

CONSTITUTIONALISM AND CIVIL SOCIETY

The Jefferson Lecture
University of California at Berkeley
25 April 2000

Stanley N. Katz
Woodrow Wilson School
Princeton University

Speaking of American constitutions in 1824, two years before his death, Thomas Jefferson said that “. . . we consider them not otherwise changeable than by the authority of the people, on a special election of representatives for that purpose expressly: they are until then the *lex legum*.”

But can they be made unchangeable? Can one generation bind another, and all others, in succession forever? I think not. The Creator has made the earth for the living, not the dead. Rights and powers can only belong to persons, not to things, not to mere matter, unendowed with will. . . . A generation may bind itself as long as its majority continues in life; when that has disappeared, another majority is in place, holds all the rights and powers their predecessors once held, and may change their laws and institutions to suit themselves. Nothing then is unchangeable but the inherent and unalienable rights of man.

(Letter to John Cartwright, 5 June 1824 in Merrill D. Peterson, ed., Jefferson (New York, 1984), pp. 1493-4)

In this characteristic statement of the constitutional views of the American Enlightenment, Jefferson evoked both political realism and rights-based legal idealism. The tension between these two concepts forms my theme today.

History and law have always been at the core of my concerns, but about twenty-five years ago I turned my attention to the history of philanthropy, and especially to the history of philanthropic foundations, and I have been working in the general field of philanthropy since that time. However, from time to time I have returned to my much older love of constitutional history and law, a field to which I was introduced by Mark DeWolfe Howe. My scholarly interests in both philanthropy and law expanded in an international direction during my eleven year stint as President of the American Council of Learned Societies – a period spent mostly on airplanes to places whose languages I could not speak. As a result, in the field of philanthropy, my attention has turned from American non-profit organizations to their foreign cousins, non-governmental organizations (or NGOs). In constitutional law, my focus has shifted to comparative constitutionalism and to constitutionalism outside the United States.

This lecture represents an initial attempt to work out a late-dawning realization that my two preoccupations -- philanthropy (that is the institutions of civil society) and constitutional law -- are in fact simply two different aspects of a single large problem. I suspect that I can understand them both better if I think of them as related, and that is what I want to attempt this afternoon. I am deeply grateful for this invitation, and honored that the University should have asked me to deliver the Jefferson Lecture at this great institution.

I.

Let me start with constitutional law. Like many historians and political scientists, I was drawn to the excitement of Bicentennial of the U.S. Constitution in the mid-1980s. My principal concern at the time of the Bicentennial was that we Americans should not devote ourselves to an orgy of self-congratulation, but rather that we should take the opportunity to reflect on the contemporary significance of our 200 years of constitutional experience. Thanks to the Ford Foundation, which asked me what it might do to commemorate the Bicentennial, I was able to organize a project on the idea of constitutionalism, which has long seemed to me the most important U.S. contribution to modern thought. The Ford staff also agreed that we ought to study the progress of this idea outside the United States, both in order to understand its range and growth, and better to comprehend American constitutionalism. The result was a large grant for a substantial ACLS project on comparative constitutionalism, beginning in 1987, spanning nearly five years and extending to Latin America, Africa, South/Southeast Asia and Europe (West and East).

What did I learn during the course of the project about constitutionalism? I will not pretend that my mind was a *tabula rasa* at the outset. My notion of the origins of American constitutionalism, drawn from my mentor Bernard Bailyn, was that eighteenth century Americans had conceived of constitutionalism in instrumental terms – as a consciously contrived mechanism for yoking limitations on government to the will of the

people in a dynamic, geographically distributed manner. American constitutionalism was thus distinguishable at the time of the American Revolution from the organic and taxonomic British notion that viewed the constitution as little more than an historical description of the proper functions of government. Ours was the constitutionalism of new nations, self-consciously rooting itself simultaneously in popular consent and self-restraint, and based upon communally prescribed (and yet mutable) institutions. But of course my notion was and is at odds with those Americans and Europeans who think of constitutions and constitutionalism in a more absolutist, rationalist, Enlightenment manner. Indeed, the tension between these two conceptions proved to be very much at the core of contention in the comparative constitutionalism project.

It would be easy to summon up a straw man to caricature the idealist position, and I do not want to be accused of taking a cheap shot. Let me offer up my friend and colleague Walter F. Murphy as a very positive example of the universalist position. Walter was a crucial participant in the Ford project. He wrote one of the two keystone essays that were circulated to all of the conferences, “Constitutions, Constitutionalism, and Democracy,” and he is still at work on a major book on the subject. His essay is a brilliant account of the role of constitutionalism in liberal democracies, and we used it to contrast with an opposing, functionalist (though some would say relativist) approach represented by H.W.O. Okoth-Ogendo’s essay, “Constitutions Without Constitutionalism: Reflections on an African Political Paradox,” of which more in a few minutes.

Murphy begins his essay by contrasting constitutionalism with democratic theory:

Whereas democratic theory turns to moral relativism, constitutionalism turns to moral realism. It presumes that “out there” lurk discoverable standards to judge whether public policies infringe on human dignity. The legitimacy of a policy depends not simply on the authenticity of decision-makers’ credentials but also on substantive criteria.

(Walter F. Murphy, in Greenberg, et als., “Constitutions, Constitutionalism, and Democracy, p.6”)

If there are discoverable standards “out there,” there are rationally specifiable parameters to constitutionalism. This is what I would describe as a truly Enlightenment account, strongly based in Lockean individualism.

Constitutionalists tend to be more pessimistic about human nature, fearing that people are sufficiently clever to oppress without hurting themselves.

Constitutional theorists do not deny the importance of institutional and cultural checks, but see those as insufficient. They are constantly concerned with the human penchant to act selfishly and abuse power. They want institutional restraints on substantive matters to prevent lapses into an authoritarian or even totalitarian system cloaked with populist trappings.

(Murphy, p.5)

But, for Murphy, constitutionalism always refers back to liberal individualism:

Constitutionalism . . . enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will.

(Murphy, p.3)

This, I would argue, is the basic Western notion of liberal democratic constitutionalism. It is what most of our compatriots conceive of when they refer to constitutionalism, and it is the account that is taught to students of American constitutional law.

But Walter Murphy's analysis is not so typical of a variety of forms of constitutionalism conceptualized and practiced outside of the western democracies. In 1987, after all, socialism was the dominant form of socio-political organization in much of the world, and the socialists contended self-assuredly that they were constitutionalists. Today, apart from China, Viet Nam and Cuba, socialist constitutionalism (something the Ford program officers confidently maintained did not even exist in 1987) is not much of a factor. But the countries of the Third World also contend for starkly alternative varieties of constitutionalism.

The second, contrasting, essay circulated to all of the Ford conferences was by the Kenyan lawyer, Okoth-Ogendo. Okoth's essay could not have been further from Murphy's, since (although trained in the U.K. and the U.S.) he was working from an African perspective. He began his essay by observing that the dilemma of African constitutionalism is that "no body of *constitutional law or principles of constitutionalism* appears to be developing in Africa, and might well fail to do so . . . The paradox lies in the simultaneous existence of what appears as a clear commitment by African political elites to the idea of the constitution and an equally clear rejection of the classical or at any rate liberal democratic notion of constitutionalism." (p.66)

From an African point of view, Okoth contended:

. . . *all law*, and *constitutional law* in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of *power*; it matters not whether that power lies with the state or in some other organized entity. From this perspective, therefore, the very idea of law, hence of *a constitution as a special body of law*, entails commitment or adherence to a theory of organized power . . . (p.67)

In Africa, the focus has had to be on constitutions rather than on constitutionalism, on “[t]he process of *constitution making*, which involves, inter alia, making choices as to which concerns should appear on that map, [which] cannot be regarded as a simple reproduction of some basic principles that particular societies may have found operational.”(p.67) Okoth, like many constitutionalists in new democracies, views constitutionalism as a struggle. Acknowledging that there is:

. . . broad agreement . . . on the essence of constitutionalism, fidelity to the principle that the exercise of state power must seek to advance the ends of society, that attainment has not been an easy matter. The political history of many societies is replete with struggles for an optimal balance between the few on whom constitutions confer power and the vast majority for whose benefit it is supposed to be exercised. What is clear is that in no society has that balance been achieved through the promulgation of a constitution, per se.” (pp.79-80)

So much for what Walter Murphy terms “constitutionism,” or constitutionalism as simple adherence to textualism. (Murphy draft essay on “Constitutionalism” for encyclopedia)

But there was no clear agreement as to the meaning of constitutionalism at the conclusion of the ACLS comparative constitutionalism project. I came away convinced that the Enlightenment interpretation did not provide a sufficiently common ground for understanding principles and behaviors thought “constitutional” by indigenes around the world.

Over the course of the project, it became clear that there were two dramatically differing thrusts in defining constitutionalism. The first led toward a highly formalistic view that relied principally on the structural features of constitutional documents. The second tended to regard the constitutionalism of a particular society as a dynamic process, rooted in underlying, local social realities. Despite the fundamental incompatibility of these two approaches, they repeatedly intersected analytically. (p.xvii)

Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, Steven C. Wheatley, eds., *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (New York, OUP, 1993)

I have already characterized these two polar views by contrasting the approaches of Walter Murphy and Okoth-Ogendo. In the Introduction to the book summarizing the project we concluded that “. . . constitutionalism is a dynamic, political process, rather than a fixed mode of distributing power, rights, and duties,” and that “[c]onstitutional legitimacy thus is more often validated by political and social realities than by formal legal criteria.” (p.xix) My colleagues and I came down strongly in the realist, functionalist camp, and this informed our attempt to articulate what we called “an approximate definition” of constitutionalism:

“. . . a commitment to limitations on ordinary political power; it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it draws on particular cultural and historical contexts from which it emanates; and it resides in public consciousness.” (p.xxi)

That is to say that “. . . constitutionalism, if it is to emerge, must arise out of such indigenous political controversies, and that its final form [is] not necessarily predictable.” (p.xx) Constitutionalism is thus a continuing political and social process, issuing out of contestation and admitting few absolutes. I tried to carry this definition a bit further a couple of years later when reflecting on the Pew conferences in East Central Europe:

. . . shorn of universals, what is constitutionalism? To my mind, if there is an essence of constitutionalism (and I believe there is) it is not to be found in the structure of the constitutional arrangements and institutions that are established in a particular country. Rather, it is to be found in the *practice* of constitutionalism, in a form of politics that is based on the notion of respect for the rule of law, in which the government, however it is configured, reflects the basic values and aspirations of the community.

That is to say that generic constitutionalism consists in a process within a society by which the community commits itself to the rule of law, specifies its basic values, and agrees to abide by a legal/institutional structure which guarantees that formal social institutions will respect the agreed-upon values. (p. 14)
 Stanley N. Katz, *CONSTITUTIONALISM IN EAST CENTRAL EUROPE: SOME NEGATIVE LESSONS FROM THE AMERICAN EXPERIENCE* (Berghan Books, Providence, 1994)

This definition will never convince anyone who conceives of constitutionalism in idealist terms, but it is as close as I can come to defining the core issues.

My own sense of the matter is well expressed in Hanna Fenichel Pitkin's wonderful 1987 AALS talk on "The Idea of a Constitution" (37 Journal of Legal Education 167, 1987). Hers is a functional notion of constitutions that works against the idealist reification of constitutionalism. She argues that:

. . . . constitutions are *made*, not found. . . . [T]hey are human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and others lose. . . . one might even want to argue that our constitution is more something we do than something we make: we (re)shape it all the time through our collective activity. Our constitution is (what is relatively stable in) our activity; a stranger learns its principles by watching our conduct. (p.168)

This is a highly realistic account that posits a tight fit between constitutional behavior and constitutionalism, and it seems compelling to me as an account of the U.S. constitutional experience, as well as a basis for thinking about comparative constitutionalism. Each society must, I think, develop its own culture of constitutionalism. Such national cultures will indeed bear certain generic similarities to one another, but they will be living cultures, constantly evolving in dialectical tension with the larger cultures of which they are a part. The larger inquiry must be what constitutes constitutional culture.

II.

What about civil society? It has only been recently that the term “civil society” has come back into fashion in political theory, and Ernest Gellner has suggested why:

A new ideal was born, or reborn, in recent decades: Civil Society. Previously a person interested in the notion of Civil Society could be assume to be a historian of ideas, concerned perhaps with Locke or Hegel. But the phrase itself had no living resonance or evocativeness. Rather, it seemed distinctly covered with dust. And now, all of a sudden, it has been taken out and thoroughly dusted, and has become a shining emblem. (Gellner, Conditions of Liberty, p. 1)

As Gellner implies, it has been the struggle of formerly communist nations to build democratic societies since 1989 that has brought the notion of civil society into currency. But now it seems essential to bring the concept into broader play in order to revisit our general assumptions about what it is that makes constitutional democracy work.

Does civil society relate to the idea of constitutionalism? We actually mentioned a possible relationship in the Introduction to the Ford Foundation book, though we did not pursue its implications:

Many participants suggested that broad-based political socialization, generally expressed as the creation of civil society, is a prerequisite to stable constitutionalism. A theory of constitutional literacy emerged that contends that the polity must be educated about the idea of limited government before such a government can succeed. This view is based, in part, on the principle that constitutionalism imposed from above, rather than being allowed to develop from below, is actually authoritarianism, and has insufficient basis in civil society to be considered a “genuine” constitutionalism. (p.xix-xx)

But in rereading this passage, I am reminded how imprecise the term “civil society” was to me in the early 1990s, and how little thought I had given to it. But over the past few years scholars have produced a series of important new works analyzing the intellectual history history of the idea of civil society – books and essays such as those by Adam

Seligman, John Keane, Charles Taylor and, most recently, John Ehrenberg, upon whose book, Civil Society: The Critical History of an Idea (New York, 1999) my present historical argument is based.

What emerges most interestingly from this new scholarship is the perception that the classical notion of civil society as nearly synonymous with the whole of the organized political community persisted until the end of the Middle Ages. The story begins, as one would expect, with the Greeks, who believed that the defining element of civilization was the capacity to live in civil society – this, after all, was what distinguished Greeks from barbarians. Through politics, citizens could surmount their personal circumstances and develop the ability to exercise virtue – the capacity to subordinate one’s individual interests to those of the community and the common good. The mechanism for identifying the common or public good was through public debate. And, once identified, the mutual pursuit of the public good transformed public life into a common moral project. As Aristotle put it, “Those constitutions which consider the common interest are the right constitutions, judged by the standards of absolute justice. Those constitutions which consider only the personal interest of the rulers are all wrong constitutions, or perversions of the right forms.”(Quoted in Ehrenberg, p. 16

State and civil society were also coterminous as Christianity became the overarching intellectual framework of the Middle Ages. Thinkers such as St. Augustine suffused their understanding of the state and politics with their theology, denying that human reason alone could discover truth or that human institutions alone could perfect

social and political life. Thus, it would not be until the Christian world began to fracture in the sixteenth century that human agency and modern notions of social engineering would once again conceptualize civil society as subject to human intervention – and as something separate from the state. At that point, a variety of thinkers from Machiavelli and Luther to Hobbes developed new theories for understanding civil society, ranging from concepts of “princely power [and] civic republicanism [to] the liberated conscience” as the “self-sufficient organizing principles of civil society.” (Ehrenberg, p.80) But they did not have to come to terms with the dominating force (and sociological idea) of the modern world – the market.

By the eighteenth century, however, the market could no longer be ignored and the historical idea of civil society split into two strands. The first of these was developed by John Locke, who thought of civil society as the representation of private interests regulated by law in the new nation state, and who equated property with citizenship. Civil society denoted people living in economic activity and in political freedom, two closely interrelated conditions. Correspondingly, however, the Lockean tradition emptied civil society of any notion of the public good, since its sole purpose was to protect private interests, yet Locke never abandoned the notion of the political importance of civil society. This line of thinking was carried further by the Scots of the Enlightenment, Adam Smith and Adam Ferguson, both of whom conceived of civil society as the realm of individual self-interest, but as tempered by moral, society-regarding sentiments. They tried to reconcile the autonomy of the rational person with the solidarity of the community and to make private desire compatible with public virtue. Thus the private character of

the interests being protected did not preclude civil society from achieving moral good. It has not been so widely recognized, however, that Smith's economics need to be understood in terms of his psychology, for the Scots Enlightenment thinkers insisted upon the need of every individual for self-recognition, and thereby infused a strongly moral element into their account of civil society. Immanuel Kant, G. W. F. Hegel and Karl Marx later developed this market-oriented notion of civil society in complex ways. But I will not pursue that development here, for it is the other strand in the history of the idea of civil society – called by Ehrenberg, “. . . an intermediate sphere of voluntary association and activity standing between the individual and the state” -- that is the idea most commonly used in the contemporary world, and therefore is of greatest interest for my inquiry (p.144).

This was the tradition of Montesquieu, Rousseau and Tocqueville. Montesquieu was the first to identify intermediate organizations as crucial components of civil society. He believed that, together with a balanced constitution, associations could make the difference between a despot and a monarch. The difference mainly resided in the lack of arbitrary laws and in the stability and predictability of the rules and regulations that governed life, so that monarchy was rendered dependent on fundamental law. The intermediate organizations of a monarchy acted as a deflection of central power; they protected both against the threat of the despot as well as those of the “mob,” since liberty was conceived of as property and the privileges of the aristocracy.

But the most important exponent of this second, associational, strand of civil society was Alexis de Tocqueville. Ehrenberg observes that “Tocqueville’s culturally driven notion of American civil society attached a profoundly individualistic people to the general welfare in conditions of widespread social equality. . . . The American disposition to form voluntary organizations distinguished her from Europe and allowed her to avoid both state leveling and aristocratic privilege.” (p.163) Here, play back in your heads all of the familiar quotations from De la Democratie en Amerique that one hears incessantly in discussions of the remarkable history of voluntary associations in the United States. Tocqueville believed that: “voluntary associations fuse personal interest and the common good” and he “hoped that civil society would serve liberty by diluting the influence of any single interest, weakening the majority, and guarding against the excesses of the very democracy that stimulated their appearance.” (p.164) It was thus the associationalism of civil society that counteracted the tendency of egalitarianism to produce a society of strangers: “This made it all the more important for civil society to provide the principles of association that are not spontaneously generated by politics or commerce.” (p.165) “Tocqueville hoped that the Americans could show Europe how to limit the egalitarian and universal democratic state by reserving considerable power to a civil society that could mediate between the isolated individuals of a commercial society and an increasingly centralized and intrusive governmental apparatus.” (p.169)

The implications of this second strand of Enlightenment thinking about civil society have been worked out in many different ways, but in one form or another they underlie the logic of most recent attempts to appeal to civil society as the backbone of

participatory democracy. There is now a virtual industry of conflicting interpretations of the relationship of civil society to democracy, almost all of them deriving from the Montesquieu/Tocqueville strand of the idea, and emphasizing the importance of the intermediary institutions of associational life to democratic behavior. There is, as Ernest Gellner as reminded us, “. . . relatively little mystery concerning why this should have happened.”

The condition defined by [civil society] had become highly valued and loaded with political appeal. In extensive parts of the world, what it denoted was absent. This lack came in due course to be strongly felt and bitterly resented: eventually it turned into an aching void. The absence was felt acutely in societies which had strongly centralized all aspects of life, and where a single political-economic-ideological hierarchy tolerated no rivals and one single vision defined not only truth but also personal rectitude. This caused the rest of society to approximate an atomized condition, and dissent then became a mark of heresy, or in the terminology of modern ideocracy, it defined an ‘enemy of the people’.

Societies of this kind had emerged through the influence and the implementation of Marxism, and one way of summarizing the central intuition of Marxism is to say: Civil Society is a fraud. (Gellner, Conditions of Liberty, p.1)

Therefore, as we have asked ourselves how to assist countries in their transition to democracy, we have frequently identified “civil society” as a concept helpful in developing strategies of assistance. It has been useful in two ways. On the one hand it identifies the problem to be solved, since civil society is usually defined as the space between the state and the free market, a space that was obviously lacking in communist regimes in which (at least in theory) the state occupied the entire sphere of social endeavor when there was no market sphere. But with the failure of state socialism, the question was whether there needed to be something other than two domains of social activity, the state and the market? The answer seemed to be that a buffer zone called civil society was indeed necessary, both for the emergence of democracy and for the successful operation

of the market. Associational, voluntary and non-market individual activity – churches, fraternal organizations, and the like -- occupy the civil society space, thus considered. In the context of transitional regimes, the most important function of the organizations of civil society is to enable society at large to determine its own interests and open the possibility for the expression of opposition to the state. This is why there has been such tremendous focus on civil society in the newly-emerging European democracies in the years following 1989.

The second way in which civil society was useful to the post-communist reformers was in defining the process by which democratization could be brought about. For the very nature of associational and voluntary life, especially its facilitation of voluntary activity of all kinds, is thought to create (or reinforce) the social values that are productive of democratic behaviors. Civil society organizations are believed to facilitate socially productive activities through voluntary efforts, and to bring individuals together in collective pursuit of common goals. We are told that they engender mutual trust amongst their participants, and that these micro-communities of trust cumulate in generalized social trust. Such behaviors are, on the contrary, not normally produced by the self-interest-maximizing pressures of the market, nor are they facilitated by interactions with the state. So “civil society,” it is argued, provides a paradigm for conceptualizing strategies to create the preconditions for democracy in transitional nations.

But of course the concept of civil society is not employed exclusively in thinking about transitional regimes. It has also, following the lead of Robert Putnam of Harvard,

become most attractive in evaluating the effectiveness of democracy in the industrial world. Ironically, Putnam, now the most vigorous analyst of civil society in the United States, came to his insights in the course of a two decades-long study of governmental performance in Italy (in Making Democracy Work: Civic Traditions in Modern Italy, Princeton U. Press, 1993). There, he was trying to determine why new regional governments of the 1970s were more successful in some parts of Italy than in others, and through a brilliant empirical/historical analysis of Italian social and political behavior, he came to the conclusion that high levels of capacity for self-government were directly correlated with long historical traditions of associational activity. It was because of the habit of joining organizations maintained for common purposes that individuals developed the civic consciousness and trust in one another that facilitated the establishment of democratic forms of governance. In other words, the existence of a vigorous and viable civil society was a prerequisite for democracy. Putnam explained this process by positing the creation of “social capital” (“features of social organization, such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions.”) as the mechanism through which effective civil society was created and maintained. (Putnam, p.167) Social capital thus created can be expended in the production of positive democratic values and behaviors.

More recently, Putnam has turned his attention to the study of social capital and civil society in the United States and to the elaboration of the thesis that social capital can be depleted as well as accumulated. His best known attempt has been an article called “Bowling Alone: America’s Declining Social Capital” (Journal of Democracy, 1995, pp.

65-78) in which he observed that levels of associational activity in the U.S. have declined over the course of the twentieth century – using the example of the decline of bowling leagues, in which substantial numbers of individuals organized their sporting lives communally, rather than exercising by themselves in front of a television set. Putnam is now systematically assessing the mechanisms through which communal activity creates social capital, and the reasons why levels of social capital rise and fall. His book, Bowling Alone, will be published this June. He argues that social capital is a concept that enables us to understand the importance of civil society for American democracy, and that, hence, can help us to develop strategies to strengthen democracy. There is an emerging scholarly school of opinion that agrees with Putnam that the associational activities of civil society engender the sort of societal trust that enables nations with vibrant civil societies to improve the quality of their democratic cultures.

Nevertheless, Putnam's positive reading of civil society is evoking scholarly dissent whose most characteristic form has been the recognition that one man's social capital is another man's treason. The militias and the Ku Klux Klan are, after all, civil society organizations. Or to use a more telling example, Princeton political scientist Sheri Berman has noted that associational life flourished in Germany well into the twentieth century:

Yet, in contrast to what neo-Tocquevillean theories would predict, high levels of associationalism, absent strong and responsive national government and political parties, served to fragment rather than unite German society. It was weak political institutionalization rather than a weak civil society that was Germany's main problem during the Wilhelmine and Weimar eras. . . . For civil society to have the beneficial effects neo-Tocquevilleans posit, the political context has to be right: absent strong and responsive political institutions, an increasingly active civil

society may serve to undermine, rather than strengthen, a political regime.
(Berman, "Collapse of the Weimar Republic," p. 402)

This analysis is what Berman's graduate students describe as "bowling with Hitler." Or, as another Princeton colleague, Keith Whittington, has asked, "Is it necessarily true that expanded civic engagement will support democracy?"

Civil Society may be as much of a threat to democratic institutions as a support. . . . A well-functioning democracy depends not only on social relations but also on political institutions and on a constitutional order that structures the relationship between them. (Keith Whittington, "Revisiting Tocqueville's America," p.22)

The Princeton scholars contend that it is not civil society alone that makes democracy work, but rather that appropriate legal and political institutions of constitutionalism are prerequisites for a democratically positive civil society. According to Whittington:

The proper functioning of democracy depends on a particular interaction of society and political institutions and not simply on the maintenance of societal activity per se. . . . Social capital is an important instrument for achieving social goals, but concentrating on the formation of social capital begs the question of the ends to which those assets are to be directed. Without equal attention to political institutions, social capital may well be directed against other members of society. Without attention to the constitutional order, social groups may well place demands on state institutions that are undesirable or unsustainable." (Whittington, "Revisiting," p.30)

Which brings me to the puzzle that forms the subject of this lecture, just what is the relationship of civil society and constitutionalism?

III.

Unfortunately, despite all of the recent scholarly attention to of civil society, there have been surprisingly few explicit attempts to relate the concepts civil society and of constitutionalism. The question is whether a civil society and constitutionalism are integrally connected to one another, and, if so, how

One way to begin the inquiry is to ask what is the purpose of each process? – for, as you have seen, I consider both constitutionalism and civil society best understood as processes rather than abstractions. Unless we think, as only an extreme formalist would, that constitutionalism is good in itself, we must value it as helping society to reach some higher goal. The common sense response would be that it is valuable insofar as it tends to produce and/or sustain a valuable end such as democracy. Walter Murphy would say that goal is securing human dignity, but he would admit that human dignity is best served in a liberal, constitutional democracy. John Rawls would argue that the goal is “. . . a well-ordered constitutional democratic society.” (“The Idea of Public Reason Revisited” in The Law of Peoples (Cambridge, Mass., 1999 p.131)

Can the same be said for civil society, for we might also argue that the end of civil society is simply to produce democracy? No, says Ernest Gellner, who in fact finds the concept of civil society more helpful than that of democracy:

. . . ‘Civil Society’ does help us clarify our social norms, and make plain what it is we endorse and why it appeals to us. In this respect, ‘Civil Society’ is markedly superior to a notion such as ‘democracy’, which, though it may highlight the fact that we prefer consent over coercion, tells us precious little concerning the social

pre-conditions of the effectiveness of general consent and participation. . . . The concept of Civil Society highlights not only the mechanics but also the charms of the kind of society to which we aspire. (Gellner, Conditions of Freedom, p.211)

There is a sense, for Gellner, in which civil society is not simply analytically but substantively more meaningful than democracy. “Although,” he contends,

“‘democracy’ is indeed involved, it is the institutions and social context which alone make it possible and preferable that really matter. Without these institutional pre-conditions, ‘democracy’ has little clear meaning or feasibility. . . . ‘Civil Society’ is probably a better, more illuminating slogan than ‘democracy’.” (Gellner, Conditions of Freedom, p.189)

My hunch is that Gellner is onto something here, and that we ought to value civil society as much for what it is and does of itself, as for what it contributes to democracy or to constitutionalism. Democracy, after all is a flawed political mechanism for perfecting society, and to some extent a successfully functioning civil society ought to be an end in itself.

But I have already acknowledged that we cannot assume that civil society will function effectively, just as we cannot assume the democracy without more will serve the interests of all citizens. The cure for malfunctioning civil society would seem to be democratic political institutionalization, while the cure for democratic excess is constitutional limitations. Although we have a classic chicken/egg problem, the reality seems to be that fully-fashioned democracy requires both civil society and constitutionalism. Civil society and constitutionalism are both necessary, but not sufficient conditions for democracy. Mark Tushnet has suggested to me that we should think of them as having an elective affinity for one another.

Something like this thought was urged in the ACLS 1992 Warsaw conference by Poland's Foreign Minister, the distinguished medieval historian Bronislaw Geremek, who said that constitutionalism:

. . . is "primarily a point of reference for the socio-political system: indeed, the highest point of reference, overriding parochial concerns. Constitutionalism reflects the recognition by all political actors that a particular political process, established democratically, must be respected for valid political activity to take place. . . . The crucial element is that, whatever the constitutional structure, it must reflect the will of the people, and it must command sufficient respect from all political actors to serve as an effective limitation on the unprincipled exercise of public power. (Greenberg et als, Constitutionalism and Democracy, p. 16)

Geremek is arguing that "constitutionism" is insufficient, that constitutionalism is a cultural process, and that it is not too much of a stretch to say that certain preconditions, perhaps those of effective civil society, are necessary for effective constitutionalism to take root.

What is it, after all, that enables citizens to develop the necessary respect for the constitution structure, unless we believe that democratic politics is an entirely self-contained system? In a recent discussion of Rawlsian contractarian constitutionalism, Frank Michelman has remarked that:

It absolutely depends on the idea that your acceptance as right – as fair, as worthy of your respect – of a lawmaking *system* (or constitution) commits you to acceptance of the daily run of lawmaking events that issue from the system. That, after all, is the point of Rawls's claim that exercises of political coercion are justifiable insofar as they accord "with *a constitution*, the essentials of which all citizens may be expected to endorse." (Frank I. Michelman, "Morality, Identity and Constitutional Patriotism," unpublished paper, 1999, p.10)

If so, to what extent do forms of civil society contribute to what might be called “constitutional respect”? James Buchanan has written about “the ethics of constitutional order,” and one might imagine such a concept to mean that good citizenship requires the development of the citizen’s moral capacities to be not only rule-abiding, but other-regarding. And these are surely traits that a strong civil society should engender. (James M. Buchanan, The Economics and the Ethics of Constitutional Order (Ann Arbor, 1991), brought to my attention by Keith Whittington)

It seems clear that neither constitutional respect nor constitutional ethics will be easily attained. I earlier quoted Hannah Pitkin as saying that constitutions are “. . . human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle.” (Pitkin, “The Idea of a Constitution,” p.168) Okoth-Ogendo, you may remember, made the same point. For someone who believes that constitutionalism and civil society are both highly contested processes, it seems likely that constitutional democracy must be the result of a long, conflicted, cultural process. I doubt that such vibrant constitutionalism can come into existence prior to the creation of a positive civil society, but I am also sure that civil society alone cannot produce such a result.

This, I fear, is as far as I can get on the basis of my previous scholarship and of my personal experiences working with aspiring constitutionalists in emerging democracies. For me the problem is not fundamentally theoretical, but practical, since a bright future for the world depends upon its solution. I hope to pursue the question comparatively, from

both historical and contemporary constitutional perspectives, but an answer will require the international efforts of many humanists and social scientists. We need to do some very sophisticated history to examine different sorts of democratic societies at different periods of time and in diverse parts of the world to determine the ways in which constitutionalism and civil society have coexisted and interacted. And, of course, we must bring social science to bear on the problem, since the contemporary world provides such intriguing contexts for exploring constitutionalism/civil society links: the ongoing democratization of formerly communist countries in Europe and (quite differently) in Asia; the democratization of formerly Right-wing authoritarian countries in Latin America and Asia, the development and democratization in Africa and elsewhere in the Third World; and the health of constitutional democracy in the post-industrial First World. The challenge is to avoid an emphasis on political institutions that ignores the cultural contexts within which they are imbedded or a focus on societal and cultural dynamics that ignores political contexts, but rather to undertake sophisticated analyses of how institutional, societal and cultural factors interact and what kinds of outcomes different combinations are likely to produce. (Acknowledge Berman, 10 April 00)

If Hannah Pitkin is correct that constitutionalism is “something we do” and that we shape “all the time through our collective activity,” those who care about the quality of democracy around the world need to consider whether their activities have to reach beyond the legal and political to the social sphere, beyond constitutionalism to civil society. Or the other way round. If democratic institutions, including law, are not enough to create and maintain democracy, we have some hard work to do if we are to sustain our

constitutional and social infrastructure of democracy into another century – and to encourage the emerging constitutional democracies around the world in their current and future struggles.