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ON THE LIMITS OF CONSTITUTIONAL LIBERALISM: IN SEARCH OF A CONSTITUTIONAL REFLEXIVITY

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Abstract:

Analyses of comparative constitutional law are frequently framed by a particular vision of constitutionalism that we call the 'structural-liberal' vision. This vision sees the purpose of constitutional as being one of limiting state power – its 'liberal' component – which is done through the construction of a particular set of institutional architectures—such as judicial constitutional review, judicial protection and enforcement of fundamental rights, separation of powers, rule of law, etc. – its 'structural component. In this paper, we argue that such analyses are incomplete. The structural-liberal vision is but one of a number of ways of conceptualizing constitutionalism. It is the product of a particular time and place, and reflects the particular concerns and experiences of that time and place. Conversely, there are other kinds of important constitutional concerns and experiences that the structural liberal-vision renders invisible. These include processes of constitutional emergence and evolution, and symbiotic relationships between constitutionalism and other aspects of the regulatory environment (such as the economic structure of the state). In order to be complete, analyses of comparative constitutional law need to be more attentive to the distinctive concerns and experiences of the subjects of their attention. This involves allowing the subject system to speak for itself within the context of the larger, human discussion of constitutionalism – an analytic methodology that we call "constitutional reflexivity"..

Keywords: Comparative constitutional law; Constitutional theory; Comparative public law, Constitutional reflexivity; Constitutional listening.

ON THE LIMITS OF CONSTITUTIONAL LIBERALISM: IN SEARCH OF A CONSTITUTIONAL REFLEXIVITY

Michael W. Dowdle[1] and Michael A. Wilkinson[2]

I. INTRODUCTION: THE FOUNDATION OF STRUCTURAL LIBERALISM

The modern, liberal vision of constitutionalism – what we are calling structural-liberalism – has contributed greatly to the human experience of constitutionalism and has come to dominate the "comparative" constitutional imagination – i.e., 'comparative constitutional law'. But, like all regulatory ideas, it is a product of particular circumstances: its foci reflect the concerns of time and place. These concerns and prescriptions are important, and are certainly not limited to the experiences of the United States, but at the same time, they inevitably overlook – or conceal – other concerns that can shape constitutionalism in other times and places.

This 'structural-liberal' vision brings together two components: a liberal component, which defines the purpose of constitutionalism to be one of limiting state power;[3] and a

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structural component, which identifies a particular set of institutional devices – e.g., judicial review, rule of law, protection of rights, separation of powers, democratic elections – as necessary to achieve that purpose.[4] It derives primarily from the particular constitutional concerns and experiences that accompanied efforts to construct a 'United States' immediately after achieving independence from the English: these include an ineffectual central-level government, operating in relative safety from a geo-political perspective,[5] but facing significant internal dissatisfaction.[6] The principal purpose of the resulting Constitution of 1789 was thus to create a strong central government capable of bringing internal coherence to the country.

In order to do that, however, it would have to reign in a budding 'constituent power' that was increasingly hostile to the conservative economic views of the (pre-) national political elite.[7] This would require diluting the powers of then quite autonomous 'states' that would constitute the union. Supporters of the state governments thus expressed their opposition to the proposed constitution by portraying the central government it created as an unnecessary threat to existing liberties. Since the American state was not under even remote military or existential threat, the debate surrounding the ratification of the constitution focused on whether the central government would be internally overbearing,

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[3] See, e.g., Graham Maddox, 'Constitution', in Terence Ball, James Farr and Russell L. Handon (eds.), *Political Innovation and Conceptual Change* (Cambridge University Press, 1989), 50-67; Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).
[4] See, e.g., Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects', in Michael Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy* (Durham: Duke University Press, 1994), 39-53.
[5] Akhil Reed Amar, 'Some New World Lessons for the Old World', *University of Chicago Law Review* 58 (1991): 483-510.
[6] See Gordon S Wood, *The Radicalism of the American Revolution* (New York: Vintage Books, 1993), 229-324.
[7] See id. at 234-270.

rather than on whether it would be effective at carrying out national policy or in resisting outside interference. [8]

The newness of the post-independence state, and its democratic fragility (as evinced, most particularly, by Shays' Rebellion, the direct inspiration for the drafting of the new constitution[9]), discouraged supporters of the new constitution from appealing to national solidarity or to constituent power as the principal device for protecting these liberties. In fact, as noted above, the constitution was intended in part to constrain constituent power, as Madison famously acknowledged in his 10th Federalist.[10] Therefore its defenders, using the mechanical political-economic analyses invented by the Baron de Montesquieu to explain the success of the English constitution, focused on particularities of the new constitution's institutional design that, they argued, would prevent the dangerous aggrandizements of political power feared by the constitution's political opponents.[11]

And so emerged the particular foci of the structural-liberal vision – a focus on safety rather than efficiency (because the United States would never really be threatened by an outside force[12]); and a focus on structure rather than on constituent power (because constituent power was the danger that the constitution was trying to overcome[13]). Over the succeeding two centuries, elements would be added to and subtracted from the structural pantheon as the United States responded to new regulatory problems – Tocqueville would introduce 'democracy' in the mid-19th century, and progressivism would

[8] See generally Ralph Ketcham (ed.), *The Anti-Federalist Papers and the Constitutional Debates* (New York: New American Library, 1986).
[9] Michael Lienesche, 'Reinterpreting Rebellion: The Influence of Shays's Rebellion on American Political Thought', in ed. Robert A Gross (ed.), *In Debt to Shays: The Bicentennial of an Agrarian Rebellion* (Charlottesville: University Press of Virginia, 1993), 161-182.
[10] See generally Wood, *Radicalization*, 234-270.
[11] See id. at XX.
[12] See Amar, 'Some New-World Lessons'.
[13] Wood, *Radicalization*, 234-270.

then convert democracy from a participatory to an electoral democracy towards the end of that century.[14] The modern, positivist understanding of the 'rule of law'[15] would also emerge in the late 19th century as a regulatory response to national industrialization.[16] At the same time, industrialization would also cause the pre-eminent status that the 'right to property' had enjoyed in the 19th century constitution to be considerably demoted.[17] In the aftermath of the Second World War, the increasing pluralization of American political society would lead to the substitution of equality for liberty as the constitutional telos.[18]

To be sure, the American structural-liberal vision was not the only constitutionalism to emerge out of the revolutions of the late 18th and early 19th centuries. Different visions were to emerge out of Revolutionary France,[19] and Tory,[20] Whiggish,[21] and radical[22] England. These visions were also addressed to their own distinct sets of problems, and

[14] See Michael W. Dowdle, 'Public Accountability in Alien Terrain: Exploring for Constitutional Accountability in the People's Republic of China', in Michael W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006), 337-342.
[15] See, e.g., Joseph Raz, 'The Rule of Law and its Virtue', in *The Authority of Law: Essays on Law and Morality* 2nd ed. (Oxford University Press, 2009), 210-231. Compare A.V. Dicey, 'The Rule of Law: Its Nature and Application', in *Introduction to the Study of the Law of the Constitution* 10th ed. (London: Macmillan, 1982 [1885]), 183-205.
[16] See Dowdle, 'Public Accountability in Alien Terrain', 332-337; cf. Michael J. Piore and Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984), 49-54.
[17] See Mary Ann Glendon, 'Rights in Twentieth-Century Constitutions', *University of Chicago Law Review* 59 (1992): 519–538.
[18] See generally Joseph Tussman and Jacobus tenBroek, 'The Equal Protection of the Laws', *California Law Review* 37 (1949): 341-381. Cf. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).
[19] See Keith Michael Baker, *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century* (Cambridge University Press, 1990), 252-306.
[20] See, e.g., Edmund Burke, *Reflections on the Revolution in France* (1790). See generally A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (ed., Richard VandeWetering) (Indianapolis: Liberty Fund, 2008).45-46, 51-90.
[21] See, e.g., A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885).
[22] See E.P. Thompson, *Makings of the English Working Class* rev. ed. (London: Penguin Books, 1991), 111-203. Cf. Dicey, *Lectures*, 150-214.

often interacted with each other and with the structural-liberal vision, changing and being changed as each continually experienced new kinds of concerns (see also below).

But after the end of the Second World War, these other visions would be significantly overshadowed in Western constitutional consciousness by the liberal-structural vision, as American political influence came to dominate the 'Western' (American and Western European) world as a result of the material and psychological destruction of Europe and the political dynamics of the Cold War. The structural-liberal vision thus currently enjoys a virtually hegemonic preeminence in a number of important international and geo-political settings: including law and development,[23] law and economics,[24] human rights,[25] 'comparative constitutional law'[26] and the 'global model' of constitutional rights.[27] But as we shall see, such hegemonic dominance is problematic when applied to constitutional situations that differ from those the structural-liberal vision evolved to address. And this counsels strongly that we need to be more aware of the limits of its vision, and how they can be overcome.

The remainder of this chapter will proceed in three parts. The second part will explore some of the principal blind-spots in the structural-liberal vision. These include its relative disinterest in issues of state-building; its inability to perceive dynamics of constitutional evolution; and its inability to account for the interdependences that tie the effectiveness of particular constitutional structures to particular environmental factors that

[23] See, e.g., Noah Feldman, 'Imposed Constitutionalism', *Connecticut Law Review* 37 (2005): 857-889.
[24] See, e.g., John Morison, Kieran McEvoy and Gordon Anthony (eds.), *Judges, Transition, and Human Rights* (Oxford University Press, 2007).
[25] See, e.g., Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press, 2014).
[26] See Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited', *International Journal of Constitutional Law* 8 (2010): 563-579.
[27] Kai Mollers, *The Global Model of Constitutional Rights* (Oxford University Press, 2012).

lie outside the structural-liberal field of vision. The third part will then explore how the structural liberal vision relates to the other European visions of constitutionalism, particularly the Rousseauean vision and the radical vision of early-industrial England. Finally, Part IV will examine how these limitations might be transcended.

II. THE STRUCTURAL-LIBERAL VISION OF CONSTITUTIONALISM AND ITS BLIND SPOTS

A. State Building

A constitution plays a significant role in the dynamic process of state building.[28] This is missed in a vision of constitutionalism that approaches it solely as a program of limiting public powers through legal norms. Such a model is incapable of exploring how the constitution gains meaningful purchase in an environment in which the driving concern is one of *creating* the apparatus of government and fomenting the idea of the state where it is weak or non-existent. A study of the constitution in any context is deficient if it is exhausted by a study of positive legal restraints on the use of governmental power; constitutional enquiry is as much about the exercise *of* public power.

(There is thus irony in the fact that the US Constitution of 1789 was itself a good example of this process of constitutional state-building, given its subsequent influence on the structural liberal vision of state-limitation. As noted by Hannah Arendt, the self-conception of the American founders speaks in an entirely clear, unambiguous language: their question, "was not how to limit power but how to establish it, not how to limit government but how to found a new one."[29])

[28] See also Hannah Arendt, *On Revolution* (London: Penguin, 1990), 145.
[29] Id. at 148.

Much of the attention focused on state-building is on the development of government regulatory capacity – what Martin Loughlin refers to as 'governance' (see also Dowdle, this volume).[30] However, there is another aspect of state-building that is less well recognized, but equally essential to the constitutional project, and equally obscured by the structural liberal vision. This involves the development of a "We the People" – i.e., the state as an organic construct rather than simply a collection of rules. (See, e.g., Wilkinson, this volume; John, this volume.)

However heterogeneous they be, 'We the People' provide the symbolic unity that underlies the authority of the modern constitution.[31] In modern terms, it is said, "a constitution involves the idea of an authority and an author whose willpower is the ultimate cause of the polity."[32] But this is a reflexive process. As Sheldon Wolin commented on the occasion of the bicentenary of the US constitution:

> [A] constitution not only constitutes a structure of power and authority, it constitutes a people in a certain way. It proposes a distinctive identity and envisions a form of politicalness for individuals in their new collective capacity.[33]

The true import of the constitutional need to reflect a 'we the people' is neatly illustrated in the recently failed European Constitutional project, a polity-building exercise

[30] Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 275-466; see especially id. at 407-434.
[31] See Simone Chambers, 'Democracy, Popular Sovereignty, and Constitutional Legitimacy', *Constellations* 11 (2004): 153-173. Cf. Hans Lindahl, 'Sovereignty and Representation in the EU', in Neil Walker (ed.) *Sovereignty in Transition* (Hart Publishing, 2003), 87-115.
[32] Ulrich K. Preuss, 'Constitutional Power-Making for the New Polity: Some Deliberations on the Relations Between the Constituent Power and the Constitution', *Cardozo Law Review* 14 (1992-1993): 639-660.
[33] Seldon Wolin, *The Presence of the Past: Essays on the State and the Constitution* (John Hopkins Press, 1989), 9.

which calculated – in hindsight *mis*calculated – "the power of the constitutional word".[34] This project failed – or has failed so far –because there is no distinctly 'European' constituent political identity to undergird it.[35] And as will be demonstrated later in this volume, this constitutional failure is a product, at least in significant part, of Europe's unfettered pursuit of a liberal constitutional vision (see Wilkinson, this volume).

B. Change

All constitutional systems evolve. And they often evolve in ways that are not foreseen by their founders; or even perceived by their contemporaries. They even can involve in ways that run counter to the intentions of both founders – as was the case with Jacksonian Democracy in the United States, for example[36] – and current political elites – a process that elsewhere has been referred to as 'runaway legitimation', and that Tocqueville described so well in the context of the French Revolution.[37] Indeed, the ability spontaneously to adapt to broader environmental changes may be a critical element of constitutional survival.

But such evolution subtly contradicts the predicates of the liberal-structural model, which claims to work by legally assigning and locking-in, in some cases indefinitely, particular configurations of state and non-state power.[38] Such a scheme presumes an ability

[34] See J. H. H. Weiler, 'On the Power of the Word: Europe's Constitutional Iconography', *International Journal of Constitutional Law* 3 (2005): 173-190.
[35] Michael A. Wilkinson, 'Political Constitutionalism and the European Union', *Modern Law Review* 76 (2013): 191-222.
[36] See Wood, *Radicalization*, 347-370.
[37] See Alexis de Tocqueville, *The Old Regime and the Revolution* (ed., François Furet and Françoise Mélonio) (trans., Alan S. Kahan) (University of Chicago Press, 1998), 230-233, 241-248; see also Jon Elster, 'Strategic Uses of Argument', in Kenneth Arrow et al. (eds.), *Barriers To Conflict Resolution* (New York: W.W. Norton, 1995), 250; see generally Michael W. Dowdle, 'Constitutional Listening', *Chicago-Kent Law Review* 88 (2012): 121-125.
[38] Sciulli, *Theory of Societal Constitutionalism*, 9-10.

to strategically control state power: to be able to intentionally disaggregate it, assign it, and limit it to some particular constellation of institutional sites. Constitutional evolution, by contrast, involves the release and reconfiguration of state power in ways that exceed the reins of strategic intentionality.[39] The spontaneous character of this evolution suggests that even in the most mature and robust of constitutional systems, public power is able to evade, or circumvent the formal constitutional architecture, extending itself in ways that bypass initial design constraints.

But at the same time, such spontaneous evolution need not be destructive for the project of constitution-building. On the contrary, challenge and disruption might be necessary in order to 'destabilize' dominant but unsustainable constitutional ideas and practices, to provoke an internal response to an external noise. [40] Indeed, the hallmark of a mature constitutional system might be in structurally recognizing when spontaneous circumvention is necessary in order to respond to new imperatives, and in nevertheless being able to ensure that this evolution preserves the constitution's foundational spirit. Again, this is problematic for the structural-liberal vision, because that vision regards un-channeled public power as innately corrupting and dangerous.[41]

Whilst such concerns are often justified, liberalism nevertheless ultimately fails to account for the political reality of constitutional survival. The fact that in all successful constitutions, including liberal ones, power always demonstrates capacity to evade strategic control, and yet nevertheless often ends up contributing to rather than corrupting the

[39] Cf. Colin Scott, 'Spontaneous Accountability', in Michael W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006), 174-191; Cf. Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions', in Robert Baldwin, Colin Scott and Christopher Hood (eds.), *A Reader on Regulation* (Oxford University Press, 1998), 406-414.
[40] See Sciulli, *Societal Constitutionalism*; Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge MA: Harvard University Press, 1986), 23, 31-32.
[41] See, e.g., Holmes, *Passions and Constraints*.

constitutional project, suggests strongly that the liberal constitutionalists blanket fear of 'unbridled power' is too simplistic. Sometimes, a constitution needs power to free itself at least somewhat from its constitutional constraints — for the sake of that constitutionalism's own survival.[42]

The structural-liberal vision of constitutionalism cannot satisfactorily account for the phenomena of evolutionary change and revolutionary rupture. In fact, it effectively presumes that our knowledge of the possibilities and impossibilities of constitutionalism and its future is already complete, [43] a presumption that David Sciulli has well-termed "the fallacy of exhausted possibilities" in American constitutional thought.[44] To identify, for example, constitutionalism with judicial supremacy leaves no conceptual purchase for critical reflection on the possibility that in particular environments there are other ways of achieving the ends it is supposed to achieve; and that in at least some of these particular environments, these alternative means may represent improvements over the structural-liberal understanding.[45] By linking liberalism to particular institutional structures, and then by identifying constitutionalism primarily by their presence, structural-liberalism not only fails to explain constitutional evolution, it also fails to leave conceptual room for constitutional innovation and idiosyncrasy.[46]

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[42] Cf. Bruce Ackerman, *We the People*, vol. 1: *Foundations* (Cambridge (MA): Belknap Press, 1991).
[43] See, e.g., Francis Fukuyama, *The End of History and the Last Man* (New York: Simon and Schuster, 1992).
[44] See, e.g., Scuilli.
[45] See Olivier Beaud, 'Reframing a Debate Among Americans: Contextualising a Moral Philosophy of Law', *International Journal of Constitutional Law* 7 (2009): 53 - 68. Cf. Michael W. Dowdle, 'On the Public Law Character of Competition Law: A Lesson from Asian Capitalism', *Fordham International Law Journal* 38 (2015): 303-305.
[46] See also Michael C. Dorf and Charles F. Sabel, 'A Constitution of Democratic Experimentalism', *Columbia Law Review* 98 (1998): 270-291.

C. Structural symbiosis

The structural-liberal vision treats the constitution as a normatively autonomous system.[47] It rejects interdependencies with environmental factors that lie outside its normative grasp (although within the liberal tradition, there are different understandings of what territory is included within that grasp – for example, whether the organization of capital – i.e., the 'variety of capitalism'[48] – is or is not a part of the constitution's normative universe[49]). Thus, for example, in the context of American constitutionalism, structural liberalism for the most part perceives no *normative* distinction between the constitution of early 19th century, agrarian and pre-industrial America, and that of early 21st century, post-industrial America—even while it does recognize the immense practical differences between those two societies.[50]

But history shows that constitutions are not normatively autonomous. Their prescriptions are continually shaped and reshaped by aspects of their environment that elude their own normative or even cognitive grasp (see Teubner, this volume). For example, American understandings of the normative shapes of democracy, rule of law, and separation of powers were all fundamentally reconfigured by the rapid on-set of Fordist

[47] See Ronald Dworkin, *Law's Empire* (Cambridge MA: Harvard University Press, 1986); cf. John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971).
[48] See Peter A. Hall and David Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).
[49] Compare Ronald Dworkin, *A Matter of Principle* (Cambridge MA: Harvard University Press, 1986), chs. 12-13, with Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962).
[50] See, e.g., David A.J. Richards, *Foundations of American Constitutionalism* (Oxford University Press, 1989). Cf. Hans Kelsen, *Pure Theory of Law* (trans., Max Knight) (Berkeley: University of California Press, 1967), 193-223.

industrialization (what Alfred Chandler has famously called 'managerial capitalism'[51]) during the latter third of the 19th century.

Structural liberalism has no handle with which to conceptualize this. Thus, for example, the structural-liberal tradition often attributes the collapse of the Weimar Republic to its inadequate constitutional institutions, particularly its lack of judicial review.[52] In doing so, however, it ignores the social devastation and corresponding political panic that was caused by the onset of the Great Depression. Could the German judiciary really have halted such a panic during such a crisis? If so, how? The American Supreme Court Justice Sandra Day O'Conner's observation about the limits of judicial power, even in the United States, is worth repeating here:

> [T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the nation's law means and to declare what it demands.[53]

A polity in significant material need or existential insecurity will not put much stock in the value of the abstract norms articulated by a remote judge.[54] They will not put as much value in the abstract norms articulated by a constitution regardless of whether they

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[51] Alfred D. Chandler, Jr., 'The Emergence of Managerial Capitalism', *The Business History Review* 58 (1984): 473-503

[52] See Christoph Mollers, 'The Scope and Legitimacy of Judicial Review in German Constitutional Law: Report on a Missing Debate', in Hermann Punder and Christian Waldhoff (eds.), *Debates in German Public Law* (Oxford: Hart Publishing, 2014).

[53] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865 (1992).

[54] Cf. Ronald Inglehart and Daphna Oyserman, 'Individualism, Autonomy and Self-Expression: The Human Development Syndrome', in Henk Vinken, Joseph Soeters and Peter Ester (eds.), *Comparing Cultures, Dimensions of Culture in a Comparative Perspective* (Leiden: Brill, 2004), 74-96.

should or not.[55] Weimar Germany was not the only European country threatened by constitutional collapse in the 1930s.[56] England was vulnerable too.[57] The English constitutional system survived of course (the Great Depression was not as brutal there as it was in Germany). But at the same time, it was also able to do so without judicial review. Structural liberalism has no explanation for how it was able to do so, when Germany could not.

When considerations of systemic symbiosis are brought fully into perspective, the liberal-structural model can seem distorting and even dysfunctional. By obscuring systemic interdependencies, the liberal vision shines a far too narrow light on the range of difficulties that can effect constitutional survival.[58] Similarly, it also threatens to misconstrue, by obscuring and mislabeling as ersatz, constitutional structures and dynamics that diverge from those in the structural liberal pantheon, but which nevertheless may be more promising and/or appropriate in light of that particular constitutional system's larger social environment (see especially Dowdle, this volume).[59]

Another example involves the relationship between the constitution and the socio-economic-industrial structure of the polity, an issue that has recently been revitalized in the

[55] See Harold James, 'Economic Reasons for the Collapse of the Weimar Republic', in Ian Kershaw (ed.), *Weimar: Why Did German Democracy Fail?* (New York: St. Martin's Press, 1990), 30–57; see also John Maynard Keynes, 'A Short View of Russia', in *The Collected Writings of John Maynard Keynes*, vol. 9 (London: Macmillan, 1971), 253.
[56] See Mark Mazower, *Dark Continent: Europe's Twentieth Century* 17-27 (London: Penguin, 1999); Fritz Stern, 'The New Democracies in Crisis in Interwar Europe', in Axel Hadenius (ed.), *Democracy's Victory and Crisis* (Cambridge University Press, 1997), 15.
[57] See Mazower, *Dark Continent*, XX; see, e.g., Keynes, 'A Short View of Russia'.
[58] See Pasuk Phongpaicht and Chris Baker, *Thailand's Crisis* (Singapore: Institute of Southeast Asian Studies, 2000), 35-82; Asli U. Bali, 'Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq', *Yale Journal of International Law* 30 (2005): 431-472.
[59] See Phongpaicht and Baker, *Thailand's Crisis*, 97-104; see also, e.g., John Braithwaite, Valerie Braithwaite, Michael Cookson and Leah Dunn, *Anomie and Violence: Non-truth and Reconciliation in Indonesian Peacebuilding* (Canberra: ANU E Press, 2010); cf. Dorf and Sabel, 'A Constitution of Democratic Experimentalism', 270-291.

wake of the Global Financial Crisis.[60] Structural-liberalism's inability to visualize the constitution's interdependence with its surrounding social environment can lend it to induce dysfunctional economic biases into its normative prescriptions. Structural-liberalism tends to conflate the material constitution (i.e., the way a constitution should distribute wealth and resources within its polity) with what we might call the constitution of liberty (i.e., the way a constitution should distribute 'liberty', and especially negative liberty, within its polity) (a conflation that sometimes referred to as 'Manchester liberalism').[61] This causes structural-liberalism to privilege demands for procedural or formal equality over demands for material equality; and that, in turn, causes it generally to privilege demands for economic (neo-)liberalism over demands for social democracy (see also Wilkinson, this volume).[62] But as has been re-emphasized since the Global Financial Crisis, material equality is an equally important factor for constitutional success: issues of material equality cannot be compensated for simply by promoting greater procedural (formal) equality.[63]

III. INTERLOCKING VISIONS

As described in the introduction to this chapter, other visions of constitutionalism exist – each, like the structural-liberal vision, adapted to address a particular set of concerns and problems, which have their own non-parochial relevance. In France, the Jacobins –

[60] See e.g. Gunther Teubner, *Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, 2011).
[61] See Peter Evans, 'Collective Capabilities, Culture, and Amartya Sen's *Development as Freedom*', *Studies in Comparative International Development* 37 (2002): 54-60.
[62] Compare Ronald Dworkin, 'What is Equality? Part 1: Equality of Welfare', *Philosophy and Public Affairs* 10 (1981): 185-246, with Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy and Public Affairs* 10 (1981): 283-345.
[63] See also Michael W. Dowdle, 'On the Public-Law Character of Competition Law: A Lesson from Asian Capitalism', *Fordham International Law Journal* 38 (2015): 355-357; cf. Michael I. Norton, 'Unequality: Who Gets What and Why It Matters', *Policy Insights from the Behavioral and Brain Sciences* 1 (2014): 151-155.

inspired by Rousseau – developed a vision of constitutionalism that celebrated *le pouvoir constituent* (see Goldoni, this volume). In England, Jacobinism fed into a long-standing 'radical' vision of constitutionalism, which dates back to the Leveller movement of the mid-17th century, [64] catalyzing the emergence of the early-industrial radical movement of the late 18th and early 19th century.[65] At the same time, both this radical movement and the associated Jacobin vision gave rise to two distinct English counter *reactions*, both reflecting a profound distrust of the masses. These include the intellectual tradition of 'Whiggish' constitutionalism, as best represented by A.V. Dicey, founded on a vision of parliamentary sovereignty and an uncodified but principled 'rule of law';[66] and a more organic and conservative vision, called the 'Tory Constitution' by Dicey and exemplified by Edmund Burke, which presented the constitution through the lens of a privileged national historical teleology.[67]

Like the liberal structural vision of constitutionalism, these other constitutional visions emerge from particular historical trajectories: a need to constitutionalize the status of the aristocracy in the case of the conservative, 'Tory' constitution;[68] the extreme social and economic disruptions of industrialization in the case of England's radical constitutionalism; emancipation of the third estate from feudal repression in the case of the

[64] See e.g. M. Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism* (Oxford University Press, 2007): 27 – 49.
[65] See Thompson, *The Making of the English Working Class*, 111-203.
[66] See generally Matthew Zagor, 'England and the Rediscovery of Constitutional Faith', ANU College of Law Working Paper (Canberra: Australian National University, July 30, 2009).
[67] See, e.g., Edmund Burke, *Reflections on the Revolution in France* (1790); Cf. Dicey, *Lectures*, 51-60.
[68] See, e.g., Burke, *Reflections.*

French Jacobin model;[69] and the projection of nationalism and imperialism in the case of Dicey's Whiggish model.

Nor were these visions hermetically sealed. Thus, for example, the American structural-liberal vision was itself strongly inspired by the English Tory constitution, particularly as reflected through the writings of Montesquieu.[70] American constitutional thought would then be (re-)introduced into post-Revolutionary France and radical England via the work of Thomas Paine.[71] (The Jacobian vision of constitution was to some extent an express rejection of the American vision, which was too authoritarian.) Both Paine and the Jacobin constitutionalism would, as we saw, be germinal inspirations for the radical constitutionalism of the early industrial English working class.[72]

During the 19th century, England's Whiggish and Tory constitutionalisms, as we also saw, were driven to considerable extent by a fear of French constitutionalism. As the commercial and agrarian classes in the early 19th century United States became increasingly dissatisfied by American constitutionalism's innately aristocratic roots (which it inherited from its Tory influences),[73] they were inspired in part by the experiences of the late 18th century English radicals[74] — a process that ultimately culminated in the establishment of Jacksonian Democracy.[75] The American structural-liberal vision, and in particular its way of

[69] See Simon Schama, *Citizens: A Chronicle of the French Revolution* new ed. (London: Penguin, 2004).
[70] See William D. Liddle, '"A Patriot King, or None": Lord Bolingbroke and the American Renunciation of George III,' *The Journal of American History* 65 (1979): 951-970; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill [NC]: University of North Carolina Press 1998), 150-161.
[71] See Thompson, *The Making of the English Working Class*, 93-113; Schama, *Citizens*, xx
[72] See generally Thompson, *The Making of the English Working Class*, 111-205.
[73] See Wood, *American Radicalism*, xx.
[74] See Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durhan [NC]: Duke University Press, 2010).
[75] Wood, *American Radicalism*, xx.

regulating democracy, were influential on Dicey.[76] Towards the end of the 19th century, the work of the English constitutional scholar Walter Bagehot would itself inspire the constitutional understandings of a Princeton Professor of Political Science named Woodrow Wilson, who would later become the twenty-eighth President of the United States.[77]

The revolutionary, Jacobin model that emerged in late 18th century France may itself have been short-lived – as Hannah Arendt put it, a model "built on quicksand". [78] But the constitutional ideas of its principal source of inspiration, Jean-Jacques Rousseau, would be particularly influential in popularizing the idea of constitutionalism beyond the North Atlantic. His influence would be felt in the diffusion of constitutional discourse into the 'Tazimat' constitutionalization of the Ottoman Empire, the Persian Constitutional Revolution of 1906, the constitutionalization of Japan during the Meiji restoration, and efforts at constitutionalization in post-imperial China.[79]

And new conceptual strands continued to be added to this interweaving during the 19th and 20th centuries. During the 19th century, these would include, for example, the Prussian Historical School, successors to the German camaralists and, through Max Weber, the intellectual discoverers of rational-bureaucratic modernity.[80] The constitutional

[76] See Michael Kamman, *A Machine that Would Go of Itself: The Constitution in American Culture* (New York: Alfred A. Knopf, 1986).
[77] See Ray S. Baker, *Woodrow Wilson: Life and Letters, Youth, 1856-1890* (Westport [CT]: Greenwood Press, 1968), 213-214.
[78] Hannah Arendt, *On Revolution* (London: Penguin, 2006 [1958]), 163.
[79] See George Akita, *Foundations of Constitutional Government in Modern Japan, 1868-1900* (Cambridge: Harvard University Press, 1967) (Japan); Robert Devereux, *The First Ottoman Constitutional Period: A Study of the Midhat Constitution and Parliament* (Baltimore: The Johns Hopkins University Press, 1963) (Ottoman Empire); Abdul-Hadi Hairi, 'European and Asian Influences on the Persian Revolution of 1906', *Asian Affairs* 6 (1975): 155-164 (Persia); Leigh K. Jenco, *Making the Political: Founding and Action in the Political Theory of Zhang Shizhao* (Cambridge University Press, 2010) (China).
[80] See Keith Tribe, *Strategies of Economic Order: German Economic Discourse 1750-1950* (Cambridge: Cambridge University Press, 1995).

development of what has been called 'infrastructural power',[81] combined with the liberal constitutional vision, results in a constitutional construction that today is called the regulatory state.[82] The later part of the 19th century would also see the emergence of Catholic corporatism (or corporativism), which would eventually morph, first into Italian Fascism, but eventually and more positively into the (neo-)corporatist welfare states of Christian democratic Europe.[83]

The 20th century would see not simply the continued expansion of constitutionalist conceptualisations, but the growing introduction to this discourse of non-Anglo-European experiences. These include the incorporation of Islamic strands (see also Lombardi, this volume),[84] neo-Confucian strands,[85] developmentalist strands,[86] and Chinese and Asian 'state-capitalist' strands.[87]

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[81] See Michael Mann, 'The Autonomous Power of the State: Its Origins, Mechanisms and Results', *European Journal of Sociology* 25 (1984): 188-194.
[82] See Tony Prosser, 'Models of Economic and Social Regulation', in Dawn Oliver, Tony Prosser and Richard Rawlings (eds.), *The Regulatory State: Constitutional Implications* (Oxford University Press, 2010), 34-49. Compare Bernard S. Silberman, *Cages of Reason: the Rise of the Rational State in France, Japan, the United States and Great Britain* (University of Chicago Press, 1993), 250-286.
[83] Robert E. Goodin et al., *The Real Worlds of Welfare Capitalism* (Cambridge University Press, 1999), 51-55. See also Philippe C. Schmitter, 'Still the Century of Corporatism?', *The Review of Politics* 36 (1974): 85-131.
[84] See also Nathan Brown, *Constitutions in a Non-Constitutional World, Arab Basic Laws and the Prospects for Accountable Government* (Albany: State University of New York Press, 2001). See, e.g., Sherman A. Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī* (Leiden: Brill, 1996).
[85] See, e.g., Jenco, *Making the Political*; Bui Ngoc Son, 'The Introduction of Modern Constitutionalism in East Asian Confucian Context: The Case of Vietnam in the Early Twentieth Century', *National Taiwan University Law Review* 7 (2012): 423-463. See also Jiang Qing, *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future* (eds., Daniel A. Bell and Ruiping Fan; transl., Edmund Ryden) (Princeton University Press, 2012).
[86] See Kanishka Jayasuriya, 'Introduction: A Framework for the Analysis of Legal Institutions in East Asia', in Kanishka Jayasuriya (ed.), *Law, Capitalism and Power In Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1999), 1-23.
[87] See Michael W. Dowdle, 'China's Present as the World's Future: China and 'Rule of Law' in a Post-Fordist World', in Leigh K. Jenco (ed.), *Chinese Thought as Global Theory: Diversifying Knowledge Production in the Social Sciences and Humanities* (New York:

Constitutionalism is thus a complex, uneven and ever-changing historical discourse – it is 'bricolage' rather than blueprint, 'layered narrative' rather than grand narrative.[88] The structural-liberal vision is a significant voice in this discourse. And for all that, a holistic understanding is necessary. The realization of constitutionalism is pluralist and diverse: no single perspective is able to capture its full possibilities as a political phenomenon; each has its own particular wisdom and folly. It is in their consilience that insights might be found into new possibilities for the constitutional project.[89]

A subtext of this narrative of interlocking narratives is that there is no linear, universal path of constitutional progression. Ideas return that were formerly consigned to the history books. And those that persist throughout do not remain in pristine condition. 'Popular constitutionalism', for example, has been revived in recent years in the form of a much narrower position in US constitutional debates over the final arbiter of constitutional interpretation, defending a position that rejects strict judicial supremacy.[90] A distinct but not unrelated vision of 'civic republicanism', with its focus on political equality and the

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SUNY Press, 2016 (in press)); see also Dowdle, 'Constitutional Listening', 142-156. Cf. Li-Wen Lin and Curtis J. Milhaupt, 'We are the (National) Champions: Understanding: The Mechanisms of State Capitalism in China', *Stanford Law Review* 65 (2013): 697-759.

[88] See Gunter Frankenberg, 'Comparing Constitutions: Ideas, Ideals and Ideologies — Towards a Layered Narrative', *International Journal of Constitutional Law* 4 (2006): 439-459.

[89] Cf. Edward O. Wilson, *Consilience: The Unity of Knowledge* (New York, Alfred A. Knopf. 1998).

[90] Compare Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University, 2004), with Frank, *Enacting the People*.

status of the citizen,[91] have 'rediscovered' the older, classic Republicanism of the early-modern era.[92]

In UK public law scholarship, a 'political' – sometimes labeled 'republican' – constitutionalism has re-emerged, attempting to reclaim the broader concept of the constitution as meaning the strength and health of the body politic, a concept that has been erased from view in the modernizing processes of constitutional reform and liberal discourses of fundamental rights.[93] But it, too, did not emerge in isolation, but as a dialogical response to the 'legal constitutionalism' of the structural-liberal vision[94], and in particular in the need to question that vision's presumption of the presence of an overarching rational consensus among the polity that supposedly allows for the judicialisation of political process and juridification of social relationships.[95]

Thus, constitutionalism has always been both a cosmopolitan and a pluralist idea. As Neil Walker has noted, "the humanist gene in the idea of popular sovereignty" means that even "the most introverted, culturally monolithic and exclusionary national ideology will develop certain universalist themes."[96] At the same time, and despite the universalism of constitutional thought, constitutional *discourse* always has to acknowledge its rootedness in a particular polity, to acknowledge some spatial boundary and limit: "even the most

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[91] See generally Iseult Honohan, *Civic Republicanism* (London: Routledge, 2002). See, e.g., Philip Pettit, *Republicanism* (Oxford University Press, 1997); Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 1998).
[92] Philip Pettit, "Two Republican Traditions," in Andreas Niederberger and Philipp Schink (eds.), Republican Democracy: Liberty, Law and Politics (Edinburgh: Edinburgh University Press, 2012) 169-204.
[93] See e.g. Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005); cf. Gregoire Webber and Grahame Gee, 'What is a Political Constitution?', *Oxford Journal of Legal Studies* 30 (2010): 273 – 299.
[94] See e.g. Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press, 2013).
[95] See Loughlin, *Foundations*, 367-372; compare Dworkin, *Law's Empire.*
[96] Neil Walker, 'The Place of European Law', in Gráinne de Búrca and J. H. H. Weiler (eds.), *The Worlds of European Constitutionalism* (Oxford University Press, 2011), 65.

avowedly universalist framework of self-government must draw from and reinvest in its own particular experience."[97] Whatever ideological commitments it makes towards a moral universalism based on the individual, the constitution is always constructed in a specific social setting with a specific political morality and contributes towards the building of a particular state or polity. But this polity is not a given, it is in turn shaped by the particular ideals that inform that state's constitutional development, those that resonate somewhat uniquely in their particular political community and forge (or fail to forge) social solidarity amongst its members. (See also Wilkinson, this volume.)

Seen in this light, modern constitutionalism is ultimately a balancing act, informed by an incredible diversity of constitutional experiences, but nevertheless uniquely attached to its political circumstances.[98] The problem with liberalism here is thus two fold. On the one hand, it obscures the diversity of sources from which a 'living' constitutional tradition can be constructed. On the other hand, its own inherent universalism leaves a polity no room or reason for feeling any special attachment to its own particular constitutional order. Given the (generally unacknowledged) evolutions in structural liberalism described above, this threatens to reduce constitutionalism simply to a political-cosmopolitan zeitgeist, as when the European Union constitutionalisation process is considered "an important stage along the route to a politically constituted world society,"[99] despite its evident fragmentation and conflict. In order for constitutionalism to continue to develop its myriad possibilities, its diversity of experiences and visions must be recognized, and critically scrutinised. How we might do this is the subject of the next and final part to this chapter.

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[97] Id.
[98] See Preuss, 'Constitutional Power-Making'.
[99] Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2012), 2.

IV. LOOKING BEYOND LIBERALISM

As noted in the introduction, the lesson in all this is that we need to expand our constitutional imagination in ways that allow us to look beyond liberalism — not rejecting liberalism per se, but realizing its limitations and developing conceptual tools that can help us transcend them.

Some argue that such cosmopolitan, cross-cultural explorations of 'law' – including constitutional law – is impossible.[100] The complexities of cultural diversity – the differences in languages, cultural metaphors, social meanings, social experiences – render any attempt at cross-cultural normative or conceptual synthesis ultimately futile. There are at least two responses to this kind of skepticism.

The first is methodological. Even if it is true that we can never really *know* if we accurately understand another culture (or even another individual), it doesn't matter: we can never really know if we *can't* understand another culture (or person) either. Both positions start from a presumption of either ultimate incomprehensibility or ultimate comprehensibly. There is no reason for preferring one to the other. For that reason, we have at least as much justification for pursuing the possibilities inherent in comprehensibly as we do for presuming that such pursuits will be in vain.

The second response to the skeptical assertion is empirical. It is not hard to find demonstration of complex cooperation across cultures, cooperation that simply could not work if cross-cultural understanding were impossible — e.g., cross-cultural marriages, cross-

[100] See, e.g., Pierre Legrand 'What "Legal Transplants?"', in David Nelken and Johannes Feest (eds.), *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001), 55-68; cf. Rebecca French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* (Ithaca [NY]: Cornell University Press, 1995), 57.

cultural friendships, cross-cultural business partnerships, even cross-culture academic conferences. The prevalence of successful endeavors of this sort argues strongly – we would say conclusively – that cross-cultural communication, understanding and consilience are eminently possible and feasible. This conclusion is supported by a large number of psychological studies. Meta-studies of the cultural psychology studies find that both perceptions of experience and modes of making sense of those perceptions (e.g., rationalism, sentimentalism, folk knowledge) in fact do not differ significantly across cultures: that both perception and cognition (reason) are human and not cultural phenomena.[101] What differs among cultures is the way perception and cognition are expressed – i.e., the symbols and metaphors that we use to locate particular perceptions and cognitions into our larger understanding of the world.[102] The key to our exploration therefore lies in looking beyond expressions and metaphors, and at the rationality and coherence that underlies the statement.

Along these lines, a good starting point for looking 'beyond liberalism' is the interpretive principle that Donald Davidson famously called "the principle of charity." [103] The principle of charity starts from the observation that the best heuristic for determining the meaning of a particular statement is to assume that the speaker is 'making sense' – i.e., to privilege interpretations that maximize the coherence and meaning of the statement. This involves, for example, presuming that the speaker is rational, presuming that she is not

[101] See Dianne van Hemert, *Patterns of Cross-Cultural Differences in Psychology: A Meta-Analytic Approach* (Amsterdam: Dutch University Press, 2003), 132-133, 136-137. Cf. Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (London: Penguin, 2002).
[102] See van Hemert, *Patterns of Cross-Cultural Differences*, 136-137. Cf. George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 1980).
[103] See generally Donald Davidson, 'Radical Interpretation', in *Inquiries into Truth and Interpretation* 2nd ed. (Oxford: Clarendon, 2001), 125-140; see also Neil L. Wilson, 'Substances without Substrata', *Review of Metaphysics* 12 (1959): 521-539.

intending to be *normatively* deceptive (although she might be wrong on particular factual matters), and that she is trying to be persuasive *to her particular audience*.[104]

The comparative advantage of the principle of charity is not that it gives the most accurate understanding of the intentions of the speaker. It is not to help us understand why somebody said what she did; or if or how that statement benefits her interests. Its purpose is to maximize our ability to learn from the speaker's statement. Consistent with this approach, this volume demonstrates how listening to alternative constitutional experiences using a principle of charity allows us to better perceive and account for the limits of liberalism, and at the same time to defend the cosmopolitan vitality of the constitutional project.

At the same time, the principle of charity demands that this listening be reflexive rather than passive. Reflexivity, as Neil Walker notes, "amounts to more than providing a reflection. . . . Rather it is about the quality of *ipseity* – of the capacity for self-reflection and the possibility of self-transformation inherent in that capacity."[105] This reflexivity is more demanding than the orthodox liberal approach permits. First, it is holistic in the sense of perceiving the 'other' polity – not as an institutionally-defined corpus (e.g., as an electorate, or as a civil society, or as a set of survey data) comprised of atomistically autonomous individual beings – but as an organic inter-linkage of an 'ideational' *telos* with a 'structural' *nomos* (again, see Teubner, this volume): it is both population and community, both

[104] See Michael W. Dowdle, 'Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China', *New York University Journal of International Law and Politics* 35 (2002): 84-47; Dowdle, 'Constitutional Listening', 126-130.

[105] Neil Walker, 'EU Constitutionalism and New Governance', in Grainne de Burca and Joanne Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006), 34.

constituted and constituting.[106] It is both abstract structure, and "the living individuality of a nation."[107]

Second, rather than see the constitution as the product of an instance of transcendental moment of pure reason, where the 'house' wherein political freedom can dwell is constructed in one go, this reflexivity recognizes that the constitution is an on-going narrative constantly interweaving a diversity of perspectives, concerns, and imaginations. Relatedly, rather than seeing the constitution in terms of a dualist structure in which meaningful constitutional discoveries only occur during certain extraordinary and punctuated moments of political sobriety, so as to avoid sliding into political excess during the otherwise normal state of political drunkenness,[108] reflexivity sees the constitution as *constantly* negotiated and renegotiated in the public realm (and soberly, as per the principle of charity).[109] It thus constantly reminds us, as discussed above, how a "constitution" is always a perpetually, spontaneously, and even invisibly evolving work in progress.

Thirdly, in order to capture the constitution's structural symbiosis with other social systems in its regulatory environment, this reflexivity must recognize law, politics, and society to be dynamically interrelated in the constitutional evolution of the polity (see also Teubner, this volume). Of course this interrelationship is not necessarily functional, stable, and/or otherwise constructive. There are no constitutional guarantees for the flourishing or even survival of the polity. Insobriety occurs. Constitutional reflexivity is a method with which to analyze the various tensions that both are latent in the pluralist nature of the

[106] See generally Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007).
[107] Georg W. F. Hegel, 'On the Scientific Ways of Treating Natural Law, on its Place in Practical Philosophy, and it Relation to the Positive Sciences of Right', in *Hegel: Political Writings* (ed., Laurence Kickey and H.B. Nisbet; trans., H.B. Nisbet) (Cambridge University Press, 1999), 176.
[108] Compare Holmes, *Passions and Constraints*, 135.
[109] M. Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 155.

constitutional project and necessary for its evolutionary survival. These tensions are sometimes productive, sometimes destructive. But in either case, they define the focus of 'constitutional' — both insofar as an individual polity is concerned, and insofar as our more cosmopolitan understandings are concerned.

Along these lines, reflexivity requires us to not privilege or essentialize legal judgment and judicial interpretation as the principle sources of a *normative* constitutional order. Such a presumption is both under inclusive and over inclusive. On the one hand, while these are significant components of that order, they must not be confused for its whole. Whether and how a legal judgment is translated into action depends on the degree to which a political culture and background social order has internalised a relatively high level of obedience to the law and at least official acceptance of the rules of law-making.[110] At the same time, the rules of law-making are frequently complex and under-determined. This makes the Court an active participant in the balance of constitutional powers — in the language of speech-act theory, it makes judicial judgements 'performative' and not simply 'constative'.[111] They are not merely logical or tautologous propositions, but acquire recognition and meaning only through broader constitutional practice. In short, the constitutional effects of a Court's judgment will depend upon the constitutional context in which it is uttered.

This symbiosis is largely concealed in the liberal-structural tradition, where the 'balance of powers' –or in classic public law, their 'separation' – has been established over years, perhaps centuries, of conflict and negotiation, and has thus attained what appears to be some kind of stable constitutional equilibrium. Juridical authority thenceforth *appears* a

[110] Cf. Tom R. Tyler, *Why People Obey the Law* (New Haven [CT]: Yale University Press, 1990).
[111] See John L. Austin, *How to Do Things with Words* (Oxford: Clarendon, 1975).

distinct and autonomous constitutional phenomenon — at least in the abstract analysis of legal scholars concerned with presenting a snapshot of the constitutional order, or what has revealingly been called a 'momentary legal system'.[112] But this appearance is deceptive, because in constitutional practice juridical authority is one player in a larger game.

Lastly, reflexivity also problematizes the constitutional nomos. Structural liberalism conceptualizes the constitutional *nomos* largely if not exclusively in terms of positive law. The canonical structures that constitute the structural-liberal vision are *defined* legally. Because reflexive constitutionalism is more sensitive to constitutional change and to the diversity of normative influences that comprise the constitutional arena, it allows for practices of constitutional *nomoi* to take a wider varieties of political and legal forms. They can take the form of pre-theoretical practices.[113] They can take the form of particular narratives, including fictional or false narratives.[114] They can even take the form of a particular homeostatic political balance that emerges out of the perpetual clashes among the many irresolvable contradictions and conflicts that course through the social and political corpus of the nation (see, e.g., Harding, this volume). Even transparently duplicitous claims can develop an normative force of their own, a dynamic that that results in part from the innate political need to be seen to be keeping one's word. [115]

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[113] See, e.g., See Clifford Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', in *Local Knowledge: Further Essays in Interpretive Anthropology* 3rd ed. (New York: Basic Books, 2000), 167-233; see, e.g., Thompson, *The Making of the English Working Class*, 74-79.

[114] See, e.g., Braithwaite et. al., *Anomie and Violence*.

[115] See, e.g., Andrzej Rapaczynski, 'Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament', *University of Chicago Law Review* 58 (1991): 595-631. See also Elster, 'Strategic Uses of Argument'.

Also along these lines, reflexive constitutionalism does not privilege any particular conception of the *telos*, of the public or political good.[116] It recognizes that like constitutionalism itself, conceptions of what constitutes the public good are also pluralist and reflect different experiences, and traumas. Each perspective has value that transcends its instantiation; each is limited in its imagination. Reflexive constitutionalism attempts to expose what is otherwise concealed in debates over the relationship between the constitution, the polity and the public good. It does not offer to determine which institutional arrangements produce optimal outcomes, let alone to offer a constitutional blueprint for the future. Reflexivity is urged to contribute to a distinct and deeper enquiry into the nature of the constitution as an ongoing exercise of collective self-commitment.

[116] See also Loughlin, *Foundations*, 159