

Hegel's Constitutionalism*

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This paper examines the historical, philosophical, and theoretical importance of Hegel's concept of constitutionalism by indicating its role in his theory of the modern state. Hegel's view of constitutionalism is distinct from contemporary applications of the term, is crucial to his attempt to reconcile the diremptions of Modernity, and is used to forge an ethical community in the modern state.

Introduction

Crucial to the interpretation of any political theory is an understanding of the meaning and function of its key concepts. However important this hermeneutical task, Leon Goldstein once remarked regarding Hegel's political philosophy that

(t)here is an aspect of futility which attends every attempt to offer an account of what Hegel meant by such terms as 'state' or 'freedom' which do not accord with the dominant interpretation (Goldstein, 1972, p. 60).

One central concept in Hegel's political philosophy is the term "constitution" (*die Verfassung*). When reading Hegel it is apparent that contemporary (Liberal) meanings of "constitution" as a *Grund Norm* (Kelsen, 1967), Rule of Recognition (Hart 1961, pp. 92-97), or set of rules to organize the government (Dworkin, 1978, pp. 39-45; Hart, 1961, p. 92) do not adequately describe the way Hegel used the term. Hegel sometimes uses the concept to apply to more than the polity or government while at other times, such as in "The German Constitution," he employs a more restricted or 20th century Anglo-American use of the term.

Given that "constitution" is an important yet ambiguous concept in western legal and political thought as well as in Hegel's writings,¹ it is surprising that there is no extended (English) discussion of a term so critical to an understanding of Hegel's political philosophy. Only two writers, Pelczynski (1964) and Avineri (1979) devote any serious attention to Hegel's constitutionalism, yet neither offers a sustained analysis of the subject. Other works, such as Verma (1974) and Cullen (1979) are representative of much of the Hegel scholarship that does mention his constitutionalism, but at best they only gloss the *Philosophy of Right* or a couple of other works, without providing a comprehensive review of Hegel's thoughts on the subject elsewhere in his writings.

This article offers an extended analysis of the meaning and role of "constitution" derived from a broad range of Hegel's writings and placed within the context of his overall philosophy. It begins with Hegel's perception of the historical and philosophical context of his constitutionalism and the problems it addressed. The second and third sections review Hegel's constitutional typology, with special attention to the role of what Hegel calls the "rational" constitution in the modern state as it expresses universally valid principles embodying both freedom and a sense of moral community and unity. Finally, the conclusion suggests that Hegel's concept of constitutionalism is relevant to contemporary legal debates in Liberal regimes over such issues as separation of powers and legal positivism.

Constitutionalism: Ancient and Modern

For Hegel, one of the greatest failures and virtues of Kantian philosophy and politics, and perhaps one of the main characteristics of Modernity, involved the attempt to split, distinguish, or "dirempt" (*entzweien*) morality from politics or law (Hegel, 1975, p. 76; Ritter, 1984, pp. 152-156). Since the dissolution of the "ethos" or ethical unity of the Greek polis, there has been a gradual diremption of ethics from law and the emergence of particularity and subjectivity as the dominant characteristic of the Modern World (Hegel, 1967, paragraph 124; Smith, 1989, p. 46). This split started in the Roman and Christian Worlds (Hegel, 1912, pp. 480-483), where abstract legal right and spiritual particularity were set in opposition to the universal (Hegel, 1912, p. 363). It continued to develop in the Middle Ages and the Germanic and Modern World, and reached its zenith in Kant's critical philosophy (Barraclough, 1984, pp. 355-406).

One result of this rise of particularity and the breakdown of the ethical unity of the Greek polis was the emergence of two political traditions — christian commonwealths and secular states — resulting in a split or

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"antithesis" between church and state and between secular positive and spiritual religious laws (Hegel, 1912, pp. 436-440, 478-480). These two types of states suggested distinct political functions and different relationships between the individual and the polity. Thus, in the Christian commonwealth, the state had a genuine concern for the moral generation of its citizens, but its political structures did not allow for individual secular or positive freedom. On the other hand, the secular (Modern Liberal) state gave citizens "positive" or formal (Kantian) political freedom, yet the division of ethics from politics left the individual without a "real" social or moral context in which each could participate with others to achieve moral freedom (Hegel, 1975, p. 76). Consequently, this state failed to provide the grounds for the real ethical unity and freedom of its members. In this Modern state, bourgeois life, while evolving and creating a sense of rational freedom (Hegel, 1912, p. 440), was still entirely negative, private, and devoid of any semblance of ethical unity.² It lacked the force of natural law which would promote the ethical life of citizens and produce true freedom (Hegel, 1975, pp. 112-114). This resulted in alienation and the merely formal unity of opposites such as the individual and the state, united solely by social contracts.

According to Meinecke and Reidel, much of Hegel's political and philosophical writings were devoted to overcoming a number of the antitheses found in Modernity and Kantianism, such as this divorce of legality and politics from ethical freedom (Meinecke, 1957, pp. 1-3; Reidel, 1984, pp. 9-17). Hegel sought to "sublate" (*aufheben*) these basic contradictions and transcend the formalism of Kantian ethics and politics that presented individual freedom as the isolated self-legislation of moral maxims.³ His attempts to do so included the rejection of Kantian Understanding (*Verstand*), as he thought it the basic cause of such political contradictions. He appealed to Reason (*Vernunft*) to reconcile the oppositions produced by this formalism and to ground Kantian freedom in a series of universal rational principles that harmonized one's freedom with that of others. Reason also mediated the antinomy between Natural Law and the Modern (secular) state by making the rational state provide the ethical community (*Sittlichkeit*) and political institutions necessary for the concrete expression and articulation of one's abstract right. Thus, Hegel sought to resurrect the standpoint of the ethical life he thought was destroyed by Kant by retaining and enlarging his concept of freedom and by resurrecting a tradition of politics derived from Aristotle that made politics a branch of ethics (Ritter, 1984, pp. 163-165; S. Smith, 1989 p. 136).

Among the political mechanisms used to forge this reconciliation, Hegel appeals to constitutionalism as a means to promote a "rational harmony" that overcomes the many contradictions (Meinecke, 1957, p. 357; S. Smith, 1989,

p. 218). At least four particular perspectives influenced Hegel's use of the term.

First, like many other thinkers throughout western history, Hegel's appeal to lawgivers and constitutions was designed to encourage political unity and the creation of a Modern German state. With Hegel, this practical concern with *Staatsräson* took on particular importance during the early 19th century as a sense of German nationalism and desire for statehood emerged. For example, in expressing admiration of Machiavelli for being concerned with the unification of the Italian state, Hegel stated that the Florentine had been misunderstood.

This book (the *Prince*) has often been thrown aside in disgust, as replete with maxims of the most revolting tyranny; but nothing worse can be used against it or the writer, having profound consciousness of the necessity for the formation of the State, has here exhibited the principles on which alone states could be founded in the circumstances of the times. (Hegel, 1912, p. 506)

His respect for Machiavelli stemmed in part from Hegel's perception that there were parallels between the fate of Germany (Austria and Prussia) in his time and the Italian republics in Machiavelli's time, and that the latter's writings expressed clear insight into the needs of statecraft (Harris, 1972, pp. 439, 470). Thus, Germany's development of a true constitution would be crucial to its political self-awareness, its salvation as a state and to Hegel's status as a lawgiver.⁴

Second, Hegel's understanding of the role of constitutions in politics and statecraft drew upon his understanding of Ancient Greek politics and of intellectual traditions found in Germany, France, and England. Hegel distinguished Ancient from Modern constitutions: the former expressed ethical unity while the latter stressed particularity and individual freedom (Hegel, 1967, p. 176; S. Smith, 1989, pp. 47, 154-155). Hegel sought to combine both unity and particularity in his constitutional theory.

For example, Hegel understood the essence of the Greek spirit as residing in the political and ethical unity of the polis. His attempts to reconstitute an ethical life in the modern state are based upon the unity he saw in the Greek politeia (Inwood, 1984). Greek ethos or customs provided for an objective morality in the law that made clear the duties of each citizen in the polis. (Hegel, 1967, p. 351) Thus, while the Athenian constitution gave individuals power, the polis promoted objective freedom (Hegel, 1967, p. 334) as it directed and encouraged that power to serve the commonweal (Hegel,

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1967, p. 342). Greek constitutions made explicit the objective morality or laws of the polis, and encouraged the interests of the community to predominate over the particular interests of the citizens (Hegel, 1967, pp. 332, 351).

Hegel stated that while subjective freedom is the basis of the modern world, the constitutions of the Greeks did not even recognize this particularity and had they done so it would have served to destroy the unity of the polis (Hegel, 1967, p. 333). Subjectivity was the "antithesis" of the unity of the Greek polis, and in the cases of the Sophists, Socrates, and Antigone's dispute with Creon, Hegel demonstrates how subjective questioning, expression, and familial duties conflicted with the ethos of the polis (Hegel, 1967, pp. 334, 351, 353; Hegel, 1977, pp. 261, 284; Steiner, 1986, pp. 20-42). The clash between the objective unity of the Greek constitution and the rise of the inner world of subjectivity eventually produced a "rupture" that was the downfall of the polis (Hegel, 1967, p. 354).

While Hegel admired the unity of the polis, his political theory is no throwback to the Greeks. Hegel's comments indicate a keen sense of history and historical development and his views do not suggest that ancient political ideas and structures could be removed from their historical context and placed elsewhere. Recreation of the Greek constitution was impossible and incompatible with the Modern expression of subjectivity and freedom.⁵

A third influence on the formation of Hegel's constitutionalism is found in the German political and legal tradition out of which he wrote.⁶ For example, Kant states that

A constitution allowing the greatest possible human freedom in accordance with laws by which the freedom of each is made to be consistent with that of all others...is at any rate a necessary idea, which must be taken as fundamental not only in first projecting a constitution but in all its laws. (Kant, 1933, p. 312)

Similarly, Kant indicates that protecting republican forms of government, including and especially the freedom of a civil community's members, is the primary task of a constitution (Kant, 1982, Part II, p. 96; Kant, 1979, pp. 99-100; Kant, 1985, pp. 93-94; Kant, 1974b, 169). Kant even argues that "the preservation of the state constitution is the highest law of a civil society... (and) only by the state constitution does civil society maintain itself." (Kant, 1974a, p. 191) A Constitution, besides fostering freedom, also preserves peace, and it is important to a state's existence and articulation of itself (Kant, 1985, pp. 94-95). Kant even argued that a constitution is indestructible, a product of culture (*Bildung*), and it helps to "artificially raise

to its highest power a species predisposition to the final end of destiny," i.e., freedom (Kant, 1974a, p. 189; Kant 1974b, p. 177). A constitution civilizes us and makes it possible for us to live in a civil community as rational and free beings.

Fichte follows Kant's idealism as he argues that a constitution is important to the articulation of freedom. In a work written soon after the French Revolution and replete with the author's enthusiasm for its politics, Fichte argues that a science of rights determines how a community of free beings is possible (Fichte, 1970, p. 126). Important to the creation of that community is a constitution which realizes the "Conception of Rights" of individuals in the sensuous world (Fichte, 1970, p. 278). A "rational" constitution ensures that civil officers follow their duties and protect the property rights and personal liberties of each citizen (Fichte, 1970, pp. 218, 255). It is important to the freedom of individuals, but such freedom is only possible in a community that is protected by laws of a state.⁷

Kant and Fichte agreed that freedom was the goal of, and impossible without, a (modern) constitution. Their views had an obvious influence upon Hegel, yet he did not adopt them uncritically (S. Smith, 1989, pp. 70-75). Hegel rejected Kantianism (this included Kant, Fichte, and other Kantians) as a formal theory of philosophy and politics that failed to produce true unity or ethical freedom. Separation of powers, for example, does not produce freedom but instead supports disunity and provides merely the semblance of a formal (and negative) freedom. What the Kantians ignore is that their constitutional ideas are the product of the Understanding producing diremptions or antinomies such as viewing the state and civil society as distinct entities. Separation of powers breaks up the essential unity in the state, and between the state and civil society.

As this example indicates, Kantian and Modern constitutionalism, while articulating freedom and *Moralität*, was devoid of the real ethical freedom and unity found in the Greek constitutions. To Hegel, a constitution, like a monarch, should express both unity and particularity, and it should not be viewed as a formal universal document confined only to the political apparatus of the state. Constitutions have a content and history that are more than the mere product of human artifice. They must be seen as evolving and changing throughout time. Hegel's constitutionalism thus sought to reconcile the split between law and ethics that had emerged since the rise of Modern Natural Law and secular states, and which had become more acute since the French Revolution.

A fourth influence was Montesquieu, whose effort to reconcile the unity of the Ancients with the particularity of the Moderns provoked Hegel's thinking (Hegel, 1964, pp. 35-36). Montesquieu shared with the Greeks the

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view that constitutions express an organic social unity, yet he also made some changes in the essence of that unity that seemed to allow for a greater sense of freedom than envisioned by the Greeks. Montesquieu wanted to use a constitution to mediate the split between unity and freedom in the Modern era, thus anticipating Hegel.

The Spirit of Laws classifies constitutions into monarchy, aristocracy, and democracy with honor, moderation, and virtue representing the respective animating forces of the states having these constitutions (Montesquieu, 1975, pp. 19-25). A nation's spirit, embodied in its culture, was also found in the constitution, and the constitution itself was part of the organic whole of the state. Like Hegel, Montesquieu saw a constitution as a product of a nation's manners and as something that structured its political and cultural relationships into an ethical whole.⁸ Additionally, like Hegel, Montesquieu argues that reconciling freedom with the contradictions of the power of the Modern state was a primary goal of political science (Keohane, 1980, pp. 396-400). Hegel himself said,

Thus Montesquieu, in his charming book *L'Esprit des Lois*, of which Voltaire said it was an *esprit sur les lois*, regarded the nations from this important point of view, that their constitution, their religion, in short, everything that is to be found in a state, constitutes a totality (Hegel, 1974, p. 399).

Hegel appears to acknowledge and agree with Montesquieu that the constitution is part of the organism of the state (Hegel, 1975, pp. 128-129).

However, Hegel and Montesquieu do differ on numerous points. Hegel (1967) rejected Montesquieu's separation of powers theory as unwise for the state because of the disunity it encourages.⁹ And despite parallels between Hegel and Montesquieu in their use of certain political concepts, their notion of constitution is not the same. Montesquieu did not view a constitution in the historical and developmental fashion that Hegel did, nor did he see the role of the constitution as including the reconciliation of the state and civil society and the articulation of the conditions necessary for moral freedom.¹⁰ Montesquieu's influence upon Hegel, although perhaps present, was in no way controlling and did not define the way Hegel sought to reconcile the opposition between Ancient and Modern constitutionalism, or between unity and particularity. Hegel's reconciliation of these contradictions took another direction in his construction of the rational constitution.

Positive and Rational Constitutions

Unlike Montesquieu, who saw the spirit of the nation's laws as residing in its manners, Hegel saw the soul of the state in its constitution. For Hegel, "it is only the constitution that the abstraction of the state attains life and reality." (Hegel, 1912, pp. 92-93; Hegel, 1964, pp. 220-221) A constitution is a means to unite or overcome the dichotomy between the amoral political activity of the secular state and the ethical mandates of the Christian commonwealth based in natural law. A constitution's

main feature of interest is the self-development of the rational, that is, the political condition of the people; the setting free of the successive elements of the Idea: so that several powers in the state manifest themselves as separate. (Hegel, 1912, p. 96)

A constitution can give birth to a state and provide both ethical and political unity. It is the "coping-stone of the fabric of the state," and its existence and enforcement are necessary if the state is to be viewed as more than theoretical (Hegel, 1912, pp. 92-93; Hegel, 1982, p. 191; Hegel, 1964, pp. 180-182, 251).

While the constitution is the lifeblood of the state and its enforcement makes a state "real," not all constitutions guarantee that a state will be rational. Hegel did not view every constitution of identical value, as capable of reconciling the contradictions of Modernity, or as equally effective in providing for the ethical unity and freedom of its citizens. Some constitutions are better representatives of the development of "rationality" of a people than others and can better promote the function of fostering an integration of abstract right into a moral community.

Throughout Hegel's writings there are critiques of the French, German, and English constitutions, as well as that of Wurtemberg, indicating how each was deficient in either promoting real moral freedom or in bringing unity to the state (Avineri, 1979, pp. 208-220). In these critiques he categorizes all constitutions and constitutional law into two groups, rational and positive.

For example, Hegel states of Wurtemberg that

the Assembly did not reject the King's constitution on the grounds that it was contrary to the rights that the subjects could claim in a political constitution of the strength of the rights of reason..On the contrary, it rejected it on the ground that it was not the old constitution of Wurtemberg. (Hegel, 1964b, p. 274)

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Further, Hegel comments on England that

the reason why England is so remarkably far behind the other civilized states of Europe in institutions derived from true rights is simply that the governing power lies in the hands of those possessed of so many privileges which contradict a rational constitutional law and true legislation. (Hegel, 1964c, 300)

Both passages reflect his view that these constitutions were deficient. Hegel reaches this conclusion by distinguishing rational from positive constitutions.

A positive constitution does not promote a genuine synthesis of moral and political freedom (while a rational constitution does). Further, a positive constitution appeals not to reason but to past historical practices to justify itself. Positive constitutional law "has history as its basis" and not reason or freedom (Hegel, 1964b, p. 300). A positive constitution grants rights solely because these rights existed in the past and not necessarily because they contribute to rational freedom.

However, constitutions are not necessarily categorized as positive (and irrational) because they are supported by past practices. Hegel asserts that constitutions in part are the product of a cultural-historical process and that the traditions of a nation are important in forming rational constitutions (Hegel, 1982, p. 180). Yet while constitutions are made in history, a positive constitution is one which fails to respect moral autonomy and the rationality of a people, in either the Kantian sense of autonomy or the sense of freedom that Hegel develops in the *Philosophy of Right*. Instead, they are composed of particular privileges that are supported by mere appeals to custom, authority, or legality. Positive constitutions, such as the one the Estates Assembly of Wurtemberg would have preferred, contained provisions and privileges devoid of moral content or respect for individual freedom. They are obeyed and enforced by coercion or out of respect for convention rather than out of regard for the freedom and rationality of the people of Wurtemberg (Hegel, 1964b, pp. 150-151, 274).

Elsewhere in Hegel's attack on the English constitution, he declares that it is not rational because it is composed of many privileges (Hegel, 1964, p. 300). Thus he states that

the constitution of England is a complex of mere particular Rights and particular privileges: the Government is essentially administrative-that is, conservative of the

interests of all particular orders and classes. (Hegel, 1912, p. 566)

His criticisms of the English Reform Bill were not based on the view that the working class should be denied the franchise. Rather, he saw the Bill as another positive or legal enactment that would do no more than grant more privileges and particulars without contributing to moral freedom. These privileges would just add to the other positive rights the other classes enjoyed. The Bill was not rational because it would neither strengthen the state, integrate individuals into an ethical community, nor enhance means or provide structures for individuals to express a their autonomy and have it recognized by others. It would only fragment the English state even more.

He also condemns the constitution of the French Revolution as a failure because it set up "an atomistic principle that insisted upon the sway of individual wills" (Hegel, 1912, p. 563). The constitution, although part of the revolutionary process that launched the struggle of rational law and freedom against ancient privilege and dogmatic authority, eventually failed because it did not remove and incorporate the particular wills of individuals and groups in the moral community of the state (Hegel, 1964, p. 282).

In general, a positive constitution is a product of the Understanding which perpetuates the split between ethics and law, and it fails to provide a context for the two to be united in a way that gives individuals a real social and not a simply formal or atomistic sense of freedom. Such a constitution fails to raise questions about the ultimate rational validity it should embody (Hegel, 1964, p. 116).

A rational constitution, on the other hand, is not the historical sum of individual rights which are granted simply because they were previously awarded or demanded. Rather, it respects and furthers individual autonomy in the context of a community morality (*Sittlichkeit*) by seeking to overcome the opposition between politics (law) and ethics (Natural Law), the individual and the state, and the opposition among and between different individual wills characterized by Kantian freedom. A rational constitution promotes the "self-development of the successive elements of the Idea (of freedom)" through the articulation of universally valid principles.¹¹ A rational constitution "contextualizes" human affairs, gives a sense of order to civil society, and reconciles the contradictions or conflicts between the precepts of the state and civil society.

In rational constitutions the private interests and privileges of citizens and organizations are incorporated or organized into a moral community of shared beliefs that makes possible mutual recognition, respect, and a context for a meaningful public life (Hegel, 1964, p. 153; S. Smith, 1989, p. 128). They

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direct all particulars into the organic whole that is the state, yet do not deny freedom, but rather enhance it. They do not have as their final goal the articulation of formal Kantian autonomy; instead they enable individuals to express their freedom in a political setting where individuals are required to recognize the freedom of others if one's own freedom is to be recognized and actualized. This freedom can only be secured in the ethical life of the community which is secured by a state that is not neutral concerning the moral character of its citizens (Kelly, 1978).

Although a rational constitution often labels particular privileges as positive, this does not mean that Hegel advocated a dissolution of private civil rights and the establishment of the totalitarian state. Personal or abstract rights have meaning, but only when they are integrated into a larger whole and directed towards the progressive emancipation of human nature. Personal privileges are only undesirable when they either fail to support the ethical community, are expressions of sheer legality, or when the privileges are only the formal expressions of ethics and not a contribution to the unity of the state and constitution or the development of real individual freedom (Hegel, 1975, pp. 126-128).

If in the sphere of the state the mere expression or legalization of positive personal privileges is not rational, in civil society such expressions are proper and to be encouraged (Hegel, 1964, p. 116). Particularity is the province of civil society, not the state. Thus, Hegel's concept of *Recht* or right included respect for rule of law, individual liberties, including property ownership as a means to translate abstract right into something embodied and capable of mutual recognition (Hegel, 1967, pp. 40-46),¹² and for democratic decision-making and a somewhat limited government (Hegel, 1964, p. 62). *Recht* or "Right therefore is by definition freedom as idea" that contains both a negative and restrictive factor and a positive factor that embodies the 'law of reason' which entails the correspondence or reconciliation of one's will with those of others (Hegel, 1967, p. 33).

Hegel further says that the state should maximize citizens' liberties by promoting a limited government to minimize the ruler's authority to that which is necessary to maintain the state (Hegel, 1964, pp. 154-155; Hegel, 1912, pp. 92-93). There are "Laws of Rationality" which must respect Real Freedom; this includes the freedom of the trades and professions; the use of abilities without restriction; and competition for admission to all state offices (Hegel, 1912). Elsewhere, he indicates support for trial by jury, freedom of the press and thought, and parliamentary style government (Knox, 1970, p. 22).

Rational constitutions, while expressing universal principles of reason, must also be viewed in light of a nation's manners, traditions, and history with

constitutional provisions and particular individual rights rooted in the evolving culture of a country. In the same way that abstract right must be embodied in property to be expressed, respected, and made actual, rational constitutional principles must similarly be embodied in a nation's specific culture, history and institutions if they are to be expressed, respected, and made actual.

A rational constitution is the best or most appropriate constitution to extend freedom to all individuals within a specific country at a specific historical moment. The constitution of the French Revolution, for example, had elements of rationality because it granted freedom to all. It extended freedom further than the old constitutions of France which had become positive documents that restricted freedoms to a few. However, some constitutions (such as the one Napoleon gave to Spain) can be overly rational and unsuited to the manners or rationality of a country and its people.

Rational Constitutions and the Organization of Society

It is not so clear that to Hegel a constitution is a universal and transhistorical political arrangement limited to the traditional governmental functions of the polity, but his usage of other political terms suggests that "constitution" might have a broader meaning than we normally assign to the term. Goldstein (1972, p. 64) demonstrated that Hegel does not use the term "state" to apply merely to the political or governmental apparatus of a country. Hegel's "state" includes what some anthropologists would consider a nation's entire culture that contains its laws, arts, morals, etc. If "state" has a broader meaning does "constitution" have an equally broad meaning? At some places in Hegel's writings the answer appears to be "yes" while in others "no."

In one work Hegel claims that the king of Wurtemberg proposed a new constitution that added popular representation and proclaimed universal principles of justice (Hegel, 1964, p. 271). He states in the same essay that the Assembly rejected this constitution. Similarly, writing on the German Constitution and the English Reform Bill Hegel indicates that a rational constitution is something that men consciously create much in the same way Napoleon wrote a constitution for Spain (Hegel, 1967, pp. 286-287). These passages suggest that Hegel believed constitutions were written and not customary. They imply that a constitution is something one can deliberate upon and construct in the same way social contract theorists thought a civil society could be created by men in the state of nature.

Further, there is strong temptation to read Hegel's use of "constitution" as a political document structured only to arrange the political offices of the

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government. Hegel states that the "constitution of the state is, in the first place, the organization of the state" and the state is divided to include both legislative and executive powers (Hegel, 1967, pp. 174, 176). He explicitly indicates that the Executive, Legislative, and the Crown are the three political divisions of the state, suggesting that his notion of constitutions is limited to the governmental apparatus.¹³ Finally, in reference to the constitutions of the ancient world he lists them as including monarchy, aristocracy, and democracy (Hegel, 1967, p. 176). This language supports the contention that Hegel refers to constitutions as merely a device to organize the government and its subparts and that he is following contemporary usages of constitutionalism.

Although Hegel does discuss constitutions in reference to a state's political apparatus, he should not be read as limiting them to those institutions. His notion of constitutionalism is much like the Greek notion of *πολιτεία* (or the modern notion of political culture) where constitution has a much broader notion of organizing the entire state where the state is understood in the larger sense Goldstein indicated (Smith, 1989, p. 155). A constitution directs and organizes the manners and culture of a nation. It is not made entirely by free and deliberate choice; it is also a product of a state's culture, history, and tradition.

A state is an individuality, of which you cannot select any particular side, although a supremely important one, such as its political constitution; and deliberate and decide respecting it in that isolated form. (Hegel, 1912, p. 95)

A constitution is tied to a nation's manners and its task is to organize those manners along with the political functions of the state.

Hegel questions the view that a rational constitution is simply a product of men's minds and agreements. He indicates that to view the subjects and the prince in a state of original independence (in a state of nature) is a false distortion of the "substantive unity" that actually exists between them (Hegel, 1964b, pp. 280-281). A contract is a private affair not suited to be a political bond. A contractarian depiction of politics views political relations as "a casual tie arising from the subjective needs and choices of the parties" (Hegel, 1964b, p. 281). True political bonds are actually "objective, necessary, and independent of choice and whim" (Hegel, 1964b, p. 281). The use of social contract metaphors to describe political legitimacy is erroneous because they depict politics as a series of relationships that are more appropriately found in civil society. Real political bonds start not with isolated men but with men in a social setting. Contrary to social contract theorists such as Hobbes, the

state does not erode natural liberty but instead promotes real freedom that can only be found in the ethical life of the state.

Hegel said that a "constitution should not be regarded as something made;" its creation is the work of centuries and its development depends upon the self-consciousness of a nation (Hegel, 1967, pp. 59, 178-179). A rational constitution develops as part of the history, culture, religion, philosophy, and traditions of a nation but it is not simply a positive enactment of historical claims.¹⁴ Even though a rational constitution can develop over time it is neither the mere sum of past practices or outgrowth of other forces in a nation. While it can be written and deliberated over, it is not the product of subjective whim or choice, but of conscious individuals acting within the historical process. It is both a product of tradition and choice and the organizer of a state. It is an outgrowth of a state and it is as unique to a state as its own borders and geography. In effect, there is a dialectical process involved where both choice and tradition work together to produce a constitution that represents a specific level of consciousness of freedom for nation.

The constitution is a part of the state yet it stands above it linking the parts into an organic whole for a common purpose. Hegel put it this way:

The constitution of the state is, in the first place, the organizer of the state and the self-related process of its organic life, a product whereby it differentiates its movement within itself and develops them into self-subsistence. (Hegel, 1967, p. 174)

Elsewhere Hegel elaborates upon this point and describes the dialectical relationship between the state and the constitution.

Thus in historical research the question may be raised in the first form, whether the character and manners of a nation are the cause of its constitution and laws, or if they are not rather the effect. Then, as a second step, the character and manners on the one side and the constitution and the laws on the other are conceived on the principle of reciprocity: and in that case in the same connection as it is a cause will at the same time be an effect, and vice versa. (Hegel, 1982, p. 218)

All rational constitutions are both the cause and effect of nation's manners. A constitution is inextricably linked to the manners of a state, giving

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the latter a sense of organization and unity. A rational constitution embodies the formal abstract rights into the political structures of a nation. A country's manners and culture give a content to these rights and structures such that the latter transform formal (theoretical) rights and constitutional provisions into something with a substantive content. A rational constitution overcomes the opposition between tradition and choice, or between views that the state is either natural or the product of artifice, and produces a real and rational moral community for individuals to express their freedom. It is, then, a prerequisite for the articulation of a moral community.

A rational constitution provides a unity that is impossible with a positive constitution, and it provides the community necessary for individuals to move beyond formal Kantian autonomy and achieve real political freedom. A rational constitution is thus crucial to Hegel's attempts to overcome the alienation present in the modern liberal state by morally contextualizing human freedom and affairs. For example, Hegel claims that a rational constitution organizes the state's activities to create a "single individual whole" (Hegel, 1967, p. 174). The constitution is described as an organism and organizer of the state (Hegel, 1967, p. 164). A constitution is both part of the total organism that makes up a nation; it is what holds the state together and transforms it from a mere abstraction or theoretical state into an actual state. As part of an organism, a constitution grows and changes with the rational consciousness of the state. It develops through the "elaboration of the laws and the advancing of the universal business of government" (Hegel, 1912, pp. 92-93). It grows and changes as the state enforces and amends it.

A rational constitution stands within and on top of the state to direct both the political (governmental) and nongovernmental activities of a national into a rational whole. It grows with its citizens and it can only be judged rational when its provisions are retrospectively compared to a nation's developing self-consciousness of freedom. A constitution is rational when its provisions are promoting freedom that is compatible with the level of consciousness of freedom a people has at a specific historical moment.

It now makes sense and it is possible to understand what Hegel meant when he said that the constitution Napoleon gave Spain was more rational than the one they had, yet they were not ready for it (Hegel, 1967, pp. 193-194). The point of that comment was to indicate that rational constitutions are not a priori abstract principles that can be lifted from one state or set of circumstances to another. A rational constitution can not be written for a state but must be a self-conscious part of the culture and choices of a people. It cannot be transplanted but is organic and native to a state; and the freedoms that it embodies are not the universal, formal product of abstract reasoning, but are the outgrowth of a nation's manners and

traditions. In short, there is a historical yet self-conscious aspect to the development of these rights (Hegel, 1967, pp. 286-287). Thus, Napoleon could not properly impose a rational constitution (by French standards) on Spain because Spaniards had not developed a culture that was ready for it. Giving them this rational constitution was irrational because it did not reflect the historical choices and traditions of Spain at that time in history.

Conclusion

Hegel's theory of the modern state attempts to reconcile the antinomies of the modern world produced by the dissolution of the Greek polis, the emergence and development of the modern concept of freedom, and the articulation of Kantianism that drove a wedge between ethics and law. Crucial to the modern state's success in bringing together these antinomies is the articulation of a rational constitution that incorporates or sublates the modern spirit of freedom within Greek-like notions of community to produce a sense of real freedom and unity that transcends what is found in most actual states, past and present. While abstract right and civil society are incorporated into the state to produce an ethical community, it is really the constitution, or the constitutional state, as the "coping-stone" of the state, that makes possible the essential unity of the state and civil society that both preserves and transcends modern freedom and brings a unity to the split between ethics and law. Hegel's articulation of the rational constitution brings together many constitutional traditions he saw in the West. It reconciles the demands for unity, for freedom, and for constitutions to be viewed as a product of both will and history. It incorporates the notion of separation of powers and seeks to develop the role of the constitution as important to statecraft.

Finally, Hegel's constitutionalism stands as a criticism of many important trends in Anglo-American constitutional and legal thought; i.e., separation of powers, legal positivism, the role of the judiciary, and the separation of law and morality (Stoner, 1989, pp. 10-13). Separation of powers brings a disunity to the state, and forces different branches of the government to oppose one another, thus making it difficult to bring about a unity that is necessary for the establishment of an ethical community. Moreover, separating legal and moral norms perpetuates Kantian formalism and perpetuates the political and ethical alienation of the individual from the state. Thus, Hegel would describe modern (Liberal) constitutionalism as a deficient product of the Understanding that perpetuates oppositions and contradictions, such as those between state and civil society, law and morality, and perhaps majority rule and minority rights. It also sets in opposition

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economic and political freedom, encourages social alienation, and denies a real sense of community and freedom. Demands for the state and law to be neutral leave no constructive room for the state to promote moral autonomy. Thus, Hegel would contend that the state must not be indifferent to the character of its citizens if it wished to articulate a moral community. Instead, the state has a positive and important role in fostering moral values. Yet, while the state would not be neutral regarding ethical concerns, it would be neutral in its particular enforcement of these norms and would probably have to respect some version of what we call equal treatment under the law.

Hegel's constitutionalism, then, while often overlooked, is crucial to his theory of the modern state and in trying to strike a balance between the formal autonomy of Liberalism, and the ethical community of the Greeks. It seeks to resuscitate a substantive unity that had been lost since the downfall of the Greeks, while placing that unity within the spirit of the modern world.

NOTES

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1. cf. McIlwain, (1940) for a useful study of the different meanings of constitutionalism in western legal thought.
2. Barraclough (1984, p. 395) makes the interesting observation that throughout the 18th century the general perception of Germans was that political life was dead in Germany and that the bureaucratic state was seen by many (perhaps even Hegel) as alien and foreign to the individual. In short, the state and its associations failed to contribute to any semblance of a moral life for its citizens.
3. cf. S. Smith (1989, p. 11 and chapter 2) where he claims that Hegel's philosophy "grew out of the attempt to overcome the phenomenon of the divided self." This "divided self" was, of course, the product of the West's diremption between ethics and law, the material and the spiritual, etc.
4. Harris (1972, p. 477) claims that Hegel perceived himself to be a German Machiavelli.
5. Hegel distinguished civil society from the state and argued that one of the important contributions of modernity was the discovery of the former and its relative independence from the latter. Thus, as one long commentary suggests (Hegel, 1967, pp. 164-174, paragraph 270),

Hegel did not even advocate the union of church and state. Instead, he viewed their disunion as the best thing that could have happened to either and for freedom and rationality. Hegel's political philosophy sought to bring unity to the state and civil society, not to submerge or collapse civil society into the state. Civil society was important to the articulation of modern individual freedoms that the Greeks did not recognize. Since ancient constitutional structures did not allow for the emergence of civil society and the articulations of freedom found in the Modern state they would be unsuitable candidates or paradigms of the rational constitution that Hegel was proposing.

6. The focus here is on Kant and Fichte. While relevant, I must omit the influence of other German constitutionalists such as Fries, Haller, and Savigny.
7. In Fichte's later writings (for example, Fichte, 1889) the enthusiasm for freedom faded. But in these later writings the role of the constitution as central to the creation of the German state became more important.
8. cf. Montesquieu (1977) where the comparison between Persia and Paris is meant to stress the difference between different cultures and to show how the manners of a nation, including its laws and thoughts on justice, are the product of its particular manners and geography. Thus, each nation has its own unique "spirit."
9. In fact, Hegel (1975, pp 116-122) rejects the notion of separation of powers as the product of the Understanding and as encouraging ethical and political disunity.
10. Absent also from Montesquieu's writings is a discussion of civil society or a distinction between the state and civil society. Yet Keohane (1980, p. 418) claims that Montesquieu's discussion of law and property "forshadows Hegel on civil society and the state." She also notes other parallels between the two thinkers such as their *commitment* to republicanism and some type of hybrid liberalism, and their conclusion that intermediate institutions were important to the functioning of a constitutional government. For a fuller discussion of Hegel's use of Montesquieu's concepts see Mosher (1984).
11. cf., where Hegel states: "The constitution of the state is grounded in a determinate principle of spirit's self-consciousness, in a manner in which spirit knows itself in respect to freedom." (Lauer, ed., 1983, p. 156).
12. Ryan (1984, pp. 118-142) offers an extended discussion of property in Hegel's political philosophy.

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13. Note that the exact status of the Crown and the role of the Monarch changed considerably in Hegel's writings; thus, a full examination of the role of the Monarch would require an extended discussion (Iltting, pp. 25-43).
14. cf. Hegel (1983, p. 156): "Now, because the constitution of the state has a connection with religion, philosophy too has a connection through religion with the state."
15. cf. Kelley (1978, pp. 135-136) who claims that "Hegel's neutral state is not a liberal minimal state, minimal and responsive to the caprice of its rights-holders." The neutrality of the state lies in the direction of particularities towards a basic unity in the state. In other words, neutrality lies in the state's undifferentiated treatment of different estates, not in the state refraining from directing these estates towards a specific end or sense of unity.

Note that S. Smith (1989, p. 130), following Kelley, also suggests that the Hegelian reconstruction of the ethical standpoint of politics would necessarily make it impossible for the state to be neutral vis-a-vis its citizens.

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