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Beyond the Courts, beyond the State: Reflections on Caldwell's "Horizontal Rights and Chinese Constitutionalism"

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BEYOND THE COURTS, BEYOND THE STATE: REFLECTIONS ON CALDWELL'S 'HORIZONTAL RIGHTS AND CHINESE CONSTITUTIONALISM'

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INTRODUCTION

It is uncommon for law journal articles to be reported in *The New York Times*, but in February 2012 the venerable newspaper carried a headline that would raise the eyebrows of many: "'We the People' Loses Appeal with People Around the World."[1] Referring to an empirical study by David S. Law and Mila Versteeg[2] tracing the declining influence of the U.S. Constitution around the world, the authors conclude, as reported in *The New York Times*, that "[a]mong the world's democracies, constitutional similarity to the United States has clearly gone into free fall. Over the 1960s and 1970s, democratic constitutions as a whole become more similar to the U.S. Constitution, only to reverse course in the 1980s and 1990s."[3] For many non-lawyers, and perhaps even for lawyers outside the field of comparative constitutional law, the declining influence of the U.S. Constitution is likely to come as a surprise. After all, our modern world still owes much to the United States and its vision of constitutional government; indeed, modern constitutionalism itself can be traced to the tumultuous end of the eighteenth century and the break by the United States from the more traditional and hierarchical forms of government across the Atlantic.[4]

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1. Adam Liptak, *'We the People' Loses Appeal with People Around the World*, N.Y. TIMES (Feb. 6, 2012), http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html.

2. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

3. Liptak, *supra* note 1. In the words of Law and Versteeg, whether "the analysis is global in scope or focuses more specifically upon countries that share historical, legal, political, or geographic ties to the United States, the conclusion remains the same: The U.S. Constitution has become an increasingly unpopular model for constitutional framers elsewhere." Law & Versteeg, *supra* note 2, at 769.

4. The American and French Revolutions offered a new understanding of constitutionalism because they sought to regulate public power comprehensively through law: *see* Dieter Grimm,

But today, as the political, economic, and legal influence of the United States stands in question and Europe's economy looks bleak, it remains to be seen whether China's economic successes will be coupled with a legal ascendance. On some measures, this seems unlikely. China's Supreme People's Court shows few signs of taking up the cause of judicial constitutional review. By that measure, China is unlikely to find itself among the world's constitutional leaders. But if Ernest Caldwell is right, those looking for an emerging constitutional culture in China have been looking in the wrong place.[5] The real action in constitutional law in China is not in the higher courts, but in the lower courts that settle day-to-day disputes, and the constitutional discourse in those courts is not about limiting state power, but about the need for "horizontal" protections of citizens—specifically laborers—from their powerful employers in furtherance of constitutional values such as social justice.[6] Caldwell finds in these examples confirmation that the American constitutional paradigm—particularly the "influence of upper-level court decisions and the ideology of judicial review"[7]—is unhelpful in other constitutional contexts, such as China's, where a focus on socio-economic rights is "important for understanding alternative avenues of constitutional development."[8]

Besides providing an important perspective on constitutionalism in China, Caldwell makes a crucial point about the methodology of comparative constitutional law. We cannot assume that the methods and models of constitutional analysis that might be appropriate in one jurisdiction (e.g., the United States of America) will be equally relevant in understanding another (e.g., the People's Republic of China).[9] Yet Caldwell's approach raises other methodological questions and invites new approaches to constitutional thinking. First, while acknowledging and drawing on other constitutional traditions in Western liberal democracies (such as Germany) to illustrate the significance of "horizontal rights" in constitutional thought, Caldwell nevertheless concludes that China's approach to rights is distinct from the Western tradition, glossing over important differences within Western constitutional

The Achievement of Constitutionalism and Its Prospects in a Changed World, *in* THE TWILIGHT OF CONSTITUTIONALISM? 3, 11 (Petra Dobner & Martin Loughlin eds., 2010).

5. Ernest Caldwell, *Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes*, 88 CHI.-KENT L. REV. 63 (2012).

6. *Id.* at 63.

7. *Id.* at 89.

8. *Id.* at 91.

9. *Id.* at 67-68.

thought. Second, while criticizing a single-minded focus on the decisions of the higher courts, Caldwell's approach remains largely court-centric; it does not acknowledge other understandings of constitutionalism, whether in U.S. constitutional scholarship or in the varying practices of constitutionalism in contemporary East and Southeast Asia. Finally, the observation that constitutional principles can play an important role in moderating private power in an age of multinational enterprises can be extended beyond jurisdictional boundaries. If private and hybrid (public-private) forms of power are increasingly operating beyond states, we need to find innovative ways of moderating power that stretch our contemporary understandings of constitutional law.

I. HORIZONTAL CONSTITUTIONAL RIGHTS

In some ways, Caldwell's critique is less a critique of "Western" constitutionalism generally than it is a critique of the projection of U.S. constitutional theories and methods onto other constitutional orders. But the scope of his critique is not always clear. Although he rejects what he regards as traditional American approaches to constitutionalism and demonstrates an awareness of other constitutional traditions, such as the German and European human rights traditions that protect horizontal rights of the sort Caldwell identifies in China, he also, at times, objects more generally to the "rights discourse of Euro-American constitutionalism" and to "non-Anglo-American[] techniques of constitutional engagement"[10] with their narrow focus "on state-citizen conflict as an indicator of constitutional engagement."[11]

Caldwell acknowledges that the idea of the "indirect effect" (i.e., that constitutional principles shape the law governing private disputes, rather than controlling the private litigants themselves) can be found in German constitutional law and in the jurisprudence of the European Court of Human Rights, demonstrating an "evolving concept of an individual right that is no longer understood as merely a defensive measure of individual protection, but [is] also considered a positive right that imposes a *duty* on the state to enforce it."[12] Even so, Caldwell concludes: "[u]nfortunately, despite these examples, the 'vertical' rights orientation continues to dominate both rights-based and constitutional

10. *Id.* at 63-64.
11. *Id.* at 74.
12. *Id.* at 77.

discourse in comparative law, particularly when discussing domestic constitutional development."[13]

It is uncontroversial to say that modern constitutional thought in liberal constitutional democracies has historically focused on the limitation and regulation of *state* power,[14] but recent developments in Europe, South Africa, and elsewhere suggest a conceptual and normative broadening. For example, the indirect application of constitutional rights to private litigants is apparent in the South African Constitution. Section 8(2) expressly provides that a provision in the Bill of Rights "binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[15] Section 8(3), in turn, directs a court to apply a provision of the Bill of Rights to a natural or juristic person if necessary to develop "the common law to the extent that legislation does not give effect to that right."[16] It also permits the court "to develop rules of the common law to limit the right," provided that the limit is consistent with the general limitation clause in section 36(1) of the constitution.[17] While the South African Constitution seeks to address the question of applicability of constitutional rights to private actors expressly, in other jurisdictions this issue has been addressed primarily through judicial interpretation.[18] The real question, it seems, is not whether constitutions govern private legal relations at all, but how and to what extent they do so. According to Cheryl Saunders in her survey of Canada, South Africa, and Australia, in a common law legal system, constitutional rights might influence private legal relations in four ways: they

> may directly affect the rights and obligations of parties under the common law; they may override the common law through a state action doctrine, treating the courts as emanations of the state; they

13. *Id.* at 78.

14. Grimm, *supra* note 4, at 11 (noting the correlation between the consolidation of public power in the state and the rise of modern constitutionalism).

15. S. AFR. CONST., Ch. 2 § 8(2), 1996.

16. *Id.*

17. *Id.* Additionally, Section 9 of the Constitution prohibits discrimination by the state, directly or indirectly, on grounds that include "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." But is also provides that no person "may unfairly discriminate directly or indirectly against anyone" on these grounds and that national legislation "must be enacted to prevent or prohibit unfair discrimination." So, at least in the context of discrimination, South Africa's constitution has a direct impact on the conduct of private actors. S. AFR. CONST., Ch. 2 § 9(3)-(4), 1996.

18. *See generally* Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003).

> may indirectly influence the common law, under authority of the constitution; they may be used as a source on which courts draw in the parallel development of the common law.[19]

These examples suggest that Caldwell's claim that the "vertical" rights orientation remains dominant does not tell the whole story of constitutional development in the broadly "Western"[20] tradition. It may be that Caldwell has the U.S. experience particularly in mind, and in this respect, he may well be correct; in some jurisdictions, it may be more difficult than in others to make a case for the horizontal application of constitutional rights, for both structural and ideological reasons.[21] But to suggest that Western (or Western-inspired) comparative constitutional methodology focuses too narrowly "on state–citizen conflict as an indicator of constitutional engagement"[22] is something of an overstatement. At a time when "post-modern governments" are increasingly "export[ing] . . . functions to private actors which were traditionally considered attributes of sovereignty, or at least were perceived as integral parts of the operation of a legitimate government,"[23] horizontal rights are increasingly relevant to the aspiration of moderating power through law.

II. CONSTITUTIONALISM BEYOND THE COURTS

Caldwell is right to be wary of equating constitutionalism with the decisions of high courts, a view that resonates with the efforts of some constitutional scholars in the United States, notably Mark Tushnet, to draw attention away from the courts and toward an articulation of a social or political understanding of constitutionalism.[24] Although Tushnet's views on constitutionalism might not seem part of the mainstream of American constitutional thinking, a substantial body of literature on constitutionalism looks beyond decisions of the U.S. Supreme

19. Cheryl Saunders, *Constitutional Rights and the Common Law*, *in* THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 183, 213 (András Sajó & Renáta Uitz eds., 2005).

20. Caldwell himself does not use "Western," preferring variously "Anglo-American," "Euro-American," or "North Atlantic" constitutionalism. Caldwell, *supra* note 5, at 59, 60 n.2, 69.

21. Tushnet, *supra* note 18, at 84-85, 88 (the relative ease with which a constitution can protect rights "horizontally" depends on both structural constitutional features, such as whether the ordinary courts or a specialized constitutional court decides constitutional questions in private litigation, and ideological commitments, including the degree of commitment to social democratic values).

22. Caldwell, *supra* note 5, at 74.

23. Renáta Uitz, *Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?—An Introduction*, *in* THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 1, 13 (András Sajó & Renáta Uitz, eds., 2005).

24. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

Court, seeking instead to understand constitutionalism from an extrinsic, contextual perspective, exposing its historically and politically contingent qualities.[25] From this perspective, Caldwell's investigation of constitutional discourse in the lower courts, while helpfully showing the limits of a single-minded focus on the higher courts, is still trapped in a court-centric paradigm of law, including constitutional law.

What the experience of constitutionalism in China and other parts of Asia (and possibly elsewhere, including the United Kingdom) reveals is that constitutionalism can be understood in ways that are radically different from the orthodox American constitutional perspective, which locates constitutionalism in the courts and, in particular, in the Supreme Court. Consider, for instance, the experience of Thailand, which since 1932, amid intermittent political instability, upheavals, and military coups, has had eighteen distinct formal constitutions.[26] A formal and cynical interpretation of these facts might conclude that Thailand effectively has no constitution, in the sense of rules or principles that constrain or moderate political power. But commentators on Thailand, both within and outside it, suggest that Thailand's "real" constitution is found, not in formal documents, but in the understandings, practices, and principles that guide and constrain Thai politics.[27] These are principles that operate informally, in the sense that they may not be visible to a formal analysis of a written constitution or the decisions of Thailand's Constitutional Court.

Singapore's constitution is equally complex. Once again, a formal analysis of Singapore's constitution and its judicial practice suggests a thin constitutional practice, with minimal intervention by the courts on constitutional grounds. But the practice of constitutionalism in Singapore might be seen as more nuanced and less susceptible to formal analytical tools and concepts.[28] As Li-ann Thio has argued, courts in non-liberal constitutional democracies "play a marginal role in consti-

25. *See e.g.*, CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY (Michael Rosenfeld, ed., 1994); THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel, eds., 2009).

26. ANDREW HARDING & PETER LEYLAND, THE CONSTITUTIONAL SYSTEM OF THAILAND: A CONTEXTUAL ANALYSIS 2 (2011).

27. Nidhi Eoseewong, *The Thai Cultural Constitution*, 3 KYOTO REV. OF SOUTHEAST ASIA 3-4 (Chris Baker trans., 2003), *available at*:
http://kyotoreview.cseas.kyoto-u.ac.jp/issue/issue2/article_243.html (this article first appeared as *Rattthamanun Chabap Watthanatham Thai*, SINLAPA WATTHANATHAM 11 (1991)). *See also* Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution*, 7 INT'L J. OF CONST. L. 83, 87-88 (2009).

28. *See* Li-ann Thio, *Soft Constitutional Law in Non-Liberal Asian Constitutional Democracies*, 8 INT'L J. OF CONST. L. 766 (2010).

tutional politics"[29] and soft constitutional law—understood as "deliberately created, constitutionally significant norms that are not legally binding but have some legal effect in ordering constitutional relationships"[30]—is much more significant. Thio proceeds to show how Singapore has used soft constitutional law tools, such as government white papers and non-binding declarations, to address problems as diverse as religious harmony and the scope of the president's powers.[31]

These examples of constitutionalism beyond the courts are not limited to Asia. For instance, while the United Kingdom has recently moved toward a court-centered constitutional practice since the Human Rights Act of 1998 entered into force, the U.K.'s constitutional history reveals a much more sophisticated political constitutional practice[32] in which mechanisms of political accountability have developed to limit the powers of government beyond the formal sphere of the courts.[33] So, according to Adam Tomkins, we should not assume "that no constitutional problem is solved unless . . . it is judicially solved, and that there is no constitutional problem that cannot be . . . solved by the judiciary."[34] Whether the United Kingdom will gradually shift toward "legal constitutionalism" in which the courts play a much greater role in constraining the government, and whether the political mechanisms of accountability will be relegated to a secondary status remains to be seen. But the crucial point here is that constitutional practices beyond the courts are not exceptional, whether in Asia or in at least some of the jurisdictions in the liberal-democratic West.

Returning to the United States, it is unlikely that U.S. constitutionalism is, in this respect, exceptional. Is constitutional practice in the United States that much more formal or court-centered than it is elsewhere? On the one hand, one of the hallmarks of Western "patterns of law" is its professional dimension; as Ugo Mattei has argued, the Western legal tradition is characterized both by "the separation between law and politics and the separation between law and religious and/or philosophical tradition," the former of which "consist[s] of the adoption of public decisions based not on politics but on technical and legal

29. *Id.* at 776.

30. *Id.* at 768.

31. *See id.* at 785, 793.

32. ADAM TOMKINS, PUBLIC LAW 18 (2003) (Under a political constitution, "those who exercise political power (let us say the government) are held to constitutional account through political means, and through political institutions (for example, Parliament)").

33. *Id.* at 132-33.

34. *Id.* at 210.

merits as interpreted by a professional legal culture."[35] On the other hand, the idea that constitutionalism has a profound informal, extra-judicial dimension has a long (if less visible) pedigree in U.S. constitutional thought, well before its recent revival.[36] Some eighty years ago, for instance, Karl Llewellyn observed that a living constitution is not merely a set of rules; rather, it is an institution, which is "in [the] first instance a set of ways of living and doing."[37] A living, "working" constitution, then, consists of more than the formal text and the decisions of the Supreme Court; rather, "a firmly established constitution ... involves ways of behavior deeply set and settled in the make-up of [the] people—and it involves not patterns of doing (or of inhibition) merely, but also accompanying patterns of thinking and of emotion."[38] Caldwell's plea to shift scholarly analysis of China's constitution away from a singular focus on the highest courts marks a step away from the formal view Llewellyn criticizes. But a full picture of constitutionalism in China, as elsewhere, must be much wider in scope than Caldwell's court-centric methodology permits.

III. CONSTITUTIONALISM AND PRIVATE POWER BEYOND THE STATE

Caldwell's analysis helpfully suggests that domestic constitutional practice ought to be regarded as more about restraining private power than it is about protecting individuals from state power. He frames this point in terms of China's constitutional commitment to a "socialist ideology"[39] as reflected in the socio-economic rights set out in the constitution. The judiciary, he argues, can make a decision based on the constitution and "can do so by portraying their act as one of promoting socialism and providing justice for the citizens caught in the grasp of the private sector."[40]

It is important to recognize that constitutional law can play a role in moderating private power, but this role need not be limited to "socialist" constitutions or to China's particular situation. The crucial

35. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. OF COMP. L. 5, 23 (1997).

36. *See* Tushnet, *supra* note 18; Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 408 (2007) (arguing that, properly understood, "'[T]he Constitution' ... include[s] not only the canonical document but also a variety of statutes, executive materials, and practices that structure [the U.S.] government").

37. Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 17 (1934).

38. *Id.* at 18.

39. Caldwell, *supra* note 5, at 91.

40. *Id.*

point—and the one that resonates even more widely in an era dominated by multinational enterprises and the rise and resurgence of private power (and its hybrid variations) that operate within and beyond the state—is that the moderation or restraint of state power ought no longer to be the singular concern of constitutional law. Indeed, Caldwell's suggestion that socio-economic rights are important "for understanding alternative avenues of constitutional development"[41] can be applied to constitutional practice more widely and hints at a broader prescription for constitutionalism in the decades ahead. There are two points here. The first is that even in the United States in the wake of the 2008 financial crisis, the role of government in constraining private power, however contested, is shifting. Although it will likely take time for judicial doctrine on financial regulation to "work[] itself pure,"[42] the involvement of the U.S. government in regulating the financial sector in the wake of the crisis—described in one account as "a creeping nationalisation of the financial services sector"—has been extensive and unprecedented,[43] suggesting that the "popular" constitution is generally more tolerant of "crisis" intervention to restore the economy.[44] But whatever the case might be domestically, it is increasingly apparent—and this is the second point—that threats to individual and communal well-being come not only or primarily from the state, but from multiple forms and shades of private power and the projection of that power around the globe.

While the nineteenth century witnessed the demise of the company-state in British India in favor of the Crown as political sovereign, and with it, the temporary demise of transnational private power in favor of state power, late twentieth century globalization saw the return of transnational private power. In the second edition of his book on the regulation of multinational enterprises, published in 2007, Peter Muchlinski acknowledges the increasing limitations of a state-centric approach to regulation:

> [A] developed understanding of the regulation of MNEs requires a further dimension. This stems from the interaction of MNEs with the political communities in which they operate. In the first edition of

41. *Id.*

42. RONALD DWORKIN, LAW'S EMPIRE 407 (1986).

43. Jose Bermudez & Eduardo Vidal, *Restructuring US financial institutions: Fannie Mae and Freddie Mac, Lehman Brothers and AIG, in* GLOBAL FINANCIAL CRISIS: NAVIGATING AND UNDERSTANDING THE LEGAL AND REGULATORY ASPECTS 13, 28 (Eugenio A Bruno, ed., 2009).

44. *See generally* Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860 (2012) (arguing against the view that formal constitutional constraints are necessary to prevent governments from overspending).

> this book [in 1995] these were identified simply as nation states, given their role as the main source of formal legal regulation. A state-centric approach is no longer adequate for two reasons. First, it fails to reflect the full range of regulatory actions and responsibilities to which MNEs may be subject, or indeed voluntarily undertake, in a complex globalizing environment... Secondly, it does not allow an adequate examination of the full range of parties that may seek to exert regulatory influence upon these firms.[45]

If multinational enterprises are no longer within the direct or exclusive regulatory control of states;[46] if states are again[47] patrons of multinational enterprises on "a scale and with... sophisticated tools" never seen before;[48] if those enterprises increasingly favor private forms of adjudication (such as international commercial arbitration) over litigation in state courts;[49] and if non-governmental organizations now have a greater impact on the conduct of international business,[50] including, for instance, the labor standards in the supply chain of multinational corporations[51] in factories around the world, including in China—then our assumptions about the adequacy of formal constraints that states purport to impose on power, public or private, must be fundamentally re-examined. A re-examination of this nature requires new ways of thinking about constitutionalism both within and beyond[52] the state, and innovative ways of imposing "horizontal" con-

45. PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 81 (2d ed. 2007).

46. *See id.*

47. We find ourselves, once again, confronted by the challenges of the "company-state" that confronted law and policy-makers in the eighteenth and nineteen centuries. *See* PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA 3 (2011) (describing the eighteenth century as "an early modern world filled with a variety of corporate bodies politic and hyphenated, hybrid, overlapping and composite forms of sovereignty").

48. Adrian Wooldridge, *The Visible Hand*, THE ECONOMIST, January 21-27, 2012, at 55, 57.

49. Duncan McKenzie, *Dispute Resolution in London and the UK 2010*, THECITYUK (September 20, 2010), *available at* http://www.thecityuk.com/assets/Uploads/Dispute-resolution-2010.pdf (noting that "resolution of disputes [in the United Kingdom] mainly involving international parties rose by 59% to 5,297 in 2009 from 3,339 disputes in 2007").

50. *See generally*, HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS (Thomas Hale & David Held, eds., 2011) (for a survey of many of these organizations and their impact on international business).

51. According to the Fair Labor Association website, before Apple Inc. joined the FLA in 2012, "FLA worked with Apple to assess the impact of Apple's training programs which help raise awareness of labor rights and standards among workers in its supply chain. Like all new affiliates, Apple will align its compliance program with FLA obligations within the next two years." *See Apple Joins FLA*, FAIR LABOR ASS'N (January 13, 2012), http://www.fairlabor.org/blog/entry/apple-joins-fla.

52. *See* Gunter Teubner, *Fragmented Foundations: Societal Constitutionalism Beyond the Nation State*, *in* THE TWILIGHT OF CONSTITUTIONALISM? 327-41 (Petra Dobner and Martin Loughlin, eds., 2010).

straints on *supra*-national forms of power. Particularly for domestic constitutional thinking, there is much work to be done.

IV. CONSTITUTIONALISM UNBOUNDED

Mainstream constitutional thought, particularly as expounded in Western legal scholarship, has long been tethered to two fundamental ideas that have, in turn, influenced the methodology of comparative constitutional law. The first is the idea that constitutionalism resides first and foremost in the courts, suggesting an analytic bias in favor of comparative judicial review. The second is the notion that constitutionalism is tightly bound to the state. Caldwell's examination of Chinese constitutionalism invites us to explore new ways of thinking about constitutionalism beyond the liberal democracies of the West, while simultaneously demonstrating the powerful hold of traditional constitutional methods on our imagination. As political and economic power continue to shift East and South while escaping the jurisdictional confines of the modern state, new ways of thinking about constitutionalism become imperative.

This is not to say that judicial review is irrelevant. There is little doubt that courts are important to constitutionalism, however much that importance may vary from one jurisdiction to another. But whatever our conception of constitutionalism, it must, to be effective, infuse the society and all those subject to it: "I often wonder," declared Learned Hand at a ceremony in Central Park in the spring of 1944,

> whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.[53]

Wherever we seek to moderate power through law—whether in wartime America, contemporary China, the newly reconfigured constitutional regimes of some Arab states, or an emerging global "societal"[54] constitution—fundamental constitutional values must have a solid, social foundation. And in this respect, if no other, the deeper sociological aspirations of American constitutionalism captured so eloquently by Learned Hand remain alive and well around the world.

53. Learned Hand, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 143, 144 (Irving Dillard, ed, 1959).

54. Teubner, *supra* note 52.