Buchbesprechungen

***Lawrence, Peter*: Justice for Future Generations. Climate Change and International Law.** Cheltenham, UK/Northampton, MA, USA: Edward Elgar Publishing, 2014. ISBN 978-0-85793-415-4. xxiii, 227 S. £ 75,-; eISBN 978-0-85793-416-1. £ 42,52

Die Sorge um die natürlichen Lebensgrundlagen zukünftiger Generationen entspricht dem Selbsterhaltungswillen der menschlichen Art. Seit einigen Jahrzehnten sehen wir dies aber auch als ein Problem der Verteilungsgerechtigkeit. Es waren insbesondere die Arbeiten von *Edith Brown Weiss*, die den Schutz der Umwelt als Problem der "intergenerational equity" formulierten. Dieser Ansatz ist innerhalb eines größeren Trends zu sehen, der nach Legitimität von Völkerrecht fragt. "Konstitutionalisierung" des Völkerrechts bedeutet Wertbezug. Er löst die Frage nach Legitimität aus. Die Erfüllung von Postulaten der Gerechtigkeit vermittelt Legitimität. Aber Gerechtigkeit zwischen den Generationen ist leichter abstrakt gefordert als konkret bestimmt. Letzteres ist das Anliegen des besprochenen Buches.

Das Buch beginnt mit ethischen und wirtschaftlichen Grundfragen des gegenwärtigen Klimaschutz-Regimes. Es stellt die Frage der Verteilungsgerechtigkeit zwischen den gegenwärtig Lebenden, d. h. zwischen den heutigen Staaten der Erde (intragenerational equity) und zwischen der gegenwärtigen und zukünftigen Generationen (intergenerational equity), zugleich aber die der Sinnhaftigkeit des Konsumverzichts zugunsten der Erhaltung von Ressourcen (discounting the future, S. 18 f.). Das veranlasst einen kurzen Blick auf die Funktion des Völkerrechts und die Rolle von "fairness" bei Vertragsverhandlungen (S. 20). Dass Völkerrecht notwendig sei (S. 24), wird allerdings an dieser Stelle eher behauptet als wirklich argumentativ begründet.

Nach dieser Einführung fragt *Lawrence* in seinem ersten Hauptkapitel genauer nach den ethischen Grundlagen der Rechte zukünftiger Generationen. Er sieht sie zunächst in der Gleichheit aller Menschen ohne zeitlichen Unterschied, weswegen die Menschen aller Generationen das gleiche Recht auf Leben und menschenwürdige Lebensbedingungen haben müssen (S. 29 ff.). Ferner sieht er im Schädigungsverbot (no harm rule) eine allgemeine ethische Regel, die auch im Verhältnis zwischen den Genrationen gilt. Diese Ansätze werden durch einen Menschenrechtsdiskurs verstärkt, der allerdings auch auf einen kritischen Prüfstand gestellt wird (S. 41 ff.). Bedenken werden jedoch verworfen: Die mangelnde Identifizierbarkeit des Rechtsträgers sieht *Lawrence* als irrelevant an (S. 42 f.). Zukünftige Rechte von Gruppen seien durchaus vorstellbar (S. 46). Damit ist man bei dem Verhält-

nis der Rechte der gegenwärtigen und der zukünftigen Generationen, für *Lawrence* ein Problem der Verteilungsgerechtigkeit. Jede Generation muss die Möglichkeit haben, ihre Fähigkeiten (capabilities) zu entfalten. Auf der Suche nach genaueren Kriterien der Gerechtigkeit wendet er sich *Rawls* und den ihm folgenden *Tremmel* und *Brown Weiss* zu: Jede Generation müsse der folgenden die Erde in einem Zustand weitergeben, der mindestens so gut sei wie derjenige, in welchem sie diese erhalten hat – ein plausibler und attraktiver Gedanke, findet *Lawrence*. Allein, dieser Ansatz sei nicht in der Lage, einigermaßen präzise Verteilungskriterien zu liefern (S. 54) und er beruhe auf einem "fragwürdigen Prinzip indirekter Reziprozität" (S. 55). *Lawrence* bevorzugt einen kommunitaristisch-kosmopolitischen Ansatz, der letztlich auf gleicher Teilhabe verschiedener Generationen an den Ressourcen der Erde beruht (S. 57). Dieser komme auch in den gegenwärtigen Klimaverhandlungen zum Ausdruck.

Ein weiteres Kapitel widmet sich dem Inhalt solcher Verpflichtungen gegenüber zukünftigen Generationen, insbesondere im Bereich des Klimaschutzes (S. 67 ff.). Diese Inhalte fasst *Lawrence* in einer Reihe von Prinzipien zusammen. Ausgangspunkt sind drei Grundprinzipien: ein Kernbereich der Achtung von Menschenrechten (core human rights principle), Verantwortlichkeit für verursachte Schäden (responsibility for harm principle) und Leistungsfähigkeit (capacity to pay principle). Diese Grundprinzipien sind zu verbinden mit zwei weiteren, nämlich Gleichheit und "sufficiency", wohl am besten übersetzt mit Geeignetheit und Erforderlichkeit. Daraus folgen fünf Grundregeln der Umsetzung dieser Prinzipien in Bezug auf die Emission von Treibhausgasen: nachhaltige Entwicklung, strukturelle Reformen, gleicher Zugang zur Atmosphäre als Senke von Treibhausgasen, grundsätzlich gleiche Pro-Kopf-Emissionen von Treibhausgasen, Subsistenz, d. h. ein Recht auf überlebenswichtige Emissionen (zusammengefasst S. 93).

Im folgenden Kapitel geht *Lawrence* der Verwirklichung dieser Regeln im geltenden Völkerrecht nach (S. 99 ff.). Er prüft zunächst die wesentlichen Grundsätze der Klimarahmenkonvention und des Kyoto-Protokolls auf die Verwirklichung der Forderungen der Gerechtigkeit. Er untersucht Emissionshandel, Finanzmechanismus und Technologietransfer, Schadenersatz (no harm principle), Vertragsdurchsetzung (compliance), Pflicht zur Zusammenarbeit, Vorsorgeprinzip, intergenerational equity, common but differentiated responsibilities und schließlich sustainable development. Er kommt zu einem differenziert unzufriedenen Urteil. Es fehle an Effektivität. Der Green Climate Fund sei ein Fortschritt, aber leider seien die Beiträge nur freiwillig. Die Regelungen zur Staatenverantwortlichkeit seien unzureichend.

Immerhin sei das Prinzip der common but differentiated responsibilities Ausdruck des Gedankens der Gerechtigkeit, wenn auch seine genauere Bedeutung unklar sei (S. 111 f.).

Sodann untersucht *Lawrence* die entsprechenden Regeln des allgemeinen Völkerrechts. Intergenerational equity und sustainable development seien keine Regeln des Völkergewohnheitsrechts, sie seien "too vague and indeterminate" (S. 115), besäßen aber doch einen "normativen Wert" als „Konzepte". Es folgt eine ausführliche Würdigung der Sondervoten in der IGH-Rechtsprechung, die sich auf diese Konzepte berufen (*Weeramantry*, *Cançado Trindade*). Aber die Mehrheit des Gerichts, so stellt *Lawrence* richtig fest, zögert eher "to develop international law beyond certain limits" (S. 122). Auch das Prinzip der Staatenverantwortlichkeit sei zu vage (S. 122 ff.). Insgesamt seien "justice principles" in den einschlägigen Verträgen und im allgemeinen Völkerrecht unzureichend verankert (S. 125 f.). Alle Grundsätze seien zu vage und unbestimmt. Auch fehle es an geeigneten Verfahren ihrer Geltendmachung (S. 124 f., 126).

Für die Verwirklichung von intergenerational justice sieht *Lawrence* die Hauptverantwortung bei den Industrieländern. Er stellt (S. 171 f.) in den Industrieländern sicher zutreffend einen Diskurs über intergenerational equity fest, der aber nicht in praktisches Handeln umgesetzt wird. Die Rhetorik der Industrieländer "has not been matched by action" (S. 165). Die Entwicklungsländer schieben die Verantwortung für intergenerational equity ohnehin den entwickelten Ländern zu. Darauf aufbauend werden Forderungen für ein künftiges Klimaschutz-Regime begründet (S. 172). Realismus ist angezeigt. Forderungen einer idealen Gestaltung des Regimes stoßen sich an "feasibility constraints", d. h. Prinzipien oder Konzessionen, die ein Vertragsregime, das Generationengerechtigkeit verwirklichen soll, erst praktisch und politisch annehmbar machen. Der Konsens ist – eine nicht wirklich überraschende Feststellung – im Lichte dieser praktischen Zwänge im Grunde ohne Alternative.

Dennoch untersucht *Lawrence* die formellen und inhaltlichen Kriterien, die ein solches Vertragsregime enthalten und verwirklichen soll. Formell ist aus Gründen der Effektivität die Vertragsform unverzichtbar (S. 175 ff., 186 ff.), was ja in den Verhandlungen umstritten war. Inhaltlich sind grundlegende Konzepte (core concepts) einer Verteilungsgerechtigkeit wesentliche Menschenrechte, Schadensvermeidung, Gleichheit, Subsistenz. Ein zentrales Prinzip ist "equal per capita share" (S. 179), was angesichts der daraus folgenden Notwendigkeit harter Emissionsreduktionen in den Industrieländern schwer durchzusetzen ist. Interessant ist die darauf folgende Analyse, inwieweit diese Prinzipien in den unterschiedlichen Vorschlägen einzelner

Staaten oder Staatengruppen in den Verhandlungsrunden verwirklicht sind, was Verf. am Ende gut zusammenfasst (S. 186): Die Vorschläge der vom Meeresspiegelanstieg bedrohten Staaten sowie der EU gehen weit im Sinne des Effektivitätsprinzips, die Vorschläge Chinas, Indiens und Brasiliens betonen das Prinzip der historischen Verantwortung, die der USA bejahen keines von beiden.

Schließlich entwickelt *Lawrence* Forderungen für das zukünftige Vertragssystem (S. 186 ff.). Das Gebot der Effektivität wird nur durch eine Formulierung der Verpflichtungen in Vertragsform erfüllt. Der internationale Verhandlungsprozess muss beschleunigt und effektiviert werden (S. 188 ff.). Die Menschenrechte sind eine solide Basis für eine Berücksichtigung der Rechte zukünftiger Generationen (S. 191 ff.).

Die Arbeit wurde fertig gestellt, bevor die Klimaverhandlungen auf der Grundlage der Durban Platform in die letzte Phase traten und in dem Abkommen von Paris im Dezember 2015 einen Abschluss fanden. Die von *Lawrence* entwickelten Kriterien sind eine gute Messlatte zur Bewertung des Abkommens. Anders gefragt: Wäre *Lawrence* mit dem Pariser Abkommen zufrieden? Die Antwort kann nur ein klares "nein" sein. Das Abkommen bestätigt die Schwierigkeiten, die *Lawrence* als Hindernisse einer Verwirklichung von Generationengerechtigkeit diagnostiziert hat. Zwar ist die Regelung völkerrechtlich bindend, eine zentrale Forderung von *Lawrence*. Aber die Schwäche der mangelnden Bestimmtheit der vertraglichen Pflichten ist geblieben, ja sie wurde verstärkt. Vertraglich verbindlich ist das Ziel der Beschränkung der globalen Erwärmung auf "deutlich unter 2°" ("well below"). Erreicht werden soll das durch "national bestimmte Beiträge", die mitzuteilen sind (Art. 3). Die Pariser Konferenz war sich bewusst, dass die bis jetzt abgegebenen Erklärungen solcher Beiträge zum Erreichen des verbindlichen Zieles nicht ausreichen. Vom Erfordernis bestimmter vertraglicher Pflichten ist all das weit entfernt. Zwar soll es ab der Staatenkonferenz 2023 eine globale Bestandsaufnahme geben, um zu klären, ob das Ziel nun erreicht werden kann. Das Ergebnis dieser Bestandsaufnahme soll nationale Maßnahmen anleiten, aber nur "auf national bestimmte Weise" (Art. 14, Abs.3). Immerhin werden von *Lawrence* vertretene Prinzipien jedenfalls in der Rhetorik vom Abkommen unterstützt: intergenerational equity und sustainable development, vor allem common but differentiated responsibility, d. h. eine stärkere Verantwortung der entwickelten Staaten. Die Finanzierung soll weitergeführt werden, ohne dass es konkretere Pflichten der entwickelten Staaten gibt. Ein gewisser Fortschritt ist in der Schadensregelung erreicht.

Das Buch von *Lawrence* ist eine kluge Zwischenbilanz der Entwicklung rechtlicher Instrumente im Kampf gegen den Klimawandel und seine Auswirkungen. Seine Forderungen bleiben auch nach dem Pariser Abkommen relevant.

Michael Bothe, Bensheim

***Macklem, Patrick*: The Sovereignty of Human Rights.** Oxford: Oxford University Press, 2015. ISBN 978-0-19-026731-5. X, 259 p. £ 48,99

Professor *Macklem's* book makes a valuable contribution to the existing literature on the role of international human rights law in the international legal order. The book's thesis is that international human rights law functions as a corrective mechanism that addresses the deficiencies, imbalances and injustices created by the international legal order. According to *Macklem*, the international legal order creates harm because it controls the distribution and exercise of sovereignty. That is, as international law validates some claims of sovereignty and rejects others, it shapes an international legal order that gives some people rights, while denying the same rights to others. International human rights law therefore exists to mitigate the adverse consequences of international law's allocation and preservation of sovereignty.

The first chapter (pp. 1-28) provides descriptions of human rights as moral, political and legal concepts, and situates the author's own conceptualisation in relation to them. On *Macklem's* conceptualisation, human rights in international law are akin to legal norms enshrined in treaties or that are part of customary international law generally. By emphasising the *function* of human rights (rather than their nature), and insisting on a legal conceptualisation, *Macklem* is effectively able to side-step questions about the universality, applicability and legitimacy of international human rights law.

The second chapter (pp. 29-50) looks in detail at the concept of sovereignty, how it shapes the international order, and as a corollary, how it gives rise to harms and injustices. In his analysis, *Macklem* argues that international law and the international legal order are rooted in the concept of sovereignty. International law shapes the international legal order by first accepting as valid some claims to sovereignty, while denying others; and second by preserving an international legal order that sees sovereign states as the basic unit of international identity. Sovereignty confers upon States the power to act for individuals, thus affecting their rights. International human rights law, then, is international law's attempt to impose positive obligations on States to respect individual human rights.

In the following chapter (pp. 50-72), *Macklem* critiques the generational account of human rights that is widely accepted by international legal scholars, practitioners and international organisations. *Macklem* queries what the "generations" actually reflect: What temporal differences, distinctive properties and analytical peculiarities differentiate each generation of rights? According to *Macklem*, classifying rights by "generations" is "historically inaccurate, analytically unhelpful and conceptually misguided" (p. 52). Further, this typology neglects the common feature that all human rights share: They are a "single population of entitlements" (p. 52) that mitigate the harms arising from international law's allocation and continued validation of sovereignty. Despite the persuasiveness of his argument, the relevance of this critique to *Macklem's* thesis is unclear, since it makes no comment on the link between sovereignty and international law, or the role that human rights play in the international legal order. It does strengthen the view of human rights offered in the book, but *Macklem's* conceptualisation of human rights is already described admirably in the preceding chapter. Nevertheless, his explanation at the end of the chapter of how civil and political rights and economic and social rights differ in the way that they monitor States' exercise of sovereignty is engaging, cogent and relevant to his thesis as a whole.

The following four chapters each focus on a particular human right or set of human rights and identify how they arose in response to a harm caused by international law's allocation and preservation of sovereign power. In the fourth chapter (pp. 73-102), for example, *Macklem* argues that workers' rights function as a means "to monitor the structure and operation of the international legal order" (p. 76). He critiques the prevailing moral and political conceptions of human rights, arguing that they miss international human rights law's "true normative significance" (p. 76). He notes that recognising the rights of workers required all States to set standards approximate to each other. If only some States adopted labour rights, this would have led to a "race to the bottom", where corporations could seek out countries with the lowest labour standards to economise on production costs. The "true normative significance" of labour rights, according to *Macklem*, is that they set global standards that each State referred to while setting their own domestic labour law regimes. International human rights law therefore directly influenced domestic law, and protected labour standards within each State. In this way, international labour rights mitigate the adverse effects of sovereignty, that is, the authority that international law confers upon to States to both protect and restrict the rights of workers.

The subsequent chapters discuss minority rights (pp. 103-132), recognition of indigenous peoples (pp. 133-162), the right to self-determination (pp. 163-185) and the right to development (pp. 186-223). Each of these chapters trace the emergence of a right, its evolution, and how in practice, they serve to mitigate the harms that international law gives rise to and perpetuates. *Macklem's* arguments in these chapters are highly sophisticated and cogent, although his analysis of some rights are stronger than others. Chapter seven, for example, traces the history of the right to self-determination, and commendably develops the thesis. This is partially because the right to self-determination is strongly linked to international law's distribution of sovereignty amongst States. As a result, the "corrective" function of the right to self-determination is perspicuous. This is also true of *Macklem's* chapter on minority rights.

The author's argument becomes less convincing, however, in the final chapter of the book. In this chapter, *Macklem* argues that the right to development mitigates the adverse effects of international economic law. International economic law's promotion of economic globalisation and integration is argued to be a reason of the exacerbation of global poverty. The mechanics of this assessment seem tenuous because of the indeterminate scope and content of the right to development itself. Similarly, although the argument in relation to workers' rights is well-reasoned, it is not as convincing as the chapters on the right to self-determination, minority rights or indigenous peoples' rights. Rights that have a closer or more apparent connection to State sovereignty succeed far better in illustrating *Macklem's* thesis than rights that do not.

Overall, *Macklem's* argument is highly original. The corollary of this originality, however, is that there are still theoretical gaps and questions that remain unaddressed. For example, the "corrective" function of international human rights law and its focus on mitigation does not fit neatly into traditional categories of legal remedies. While violations of human rights individually might give rise to recognisable remedies (at least in some States), mitigation is not a discrete remedial goal in itself. On *Macklem's* conception of international human rights, the goal of mitigation is to "correct", but no further description is offered. Similarly, the substance and scope of the term "international legal order" is not defined with clarity. While sovereignty is identified as the root of the international legal order, its development and evolution is not addressed. What role, for example, do non-State actors play in the international legal order and in international human rights law? What effect does the evolution of international law and the dilution of state sovereignty have upon the possible emergence of human rights in the future?

Nevertheless, this account of international human rights founded on a purely legal conception is impressive and thought-provoking. It makes for very enjoyable reading, and its argument invites meaningful consideration and debate.

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***Tushnet, Mark/Graber, Mark A./Levinson, Sanford* (eds.): The Oxford Handbook of the U.S. Constitution.** Oxford: Oxford University Press, 2015. ISBN 978-0-19-024575-7. xi, 1095 p. £ 81,-

The U.S. Constitution is both the first and the longest-standing written national constitution. It was also the first constitution to be analysed in a comprehensive manner: The *Federalist Papers*, the series of essays published by *James Madison*, *Alexander Hamilton* and *John Jay* under the collective pseudonym of "Publius" in New York City newspapers in 1787-1788 was not only, in the words of *Thomas Jefferson*, the "best commentary on the principles of government which ever was written", it was also a spirited defence of the constitutional document adopted at the Philadelphia Convention designed to convince undecided delegates to the ratification conventions that the Constitution was well worth supporting and ratifying. As the editors of the new "Oxford Handbook on the US Constitution", *Mark Tushnet*, *Mark A. Graber* and *Sanford Levinson*, point out in their introductory essay, since then the debate on the meaning of the constitution and the fulfilment or non-realization of its promises has been a permanent feature of American life. For over two centuries, Americans experienced "political developments that are described by their proponents as means for fulfilling constitutional aspirations, by their opponents as subverting the constitutional order, and by outside observers as efforts to continually patch a leaky ship of state while at sea" (p. 1).

The particularly dynamic character of the rapidly growing and expanding American polity quickly undermined central assumptions on which the original document had rested. Already by the 1820s some of the basic assumptions of the framers, which had conceived the Constitution as a republican effort to slow a democratic tide – *Madison* famously described the indirect election mechanisms for the Senate and the President provided for in his Virginia Plan and largely carried over in the final document as "the policy of refining the popular appointments by successive filtrations" – had been undermined by the rage for democratic equality and the emergence of mass-based partisan coalitions. Rapid and often turbulent change has remained a hallmark of American constitutional development ever since: From the fight about slavery, which culminated in a bitter civil war, to the

emergence of a deeply divided society in the reconstruction era, from the progressive era to the "New Deal", from the civil rights movement to the conservative backlash of the *Reagan* era. A fixture of all these developments and transformations has been their important constitutional dimension. They were not merely the object of intense and sometimes bitter political confrontation, but also triggered important constitutional debates: in Congress and in the executive branch, in the courts, but also – at least since the early 20th century – in the population at large. This has provided U.S. constitutionalism with one of its distinctive features. As *Mark Tushnet* concludes in his chapter on social movements: "The Constitution is embedded in a matrix of politics and civil society, and understanding constitutional development requires that we understand that matrix as well" (p. 258).

The importance of both a historical and a political science perspective for understanding the US constitution is reflected in the structure of the Handbook as well as in the methodology followed by the contributors of the individual chapters. The introductory essay is followed by a part on "History" which sketches in five chapters (Chapters 2 to 6) American constitutional development from the colonial period until the present. The second part of the book "Political Science" features a series of essays focusing on the most diverse aspects of the Constitution from a political science perspective (Chapters 7 to 16). Part III containing five chapters on "Law" is rather short (Chapters 17 to 21), occupying barely more space than the historical chapters. It is complemented by Part IV on "Rights" (Chapters 22 to 35) which constitutes the largest section of the book and deals extensively with legal and jurisprudential developments. The final Part V on "Themes" (Chapters 36 to 48) is almost as extensive and puts the Constitution in an international, comparative and cultural perspective, also combining legal and political science perspectives. While the distinction between law and political science is thus reflected in the structure of the Handbook, most essays in the volume deal with both: The essays written by political scientists also discuss constitutional law (e.g. the chapters on "Political Parties" and "Empire") while the chapters on "Law" and "Rights" do not limit themselves to commentary on case law and doctrine. This interdisciplinary approach to the analysis of the U.S. Constitution is based on an interest in and preference for the historical-institutionalist school of political science shared by most contributors to the volume. It provides a coherent methodological framework for the different parts of the book and the individual essays it contains. As a result, the analysis presented is more easily accessible to foreign readers, which makes this Handbook the most comprehensive

and illuminating guide to the U.S. Constitution available today to comparative constitutional scholars and practitioners alike.

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The overarching theme of the U.S. Constitution is the transformations it has witnessed since it was drafted at the constitutional convention in Philadelphia, and the role individual and collective, institutional and non-institutional actors have played in these transformative processes. Originally conceived for a people of roughly four million people east of the Mississippi which, in the words of the Federalist Papers, "descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs", the US Constitution now applies to a country of more than 300 million people extending from Maine to Puerto Rico in the South and the mid-Pacific in the West. Already at the time of its inception, however, the new Republic had a far more diverse population than the authors of the Federalist Papers cared to admit, ignoring the hundred thousands of slaves and members of many different indigenous tribes living in the national territory who were denied citizenship rights under the Constitution. This was to become part of larger pattern in which issues of race, gender, equality, and citizenship have troubled the life of the new Republic and at times threatened its very existence.

As the chapters on "Equality" (*Julie Novkov*), "Gender, Sex, and the Constitution" (*Leslie F. Goldstein*), "Racial Rights" (*Girardeau A. Spann*) and "Native Americans" (*Matthew L. M. Fletcher*) show, marginalised groups – some of which, like homosexuals, did not yet exist as distinct groups in 1787 – have fared very differently in their struggle for full constitutional equality. The civil rights movement has been fairly successful in securing basic political and civil rights for black people, through Supreme Court decisions following the seminal ruling in *Brown v. Board of Education for Topeca*, but even more so through statutory legislation, among which the Civil Rights Act (1964) and the Voting Rights Act (1965) have acquired quasi-constitutional status. By contrast, their social and economic rights, which have been promoted by affirmative action programs of various institutions and at different levels, have been politically contested and challenged in the courts right from the start. Progress on equal rights for women has not been much quicker, with half a century of campaigning and millions of dollars being necessary before the national suffrage amendment came into force in 1920, and the failure of the Equal Rights Amendment in the 1970s (although its substance found its way into the Supreme Court's gender equity jurisprudence under the Fourteenth and Fifteenth Amend-

ment). Poor Americans have had to rely entirely on legislative action even for the most basic welfare rights. Native Americans live under a special regime altogether – Indian law based on the recognition of the inherent sovereignty of American Indian nations – but despite (or because) of their special constitutional status have generally fared even worse than the other groups. By comparison, equality for gays and lesbian has been achieved much quicker, with only little more than a decade between the outlawing of so-called sodomy laws by the Supreme Court in *Lawrence v. Texas* (2003) and its extension of constitutional protection to same-sex marriages in *Obergefell v. Hodges* in 2015. *Julie Novkov's* conclusion in the general chapter on "Equality" is rather sobering: "As countless critical race and feminist thinkers have noted, the ease of making successful equality arguments silently depends upon the claimant's ability to show that he or she is like the dominant class except for some minor and irrelevant difference" (p. 473).

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While equality thus remains a vividly contested concept whose scope and meaning is likely to be redefined by each new generation, liberty is often seen to have been firmly rooted in the American constitutional tradition right from the start. Drawing on a genuinely American preference for individualism and self-reliance, it places a strong emphasis on political liberty and civil rights, as evidenced by the totemic place of free speech in the U.S. constitutional order. However, as the essays dealing with "Liberty" (*James E. Fleming*), "Autonomy" (*Dale Carpenter*) and "Free Speech and Free Press" (*Stephen M. Feldman*) demonstrate, this tradition is far more nuanced than it appears at first sight. *Stephen Feldman* argues that free expression in America has been shaped by two competing traditions, both of which reach back to the nation's beginning: a tradition of dissent, which embodies the American ethos of speaking one's mind without fear of governmental punishment, and a countervailing and equally powerful tradition of suppression of those who seem to diverge too far from the mainstream, operating through both official and unofficial mechanisms. He notes that while the Supreme Court has upheld free speech as an essential mechanism of democracy, the "haves", i.e. the applicants wielding significant wealth and power, typically come out ahead in free-expression-jurisprudence, as in *Citizens United v. Federal Election Commission*, whereas the "outliers" often lose their case.

Liberty more generally has increasingly become the battlefield of constitutional "culture wars" as a changed interpretation of individual liberty has raised difficult issues with regard to the constitutional legitimacy of moral legislations. Starting in the *Lochner* era, the Supreme Court has developed a

broad concept of liberty, which protects economic liberties, such as liberty to contract and the right to engage "in any of the common occupations of life", along with personal liberties, such as the right to marry and to raise children, to confess and practice the religion of one's choice and, more generally, "to enjoy those privileges long recognized at common law essential to the orderly pursuit of happiness by free men" (*Meyer v. Nebraska*). As *James E. Fleming* and *Linda McClain* argue, the Court's broad conception of liberty first set out in the *Lochner* era, a conception of liberty as a broad principle which is not limited to a concrete historical practice or a specific original meaning, survived all later challenges from both within and outside the Court that dismissed the judicial recognition of substantive liberties not enumerated in the constitutional text itself under the categories of privacy, autonomy, or substantive due process as an indefensibly indeterminate and irredeemably undemocratic exercise. By contrast, the Court's jurisprudence recognising personal autonomy as a key component of individual liberty which reached an early climax in *Roe v. Wade* has proved far more controversial. *Roe* triggered the backlash of the conservative movement against an allegedly overweening and liberalist court, and has constituted a rallying point in what became known as America's "culture wars". The precise constitutional limits of personal autonomy, and the burdens which may be imposed on its exercise in the name of certain moral requirements supported by the majority, remain a largely unresolved matter in U.S. constitutional law as public and individuals' conceptions of morals and autonomy, and the relationship between them, keep shifting.

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The federal judiciary and the U.S. Supreme Court have played a leading role in the exposition of the law of the Constitution since the Reconstruction era, although judicial supremacy has not gone unchallenged. America espouses a "Protestant" approach to constitutional meaning, as *Sanford Levinson* has written, one which holds that each individual can read and interpret the constitutional text for himself. This widely shared view has favoured challenges to the privileged role enjoyed by the Supreme Court in the interpretation of the Constitution every now and then. But as *Ernest A. Young* points out in his chapter on "Constitutionalism outside the Courts", much of the recent academic writing on "popular constitutionalism" which massively advocates a greater role of people outside the professional community of lawyers and judges in constitutional interpretation suffers from a distinct lack of public support, since a majority even of those ordinary Americans who are unhappy with individual decisions of the Court continue to profess a great deal of loyalty to the institution as such.

The high level of public support for judicial review notwithstanding, the discussion on the limits of judicial supremacy in the interpretation of the Constitution has left its mark not only on academic debate, but also on the Court itself. *Jamal Greene's* chapter on "Interpretation" shows that originalism as a distinctive American contribution to the debate on methods of constitutional interpretation rose to prominence in the 1980s explicitly as a theory of judicial restraint, as an antidote to the activism of the *Warren* and *Burger* courts. In his definition originalism does not refer to one specific method of interpretation, but rather to a family of interpretive approaches united by the view that, unless validly changed by constitutional amendment, the Constitution continues to mean what it meant at the time of its enactment. *Greene* points out, however, that despite claims to the contrary and individual Supreme Court cases which overturned precedent on originalist grounds originalism, understood as affirming the normative priority of originalist understandings, has not succeeded at dislodging other interpretive methods like structuralism or deference to (judicial as well as political) precedent, neither in scholarly debate nor on the Court. He concludes that if there is a U.S. exceptionalism in constitutional interpretation, it is less any particular approach or range of approaches than the nature of interpretive discourse itself. One of the distinctive features of this discourse is, as *Greene* puts it by quoting *Robert Cover*, its polycentric character: "Constitutional meaning in the U.S. gets worked out not in one or several privileged fora, but in multiple sites, by multiple actors within federal, state, and local legal and political institutions, within the hearts and minds of social movement actors, and among ordinary citizens" (p. 905).

With this view *Greene* (and *Cover*) do not stand alone. In her chapter on "Positive Rights" *Emily Zackin* argues that the significance of positive rights in U.S. constitutionalism often tends to be overlooked, not least by foreign observers, due to their focus on the federal Constitution and the relevant case law of the U.S. Supreme Court. This narrow focus, however, is bound to produce a distorted picture: "America's constitutional tradition is much bigger than the U.S. Constitution. A great deal of serious and substantial constitutional drafting has occurred at the state level. In addition, entrenched statutory programs and popular contests over the Constitution's meaning are arguably additional sites of constitutional governance in America. The U.S. Constitution and the body of case law interpreting it yield an incomplete picture of Americans' constitutional commitments" (p. 736).

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Foremost among those sites where constitutional meaning is worked out are the democratically elected political institutions. *Michael Les Benedict*

describes in his chapter on "Constitutional Development from Jackson through Reconstruction" the early dominant role of Congress in the development of constitutional law. He notes that for most of the nineteenth century – from the *Jacksonian* era through Reconstruction – the records of Congress were filled with constitutional debates. Political parties made opposing constitutional philosophies centrepieces of their pitch to the voters and constitutional arguments were decided in elections rather than in the courts. While the elected politicians accepted after *Marbury v. Madison* that the Constitution also constituted fundamental law which the courts were bound to enforce in cases of conflict with the statutes voted by Congress, judges in the 19th century normally avoided decisions that would bring this tension to the fore and only rarely overturned federal laws that had survived constitutional scrutiny in the political arena. This only began to change in the wake of Reconstruction, when the justices started to use growing popular disenchantment with Reconstruction legislation to build up their own position as constitutional arbiters.

By contrast, modern Congress which operates against the backdrop of a powerful judicial branch seems largely uninterested in the Constitution. As *Neal Devins* shows in his analysis of the Affordable Care Act (*Obamacare*) in the chapter on "The Constitutional Politics of Congress", the members of Congress, including those sitting in the powerful committees, today tend to give short shrift to constitutional concerns and to focus almost exclusively on policy issues. In the case of the Affordable Care Act, Republican opposition to the legislation in the House of Representatives and the Senate was purely about policy, not constitutionality. Constitutional issues only entered the picture when the Tea Party expressed opposition to the bill and Republican governors and attorney generals in the states started to file lawsuits on constitutional grounds, failing only narrowly (and partially) in their attempt to have the statute overturned by the Supreme Court on federal and individual rights issues.

Lawsuits filed by Congress asserting its own constitutional prerogatives are extremely rare. The departmentalist view first formulated by *Thomas Jefferson* that the Constitution has made "all the departments co-equal and co-sovereign within themselves" and therefore each department of government can (and must) interpret the Constitution for itself in the course of its own institutional responsibilities still resonates in modern constitutional practice and limits the scope of judicial supremacy. This creates a considerable space for constitutional interpretation by the political branches with regard to their respective institutional powers, a space which may be abused by power-hungry politicians in the absence of effective judicial oversight.

As both *Mariah Zeisberg* and *Oren Gross* note in their respective chapters on "The Constitutional Politics of the Executive Branch" and "Emergency Powers", Presidents frequently have found it hard to resist the temptation to interpret their institutional powers generously, so as to extend the scope for unilateral presidential action. This approach is encouraged by the Supreme Court's willingness to punt many questions of foreign affairs under standards of legal review that are highly deferential to presidential judgment. But Congress itself has also contributed to the growing concentration of governmental powers in the hands of the executive branch by delegating broad powers to the executive, so much so that the *Obama* administration was able to claim statutory authority for its extraordinary actions, including drone warfare and wiretapping. This has prompted renewed interest in the non-legal, political checks on executive branch judgments. But such an enquiry, *Zeisberg* argues, raises complex and largely unexplored issues with regard to the way in which partisanship, social movements, bargaining, and voting behaviour interrelate with the conditions of presidential accountability: "If politics were a plausible hope for reviewing discretionary presidential action, then one would want to know a great deal about the institutional, structural, ideological, and behavioural tendencies behind political checking and political judgment" (p. 190).

Such concerns are not limited to the use of extraordinary presidential powers in emergency situations. The administrative state that emerged in the United States as a result of the Progressive Era and the New Deal was largely built outside the Constitution. The drafters of the U.S. Constitution had viewed bureaucracy as a European innovation designed to harass and control people and to make their lives more difficult. This omission has given rise to vastly differing views with regard to the constitutionality of the administrative state created in the 20th century, with some arguing that the administrative state was unconstitutional as an original matter and has remained so, while others affirm that the new bureaucracy was vindicated by the electoral victories of the New Deal coalition (prompting the criticism that this view confuses issues of democratic legitimacy with those concerning constitutional legality). In constitutional practice, delegation has become the central concept on which the constitutionality of the whole edifice rests – delegation of policymaking, adjudicatory, and enforcement authority to administrative agencies. Such delegation involves transfers of authority not just from Congress to administrative agencies, but also from the President through the executive branch and from agency heads through the layers of agency leadership and personnel. As *Gillian E. Metzger* demonstrates in the chapter on "Delegation, Accommodation, and the Permeability of Consti-

tutional and Ordinary Law", courts have generally accommodated delegation and the administrative institutions thereby created by following the post-New Deal decisions of the Supreme Court sustaining broad congressional regulatory authority. While challenges and disputes do occur, and occasionally a delegation or federal arrangement is struck down, these invalidations affect the growth of the administrative state only at the margins, relegated there by the political, economic, and societal realities that make modern administrative government a national necessity.

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By contrast, federalism has been a long-standing feature of U.S. constitutionalism, and it has proved remarkably resilient. The accommodation of slavery interests was a fundamental feature of the federal system established in 1787, and adaptation away from privileging of these interests nearly split the Union half a century later. The New Deal was widely seen as a triumph of the national government over state governments which prompted commentators in the 1950s to speak of the "insignificance of the states in the American federation" (*William Rilker*), but federalism survived even as it was transformed from "dual federalism" (in which each level of government operates largely independently within its respective sphere of competences) into "cooperative federalism" (in which the federal government's powers are effectively "national" in extent, but rely on state and local governments for the implementation of federal programs, in exchange for partial funding). It is with some anxiety that *Michael Greve* raises the question in his chapter on "Federalism" whether, and how, this cooperative federalism will be able to manage the growing political polarization between "red" and "blue" states which have opposed each other in litigation over healthcare, climate change, labour policy and other salient issues ever more often.

In particular, states remain important laboratories of constitutional experimentation, as *John Dinan* shows in his chapter on "State Constitutionalism". State constitutions are changed more easily than the federal Constitution, and as a result state constitutional development frequently takes place through amendment and revision, rather than through judicial interpretation. State constitution-makers sometimes have adopted institutional arrangements and provisions that have been rejected at the federal level, such as unicameralism, direct democracy, or election of judges. On other occasions, state constitutions have guaranteed rights with no counterparts in the federal constitution, like victims' rights guarantees or the right to a clean environment, or provided greater protection for certain rights than is guaranteed under the U.S. Constitution (e.g. limits on the use of eminent domain power for economic development purposes, or on aid to religious

schools). With good reason *Dinan* therefore concludes that a complete account of American constitutional development must give proper attention to constitutional politics in the fifty states, alongside of the standard focus on the origin, development, and interpretation of the U.S. Constitution.

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Political parties and social movements have also become indispensable institutions of contemporary governance, although they are not mentioned anywhere in the constitutional text. This omission was deliberate in the case of political parties, as the framers where highly suspicious of the "baneful effects of the spirit of party" which *George Washington* denounced in his famous Farewell Address of 1796. In their chapter "The Uneasy Place of Parties in the Constitutional Order" *Russell Muirhead* and *Nancy L. Rosenblum* show that this "fundamental and ineradicable ambivalence about parties" persists in American constitutional law up to the present day. Their autonomy anchored in the First Amendment is more likely to be limited than that of other voluntary associations and groups since parties are an essential structural part of the democratic process, which in the Supreme Court's view means that there are important public interests at stake in regulating them. In the American majority system these public interests take the form of a resolute defence of the competition between two broad-based and inclusive parties against a proliferation of "faction-like" parties. Thus the state may legitimately intervene in the democratic process to inhibit splintering and "excessive factionalism". But even these adjustments cannot obscure the fact that political parties do not fit easily into a constitutional order based on "checks and balances", a problem which has been exacerbated by the growing polarization of the party system over the last four decades. When parties divide control of the executive and legislative branches, they amplify the *Madisonian* separation of powers to the point of impeding the prospects of almost any legislation. By contrast, when one party unifies government by capturing control of both houses of the legislature and the presidency, partisanship dissolves the salutary checks intended by the separation of powers. Thus "parties overwhelm the Constitution either way: they make the Constitution unworkable, or they displace it" (p. 226).

While political parties are central to the operation of popular democracies everywhere – and often form the object of express constitutional regulation today – the place of social movements in the operation of the U.S. Constitution is quite unique. Unlike political parties, social movements have no formal role in the electoral process or in legislative and executive governance. As *Mark Tushnet* shows, such movements have nevertheless played a central role throughout U.S. constitutional history, from the abolitionist

movement in the 19th century to the Tea Party in more recent times. They push their agenda in a variety of ways, often aligning themselves with one of the big parties in order to influence that party's political agenda – the labour movement and the civil rights movement in due course became part of the Democratic Party's coalition, while the Christian Right and the Tea Party aligned themselves with the Republican Party. Another, distinctively American feature of social movements' impact on constitutional law is the support of litigation campaigns to change the interpretation of certain constitutional guarantees central to the movement's ideological commitments. As the social movement becomes more active, lawyers and scholars affiliated with it begin to develop new arguments that a more movement-favouring interpretation is available, which, although viewed sceptically at first, may over time develop into standard arguments which are taken into account also by judges not affiliated with the movement, thus paving the way for a later revision of the relevant jurisprudence. The success of the National Association for the Advancement of Coloured People (NAACP) in promoting a broader reading of equality rights in *Brown*, the breakthrough of the gun rights' movement in securing the recognition of an individual right to own ordinary weapons in *Heller*, or the gay rights movement's successful campaign for the nationwide legalization of same-sex marriage culminating in *Obergefell* are all testimony to the crucial role played by social movements in promoting constitutional change through litigation.

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In the light of the foregoing, the question finally arises whether the U.S. Constitution is still relevant to foreign comparative constitutional law scholars and practitioners today. The constitutional text itself certainly is not, as there are substantial omissions with regard to a number of issues today considered as fundamental – positive rights, bureaucracy, independent agencies, political parties and social movements – which have been the object of a much more detailed constitutional regulation elsewhere. As *Heinz Klug* shows in the chapter on "The Constitution in a Comparative Perspective", the record is hardly more encouraging with regard to constitutional practice, and the jurisprudence of the Supreme Court in particular. While the highest courts of constitutional review in places like Canada, India, or South Africa engage in extensive discussion of constitutional jurisprudence, U.S. jurisprudence today is often referred to as counterexample, as a source of distinction, or merely distinguished as inapposite. This may reflect the Supreme Court's reluctance to cite and discuss foreign case law in its own jurisprudence, but it may also be due to the more sceptical attitude adopted by the U.S., and the U.S. Supreme Court, towards international law in gen-

eral. As *Vicki Jackson* analyses in her chapter "The U.S. Constitution and International Law", the Supreme Court has all but abandoned any presumption in favour of the self-executing character of international treaties, reversing its earlier position that the effect of the supremacy clause's inclusion of treaties in the "supreme Law of the Land" was to require that treaties be treated as law, enforceable by courts, rather than as executory contracts dependent on later action by the legislators. *Jackson* concludes that, as a result, the United States has moved closer to a "dualist" than a "monist" constitutional state. While she acknowledges that this shift of paradigm reflects the rapidly increasing scope of international treaty law as well as the changed geopolitical situation of the country and a growing domestic concern for "federalism"-based claims, she is clearly worried that by weakening the position of international law in the domestic constitutional order the Court may have reduced U.S. capacity to influence its development.

Despite its reduced international standing, it would be rash to dismiss the relevance of the U.S. constitutional experience to contemporary debates on constitutionalism. As *Heinz Klug* reminds us, there are still good reasons for comparative constitutional lawyers to engage with the U.S. Constitution. The basic structure of the Constitution, its allocation and distribution of power constitute the starting point of modern constitutionalism and have provided the basic institutional building blocks and concepts for constitution-makers around the world for over two hundred years. In addition, more than two centuries of Supreme Court jurisprudence provide a record of constitutional argument, debate, and decision unmatched by any other record of political and legal decision-making. One must abandon the narrow legal focus, however, if one is to understand the U.S. Constitution's real significance: The fact that despite its substantial omissions and contradictions, despite the huge political, economic, social and cultural transformations it has undergone since its enactment it has stayed relevant to the nation's political life for more than two hundred years. The place the Constitution occupies in the minds and hearts not only of scholars, lawyers or political activists, but of ordinary Americans is quite unique. It is this popular belief in the Constitution with its distinctly American cultural and spiritual underpinnings explored by *Paul W. Kahn* in the concluding essay which has created a vibrant constitutional culture that sets the U.S. apart even from most constitutional democracies. In analysing the multiple elements of this unique culture and their complex interplay along with the various contradictions generated by the operation of a constitution designed to prevent the rise of political parties, interest group politics, and an en-

trenched bureaucracy by those very same groups and institutions, the Oxford Handbook of the U.S. Constitution succeeds brilliantly.

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