

CONSTITUTIONALISM

As described by political scientist and constitutional scholar David Fellman:

“ "Constitutionalism is descriptive of a complicated concept, deeply imbedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials.... Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law."¹

(David Fellman, "Constitutionalism"), vol 1, p. 485, 491-92 (1973-74) ("Whatever particular form of government a constitution delineates, however, it serves as the keystone of the arch of constitutionalism, except in those countries whose written constitutions are mere sham. Constitutionalism as a theory and in practice stands for the principle that there are—in a properly governed state—limitations upon those who exercise the powers of government, and that these limitations are spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial. This is by no means a modern idea, for the concept of a higher law which spells out the basic norms of a political society is as old as Western civilization. That there are standards of rightness which transcend and control public officials, even current popular majorities, represents a critically significant element of man's endless quest for the good life.")

Philip P. Wiener, ed., "Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas",

Constitutionalism has prescriptive and descriptive uses. Law professor Gerhard Casper captured this aspect of the term in noting that: "Constitutionalism has both descriptive and prescriptive connotations. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's right to 'consent' and certain other rights, freedoms, and privileges.... Used prescriptively ... its meaning incorporates those features of government seen as the essential elements of the ... Constitution."

Leonard Levy, ed., *Encyclopedia of the American Constitution*, (Gerhard Casper, "Constitutionalism"), vol 2, p. 473, 473 (1986) ISBN 9780028648804.

Descriptive use

One example of constitutionalism's descriptive use is law professor Bernard Schwartz's 5 volume compilation of sources seeking to trace the origins of the Federal bill of rights. Beginning with English antecedents going back to the Magna Carta (1215), Schwartz explores the presence and development of ideas of individual freedoms and privileges through colonial charters and legal understandings. Then, in carrying the story forward, he identifies revolutionary declarations and constitutions, documents and judicial decisions of the Confederation period and the formation of the federal Constitution. Finally, he turns to the debates over the federal Constitution's ratification that ultimately provided mounting pressure for a federal bill of rights. While hardly presenting a "straight-line," the account illustrates the historical struggle to recognize and enshrine constitutional rights and principles in a constitutional order.

Bernard Schwartz, *The Roots of the Bill of Rights* (5 vols., Chelsea House Publisher, 1980) [ISBN 9780877542070].

Prescriptive use

1. In contrast to describing what constitutions are, a prescriptive approach addresses what a constitution should be. As presented by Canadian philosopher Wil Waluchow, constitutionalism embodies "the idea ... that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the state."

Stanford Encyclopedia of Philosophy, Wil Waluchow (Constitutionalism) (Intro Jan 2001 (revised Feb 20, 2007).