the authoritative instrument of government, a constitution "requires clear rules on the allocation of decision-making authority."[51] As a symbolic expression of "the regime's collective identity," however, the "constitution must incorporate values and statements of principles pitched at a high level of abstraction and ambiguity."[52] The "resolution" to this dilemma, Loughlin argues, is found in the allocation of greater power to the judiciary, which is entrusted with alleviating this tension by the application of abstract principles of legality (or "super-legality").[53] The judiciary becomes the authoritative interpreter of an "invisible" constitution, a set of abstract constitutional principles and values elaborated through "reason," and not answerable to democratic majorities.[54]

Loughlin's argument that the new era of an "invisible" constitution of supra-legal Enlightenment rationality presided over by a juristocracy is a response to the tension between a symbolic constitution of abstract principles and values and the demands of effective governance is plausible. It also, particularly in its account of "the regime's collective identity," points the way forward to a more complete explanation of the significance and prominence of the symbolic constitution. The symbolic constitution reflects an aspiration for national constitutions to serve as representations of political unity and identity. From a historical perspective, it would certainly seem accurate to say that the American constitutional experience is seminal, and the post-WWII German constitutional experience is paradigmatic. In order to explain the significance of the symbolic constitution, however, it is also necessary to reflect on the achievement of modern constitutionalism more generally and the status of national constitutions as representations of political identity in the context of the dissolution of other forms of political unity. The following section pursues this line of inquiry by reference to Niklas Luhmann's theory of the modern constitution as an evolutionary achievement that mediates between political and legal subsystems of society.

D. The Symbolic Constitution as Unity in Difference

The symbolic constitution may be characterized as ideological insofar as it offers a representation of political unity that premises social integration on a set of "universal" values that are not effectively operationalized and in the service of existing power relations. A more systematic explanation of the prevalence and appeal of symbolic constitutionalism requires, however, consideration of its relationship with, and derivation from, the modern constitutional form. The current section pursues this line of inquiry, initially by reference to Luhmann's argument that the primary function of the modern constitution is to facilitate communications and reciprocal

[50]Loughlin, *Against Constitutionalism* 114-15; Abraham Lincoln, *On the Perpetuation of Our Political Institutions*, speech of 27 January 1838, cited in HARVEY C. MANSFIELD JR., AMERICA'S CONSTITUTIONAL SOUL (Baltimore: John Hopkins University Press, 1991) 31.

[51]Loughlin, *Against Constitutionalism* 122.

[52]Loughlin, *Against Constitutionalism* 122.

[53]Loughlin, *Against Constitutionalism* 122–23.

[54]Loughlin, *Against Constitutionalism* 161–62.

"performances" between the autonomous political and legal subsystems of society. Proceeding from broadly Luhmannian insights, I contend that symbolic constitutionalism offers an idealized reflection of unity which conceals the true function and meaning of modern constitutional orders.

On Luhmann's account, the modern constitution, as it emerged with the late eighteenth-century revolutions in France and America, is an evolutionary achievement that consolidates and makes explicit developments – such as limitations on government power and assertions of fundamental individual rights – identifiable in seventeenth-century England and before.[55] This raises the question as to what is truly distinctive about the post-1780's concept of the constitution. Luhmann's answer assumes key tenets from his systems theory of society. For Luhmann, modern societies are distinctive in their functional differentiation of subsystems such as politics, law, the economy, art, and religion. Each subsystem is governed by its "programs" and "codes" in the performance of a distinct function for society and is operationally (although not cognitively) closed in relation to the communications of other subsystems. The function of the political system, for example, is to enable collectively binding decisions to be reached through the medium of power, whereas the function of the legal system is to manage normative expectations through the code of legal/illegal.[56] While different subsystems are "autopoietic" and operationally closed, they are able to interact with other systems through the medium of "structural coupling," a form of selective exchange between systems that allows them to be "irritated" by the communications of other systems.[57]

The modern post-1789 written constitution, Luhmann contends, is a consolidated evolutionary response to the functional differentiation between the political and legal systems. This reflects a shift from a hierarchical subordination of law to power towards a relationship of reciprocal influence.[58] The modern constitution enables a structural coupling between the two systems that also serve to mitigate or conceal their underlying paradoxes of self-reference. Modern positive law rests on a self-determining positive binary code of legal and illegal. The legal system enters into paradoxes of self-reference, however, when it attempts to apply the code to itself i.e. to determine the "ground" of the code and the system's legality/illegality. This explains why the legal system continues to seek recourse to a "superregulative instance" (for example, nature, the state, "the people.")[59] Yet such appeals are no longer plausible in hypercomplex societies. The way out of this paradox is to establish a state constitution that is taken to generate the legal/illegal code, but is itself attributed to an external "political" source. From the perspective of the legal system, the modern constitution responds to its own autonomy or capacity to generate positive laws as an operationally closed normative system independent of political and moral foundations. A modern constitution thus rests on an externalization of foundations that is, in fact, internal to the legal system's own communications.[60] In the constitutional settlements of the United States and France, the legitimating foundational principle is "We the People" and the Nation, respectively, which are taken to exercise popular sovereignty or the *pouvoir constituant* in establishing the state constitution. The political system that emerges with the rise of state sovereignty and operates with the power/no power code confronts a constitutive paradox of its own: the binding of necessarily unbound authority.[61] This paradox, which persists with the transfer of sovereign authority from a

[55]Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft* (1990) 9 RECHTSHISTORISCHES JOURNAL, 176–77.

[56]See NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT (Frankfurt: Suhrkamp, 2000) and NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT (Frankfurt: Suhrkamp, 1995).

[57]Luhmann, *Die Gesellschaft der Gesellschaft* 92–119.

[58]Niklas Luhmann, *Machtkreislauf und Recht in Demokratien* (1981) 2 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE, 159–60.

[59]Luhmann, *Verfassung als evolutionäre Errungenschaft* 186.

[60]Neves, *Symbolic Constitutionalization* 47.

[61]Luhmann, *Verfassung als evolutionäre Errungenschaft* 195–96.

monarch to "the people," is also addressed with the aid of the state constitution and an "internal externalization" to the legal system.[62] Through the establishment of a state constitution, the sovereign can "self-bind" and remove the impression that it is a domain of arbitrary decision. The modern constitution hence allows the political and legal systems to resolve their founding paradoxes through a "reciprocal externalization" towards the state constitution.[63]

Luhmann argues that the symbolic role attributed to constitutions conceals the status of the modern constitution as a structural coupling and the associated externalization of the paradoxes of self-reference.[64] Constitutional symbolism allows the constitution to be regarded as a "unitary and a superior form," when in truth, it is only a form that can be considered under two aspects, and which has the function of mitigating the risk of intractable political disputes.[65] When the modern constitution, as a source of rights and values, becomes a kind of "civil religion," this reduces the pressures of self-justification on the autonomous legal and political systems.[66] The symbolic constitution hence emerges, on Luhmann's account, as a construct that helps legitimize the political and legal systems by concealing their autonomy. Consistent with the arguments above, it offers a projection or representation of political unity that masks a deep underlying complexity.

From a structural perspective, the function performed by the symbolic constitution is necessary for the legitimation of the modern constitutional form. The modern constitution arises in conjunction with economic modernization and increased social complexity, the dissolution of "thick" ethical and religious frameworks, and the rise of moral pluralism. It reflects an increasing tendency to renounce transcendent (divine or natural) justifications for political rule; a characteristic of modernity is that it must generate its own normative resources rather than rely on external sources of legitimation. As a historical process, this reflects a shift from heteronomy to autonomy, from content-rich cosmologies, tribal particularism, and personalistic domination to universalistic systems of meaning, consolidated by urbanization, economic modernization, and differentiation of spheres of action and social systems.[67] The modern constitution answers the consequential demands of self-legitimation, primarily by appeal to the normative grounds of popular or national sovereignty and inherent or political basic rights. Yet, crucially, the veneer of unity and identity provided by the modern constitution under conditions of social fragmentation and differentiation requires supplementation from the symbolic constitution. While the modern constitutional form itself projects a political unity following the dissolution of traditional sources of authority and justification, the need it responds to are not satisfied either by the more "operational" provisions of a constitutional text or the principles of popular sovereignty and basic rights considered as bare "declarations." In this sense, the derivation of the symbolic constitution from constitutional principles is conterminous with the modern project of constitutionalism itself. The demands placed on the symbolic constitution in enabling a representation of the unity of the political, on this analysis, will only tend to increase with ever greater social complexity, and the dissipation of common religious and ethical frameworks and commitments through pluralism.

More generally, the symbolic constitution should be understood within a Luhmannian framework as a legitimating formula for a unified and simplified self-description of society.[68] The power-enabling and constraining dimensions of modern constitutions already offer idealized

[62]Luhmann, *Die Politik der Gesellschaft* 141.

[63]Gunther Teubner, *Exogenous Self-Binding: How Social Subsystems Externalise Their Foundational Paradoxes in the Process of Constitutionalization*, in Alberto Febbrajo and Giancarlo Corsi (eds.) SOCIOLOGY OF CONSTITUTIONS: A PARADOXICAL PERSPECTIVE (London: Taylor and Francis, 2016) 32. In the same volume see also Giancarlo Corsi, *The Constitution in the Work of Niklas Luhmann* 260.

[64]Luhmann, *Die Politik der Gesellschaft* 392.

[65]Corsi, *The Constitution in the Work of Niklas Luhmann* 262 and Luhmann, *Die Politik der Gesellschaft* 392.

[66]Luhmann, *Die Politik der Gesellschaft* 141.

[67]JÜRGEN HABERMAS, LEGITIMATION CRISIS, trans. Thomas McCarthy (Cambridge: Polity, 1976) 11–12 and 22.

[68]Luhmann, *Die Politik der Gesellschaft* 319–74.

expressions of the operation of contemporary political and administrative power.[69] Foundational principles that provide a supporting platform for symbolic constitutionalism – principally basic rights and popular sovereignty – create reserves of legitimacy through associations with widely accepted values such as freedom and equality, while mystifying the autonomy and the instrumental rationality of the political and legal systems, and their interrelationship, not to mention contingent foundations. These claims can be elaborated by a closer examination of the principles of basic rights and popular sovereignty, which both strongly inform appeals to the constitution as a symbol of political unity.

Basic rights – initially classical liberal "negative" liberties against the interference of the state or other citizens, then political rights of participation, and then social and economic rights – are closely associated with the modern constitutional form and remain fundamental for appeals to the symbolic constitution.[70] While the provision of rights as protective guarantees or positive entitlements clearly plays an important role in the legitimation of the modern constitutional state, their role in promoting forms of social integration under contemporary conditions is frequently overlooked. Fundamental or "universal" rights offer a "semantics of inclusion," which allows the political and legal systems to apply norms at a greater level of abstraction and generalization, and with greater predictability and efficiency, to all individuals in society, regardless of structural particularities.[71] In their practical operation, basic individual rights reflect a society where individuals have become increasingly dissociated from traditional allegiances and forms of belonging. From the perspective of the symbolic constitution, however, rights can also be understood as protections and entitlements that project a sense of normative closure and unity.

Popular sovereignty offers a rich source of constitutional symbolism. Appeals to "We the People" are well-adapted to the integrative aims of the symbolic constitution, insofar as they expressly project the political unity of citizens as a "corporate" body while remaining ambiguous enough not to contradict the liberal idea of the moral distinction between persons.[72] Although the well-attested ideological aspects of popular sovereignty would seem to compromise its status as a foundation for political legitimacy, contemporary reconstructions seek to neutralize the implications of "mass rule" and nationalism and play on associations with democratic or public autonomy.[73] This allows popular (and national sovereignty) to be retained as abstract concepts for deployment in symbolic representations of political unity, despite the inevitability of representation by elites at the level of both "extraordinary" and "ordinary" politics, the enhanced reach of the administrative state, and a general decline of interest and engagement with politics at the state level. As abstract expressions of democratic equality and related value commitments, appeals to popular sovereignty in constitutional texts and justificatory theoretical reconstructions have, in fact, performed an indispensable role in "pacifying"

[69]Christopher Thornhill, *Niklas Luhmann and the Sociology of the Constitution* (2010) 10 JOURNAL OF CLASSICAL SOCIOLOGY, 326–27.

[70]This applies even for constitutional settlements without a written bill of rights. Interestingly, the percentage of constitutional texts expressly incorporating "negative" liberties has greatly increased since 1900. See Elkins and Ginsburg, *What Can We Learn From Written Constitutions?* 335. More generally, see GERALD STOURZH, WEGE ZUR GRUNDRECHTSDEMOKRATIE: STUDIEN ZUR BEGRIFFS- UND INSTITUTIONENGESCHICHTE DES LIBERALEN VERFASSUNGSSTAATES (Wien: Böhlau Verlag, 1989) 155–74.

[71]Thornhill, *Niklas Luhmann and the Sociology of the Constitution* 327 and Niklas Luhmann, *Politische Verfassungen im Kontext des Gesellschaftssystems Teil 1* (1973) 12 DER STAAT 4.

[72]See David Ciepley, *Is the US Government a Corporation? The Corporate Origins of Modern Constitutionalism* (2017) 111 AMERICAN POLITICAL SCIENCE REVIEW, 418–35.

[73]On the historical origins of popular sovereignty and its ideological implications see, respectively, DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT (Oxford: Oxford University Press: 2016) and EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (New York: W.W. Norton, 1988). For "reconstructions" of popular sovereignty in accordance with the normative presuppositions of liberal-democracy, see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS, trans. William Rehg (Cambridge: Polity, 1996) and PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY OF DEMOCRACY (Cambridge: Cambridge University Press, 2012).

the volatility of political conflict, immunizing the political and legal systems from more intense forms of disagreement and potential intrastate forms of violence.[74]

The significance of the symbolic constitution, this section has argued, is inseparable from its structural role in relation to the modern constitutional form. The symbolic aspect of constitutionalism is, in fact, inherent to the logic of the modern constitution, which projects a form of political unity that it cannot itself satisfy under conditions of increased social and economic differentiation and the breakdown of shared religious and ethical frameworks. Symbolic constitutionalism extends the representation of political unity already contained within the modern constitutional form, and it follows a systemic imperative to conceal or downplay the underlying complexity and differentiation of contemporary societies. In the final section of this article, I elaborate on this argument by reference to an alternative traditional source of political unity and justification: the common good. It is by considering the relationship of the symbolic constitution with the common good, I contend, that the systemic and motivational drivers for the increased evocation of the symbolic constitution can be more precisely understood.

E. Symbolic Constitutionalism and the Common Good

The rise of the symbolic constitution as a normative resource deployed in support of political legitimation and social integration reflects the decline of traditional concepts for the representation of political unity. Historically, the most pre-eminent of these concepts was the common good. In the political thought of classical thinkers like Aristotle and Cicero, medieval thinkers like Aquinas, and even to a significant extent in early modern theorists, the common good functions as a unifying principle of deliberation and action and as a source of justification for the directives of political authority. Yet the common good understood more broadly (the well-being, welfare, utility, or advantage of the polity, the *salus populi*) has an intuitive and practical appeal that extends beyond its classical theoretical formulations. This is why it would be misleading to assert that the common good was "replaced" by the symbolic constitution. While the common good (or related ideas like the "general welfare" or "public interest") continues to feature in constitutional texts, political deliberation, legal judgment, judicial interpretation, and theoretical reflection, its semantic and normative content still shifts with the rise of modern constitutionalism. One way to put this point is that appeals to the symbolic constitution become more attractive and necessary as the possibility of conceiving of the common good in the traditional sense as a teleological principle guiding practical deliberation is more difficult to sustain. This imparts to the concept of the common good a noticeably "spectral" quality, illustrated by the examples below.

On the classical conception of the common good, articulated in the teachings of Aristotle and Aquinas, political deliberation and its outcomes are justified by reference to the flourishing of the community as a whole. For Aristotle, the common advantage (*to koine[i] sumpheron*) is the end at which all laws should aim and the central criterion for the classification of correct and defective regimes (*politeiai*).[75] Aristotle suggests that the common advantage is a "motivational" reason in the sense that each member of a political community accrues benefits from their membership that would not otherwise be available.[76] Yet Aristotle also identifies the common advantage with political justice and communal well-being as a beneficial state of affairs attributable to the

[74]Luhmann, *Politische Verfassungen im Kontext des Gesellschaftssystems Teil 1* 12; Thornhill, *Niklas Luhmann and the Sociology of the Constitution* 329; Hauke Brunkhorst, *Sociological Constitutionalism: An Evolutionary Approach*, in Blokker and Thornhill (eds.) SOCIOLOGICAL CONSTITUTIONALISM, 118.

[75]Aristotle *NE* V.1, 1129b15-19; *Pol.* III.6, 1279a17-29.

[76]Aristotle *Pol.* III.6, 1278b 19-23.

community as a whole when it is ordered by (practically reasonable) law.[77] Aquinas' famous definition of law in *Summa Theologiae* assumes the status of the common good as a directive principle of all rational human legislation. According to Aquinas, law (*lex/legis*) is "nothing else" than an ordinance of reason for the common good (*rationis ordinatio ad bonum commune*), made by the authority who has care of the community, and promulgated.[78] Aquinas views the common good as the common end of a political community conceptualized as a unity of order.[79] Consistent with this, the common good is identified with justice (a certain equality or proper relation among persons) and peace (the proper ordering of citizens and the absence of strife and discord).[80]

Three aspects of the classical conception are particularly salient in the current context. First, the flourishing of a political community is a "distinctive" common good that is constitutive for the individual flourishing of citizens, not simply constituted by their individual activity and flourishing.[81] While the common good can also be regarded under "aggregative" and "instrumental" aspects, the distinctive aspect of communal flourishing has normative primacy.[82] Second, in the classical conception, the common good serves as a principle of justification so that good and bad regimes or laws can be assessed by reference to their capacity to promote or impair the flourishing of the community.[83] Third, the common good on the classical model presupposes a teleological conception of practical reason: the common good is an end (or reason for action) that motivates and justifies action directed towards its fulfillment.[84] It is the status of the common good as an end (*telos*) which allows it to be understood as a projection of political unity and as a unity of order.[85] A political community is, on this view, unified by a shared orientation by rulers and citizens to the goal of communal well-being, and the prevailing governmental or regime form – its constitution in the classical sense – is largely a function of how it pursues this end.[86]

This classical conception of the common good remains influential in early modernity, albeit often in a modified or attenuated form. It is, moreover, only gradually displaced as greater emphasis is placed upon popular sovereignty and liberty in the late eighteenth-century constitutional settlements of the United States and France.[87] This gradual process of displacement is discernible in a comparison of the 1789 US Constitution with the 1949 German *Grundgesetz*. The Preamble of the US Constitution refers to the promotion of "the general Welfare" as one of the ends of a "more perfect Union" that was established by "We the People" and also designed to "secure the Blessings of Liberty."[88] Here, a variant of the classical conception of the common good

[77]Aristotle *Pol.* III.6, 1279a18, III.12, 1282b17-18; *EE* VII.9, 1241b13-15; *NE* V.6, 1134a30.

[78]ST I-II, q. 90, a. 4.

[79]ST I-II, q. 90, a. 3. See also M.S. KEMPSHALL, THE COMMON GOOD IN LATE MEDIEVAL THOUGHT (Oxford: Oxford University Press, 1999) 76–101.

[80]ST II-II, q. 29, a. 1 and q. 57, a. 1.

[81]The distinctive common good is a good attributable to the community as a whole and not merely its parts. "[T]he distinctive principle of common goods properly so called ... is a unity that diffuses its goodness universally." Aquinas Guilbeau, *What Makes the Common Good Common? Key Points from Charles De Konick* (2022) 20 NOVA ET VETERA, 746.

[82]Aristotle *Pol.* I.2, 1253a19-20 and III.3, 1276b7-8; Aquinas *Sententia Ethic*, lib. 1I .1. n5. My terminology in this paragraph draws on Mark C. Murphy, *The Common Good* (2005) 59 REVIEW OF METAPHYSICS, 133–64. The normative priority of the distinctive conception explains why the "aggregative" aspect of the classical conception of the common good is not to be understood in utilitarian terms; aggregation here refers to the contribution that the flourishing of individuals makes to the flourishing of the community as a whole, not an aggregate of utility. The instrumental aspect of the common good refers to the provision of the conditions which promote the common good; these conditions promote the good of the community as a whole, not only the goods of its members. The three conceptions are aspects of one political idea, but the "distinctive" dimension is granted priority in the classical tradition.

[83]Aristotle *Pol.* III.6, 1279a17-29.

[84]Aristotle *NE* V.1, 1129b15-19; Aquinas ST I-II q. 90 a.3.

[85]Aristotle *Pol.* VIII.1, 1337a27-30; Aquinas ST I-II q. 90 a.3.

[86]Aristotle *Pol.* III.6, 1279a17-29.

[87]Luhmann, *Die Politik der Gesellschaft* 120–1.

[88]The Preamble also refers to "Justice" and "domestic Tranquility," which are consistently identified with the common good on the classical conception. See, for example, ST II-II q. 29. a1 and q. 57. a1.

continues to feature, but surrounded by declarations of popular sovereignty and liberty. The Preamble and the first five articles of the *Grundgesetz*, by contrast, center human dignity, human rights, and negative liberties.[89] For understandable historical reasons, the *Grundgesetz* offers scant resources to appeal to the common good as part of its constitutional symbolism, at least if one relies primarily on the text.[90]

Intriguingly and instructively, one also finds a muted appeal to the common good in prominent post-WWII normative reconstructions of the liberal-democratic welfare state. Despite the deontological (rather than teleological) tenor of their political theories, for example, John Rawls and Jürgen Habermas both retain a place for the common good "off the main stage" of their central explanatory and justificatory projects.[91] It is certainly plausible to read this deconstructively as a "return of the repressed," and as indicative of the "inevitability" of appeals to the common good in normative justifications for political and legal authority.[92] Political rule, even in its modern bureaucratic and administrative manifestations, must at least profess to serve the general or public interest if it is not to be identified with elite capture, tyranny, and injustice. Yet it remains the case that the common good and synonymous concepts do not tend to feature prominently in advocacy for constitutional symbolism as a source of political legitimacy and social integration.

Adrian Vermeule's recent proposal to recover a conception of common good constitutionalism from the "classical legal tradition" has aroused intense interest in part because it seeks to resist these tendencies. Drawing on classical sources – primarily the Roman civil lawyers and Aquinas – Vermeule contends that "the master principle of our public law should be the classical principle that all officials have a duty, and corresponding authority, to promote the common good."[93] The common good is understood by Vermeule, consistent with the classical tradition, as "unitary and indivisible," rather than as "an aggregation of individual utilities."[94] It is given more specific content by reference to precepts of legal justice ("to live honorably, to harm no one, and to give each one what is due to him in justice") and "the famous trinity" of "peace, justice, and abundance."[95] Vermeule also frames his account of the common good by recuperating the classical distinction between the "enacted positive law" (*lex*) and "the overall body of law" (*ius*); the latter includes and subsumes positive enactments and statutes but also transcends them insofar as it contains "general principles of jurisprudence and legal justice."[96]

[89]One finds a distant echo of the classical conception of the common good in Article 14, which stipulates that the use of property (and potential expropriation) should serve the public good. GG Art. 14 Abs. 2–3. "Public good," however, translates "*Wohle der Allgemeinheit*," not "*Gemeinwohl*."

[90]It is important to distinguish the claim that the *Grundgesetz* offers minimal textual basis for a classical notion of the common good from the claim that it establishes a "social state" (see Article 20(1)) which reflects a commitment to the situatedness of the individual in a larger community. See Winifried Brugger, *Communitarianism as the Social and Legal Theory Behind the German Constitution* (2004) 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 431–60; Dieter Suhr, *Vom selbständigen Menschen im verfassten Gemeinwesen*, in G.F. Schuppert and W. Tzschaschel (eds.) ANGEWANDTE DIALEKTIK: DIETER SUHR ZUM GEDÄCHTNIS (Heidelberg: CF. Müller, 1992) 64–75; Somek, *The Cosmopolitan Constitution* 124–27.

[91]Habermas, *Between Facts and Norms* 84 and 95; JOHN RAWLS, A THEORY OF JUSTICE rev. ed. (Cambridge: Harvard University Press, 1999) 219. From a more radical-democratic perspective, see also EMILIOS CHRISTODOULIDIS, THE REDRESS OF LAW: GLOBALISATION, CONSTITUTIONALISM AND MARKET CAPTURE (Cambridge: Cambridge University Press, 2021) 161.

[92]ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (Cambridge: Polity, 2022) 52–90.

[93]Vermeule, *Common Good Constitutionalism* 1. Vermeule qualifies this statement (at 1 and 43) by reference to the need for officials to promote the common good in conformity with official role morality.

[94]Vermeule, *Common Good Constitutionalism* 7.

[95]Vermeule, *Common Good Constitutionalism* 7. Vermeule extrapolates from "the trinity" commitments to health, safety and economic security, and also "elicits" principles of solidarity and subsidiarity from the classical tradition.

[96]Vermeule, *Common Good Constitutionalism* 4. For critical discussion of Vermeule's treatment of the *lex*/*ius* distinction see Jeffrey A. Pojanowski and Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory* (2022) 98 NOTRE DAME LAW REVIEW, 411–12.

While the classical credentials of Vermeule's account of common good constitutionalism are complicated by the methodological deployment of Dworkinian interpretivism to challenge tenets of originalism and positivism, it represents an attempt to retrieve pre-modern legal concepts.

The many critics of Vermeule's common good constitutionalism have tended to focus on (i) the ambiguities or perceived weaknesses of its rejection of originalism and (ii) its alleged "Schmittean" or authoritarian implications.[97] On a more fundamental level, which is reflected in both forms of criticism, Vermeule's theory is conspicuous for its neglect of some central features of modern constitutionalism. Perhaps the most obvious omission is identified by Michael Wilkinson: common good constitutionalism does not directly address the site of constitution-making authority and lacks a clear "distinction between higher and ordinary lawmaking."[98] While this negelct of popular sovereignty can in large part be explained by Vermeule's focus upon judicial interpretation, it is nonetheless a striking feature of common good constitutionalism that it has relatively little to say about the constituent source of authority, which is, in historical terms at least, central to the US constitutional settlement and the legitimacy of modern constitutionalism more broadly.[99] In Aristotelian terminology, Vermeule focuses squarely on the final, not the efficient, cause of constitutional order.[100] One of Wilkinson's main reproaches is that Vermeule's refusal to acknowledge any necessary connection between constitutional authority and democracy appears to warrant suspicions regarding the power that common good constitutionalism would bestow upon the executive and a morally committed judiciary.[101] Yet, underlying this reproach is the more general concern that Vermeule's classical common good constitutional framework seems ambivalent regarding modern constitutionalism's at least rhetorical commitment to the popular origins of legitimate law.

It is certainly possible, on a conceptual level, to attempt to shoehorn modern constitution-making processes within an account of the common good as the normative end of the political and legal order. One might, for example, try to ascribe the role of the fundamental legislator to the constituent people within a more Aristotelian or Thomistic model.[102] More generally, a normative focus on the common good need not necessitate relativizing democracy as one regime type among

[97]For (i) see, for example, Pojanowski and Walsh, *Recovering Classical Legal Constitutionalism* 403–63 and William Baude and Stephan E. Sachs, *The 'Common Good' Manifesto* (2022) 136 HARVARD LAW REVIEW, 861–906. For (ii) see Michael Wilkinson, *The Authoritarian Nature of Common Good Constitutionalism* (2022) 13 LSE, LAW SOCIETY AND ECONOMY WORKING PAPERS, 1–28; David Dyzenhaus, *Schmitten in the USA, Verfassungsblog* (April 4, 2020) https://verfassungsblog.de/schmitten-in-the-usa/ (last accessed 5 June 2023); Bernard Keenan, *Baptizing the State: Vermeule's Common Good Critical Legal Thinking* (23 May 2022) https://criticallegalthinking.com/2022/05/23/baptizing-the-state-vermeules-common-good/ (last accessed 5 June 2023). Both dimensions of criticism are evident in Brian Leiter's critique, which is nonetheless informed by a more fundamental rejection of natural law jurisprudence, and an associated skepticism regarding its doctrinal relevance for US constitutional circumstances. See Brian Leiter, *Politics by Other Means: The Jurisprudence of 'Common Good' Constitutionalism* (2023) 90 UNIVERSITY OF CHICAGO LAW REVIEW, 1–23.

[98]Wilkinson, *The Authoritarian Nature of Common Good Constitutionalism* 10. This concern is also identified, for obvious reasons, by originalist critics of Vermeule. See, for example, Pojanowski and Walsh, *Recovering Classical Legal Constitutionalism* 434.

[99]For the argument that popular sovereignty and constituent power have increasingly been displaced by human rights as the principal source of constitutional legitimacy following WWII, see Somek, *The Cosmopolitan Constitution* 79–133 and CHRISTOPHER THORNHILL, A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS: SOCIAL FOUNDATIONS OF THE POST-NATIONAL LEGAL STRUCTURE (Cambridge: Cambridge University Press, 2016).

[100]See Pojanowski and Walsh, *Recovering Classical Legal Constitutionalism* 416–48.

[101]See Vermeule, *Common Good Constitutionalism* 47: "Democracy – in the modern sense of mass electoral democracy – has no special privilege."

[102]This approach has, in fact, an historical lineage extending back to at least Marsilius of Padua. See BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT *1150-1650* (Cambridge: Cambridge University Press, 1982) 54–79.

others.[103] Vermeule's contemporary retrieval of the common good nonetheless suggests that there is no reason in principle why higher lawmaking authority needs to be ascribed to a democratic constituent, "We the People." As a representation of political unity that ascribes ultimate normative priority to the end of communal and individual well-being, the common good is at least potentially in tension with a robust democratic conception of constitutional legitimacy.

Conversely, and seemingly paradoxically, the gradual attenuation of the normative significance of the common good also derives from its perceived lack of universality. The point here is not the obvious one that, in sociological terms, the common good is often associated with the Catholic natural law tradition and synonyms like "General Welfare" with utilitarianism. It is rather that – and in this respect the common good is analogous to popular sovereignty – the concept is usually applied in a "restrictive" or "exclusionary" fashion to a bounded or national political community.[104] The common good hence sits uneasily with the increased trend, reflected most obviously in the judicial reasoning of apex courts, to regard national constitutions as answerable to "universal values." Exemplified by the jurisprudence of the German Constitutional Court, this model of "cosmopolitan constitution" is, Alexander Somek argues, not a "world constitution" as such, but a national constitution governed by "an objective scheme of values" held to be of universal validity and acceptable to all "reasonable" persons.[105] The cosmopolitan constitution is in this sense a much more natural fit with symbolic constitutionalism.

A comparison between the common good and the symbolic constitution as alternative representations of political unity is highly instructive on a structural level. The common good provides a representation of the unity of a political community through its function as an end; it is the projected convergence of the practical intentions and actions of rulers and citizens upon the *telos* of the well-being of a political community which serves structurally as a unifying principle. A polity correctly understood, on this conception, is the set of institutions, offices, competences, social practices, and even modes of life that are "formed" by an interpretation of the common good. The symbolic constitution, by contrast, is an idealization of written and conventional norms; it is a unity constructed upon the basis of social facts – whether legal or customary – and through the formal distillation of the content of the norms enacted to govern those social facts.

This point can be made in a less abstract way by considering a well-known objection to constitutional patriotism. Constitutional patriotism may be defined as the idea that "political attachment ought to center on the norms, the values, and more indirectly, the procedures of a liberal democratic constitution."[106] Framed this way, constitutional patriotism attaches normative weight to a citizen's rational allegiance to the symbolic constitution. The main difficulty that has always confronted advocates of constitutional patriotism is that it has an "abstract" or "bloodless" quality due to its commitment to a universalist morality.[107] Constitutional patriotism hence seems to have a weak motivational force relative to national allegiance and, indeed, struggles to justify why citizens should identify with their polity in particular. This concern is exacerbated by the acknowledgement that complex modern societies cannot be sustained by "a substantive consensus on values but only by a consensus on the procedure, the legitimate enactment of laws and the

[103]See, for example, N.W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM (Oxford, Oxford University Press, 2018) 147–86. Barber advocates for a "positive constitutionalism," directed to human well-being or flourishing (in contrast to the "negative constitutionalism" of limited government), but also includes a commitment to democracy amongst his fundamental constitutional principles.

[104]It is intelligible to speak of the "common good" of humanity, and hence to postulate different levels of common good for each individual extending to the cosmopolitan domain, but this is not customary usage in current political and legal discourse. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (Oxford: Oxford University Press, 2011) 134–60.

[105]Somek, *The Cosmopolitan Constitution* 134–75.

[106]JAN WERNER-MÜLLER, CONSTITUTIONAL PATRIOTISM (Princeton: Princeton University Press, 2007).

[107]Werner-Müller, *Constitutional Patriotism* 5.

legitimate exercise of power."[108] Yet how can the "norms and values" at the heart of the constitution ultimately be identified with lawmaking procedures when the "point' of such procedures is to promote the liberal-democratic values of freedom and equality? It would therefore seem most accurate to say that constitutional patriotism advocates adherence to substantive values that are explicit or implicit in a constitutional text and widely accepted enough to meet with acquiescence, even if claims of "consensus" are both unrealistic and ideological. Part of the magic of the symbolic constitution is hence that the contingency of the object of worship is concealed by the formalization of the underlying model of constitutional order.

There is no way around the fact that the cosmopolitan symbolic constitution embeds a set of substantive "value" or ethical commitments. Yet, as a representation of political unity, the symbolic constitution arguably better facilitates the mystification of the contingent and contestable nature of those commitments than the explicitly teleological, yet substantively open, idea of the common good. Considered as an idealization of a written text that is still attributed to the people and asserted to embed claims of universal rationality or "reasonableness," the cosmopolitan symbolic constitution provides a representation of the unity of the political which partially obscures the centrality of prudential judgment for effective political rule. In the classical conception, the pursuit of the common good will rule out some obviously bad courses of action but often depends on the determination (*determinatio*) of the legislator or ruler.[109] In Aquinas' classic analogy, when the architect turns the idea of a house into a particular house, they work with general constraints and guidelines but also reasonable discretion (to be distinguished from arbitrariness in the pejorative sense). The lawmaker may likewise derive the proposition that those who commit evil acts should be punished from principles of natural law, but the application of a particular penalty offers significant room to manoeuvre within a range of reasonable alternatives.[110] Good and effective lawmaking, on this model, relies on an exercise of practical reason, which, while drawing on theoretical insight, requires sensitivity to context and the application of prudential judgment in the circumstances. As an abstract set of values, the liberal-democratic symbolic constitution relies on practical judgment inclusive of the application of universal principles to the circumstances. Yet this practical judgment often assumes a set of substantive values framed as beyond reasonable disagreement.

None of this is to suggest that the model of architectonic or "regnative" prudence is easily transferable to modern conditions or that contemporary lawmakers, officials, or judges do not need to apply sound practical judgment to particulars in the application of constitutional norms. What is true, however, is that the idealization of the modern constitutional form through the symbolic constitution consolidates a formalization of certain principles or values as fixed and accessible to any truly rational or "reasonable" observer or agent. In this respect, at least, the values of the symbolic constitution are more analogous, if one wishes to frame the point paradoxically by referencing Thomistic concepts, to the "eternal law" than the "natural law."[111]

The ascendancy of the symbolic constitution as a representation of political unity reflects a loss of confidence in the capacity of those in positions of authority to exercise practical reason in the classical sense of making sound prudential judgments directed at the advantage of citizens in response to concrete circumstances. Appeals to an abstract realm of values gather momentum stepwise with the decline of a teleological model of political reasoning, which assumes the capacity for rulers to make determinations that reflect the interests of their citizens. This potential is

[108]Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* Amy Gutman (ed.) MULTICULTURALISM (Princeton: Princeton University Press, 1994) 135. See the discussion in Werner-Müller, *Constitutional Patriotism* 58.

[109]For an instructive recent account of *determinatio*, see Conor Casey and Adrian Vermeule, *Myths of Common Good Constitutionalism* (2022) 45 HARVARD JOURNAL OF LAW AND PUBLIC POLICY, 120–23.

[110]ST I-II q. 95. a.2.

[111]The Thomistic eternal law is the exemplar of divine wisdom, which directs the motions and acts of all things. Natural law is the sharing in eternal law by intelligent creatures through (practical) reason. ST I-II q. 91 a.2 and q. 93 a.1.

inherent to modern constitutionalism, which is partly motivated by suspicion of arbitrary monarchical or aristocratic rule. One explanation for the inflation of this latent tendency in the symbolic constitution is the indisputable implausibility in modern complex and pluralistic societies of a model of political rule in which a statesman with an exceptional level of practical insight governs a polity astutely from on high. Even if such an agent existed and was recognized for their expertise, the potential for a ruler to make synoptic political judgments is considerably truncated, to the point that it appears totally incongruous, in societies dominated by economic and technological modes of reasoning and structured by the differentiation of social functions. Another factor – and it is here that the contrast between the symbolic constitution and older models of representation of political unity is perhaps most illuminating – is the rejection of the very idea of superior practical insight in political contexts. Human dignity, rights, and popular sovereignty, all in their own way, reflect a political imaginary that is egalitarian and abstract in its overall orientation. Nonetheless, the problem is that all political "values" reflect an understanding of human good so that, in the end, the symbolic constitution is indeed ideological in concealing its own contingent origins.

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