The Cosmopolitan Constitution

Alexander Somek

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Introduction: Constitutionalism 3.0

Modern constitutionalism is the project to establish and to constrain public power. Law is the means thereto.

As a project, constitutionalism has undergone two momentous transformations. These transformations are studied in this book by asking a seemingly simple question: What is it that accounts for the constitution's quality to be law? The final chapter offers a philosophical account of what is at stake in these transformations. It concerns the emergence of the "cosmopolitan constitution."

In order to prepare this study, this introduction provides a sketch of three stages in the evolution of the constitutional project. It then goes on to introduce some basic concepts and ideas.

THE LAW OF A FREE PEOPLE

Constitutionalism 1.0 perceives the constitution as authored by a people. A constitution is, in the words of James Madison, "a charter of powers granted by liberty."[1]

Liberty, collectively exercised, is the *origin* of the constitution. The people adopt a constitution freely through exercising their constituent power. They are thereby constrained, if at all, only by natural law.[2] The source of the constitution's authority is not law, however divine it may be, but human action, that is, a founding act or a practice commanding respect.[3]

Liberty, however, is not only what creates a constitution; it is also what a constitution is about. The constitution enables a people to be free by virtue of facilitating collective action. Moreover, the constitution is supposed to guarantee individual liberty. This liberty is perceived *vis-à-vis* potential encroachments by public power. It therefore appears in negative form and is, essentially, freedom *from* coercive interference by the state.

[1] James Madison, "Charters," *National Gazette*, 19 January 1792: "In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty," available at <http://www.constitution.org/jm/17920119_charters.htm>.

[2] Abbé Sieyès, "What Is the Third Estate?" in *Political Writings* (ed. and trans. E. Sonenscher, Indianapolis: Hackett Publishing, 2003) 136–137.

[3] Alexander Somek, "The Constituent Power in National and Transnational Contexts" (2012) 3 *Transnational Legal Theory* 31–60.

[4] On the following, see Dieter Grimm, "The Achievement of Constitutionalism and its Prospects in a Changed World" in *The Twilight of Constitutionalism?* (ed. P. Dobner and M. Loughlin, Oxford: Oxford University Press, 2010) 3–21 at 13.

As a consequence of the freedoms guaranteed by the constitution, a sphere of social interaction called civil society can be sustained.[5] It is conceived as the zone where human interaction is free from state interference.

The constituent power of the people is manifested, hence, in a free act undertaken for the sake of liberty. A constitution represents the self-constitution of liberty.[6] In order to secure private liberty, public liberty is exercised in the form of the former, i.e. through choices.[7] Free choices that are made in communion with others are epitomized by contracts. The authority of the constitution is therefore most conveniently explained through the lens of a social compact.[8] Indeed, in the wake of the American Revolution some publicists repeatedly emphasized that what had been concluded in the former colonies were *real*—and not merely fictive or hypothetical—social contracts.[9] The procedures of making a constitution followed an intuitively democratic pattern, without, however, observing already constituted procedures. For example, the American colonists used a pre-existing system of committees of correspondence in order to debate questions of constitutional concern.[10]

POWERS

A constitution is a charter of powers. Indeed, powers are what constitutions were originally composed of.[11] These can be either properly understood legal powers, such as a power to conclude international agreements, or permissions to take action backed up by coercive force.

That a constitution is *made* of powers is not a trivial point. The underlying idea is that government does not precede the constitution. It is not party to the social compact.[12] It is trusted by the people and has only duties. Likewise, the constitution is not a bargain among different groups. It is, ideally, authorized by each and every individual.

[5] See Dieter Grimm, *Die Zukunft der Verfassung* (Frankfurt aM: Suhrkamp, 1991) 45–48; *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt aM: Suhrkamp, 1987) 46.

[6] Self-constitution is the seemingly paradoxical process by which action constitutes the authorship of the agent. The underlying agency is not given as a thing but consists of the act of self-positing. See, from different philosophical traditions, Christine M. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Cambridge: Cambridge University Press, 2009) 18, 45, 126, 133; Eckart Förster, *The Twenty-Five Years of Philosophy: A Systematic Reconstruction* (trans. B. Bowman, Cambridge, Mass.: Harvard University Press, 2012) 180–182.

[7] This is epitomized by the career of rights whose exercise is no longer linked to duties or the performance of certain social roles. See the very perceptive observations by Grimm, *Recht und Staat*, note 5 at 29–30.

[8] Grimm, note 4 at 7.

[9] See the sources quoted in Silvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990) 23–24.

[10] As is reported for Pennsylvania in Thomas Paine, *Rights of Man* (ed. E. Foner, London: Penguin Books, 1969) 186.

[11] Madison, note 1. See also, implicitly, *The Federalist* (ed. C. Sunstein, Cambridge, Mass.: Harvard University Press, 2009) No. 49 at 316.

[12] Paine, note 10 at 188–189.

As a legal instrument, the constitution establishes limited powers. Sovereignty is not an element of the constitutional system.[13] Owing to their very limitedness, separated powers necessitate mutually beneficial cooperation and guarantee individual liberty by forestalling large concentrations of power in one hand.[14] Neither the benefits of cooperation nor the preservation of liberty would be achievable without observing the limits of powers that are laid down in the constitution. It is essential, therefore, that the constitution be observed as law.[15]

One way of giving it effect is to introduce periodic reviews of constitutional practice. At the end of such a review, the reviewing body—for example, a council of censors[16]—may want to propose amendments in order to prevent future transgressions. Since the constitution is the work of the people, the people should speak when it comes to adjudicating questions of constitutional law. They or their representatives should decide on these amendments.

The founders of the American republic famously dismissed these various procedures because these procedures would put the fox in charge of the henhouse.[17] Madison suspected that a council of censors would be composed of the very politicians whose deeds it would have to adjudicate in constitutional terms. Instead, he favored the system of checks and balances.

Such a system inherits from the mixed constitution the idea of a mutual balance among forces. At the same time, these forces are stripped of their overt association with the different virtues of constituent groups.[18] They are merely understood to be functionally specified aspects of sovereignty. Due to their limitedness they even amount to its negation. Limited powers are finite instantiations

[13] This is an old insight of Martin Kriele's. See Martin Kriele, *Einführung in die Staatslehre* (Reinbek: Rowohlt, 1976) 224.

[14] *The Federalist* No. 47, note 11 at 316.

[15] In the context of British constitutional scholarship, a distinction is often made between a "legal" constitutionalism that relies on judicial review and a "political" constitutionalism that relies on political mechanisms of accountability, such as elections or ministerial responsibility. For an introduction, see Graham Gee and Grégoire C.N. Webber, "What Is a Political Constitution?" (2010) 30 *Oxford Journal of Legal Studies* 273–299 at 278, 282. The difference between "legal" and "political" constitutionalism is thereby rendered rather narrowly. The experience with the early American constitution teaches that it is quite conceivable to see the law of the constitution enforced through mechanisms of political accountability. The question is, rather, whether a system of the separation of powers is supposed to facilitate the observance of law or whether constitutional constraints eventually merely reflect various and shifting equilibria among contending groups. This latter form of "political constitutionalism" would be more congenial to ancient constitutionalism. Perhaps it needs to be said, in all fairness, that the latter actually had been John Griffith's understanding of "political constitutionalism." See J.G.A. Griffith, "The Political Constitution" (1979) 42 *Modern Law Review* 1–21.

[16] Section 47 of the Pennsylvania Constitution of 28 September 1776, available at <http://avalon.law.yale.edu/18th_century/pa08.asp>.

[17] *The Federalist* No. 47, note 11 at 337.

[18] The latter idea is most beautifully reflected in Charles I's answer to the Nineteen Propositions, printed in *The Stuart Constitution 1603–1688 Documents and Commentary* (2nd edn, ed. J.P. Kenyon, Cambridge: Cambridge University Press, 1986) 19–20.

of a power that is essentially self-limiting. This finiteness is the opposite of sovereignty, which thereby realizes itself through what it is not.[19]

THE IDEAL AND THE REAL, THE PART AND THE WHOLE

The system of checks and balances is based on two uncertain assumptions. The *first* is that the interest of the person holding an office will coincide with the interest of the department of government to which the office is linked. Personal ambition is supposed to drive people to assert the institution's position within the system of separation of powers.[20] According to the *second* assumption, the resulting equilibrium among branches of government will coincide with the limits of powers set by the constitution as law. Conversely, this means that the limits of powers need to be drawn such that the actual scope of powers that emerges from the agonistic interaction among branches will reflect their ideal scope, that is, how they are supposed to be legally defined. A constitution would be ill-conceived if the executive branch could not be effectively checked by other branches, for example, for want of political clout caused by the overall constitutional composition of powers. Such a constitution would be self-contradictory for it would contain a discrepancy between the limits of powers considered in isolation[21] and how these limits can be realized through the interaction among the powers envisaged by the constitution. This means, however, that the actual normative force of the constitution—that is, normativity that is not merely an empty ought[22]—depends on factors that are not constituted by the constitution as a legal instrument. Such factors are, for example, the strength of popular support for a President, the party system, or the respectability of the judiciary. They are, however, not external to the constitution either, for there would be no *actual* constitution without them. Put differently, the constitution as law not only establishes powers but also *allows* these powers to be determined by the social forces underlying their actual exercise. Just as sovereign power can be realized constitutionally only by virtue of its own negation, the ideal "parchment barriers" of powers can have effect only in the course of real struggles among contending forces.

The first assumption underlying the idea of checks and balances is empirically questionable. There is no necessary correlation between the interest of the "man" and the interests of the "constitutional rights of the place."[23] It is quite possible that institutions are composed of people whose major interest is to weaken

[19] Whatever is finite has its limit outside itself, whereas the infinite limits itself. See G.W.F. Hegel, Enzyklopädie der philosophischen Wissenschaft im Grundrisse, *Werke in zwanzig Bänden* (ed. E. Moldenhauer and K.M. Michel, Frankfurt aM: Suhrkamp 1969–1971) vol. 8, 95, 144, 197, 200.

[20] Here are Madison's famous words from *The Federalist*, note 11 No. 51 at 341: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

[21] The limits, thus understood, were referred to as mere "parchment barriers" by Madison. See *The Federalist*, note 11 No. 48 at 325.

[22] G.W.F. Hegel, Wissenschaft der Logik, *Werke in zwanzig Bänden*, note 19, vol. 5 at 147.

[23] See note 20.

their influence or who mistakenly trust that the monitoring will be done by some other institution.[24] It is not unheard of that in some legislatures delegates favor curbing the power of their own institution in order to create room for a strong leader to maneuver.

The second assumption reveals, as already indicated, an internal conflict within the constitutional project. There can be no guarantee that the actual scope of powers emerging from equilibria among players will coincide with what is demanded by law for each power separately. No power has the power to rise above all others and to put them into their place. Each has to struggle for legality from within the system.

This is a true predicament. Necessarily, any constitution needs to leave the application of the rules of the game to the players. Necessarily, the most powerful players will bend the rules in their favor. There is a tension between the elements of the constitution, ideally considered, and the whole constitution as effectively realized in various contexts. Both are law.[25] The constitution is actually composed of both ideal limits *and* the use of checks and balances for their realization.[26] The legal quarrel over the former is part of the latter. A constitution is not simply a charter of powers, but a charter of powers acting upon each other.

Not surprisingly, within constitutional systems the question *must* arise which of the contending branches, at the end of the day, has to have the power to say what the constitution means *legally*.

Periodic reviews of constitutional practice by some distinguished extraordinary body did not become part of constitutionalism's legacy. Obviously, checks and balances did. Therefore, constitutionalism's embrace of legal form became embedded into the context of what is nowadays called "political constitutionalism." The idea of the latter is that the constitution is nothing outside the practice of participants in the political system.[27] Ideal legal constraints are chimerical.[28] Such a "political constitutionalism," however, entertains a rather crude view. It merely says that deep down the constitution is a factum, not a norm. But this misses the point. Rather, the constitution allows the factual circumstances of its realization to determine the scope of powers that are defined prior to these circumstances. This dialectic escapes this type of "political" constitutionalism.

[24] Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010) 20.

[25] Hans Kelsen memorably accounted for this tension as regards the legal system as a whole by using the distinction between the principle of legitimacy and the principle of effectiveness. See Hans Kelsen, *Pure Theory of Law* (2nd edn, trans. M. Knight, Berkeley: University of California Press, 1967) 211.

[26] It should not come as a surprise that the more sophisticated contributions to constitutional theory accounted for this tension and conceived of their work in sociological terms. See Hermann Heller, *Staatslehre* (6th edn, Tübingen: Mohr, 1983) 57–59.

[27] See, for example, Richard Bellamy, "Political Constitutionalism," *UCL School of Public Policy Working Paper Series* ISSN 1479-9471 at 9 who would have us perceive "[. . .] the political system itself, not its legal description in a written constitution, but its actual functioning, as the true and effective constitution." See also his *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007) 207–208.

[28] Griffith, note 15.

This basic normative tension is nonetheless troubling for the project of constraining power through law. The question must arise, therefore, whether one branch of government is particularly well positioned when it comes to saying what the law is. This branch would be a good candidate to be the supreme expositor of constitutional law.

Unsurprisingly, the eyes come to rest on the judiciary. With regard to the judicial application of the constitution it needs to be clarified in which respect the constitution is law, and for whom.

JUDICIAL REVIEW: THREE POSITIONS

Initially, in the aftermath of the American Revolution, some authors took the constitution to be law for the legislature only. The constitution was supposed to be a binding legal instrument, but not enforceable *vis-à-vis* the body representing the popular sovereign. The judiciary had no role in enforcing the constitution. This position was most clearly summarized, although not defended, by James Iredell:[29]

> The great argument is, that though the Assembly have not a *right* to violate the constitution, yet if they *in fact* do so, the only remedy is, either by a humble petition that the law may be repealed, or a universal resistance of the people. But that in the meantime, their act, whatever it is, is to be obeyed as a law; for the judicial power is not to presume to question the power of an act of Assembly.

According to another view, judicial review of legislation was deemed to be permissible if exercised only vicariously on behalf of the people exercising their right of resistance. Since the latter would be exercised only in cases of egregious violations of the constitutional order, judicial review was also supposed to be limited to cases of clear unconstitutionality, that is, the "concededly unconstitutional act."[30]

What historically prevailed, however, was an understanding that merged the constitution as a species of law with its overall genus. This meant in practice that the principle according to which it is "emphatically the province and duty of the judicial department to say what the law is"[31] became extended to the constitution, too. More fully developed, this understanding supports the proposition that there is no other way of asserting the legality of the constitution than by yielding to the supremacy of judicial expositions of constitutional law.[32] This idea became such ordinary wisdom that the purveyor of specialized constitutional tribunals, Hans

[29] James Iredell, "To the Public," quoted in Snowiss, note 9 at 34.

[30] Snowiss, note 9 at 3, 41–42, 49.

[31] *Marbury v. Madison*, 5 US 137, 1 Cranch 137 2 L. Ed. 60 (1803).

[32] *Marbury* does not yet manifest the full-blown view. See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004) 125–126, according to whom the case does not yet state that it is the business of the Courts alone to say what the law is.

Kelsen, already took it for granted that constitutional adjudication was the only way to secure the legality of ordinary law.[33]

The elevated position of the judiciary in matters of constitutional interpretation makes it very difficult to imagine judicial "self-restraint" on any other basis than observing the proper standards for judicial exposition of law generally. It would be odd, in other words, to have the judiciary determine, by means of a run-of-the-mill construction of legal texts, what the constitution requires as law and *then* to demand that it exercise self-restraint because the detected unconstitutionality is not obvious in the eyes of the outside observer. If the legal knowledge of the constitution is something that the judiciary is privy to it must be the right and the privilege of the judiciary to find unconstitutionality on the basis of legal analysis even in cases where the unconstitutionality is far from obvious to any other observer. All theories of constitutional interpretation, regardless of whether they favor or disfavor "judicial self-restraint," need to address the predicament that once a constitutional system embraces judicial review, the debate of constitutional questions becomes invariably "juridified."

THE ESSENCE OF CONSTITUTIONAL ADJUDICATION

The core legal question that arises under constitutionalism 1.0 is whether a branch of government has stayed within the confines of its powers. In the course of a judicial review of this basic question, not by accident some version of a rationality test comes to play an important role.

Organs of the state abide by constitutional constraints if they do what is within their power. That is the case so long as what they are up to can be plausibly, which means causally, perceived as an exercise of their respective powers. If the legislature prohibits the sale of handguns with the purpose of exercising its power to "regulate interstate commerce," it stays within its power if there is a causal relationship between the circulation of guns and commerce among states. Whether or not this is the case depends on how the "regulation of interstate commerce" is to be understood as an aim. If regulating interstate commerce may concern anything that is relevant to the flow of goods within a federal territory, the prohibition on the sale of guns will pass muster; however, if regulating interstate commerce is calibrated to the removal of obstacles, it will not. Whether the relevant power means one or the other needs to be determined on the basis of constitutional interpretation. The analysis of a means-ends relationship, however, is an essential component of constitutional adjudication. The legislature is treated as a rational agent. The question is whether it has pursued the permissible aim(s) for which it has been granted powers. If the relationship between the means chosen and the end pursued is too tenuous, the legal analysis will find that the legislature did not do what it purported to do.

[33] See Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit," reprinted in *Die Wiener rechtstheoretische Schule* (ed. H. Klecatsky et al., Vienna: Europa Verlag, 1968) vol. 2, 1813–1871 at 1836–1838.

As is well known, tricky questions can arise in this context. For example, assuming that the power to regulate interstate commerce means that the legislature may only remove obstacles, what is one to make of a handgun product standard regulation that is likely to increase the overall volume of sales while harming small producers in one particular region? Has the legislature really pursued the aim of regulating interstate commerce, or has it favored larger national industries? Only a detailed assessment of the facts may help one to arrive at a clearer perspective. If, at the end of the day, the analysis finds that the legislature actually merely supported larger producers, it is thereby established that it did something for which the constitution has not granted it any power.

It bears emphasis that what is decidedly *not* at stake in this type of constitutional analysis is the *reasonableness* of action. If the regulated matter is rationally related to an objective within the state organ's power to pursue, the organ may proceed. The implied powers doctrine is a natural consequence of this link between powers and aims. If the organ necessarily has to do or regulate something in order to exercise an explicit power, it follows that it is invested with the requisite implied power. This way of reasoning is distinct from the application of the proportionality principle, which is at the center of constitutionalism 2.0.

SUPERLEGALITY AS LEGALITY WITH A TRUMP CARD

The legality of norms concerns how they are expected to be complied with.[34] Adopting Carl Schmitt's terminology, one can say that superlegality[35] is about how ordinary law is supposed to be consistent with the constitution. It is important to note that, in the case of constitutionalism 1.0, legality and superlegality are made of the same material. The law of contract, for example, is replete with permissions and legal powers. Constitutional law comprises the selfsame types of powers. The conformity with one and the other is the same. Legality and superlegality are carved out of the same wood. One merely trumps the other. It will be seen below that this changes in the context of constitutionalism 2.0, where superlegality requires meeting a standard for the reasonableness of government action. Constitutional law is, then, no longer the same as the law that one encounters in 1.0.

In spite of the importance of actual means-ends relations, the normativity of superlegality supposedly flows from the link between powers and permissible aims. The identification of the latter is the task of constitutional interpretation. Constitutionalism 1.0 is thoroughly convinced that the constitution is a source of law. What the law means is known on the basis of interpretation.

[34] This is, to be sure, the Kantian perspective. See Immanuel Kant, *The Metaphysics of Morals* (trans. M. Gregor, Cambridge: Cambridge University Press, 1991) 46.

[35] Carl Schmitt, *Legality and Legitimacy* (trans. J. Seitzer, Durham: Duke University Press, 2004); Carl Schmitt, "Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität" (1978) 17 *Der Staat* 321–339.

THE TURN TO HUMAN DIGNITY AND HUMAN RIGHTS

Constitutionalism 1.0 is far from obsolete. Indeed, almost without interference by its further transformations, it is still in full bloom in its vintage legal culture, that is, the public law of the United States. But even where countries have made the transition to the next level, elements of constitutionalism 1.0—for example, the mode of interpretation of the scope of powers—are likely to remain in place. The transformations of constitutionalism, therefore, add to the complexity of the project. One version becomes grafted upon the other.

Constitutionalism 2.0 alters the picture.[36] It is paradigmatically embodied in the constitutional practice that emerges in Germany after the Second World War. The constitution is no longer deemed to originate from the free choice of a people. Rather, it originates from an act of reasonable recognition concerning the supreme value and authority of human dignity and human rights.[37] While the idea that the constitution is a choice made in some foundational act is still of relevance for the organizational part of the constitution, fundamental rights lend expression to the free recognition of a moral necessity. A necessity of this type is intrinsic to the rational will. The connection between what necessitates and what is necessitated is not mechanical; it is supposedly mediated by insight.[38]

The first major difference, therefore, between constitutionalism 1.0 and constitutionalism 2.0 concerns the origin of constitutional authority. Whereas 1.0 relies on a great story about the voluntary realization of values by a particular nation, 2.0 is about abdicating voluntarism in the face of human dignity, which is the reason for the protection of human rights.[39] It can be argued that the transition from one to the other marks a step in the self-determination of constitutional reason.[40] No less a scholar than Carl Schmitt unearthed this discrepancy between the voluntarism of the legislative state and the value commitments expressed in the fundamental rights of a constitution.[41] Constitutionalism 2.0 appears to draw the conclusion that follows from realizing that the voluntarism intrinsic to 1.0 is at odds with the universal values of freedom, equality, and solidarity on which it claims to rest. In any event, the emergence of 2.0 cannot be adequately understood without reconstructing the shift from liberty to dignity.

[36] Bellamy observes correctly that the contemporary focus of constitutionalism rests on a bill of rights. See Bellamy, note 27 at 6–9.

[37] Thilo Rensmann, "The Constitution as a Normative Order of Values: The Influence of International Human Rights Law on the Evolution of Modern Constitutionalism" in *Common Values in International Law: Essays in Honor of Christian Tomuschat* (ed. Pierre-Marie Dupuy et al., Kehl: Engel Verlag, 2006) 259–278.

[38] See, for that matter, Michael Rosen, "Freedom in German Idealism," available at <http://scholar.harvard.edu/files/freedom_in_german_idealism_0.pdf> at 11–12.

[39] The latter appears to have been the understanding of the founding mothers and fathers of the German Basic Law that declares human dignity to be the reason for the recognition of human rights. See Christoph Enders, "The Right to have Rights: The Concept of Human Dignity in German Basic Law" (2010) 2 *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 1–8 at 2. See also Christoph Menke and Arnd Pollmann, *Philosophie der Menschenrechte zur Einführung* (Hamburg: Junius Verlag, 2008) 152–153.

[40] On reason as self-determining, see Hegel, note 19 at 67, 85, 95, 137.

[41] Schmitt, note 35 at 53.

CONSTITUTIONALISM AS A PROJECT OF EMANCIPATION

Ordinarily, this shift is intuitively associated with a reaction to the Holocaust. While this is arguably true for the German constitution,[42] it is not so easy to sustain this view for the Universal Declaration of Human Rights. If Moyn is right, there was no widespread Holocaust consciousness in the immediate post-war era.[43] The substance associated with modern human rights—that is, the full panoply of political, civil, and social rights—slowly but surely entered the domain of constitutional politics in reaction to what were perceived to be the root causes of the rise of authoritarian and totalitarian governments, namely, economic insecurity and dependence.[44] It is not unreasonable, hence, to follow Rensmann[45] in tracing the emergence of a human rights-based constitution back to Franklin Delano Roosevelt's plea for a Second Bill of Rights. It would have complemented traditional liberties, which Roosevelt took to be epitomized by freedom of speech and freedom of worship, with freedom from fear and freedom from want:[46] "Necessitous men are not free."[47]

What emerged from this background was the newly established connection between dignity and a full package of rights, which is manifest, not least, in the Universal Declaration.[48] Indeed, historically this is consistent with the various contemporary Roman Catholic teachings relevant to this story, not least because they embraced, however vaguely, a vision of the human community that tried to make out a third path between the ruthless individualism of liberalism on the one hand, and the depersonalizing thrust of totalitarianism on the other.[49] Thus understood, human dignity was very much associated with the aspiration to be a whole person within a community.

However, in order to reconstruct rationally the transition from a constitutionalism that emphasizes liberty to a constitutionalism that puts dignity at the center, it is necessary to perceive constitutionalism as a project of emancipation.

Constitutionalism 1.0 is a project of emancipation from received feudal hierarchy. This is evident not only in the constitutionalism of the French revolution but also in the self-understanding with which the colonists on the American

[42] Christoph Goos, *Innere Freiheit: Eine Rekonstruktion des grundgesetzlichen Würdebegriffs* (V&R unipress—Bonn University Press, 2011).

[43] Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Harvard University Press, 2010) 7, 47.

[44] Franklin Delano Roosevelt, State of the Union Message to Congress, 11 January 1944, *The Public Papers and Addresses of Franklin D. Roosevelt* (Samuel Rosenman, ed.), vol. 13 (New York: Harper and Row, 1950) 40–42.

[45] Rensmann, note 37 at 262.

[46] Franklin Delano Roosevelt, Address to Congress, 6 January 1941, available at <http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm>.

[47] Roosevelt, note 44.

[48] See the preamble of the Universal Declaration of Human Rights, 10 December 1948.

[49] Samuel Moyn, "Personalism, Community, and the Origins of Human Rights" in *Human Rights in the Twentieth Century* (ed. S.-L. Hoffmann, Cambridge: Cambridge University Press, 2011) 85–106; Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

continent embraced the freedoms allegedly guaranteed by the "ancient" English constitution. In both cases, constitutionalism is, even if with different temporal horizons,[50] intrinsically linked to overcoming a society predominated by formal status distinction and privilege. In the case of the *bourgeois* emancipation of constitutionalism 1.0, the new realm of equal freedom was supposed to be located within a market society largely immune from state interference.[51]

Decentralized human cooperation in markets, however, works by virtue of unintended man-made necessity. If all surrounding barbershops offer complementary coffee, my shop has to offer it too. This necessity is "external" in the sense that the opportunities to which it gives rise do not reflect what one wants by virtue of who or what one takes oneself to be.[52] There is no way of living off exploring the contraction of God at the moment of creation if all that people want is lean food and inexpensive mobile phone plans. Likewise, if others work for less, one has the choice of working for less oneself. If competitors innovate, one has the choice to innovate first. A competitive life is spent engaging in pre-emptive strikes. If one does not choose what one must choose, one will go under. The choice is the choice of necessity, objectively and subjectively considered. It is the choice *of* and *by* necessity.

The freedom enjoyed in this type of society is *formal*. One gets to choose, and freedom of choice is indifferent to the substance of choices. What is more, it is so formal that it is even indifferent to its own exercising. The exercise of volition morphs into the flexible adaptation to shifting circumstance.

Human dignity signifies—without being exhausted by it—the reassertion of individual freedom against its loss in a web of horizontal transactions.[53] Constitutionalism 2.0 endorses negative liberty from markets through the pooling of risks. The negative liberty from state interference is thus complemented with the negative liberty from interference by the aggregate effects of private acts, or—as we shall call it—the private polity. In fact, it is the *same* negative liberty applied to different *forms* of being who *we* are, collectively considered. It is the emancipation of human beings from the collective face of their private nature. The government, by contrast, represents the public side of their self.

[50] Usually a contrast is drawn between the forward-looking French declaration of the rights of men, which contained a program for the rebuilding of society, and American state constitutions whose task was to preserve an already developed post-feudal, civil society. See Jürgen Habermas, "Naturrecht und Revolution" in his *Theorie und Praxis: Sozialphilosophische Studien* (2nd edn, Frankfurt aM: Suhrkamp, 1971) 89–127. See also Dieter Grimm, "Europäisches Naturrecht und Amerikanische Revolution. Die Verwandlung politischer Philosophie in politische Techne" (1970) 3 *Ius Commune* 120–151.

[51] See the discussion in the works of Grimm, note 5.

[52] The necessity that is felt on the latter grounds is consistent with freedom. This has been a topic of philosophical reflection from Fichte to Frankfurt. See Johann Gottlieb Fichte, *System der Sittenlehre nach den Prinzipien der Wissenschaftslehre*, Sämtliche Werke (ed. I.H. Fichte, Berlin: de Gruyter, 1971) vol. 4, 35–36. Harry Frankfurt, *Necessity, Volition and Love* (Cambridge: Cambridge University Press, 1998).

[53] Yielding to necessity also does not detract from dignity if it is a means to pursue self-chosen aims. This explains why the means-ends formula is important to the jurisprudence of dignity. It does not offend human dignity if necessity serves agreeable ends. This could be said on behalf of markets. The mutual reification of humans into resources is an efficient means of catering to their needs. The increase of welfare for all is the enclosure of necessity that preserves human dignity.

THE MORE GENERAL MEANING OF HUMAN DIGNITY

It might be objected that while this historical nexus is not entirely implausible, it nonetheless endorses a very narrow understanding of dignity. It seems to reduce the notion to freedom from want.

The objection is mistaken, but in the right way. The emancipation from economic necessity and commodification is indeed only a particular application of a broader idea. Dignity enters the purview of constitutionalism with a focus on a general pathology of private freedom. Nonetheless, even in this usage dignity already exemplifies a more general idea.

People who struggle with economic necessity remain formally free. They do not lose their freedom of choice. Their choices, however, are driven by their needs and their fear of losing their livelihood. They take on any job they can find. They readily serve any master. They run through this world with a servile posture. They do not *lead* their lives. Admittedly, they may be able to get by, but they are not substantively free. Whatever conception they may have had of where their lives were heading has been torn apart by the overwhelming forces of necessity. Theirs are not lives lived in dignity.

The link to the more general idea of dignity is provided by aspiration to stand tall. As the social face of freedom, human dignity is about sustaining the appearance of being human toward others. This requires being demonstrably able to pull oneself together. The means thereto is action.[54] Aside from being more or less aware of our aims, we are also—in a morally unpretentious way—paying attention to whether what we are choosing is right for *us*. The standards that we observe may be conventional. But it is important that we do not behave like puppets on a string. We have dignity only if it can be seen that it is we who are pulling ourselves together.

Human dignity is either lost or severely damaged whenever this capacity is suspended either from the outside or the inside. We are then demonstrably falling apart. Aside from exposure to economic necessity, this happens on account of what is our nature in us. Being overtaken by necessity—as is epitomized, for example, by any form of compulsion—confronts us with our dependence on a basis that is stronger than our ability to govern and to conduct ourselves. It reminds us that our mindedness is a brittle achievement that we have at the pleasure of something both intractable and fundamental.[55] Nature is what makes us possible, and it threatens to disrupt us.[56] It also makes us vulnerable to others. Our rootedness in nature can be turned against us. We can be brought into a

[54] Korsgaard, note 6 at 20.

[55] It is for heuristic reasons only that I tacitly draw on the distinction between ground and existence, which is so important for Schelling's middle philosophy. Schelling would have called nature the basis or "ground" of existence that enables and threatens to undo, at the same time, all order and coherence. See F.W.J. Schelling, *Über das Wesen der menschlichen Freiheit und die damit zusammenhängenden Gegenstände* (ed., T. Buchheim, Hamburg: Meiner, 1997) 30. On the systematic context of Schelling's ideas, see the excellent introduction by Michelle Kosch, *Freedom and Reason in Kant, Schelling, and Kierkegaard* (Oxford: Clarendon Press, 2006) 98–100.

[56] Slavoj Žižek, *The Indivisible Remainder: On Schelling and Related Matters* (London: Verso, 1996) 72–73.

situation where we are helplessly exposed to our disruption. Pain and fear expose humans to their persistent vulnerability to physical reactions. Dignity is lost, then, in the gaze of the perpetrators who not only inflict suffering, but also perceive and enjoy the helplessness of their victim. Persons who are screaming and shivering are overtaken by emotional reactions. They involuntarily do what the perpetrator wants them to do. They are turned into pieces of matter.

These are more general implications of human dignity. Nonetheless, it is important to view human dignity as intrinsically associated with the whole package of rights that are characteristic of constitutionalism 2.0. Its point is to overcome a constitutionalism that puts freedom of choice at the center with a constitutionalism that concerns itself with rising above the disruptive effect of our nature. Hence, positive obligations on the part of the state and the third party effect of fundamental rights are integral parts of the protection of dignity.[57]

The potentially enslaving effects of bourgeois emancipation are not overcome if people remain alienated from their political selves. The importance of this point may not be entirely obvious, but it actually explains the ambivalence of 3.0 *vis-à-vis* 2.0. Constitutionalism 3.0 pushes the project of emancipation beyond national bounds. If this is accompanied with de-politicization, as it arguably is, the progress of emancipation becomes overlain with regression. This explains why, from the perspective of emancipation, at its third stage constitutionalism becomes *internally ambivalent*.

POSITIVE OBLIGATIONS, THIRD-PARTY EFFECT, AND INSTITUTIONS

Strangely enough, constitutionalism 2.0 emerges and flourishes in a country that does not recognize social rights in its constitution: Germany. But despite the fact that the drafters of the German constitution thought it unwise to incorporate promises that were difficult to keep in a post-war situation,[58] the Federal Constitutional Court developed a sophisticated jurisprudence of positive rights.[59] Initially, the Court spelt out the actively protective function of the state not without trepidation. The fundamental rights contained in the constitution were said to be not only negative rights, but also "objective principles."[60] It was not clear under which conditions such an objective principle would give rise to a positive right. Objective principles could mean a variety of things. By far the most important innovation to follow, however, was the "duty to protect," which introduced *de facto* the third party effect of human rights.[61]

[57] The irony of human dignity, understood as a right, and of human rights in general, is that their particularity loses track of the overall objective. The means-ends formula, alas, takes center place.

[58] Rensmann, note 37 at 173.

[59] For a particularly useful introduction, see Dieter Grimm, "Human Rights and Judicial Review in Germany" in *Human Rights and Judicial Review: A Comparative Perspective* (ed. D. Beatty, Dordrecht: Martinus Nijhoff, 1994) 267–295.

[60] Grimm, note 59 at 283.

[61] For a succinct analysis, see Mattias Kumm, "Who is Afraid of the Total Constitution?" (2006) 7 *German Law Journal* 341–370.

Even more importantly, the Court soon became acutely aware of the institutional nature of fundamental rights.[62] In this context, formal freedom is given substance. It involves a combination of two ideas. First, the Court recognizes that the exercise of fundamental rights creates certain public goods, which are also objective principles guaranteed by the constitution. From this it follows that the legislature is under an obligation to sustain the institutional conditions under which these goods can be brought about.[63] Second, the ominous problem of "balancing" the fundamental rights of individuals and other interests can be given guidance against the overall institutional background. Individual fundamental rights attain their significance and weight with an eye toward how individuals contribute to the germination of these goods. It is not by happenstance, and also not with empty rhetoric, that the German Court proclaims that the freedom guaranteed by the Basic Law is "not that of an isolated and self-regarding individual but rather that of a person related to and bound by the community."[64] In fact, it is possible to reconstruct the institutional framework of individual freedom from the perspective of relationships of *social* freedom in which the pursuit of the aims of one person is mutually instrumental for the pursuit of the aims of another person. It is in these institutional settings that freedom is emancipated from serving the end self-preservation, broadly understood.

The German constitution, the Basic Law, puts dignity at the top. Article 1 section 1 of the Basic Law states that human dignity is inviolable. The statement is followed by the pledge in section 2 that "the German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." Section 3 ordains that the rights that follow shall be directly binding on all three branches of government. The overall composition of Article 1 suggests that human dignity was believed to be the foundation of all fundamental rights without being a right itself.[65] In spite of the overall structure of the constitutional document, the Court has turned human dignity into a separate fundamental right. The result is threefold. First, the particularization of dignity, which was supposed to be the universal aspiration of the constitution, submerges the nexus with a revised project of emancipation. The Bill of Rights loses its organizing center when human dignity becomes one of the elements for which it was to provide orientation. Second, the meaning of dignity becomes identified with judicial formulae that are used to ascertain violations of dignity. Of essential relevance becomes the question of whether people have been treated as "mere means." Third, dignity becomes deflated and slightly

[62] Peter Häberle, *Die Wesensgehaltsgarantie des Artikel 19 Abs. 2 des Grundgesetzes* (3rd edn, Heidelberg: C.F. Müller, 1983).

[63] See, for example, the Third Broadcasting Case (1981), 57 BVerfG 295, translated in Donald P. Kommers and Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Durham: Duke University Press, 2012) 514.

[64] Life Imprisonment Case (1977), 45 BVerfG 187, Kommers and Miller, note 63 at 365. For an account, see Winfried Brugger, "Communitarianism as the Social and Legal Theory behind the German Constitution" (2004) 2 *International Journal of Constitutional Law* 431–460.

[65] For a discussion of this claim, see Goos, note 42 at 166–168.

decomposed in a curious case law that is a composite of casuistry and rather overdrawn deontological claims.[66]

THE STRIKING IRRELEVANCE OF THE "COUNTER-MAJORITARIAN DIFFICULTY"

If there is one phenomenon that bestows intellectual salience on constitutionalism 1.0, it is the persistent debate over the legitimacy of judicial review of legislation.[67] The core question is whether the intra-constitutional representation of pre-constitutional sovereign authority in the legislature should serve as the watchman of the constitution or whether the judicial department should play this role because it is generally well equipped to say what the law is. In all fairness, this question may not admit of a conclusive answer.

The core relevance of the question of judicial review to constitutionalism 1.0 makes it all the more surprising that it more or less disappears on the next level. It is no longer relevant. The explanation lies in a profound alteration of the constituent power. It shifts from activity to receptivity. With regard to human rights, the constitution becomes a self-denying ordinance on the part of the sovereign. The people recognize that their hands were already tied before they even entered the scene. This recognition *replaces* the counter-majoritarian ("Why should judges have the power to override democratic majorities?") with a super-majoritarian difficulty.

Human rights have to be recognized by all peoples. Their adoption within a constitution is not an act of choice but the fulfillment of a moral duty. Human rights are not at the disposal of a people. *A fortiori*, the majority represented in parliament cannot have a choice over them either. Why should even a super-majority be given the power to revoke what requires recognition owed to intrinsic value? This is the question that led Schmitt to the conclusion[68] that the part containing the fundamental rights of the Weimar constitution is essentially different from the organizational constitution of the legislative state.[69] Within a human rights-based constitution, the legislature can no longer claim to be the intra-constitutional representation of the pre-constitutional sovereign since the sovereign does not exist as a collective body, however elusive it may be, but only as an act of recognition that transforms the constitution into a carrier of morally compelling demands. The constituent power is passive, not active. Hence, it cannot be adequately represented by the branch of government that is most

[66] The latter is most controversially manifest in the aircraft takedown case, BVerfG 15, February 2005, BvR 357/05. For a brief discussion, see Michael Rosen, *Dignity: Its History and its Meaning* (Cambridge, Mass.: Harvard University Press, 2012) 104–107.

[67] For a late fruit of this debate, see Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *Yale Law Journal* 1347–1406.

[68] Schmitt, note 35 at 41: "In general, it would be a peculiar type of 'justice' to declare a majority all the better and more just the more overwhelming it is, and to maintain abstractly that ninety-eight people abusing two persons is by far not so unjust as fifty-one people mistreating forty-nine."

[69] Schmitt, note 35 at 53, 55.

similar to a constitutional convention or by other forms in which the people *act* as a corporate body.

Consequently, the legislature drops out of the picture drawn of the counter-majoritarian difficulty. This leaves us with the judiciary. Interestingly, the role of the judiciary changes too, since under the precepts of constitutionalism 2.0 the constitution no longer is a set of powers acting upon one another. Rather, it comprises a set of programmatic values that need to be observed in the pursuit of any political goal. The judiciary becomes a censorial body that watches over the implementation of the constitution, understood as the ultimate final program of politics. This is the core idea of the "value order:"[70]

> The system of values, which centres on the dignity of the freely developing person within society, must be seen as fundamental to all areas of law.
>
> This value system, which centres upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication.

The legislature no longer has a privileged position in such a constitutional system. It is one agent among several others that are confronted with the demand of either doing more or less[71] when they create a legal order in which dignity and the free development of personality are to be given actuality.

THE NEW ESSENCE OF CONSTITUTIONAL ADJUDICATION

The constitution of constitutionalism 2.0 is ontologically different from its precursor. It is not only composed of powers whose limits are set by rules susceptible to interpretive elaboration. The constitution is not a side-constraint on the pursuit of various objectives. Rather, the constitution sets out the principles that the polity is supposed to build into its legal system. The constitution is, therefore, not a norm external to the pursuit of whichever goal. It is integral to the pursuit of any political aim.

The constitution is the ultimate program of politics. Sound action is required for its actualization. The core of the constitution is, therefore, composed of standards for the assessment of the rationality and reasonableness of any government action against the normative background constituted by the value order. This order is supposed to be one coherent whole. While human dignity is at the center, all rights are understood to be specifications of freedom and equality.[72]

[70] The first paragraph cited in Kommers and Miller, note 30 at 57. The second paragraph is from the Lüth case, BVerfG 7, 198, Kommers and Miller, note 63 at 444.

[71] On proportionality and reverse proportionality, see Grimm, note 59 at 275, 279.

[72] Mattias Kumm, "Constitutional rights as principles: On the Structure and Domain of Constitutional Justice. A Review Essay on a Theory of Constitutional Rights" (2004) 2 *International Journal of Constitutional Law* 574–596.

The text of the constitution is of subordinate relevance. The application of the constitution is not based upon an interpretation.[73] The true seat of constitutional authority is a "constrained" judicial conversation that revolves around two principles: proportionality and reverse proportionality. The recurring questions are whether government action has been too intrusive *vis-à-vis* fundamental rights or not sufficiently protective of them.

Constitutionalism 1.0 is based on the understanding that law requires outward conformity with legal norms. Law imposes *external* constraints. It is a system of legality. Constitutionalism 2.0, by contrast, goes beyond demanding observance of jurisdictional or behavioral space. The constitution establishes *internal* constraints, for it supplies the semantics of a constrained conversation[74] over the rationality and reasonableness of government action. It is no longer the case that the legal power to regulate comes first while the rationality test is merely a mode to ascertain whether the limits set for this power have been observed; the power to regulate is derivative of successfully climbing the obstacles posed by the grammar of justification. In order to have a shorthand expression for this transformation, it can be said that proportionality is taking the place of the former version of superlegality.

FROM HUMAN RIGHTS TO PEER REVIEW

Constitutionalism 2.0 is based upon the recognition of human rights. But it still presupposes sovereign peoples. This leaves constitutional authority in a remarkable limbo. While human rights are supposedly superior to sovereign authority, which is indeed forced to relinquish its voluntarism, they also require sovereign authority for their articulation and realization.

This relationship of simultaneous superiority and dependence is of enormous import. First, it means that any institution wielding public authority needs to be as good as any other in the face of human rights. Second, whether the institution meets the relevant standard can only by ascertained by heeding what peer institutions are doing. Human rights *depend* for their articulation and realization on public authority even though they also *transcend* any instantiation of it. The transcendence of particularity can be real only in horizontal self-relativization. There is no other way. Sovereignty *serves* human rights through its *own* abdication. Authority says: "I am one among others. In order to find out whether I live up to my standards, I will look around and see what my peers are doing."

This marks the transition to constitutionalism 3.0. National polities retain final authority provided that they commit themselves to human rights. Owing to this commitment, the final authority needs to be *earned* by explaining oneself with an eye toward how members of the peer group behave. This is the practical implication of the simultaneous retention and abdication of sovereign authority in the field of human rights. As the discussion over the use of "foreign precedent" in

[73] Of course, whatever judges do is dressed up as "teleological interpretation." See Kommers and Miller, note 63 at 63.

[74] Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980) 8.

American constitutional law reveals, this tension cannot be integrated into the mindset of constitutionalism 1.0. According to 1.0, the constitution is all about *us*, and not about *them*.[75] The truth, however, is that with the transition to constitutionalism 3.0, the quest for the adequate protection of human rights is conducted within informal or formal systems of peer review.

The European Convention on Human Rights established the most successful formal system.[76] In many respects, the notion of peer review most adequately captures its spirit. First, the judges deciding cases on panels of various sizes are from the participating states.[77] Second, the "evolutive" interpretation given to various provisions of the convention pays attention to an emerging convergence, in particular when it comes to determining how much leeway is left to a Member State within the so-called "margin of appreciation."[78] Third, the authority granted to the European Court of Human Rights to find a violation renders the system more hierarchical than it truly is.[79] One would expect not only that the findings by the Court are final but also that they establish binding authority for whichever country happens to participate in the system. But matters are *in fact* messier than they appear on the pages of international instruments. In certain instances, the participating states do not comply either because the countries regard their own constitutional essentials affected or because they find that the European Court has acted *ultra vires* in a case when an "evolutive" interpretation has given rise to an all too surprising result.[80]

This reflects the enduring relevance of self-relativizing sovereignty. Any site of public authority[81] has to respect human rights. Arguably, with the horizontal effect of rights, this may be also true of sites of "private" authority. Each has equal authority to give effect to its mandate. The effort to reconcile potentially conflicting peer authorities within informal or formal processes of review is commonly called "constitutional pluralism."[82]

[75] See "A Conversation Between U.S. Supreme Court Justices" (2005) 3 *International Journal of Constitutional Law* 519–541. For a discussion, see Christopher McCrudden, "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights" (2000) 20 *Oxford Journal of Legal Studies* 499–532.

[76] For an explanation of the creation of the system that highlights the interests of new democratic states to use international peer review in order to "lock in" domestically their commitment to democracy and human rights, see Andrew Moravcik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54 *International Organization* 217–52.

[77] Article 20 of the European Convention on Human Rights.

[78] On this see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2008) 65, 75–78. A more nuanced picture will be developed in Chapter Four.

[79] Mark W. Janis, Richard S. Kay, and Anthony Bradley, *European Human Rights Law: Text and Materials* (3rd edn, Oxford: Oxford University Press, 2008) 845–853.

[80] On these cases, concerning France and Austria respectively, see Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) 119–126.

[81] I am borrowing the term "site of authority" from James N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997).

[82] For a useful introduction, see Daniel Halberstam, "Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance" in *Constitutional Pluralism in the European Union and Beyond* (ed. M. Avbelj and J. Komárek, Oxford: Hart, 2012) 85–125.

THE MARGIN OF APPRECIATION

Pluralism is the consequence of the mutual recognition of final authority.[83] Each site of authority has the final say. The result of this stance is a growing potential for conflict. In order to avoid its occurrence each yields to the authority of the other "so long as"[84] this other does not invade that jurisdictional space where each decides that yielding must come to an end. Germany yields to the European Union with regard to the protection of fundamental rights so long as the European Union retains a standard of protection that is equivalent to its own.

Intriguingly, each participant in an international peer system retains final authority on the question of what standard needs to be sustained by others. Legitimacy is earned by comparing oneself with others, but nobody is superior to anyone else. Hence, pluralism is not at all indicative of the emergence of a post-sovereign world.

Constitutional pluralism has been implanted into the convention system already in the form of the doctrine of the "margin of appreciation."[85] In its strong sense,[86] it reflects considerations of "institutional competence" in human rights law concerning the conditions under which the international tribunal yields to the judgment of national institutions with respect to assessing the *significance* of public interests and the *necessity* of measures to secure them. The doctrine is based on the idea that national authorities are better positioned to strike the balance between individual rights and the common good since they are in "direct and continuous contact with the vital forces of their countries."[87] That the vital forces could be evil forces does not enter the picture as long as the societies continue to be democratic.

FROM THE SOCIAL COMPACT TO THE ABSTENTION FROM RESISTANCE

The structural understanding of the margin of appreciation offers a solution to the situation of pluralism before it even arises. Basically, it rests on the same gesture of yielding to the authority of another "so long as" this other respects a threshold level of constitutional decency.

"Yielding so long as" is how authority is generally conceived of under constitutionalism 3.0. There is no reason not to view even individual conduct as governed by the same principle. Individuals yield to the demands of whoever claims

[83] Evidently, pluralism is a variety of monism. This question need not detain us here. See Alexander Somek, "Monism: A Tale of the Undead" in *Constitutional Pluralism in the European Union and Beyond* (ed. M. Avbelj and J. Komárek, Oxford: Hart Publishing 2012) 343–379.

[84] The idea has been first developed by the Federal Constitutional Court in relation to the claim of EU law to be supreme. For a historical account, see Julio Baquero Cruz, "The Legacy of the Maastricht-Urteil and the Pluralist Movement" (2008) 14 *European Law Journal* 389–422.

[85] See, as *locus classicus, Handyside v. United Kingdom* 1 EHRR 737 paras 48–49.

[86] Letsas, note 78 at 80, 84, 90.

[87] Handyside, note 85 at para. 48.

to have authority to direct them so long as the conditions warranting resistance are not met. This is the basic relationship to authority that is implicit in constitutionalism 3.0. Not by accident, it is homologous to freedom of conscience. Individuals or sites of authority yield to whoever wields *de facto* authority unless their conscience (or their understanding of their own law) warrants defiance. Legitimate authority is derivative of the absence of conscientious objection.

There is nothing beyond conscience. It has final authority. Only conscience can tell whether the call of conscience has to be followed. Pluralism, designed consistently, does not end at the threshold of public authority. At the end of the day, all jurisdictional authority devolves to whoever believes to be the conscience of humanity. This could be anyone. And this anyone has to constitute him or herself as that voice.[88]

While constitutionalism 1.0 explained the constitution on the basis of an analogy to the social contract, constitutionalism 3.0 is consistently anarchical. There are no promises, only various arrangements of conditional yielding. The fabric of society is not composed of agreements but woven of concurrent—and concurrently reasonable—omissions of resistance. Constitutionalism 3.0 is constitutionalism in its most individualistic form.[89]

While it is taken for granted that each system that protects human rights relies on proportionality for the articulation of normative constraints, proportionality no longer represents the ultimate standard. The margin of appreciation continues the chain of substitution that began with the understanding of normativity that puts limited powers at the center. While legally limited powers were dethroned by proportionality, the latter now becomes subordinate to the application of a standard of self-relativization. What supposedly governs yielding is left in a sufficiently indeterminate state so as to leave sufficient wiggle room for adaptation on prudential grounds.

POLITICAL CONSTITUTIONALISM REDUX

Under conditions of pluralism there is no final legal resolution to jurisdictional conflicts between and among different systems. Each system has its own way of accommodating the presence of others. No meta-law governs their interaction.

Modern pluralist theory assumes, however, that there is a layer of shared meanings available in order to articulate assertions of jurisdiction.[90] For example, a less comprehensive system might claim that it legitimately establishes

[88] This is a gesture remarkably similar to the sovereignty of the Leninist vanguard party. See Georg Lukács, *Geschichte und Klassenbewusstsein: Studien über marxistische Dialektik* (10th edn, Neuwied: Luchterhand, 1988) 499–500.

[89] This is particularly obvious in a work that claims to go beyond constitutionalism. See Krisch, note 80 at 69–105.

[90] Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State" in *Ruling the World? Constitutionalism, International Law, and Global Governance* (ed. J. Dunoff and J. Trachtman, Cambridge: Cambridge University Press, 2009), 258–325 at 277, 293–295, 290, 298–300; Daniel Halberstam, "Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States" in *Ruling the World?*, 326–355.

jurisdiction over certain issues simply because it is more responsive to the moral sensibilities of a resident population. Hence, "responsiveness" would be one element of the semantics with which various systems signal to one another why they believe that final authority ought to be theirs. The existence of this layer of shared meanings does not alter the fact that pluralism is essentially about the mutual recognition of final authority. Each system determines for itself whether it meets the standard set out in the semantics of mutual "engagement."[91]

In practice this means that in the course of pluralist interaction, all participants are able to exercise any power so long as they can effectively get away with it. While this smacks of the law of the jungle,[92] it is obvious that the overall interaction between and among national or international or supranational sites is eventually embedded into political constraints. Owing to their existence, each participant realizes it would be imprudent or unwise to offend others. They realize that they had better respect what is important to others and grasp opportunities to avoid conflict by leaving matters undecided.[93] Constitutionalism 3.0 is, therefore, witness to the return of *political* constitutionalism. Effective constraints emerge not from law but from more or less subtle equilibria of power. In contrast to the legally grounded political constitutionalism envisaged by the system of checks and balances, this political constitutionalism is rather crude.[94] The overall constitution of the multilevel system ceases to be law altogether. It is a factum, not a norm.

Therefore, constitutionalism 3.0 is congenial to the pre-modern way of conceiving constitutional authority. According to this venerable tradition, the constitution is supposedly composed not of one piece but of heterogeneous groups. The art of constitution making consists of arranging these forces in a manner that does not risk disruption of the polity owing to the alienation and revolt of one of these groups.[95]

By comparison with ancient predecessors the pluralism of constitutionalism 3.0 must appear to be rather faint-hearted. The systems involved are all of the same kind. In the case of the European Convention system, for example, each system is committed to the protection of fundamental rights. In the case of the European Union, in turn, each system is committed to democracy and the rule of law. They are substantively homogeneous. Supposedly, there is a layer of shared meanings that they resort to in order to explain themselves to others.

This tame pluralism is decidedly different from some conceptions of the mixed constitution according to which polities are based on the different temperaments

[91] See my observations in the article quoted in note 38.

[92] See my observations in the article quoted in note 38 at 367.

[93] For a remarkable example set by the Federal Constitutional Court in which it elaborated the conditions for the exercise of its final authority in a manner in which it became effectively a self-denying ordinance, see Christoph U. Schmid, "All Bark and No Bite: Notes on the Federal Constitutional Court's 'Banana Decision'" (2001) 7 *European Law Journal* 95–113.

[94] See above p. 16.

[95] This approach has been recently beautifully reconstructed by John P. McCormick, "'Greater, More Honorable and More Useful to the Republic': Plebeian Offices in Machiavelli's 'Perfect' Constitution" (2010) 8 *Journal of International Constitutional Law* 237–262.

of contending groups.[96] The difference of temperaments translates into the external interaction between offices that actually belong to each group's proper constitution. Ancient pluralism does not exhaust itself in the mutual ascription of final authority. It favors the institutionalization of effective veto powers.

THE BRAVE NEW WORLD OF EXIGENCIES

That constitutionalism 3.0 is a form of political constitutionalism can be observed also against the broader social context from which it emerges. It is a world in which the remains of constitutionalism 1.0 are increasingly subject to erosion. As a result, one arrives at a twofold picture. While the world of human rights protection is "pluralistic" owing to various forms of formal or informal peer review, the organizational part of constitutional law is permanently under siege by the exigencies of practical problem solving across national borders and various layers of an emerging multilevel system.

The pressures of practical problem solving, which are most salient in combating terrorism or rescuing a common currency, affect the role of legislature, which took center place in the world of constitutionalism 1.0. Nowadays, societies exist under conditions of permanent social acceleration.[97] Not least owing to the influence of mass media reporting, the public and politics are under the impression of being persistently seized by this or that crisis. Under these conditions, expeditious and effective problem solving becomes imperative. Authority is, therefore, systematically inclined to migrate toward *transnational* fora (or "networks") of *executive governance*.[98] The new allocation of power is occasioned by the *impression of necessity*. The authority that is constituted *de facto* ceases to be based on a charter created by liberty. In its more disturbing instantiation, constitutionalism 3.0 is the constitutionalism of necessity.

Once repeated and expeditious problem solving becomes the categorical imperative of governance, the executive branch is likely to gain power at the expense of the legislature.[99] Officially, the central role accorded to the legislature stays in place. However, in the face of the exigencies of interventions and the technicality of regulation, the legislature needs to cede ground to administrative processes. Legislative delegations and various avenues of oversight are means to retain the superiority of the legislature at a symbolic level. But these are, in fact, *mere* symbols. While delegation has long ceased to be convincing as a doctrine, oversight might not be terribly effective owing to a lack of capacity on the part of the legislature to monitor and apprehend even a fraction of what is done by the administrative branch.[100] The very reasons that make delegation reasonable

[96] John P. McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011) 5, 23.

[97] William E. Scheuerman, "Citizenship and Speed" in *High-Speed Society* (ed. H. Rosa and W. Scheuerman, University Part: Pennsylvania State University Press, 2009) 287–306.

[98] *Handbook of Transnational Governance* (ed. T. Hale and D. Held, Cambridge: Polity Press, 2011).

[99] For an explanation of the causes, see Posner and Vermeule, note 24 at 26, 42.

[100] Posner and Vermeule, note 24 at 19.

explain why oversight is blunt, in particular owing to the legislature's lack of information and expertise.[101]

The real world of constitutionalism 3.0 is the world of a perplexingly diffuse administrative state sans sovereignty juxtaposed with a multilevel system of fundamental rights protection. Old domestic authorities persist, not least because the national coercive apparatus is indispensible for purposes of implementation. It is more cost-effective than private enforcement or security services. Nevertheless, the center of gravity with regard to risk management and crisis intervention shifts to transnational governance structures. As the European sovereign debt crisis has revealed, formal legal constraints are bent in order to accommodate necessities.[102] Elections on the national level matter inasmuch as they add public acclaim to one or the other *fait accompli*. If the voters do not deliver "reasonable" results they are suspected of adhering to dangerous right-wing ideology.

BEYOND EMANCIPATION: TOWARD AUTHORITARIAN LIBERALISM

Turning to the factors triggering this development, constitutionalism 3.0 needs to be set against the background of the evolution of modern capitalism. If Streeck is right, the post-war development of the Western economies has been witness to a displacement of the original conflict between capital and labor with a persistent tug-of-war between countries with high public debt, on the one hand, and financial markets, on the other.[103] Countries that struggle to restore private credit to their damaged economies have to increase their public debt. In order to succeed at that, they depend on a favorable response from those institutions that actually benefit from their largesse.[104] Evidently, the locus of control shifts from politics to the economy. The consequences are disheartening. In order to come out with a sustainable credit score, countries need to implement austerity programs that signal credibility to credit markets. Countries seem to have no choice. The affected populations either react with revolt or realize that there is nothing left for politics to decide and turn away from democracy. It begins to dawn upon them that the real constraints on governance are economic. They are intrinsic to fostering the public weal.[105]

In the end, constitutionalism persists in a symbolic sphere where heated debates about court decisions compensate for the loss of political agency. Constitutionalism 3.0 is most salient where fundamental rights protection has become pluralized and fluid. Its major attractors are cases concerning issues

[101] Posner and Vermeule, note 24 at 27.

[102] Martin Höpner and Florian Rödl, "Illegitim und rechtswidrig: Das neue makroökonomische Regime im Euroraum" (2012) *Wirtschaftsdienst* 92(4), 219–222.

[103] Wolfgang Streeck, "The Crises of Democratic Capitalism" (2011) 71 *New Left Review* 5–29.

[104] Streeck, note 103 at 26.

[105] On the contrast between external legal constraints and internal constraints of the political economy, see Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–79* (trans. G. Burchell, Houndmills: Palgrave, 2008) 13–21.

such as gay marriage, transsexuality, headscarves in public settings, or crucifixes in classrooms. These issues are highly morally charged. Economically, they are largely neutral. Constitutionalism ceases to be a project of emancipation. While the gaze of members of legal academia, of various "activists," and of more upscale journalism is directed at court decisions that address these moral questions, the remains of constitutionalism 1.0—such as the separation of powers—are slowly eroding. The received allocation of powers becomes flexibly adapted to fit the imperatives of economic crisis management. The reactions of economic agents, such as financial markets or rating agencies, are of utmost importance to the design of economic and fiscal policies, but they do not bear any public responsibility. Financial markets appear to have a predilection for public austerity. Consequently, governments cooperating across national bounds need to ever more tightly tame democratic resistance against retrenchment in order to implement from above what is good for the "healthy economy."[106]

The emerging authoritarian liberalism[107] is internal to the liberalism that conceives of freedom as formal freedom of choice. States that jointly abstain from controlling markets expose themselves fully to their force. They need to be governed like businesses in order to navigate civil society through a sea of unpredictable forces. It is one of the great ironies in the history of neoliberalism that Hayek firmly believed that economic governance can be sequestered at the level of private firms whereas public authority would have to respect the rule of law.[108] With the current transformation of economic liberalism, it turns out that Hayek was terribly mistaken. In order to sustain private businesses—in particular through a viable banking system—any national economy needs to be managed like a business. Economic liberalism is hoist with its own petard. Once everything is economic, nothing can comply with rules because everything requires micro-management.

THE TWO FACES OF THE COSMOPOLITAN CONSTITUTION

It would not be possible to perceive constitutionalism 3.0 as continuous with the overall tradition of modern constitutionalism if it could not be espoused in terms that put freedom, equality, and—most importantly—collective self-determination at their center. It is indispensible, therefore, to complement the sketch of historical transformations with a systematic reconstruction in the course of which, paradoxically, an attempt has to be made to reconcile even the

[106] Carl Schmitt, "Starker Staat und gesunde Wirtschaft" (1932), reprinted in Carl Schmitt, *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916–1969* (ed. G. Maschke, Berlin: Duncker & Humblot, 1995) 71–85.

[107] Hermann Heller, "Autoritärer Liberalismus?" (1933), reprinted in *Gesammelte Schriften*, vol. 2 (Leiden: A.W. Sijthoff, 1971) 643–653. A general account of the rise of German ordo-liberalism and how it coincides with authoritarian liberalism is offered by Dieter Haselbach, *Autoritärer Liberalismus und Soziale Marktwirtschaft: Gesellschaft und Politik im Ordoliberalismus* (Nomos: Baden-Baden, 1991). See most recently, Michael A. Wilkinson, "The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union" (2013) 14 *German Law Journal* 527–560.

[108] Friedrich August von Hayek, *The Road to Serfdom* (London: Routledge, 1991; first edn 1944).

above necessity with a specific variety of freedom.[109] This is the task of the final chapter of this book.

The evolution of constitutionalism 3.0 gives birth to a type of constitution that can be called the cosmopolitan constitution. It does not designate a constitution "beyond the nation state," such as the constitution of the European Union, or some form of "societal constitutionalism;"[110] rather, the name seeks to capture the constitution of the nation states under conditions of international engagement.[111]

Intriguingly, the cosmopolitan constitution is internally ambivalent. This ambivalence is not caused by some external force that acts upon it. It arises from within. This lends the cosmopolitan constitution a janus-faced appearance. Viewed from one perspective, it is congenial to our political nature; from another, it is not. It is possible, therefore, to distinguish between a *political* and an *administrative* face of the cosmopolitan constitution.

The political face of the cosmopolitan constitution accounts for matters such as peer review and the yielding to authority "so long as. . ." – authority *par provision*, as it were. As we have already seen, the cosmopolitan constitution severs the authority of human rights from the national polity but also depends on the state for their realization. The resolution of this tension is the co-existence of the national "spirit of the people" within a system of pluralistic "mutual engagement." This is consistent with a certain cosmopolitan understanding of collective self-determination.

THE POLITICAL FACE

Generally, one is collectively self-determining if one permits determination by an entity other than oneself to which one nonetheless belongs. As a citizen, I am collectively self-determining if I submit to the authority of *my* citizen body regardless of whether I support the prevailing majority or not. The identification with the body politic sustains the identity in spite of difference. At any rate, this is what it means to be *politically* self-determining. The submission to the authority of one's own folks is not unconditional. It is dependent on having one's rights respected, on the existence of a relatively fair system of representation and, finally, on the sense of sharing a place with others.

It is not inconceivable to arrive at an equivalent concept of cosmopolitan self-determination. Generally, cosmopolitanism admits of a number of variations, which need not detain us here.[112] According to a very elementary and not

[109] Will Dudley, *Hegel, Nietzsche and Philosophy: Thinking Freedom* (Cambridge: Cambridge University Press, 2007).

[110] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

[111] For a similar perspective, see Vlad Perju, "Cosmopolitanism in Constitutional Law" (2013) 35 *Cardozo Law Review* 711–768.

[112] For an overview, see David Held, *Cosmopolitanism: Ideals and Realities* (Cambridge: Polity Press, 2010) 39–50.

at all unappealing understanding, we are cosmopolitans inasmuch as we are at home in the world. If we conceive of ourselves as beings inhabiting the world while also recognizing that the world is composed of a plurality of political communities, our social existence is no longer mediated by our membership in our own polity. Being at home in the world, and not in one's political community, means to inhabit the world as a foreigner.

In order to arrive at a sound understanding of cosmopolitan self-determination, it is necessary to identify the conditions under which yielding to the law of any polity can be expressive of one's self-determination as a foreigner. These conditions have to guarantee that any polity is as good as any other for anyone even though their law will be inevitably marked by the particularity of national traditions. Arguably, these conditions are satisfied by, first, a system of human rights protection that meets the mark of international peer review and, second, a strong protection against discrimination on the grounds of nationality. If these requirements are met, non-citizens can endorse any system *as their own*. Their self-determination is mediated by virtual representation, which is but another name for collective self-determination of foreigners.

VIRTUAL REPRESENTATION

Virtual representation is one of the most notorious concepts of our political language.[113] Ever since Burke introduced the concept,[114] it has been suspected of being a fraud. It can be argued, however, that even though virtual representation would indeed amount to swindle if applied *vis-à-vis* citizens, it is quite accurate in order to describe the relation between foreigners and a national polity.

Correctly understood, virtual representation means to be represented through the *representation* of others (not through others as though these were deputies, this was Burke's misleading exposition of the idea[115]). The concept looks at the polity from a very traditional lens. Societies are made up of different groups ("descriptions"); such as trades, professions, or estates. In order to have their interests in a polity represented, even only virtually, it is sufficient to have representative samples of these descriptions participate in the political process. This means that as long as at least one representative of a group is given a voice, the interests of the group are represented.

Admittedly, the idea does not have appeal in a national polity, for it renders the represented entirely mute. But it has great appeal in a context where it is *prima facie* unobjectionable that the represented do indeed remain mute. This is the context in which foreigners are represented. Their representation is effected whenever it is principally *possible* that one citizen *might* articulate their interest. This is the case, indeed, so long as fundamental rights—in particular political

[113] For a superb discussion, see Melissa S. Williams, "Burkean 'Descriptions' and Political Representation: A Reappraisal" (1996) 29 *Canadian Journal of Political Science* 23–45.

[114] Edmund Burke, "Speech to the Electors of Bristol" (1774), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>.

[115] Edmund Burke, "Letter to Sir Hercules Langrishe" (1792), available at <http://www.ourcivilisation.com/smartboard/shop/burkee/extracts/chap18.htm>.

rights—are respected. Under this condition, foreigners are self-determining in any national polity by virtue of being represented through the representation of citizens. This means that the laws of a nation, such as France, are my laws if by "my" I mean it is a polity whose laws express my identity as a foreigner.

It is important to understand that cosmopolitan self-determination is not primarily about having the interests of outsiders somehow represented inside a national polity. It is about the opportunity of representation that foreigners would have if the polity were theirs. If this is guaranteed, they are *virtual* members. They are citizens of the world, and this world is composed of a plurality of national polities to which they do not belong as citizens.

BEING REPRESENTED BY NOT BEING THERE

This view must invite the objection that citizens whose views enjoy the support of the majority in their own country would be much worse off in another country where their views are of entirely marginal significance. But this objection misses the point. Any system of representation expresses the relative strength between and among different groups. The virtual representation of foreigners through the representation of nationals is intact if it is possible to have their political views and interests *potentially* articulated within the constitutional system. In other words, their views, their opinions, or their ideologies, if actually represented, would count as legitimate input. As long as this condition is met, non-nationals are present in a political system *precisely* by virtue of their absence. This is how one is at home in the world as a foreigner. Foreigners are represented through the constellation of political forces prevalent in the relevant country. As stated in the previous section, they are represented through representation as a whole.

A hypothetical example may help to clarify the point. Spanish social democrats believe that the creation of a stratified system of public education is wrong. They are, therefore, strictly opposed to creating "excellence clusters" or any other institution of "meritocracy." The Germans, on the other hand, are overcome by the idea that the state ought to help breed an elite. The view of Spanish social democrats does not have much support in Germany. The few people who hold it always suffer defeat. But even if there were not even one person in Germany opposed to elite breeding, as soon as the opposition can be voiced, the Spanish social democrats are virtually represented. They are present by their absence. Indeed, this absence accounts for the plurality of the political world to begin with. If it disappeared, the cosmopolitan world would indeed be one.

The relation of virtual representation pertains, *a fortiori*, also to citizens who do not vote. They decide, thereby, to inhabit their own country as a foreigner. As long as their country's legal system meets the condition set out above, they are collectively self-determining in a cosmopolitan form. This is not necessarily an uncomfortable position to hold. Virtual representation facilitates a legitimate disconnect from a polity.[116]

[116] Many people are already alienated from their political systems and do not see themselves represented by political parties. They find themselves in the relation of virtual representation. Their views could

The real legal possibility to have input in a foreign country formulates merely a necessary condition of virtual representation. But it is *not* sufficient. It would be inaccurate to say that foreigners are also virtually represented if their interests are unduly discounted. They would be treated as non-existent, not merely as politically disenfranchised. Hence, their interests could never be represented through a national representation that fails to protect them against discrimination on national grounds.

The most interesting question of the political cosmopolitan constitution is how this protection against discrimination is to be understood. May it be restricted to an equal treatment obligation toward foreigners, or is it to be extended into a principle that forces democracies to internalize the "externalities" that they create for others?

THE DARLING DOGMA

One of the most reliable satellites of the cosmopolitan constitution is what will be referred to in this book as the "darling dogma of bourgeois Europeanists." It is often cast as an argument about externalities that are supposedly imposed by one political unit on another. If Spain decides to ban the consumption of red wine because of the adverse impact that its consumption has on labor productivity, it creates an externality for Portuguese wineries. They lose a whole national market for their product. The point of the darling dogma is to present a relationship between regulating activity and its effect on outsiders as a problem of democratic legitimacy. The argument says that it is undemocratic for bounded democracies to adopt decisions whose implementation affects citizens of other states without giving these citizens a voice. Paradoxically, bounded democracies are presented as inherently undemocratic. It does not come as a surprise that the argument amounts to an indictment of national boundaries. Democracies are allegedly incapable of responding fully to the "needs and interests of those outsiders that are affected by their decisions."[117]

What is, however, surprising about the argument is that it has advanced to a standard of European political correctness in spite of its obvious flaws. Everyone professes belief in its purchase even though it rejects its core premise in its conclusion. Democracies adopt decisions. This presupposes a bounded political unit, for otherwise it would be impossible to count votes. The number of votes needs to be finite. Yet, owing to their very boundedness, democracies are supposedly undemocratic. Democracies would be fully democratic only if they transcended their boundaries and became more perfectly inclusive. Without boundaries,

be articulated, but they are discouraged from voicing them since they believe them to remain without impact. They live as foreigners in their own countries. The constitution is still revered by them and adhered to not least because it signifies in some instances the legacy of a great deed, a remarkable achievement that was brought about by a prior generation. The constituent power, therefore, remains an element of the political understanding of the cosmopolitan constitution.

[117] Krisch, note 80 at 86.

however, democracies cannot adopt decisions. By this logic, democracies should not decide.

Indeed, once the internal logic of the darling dogma is exposed, it becomes clear that it rests on an assimilation of democracy to the mind-set of liberalism. Liberalism has a preference for unanimity because liberalism puts rights before the political process. Rights give people at least a *prima facie* power to veto interferences. Hence, a unanimously agreed upon result is unproblematic because it satisfies the liberal principle according to which right-holders should in principle be free to dispose of their rights only voluntarily. If they do, they have nothing to complain about: *volenti non fit iniuria*. From the perspective of this liberal social vision,[118] sweet harmony of agreement is "democratic," and at any rate, it is more democratic than majority rule within a bounded unit.

The legitimacy of unanimity can easily be substituted with the belief in the right answer. One merely has to assume that all liberal subjects are reasonable. Reasonable people would converge on the right answer. Their idiosyncratic will would be overridden by insight. Such a substitution of willing with knowing may explain the appeal of the darling dogma. The idea may well be that at the end of a day of all-inclusive deliberation the right answer will be known. No decision needs to be taken. Someone will know the answer, however, that someone is notoriously unknown. If that someone were known it would, in order to be someone, have to have boundaries.

Its apolitical nature is not the only problem plaguing the darling dogma. It also leaves open under which conditions bounded polities could *legitimately* not take the interests of others into account.[119] Arguably, a secular liberal democracy may ignore a neighboring theocracy's interest in being surrounded by sibling theocracies. A country sustaining a high level of social protection may insulate itself against competitive pressures that originate from societies embracing authoritarian capitalism. The darling dogma says nothing about the *legitimacy* of the demands of others. It is substantially empty.

Rights are vehicles for excluding potential impositions by others. In order to have bite, the darling dogma would have to embrace a theory of the rights of individuals and collectives. Without an anchor in rights, the demand for participation loses its point. Mere participation neither confers nor enhances legitimacy; only *rightful* participation does. Everything else is troublesome meddling. Undoubtedly, the Pope has an interest in preventing abortions, but it would be more than odd to concede that the papal legate must participate in national political processes because the Pope has a stake in protecting the life of the unborn.

Again, the emptiness of the transnational effects standard is a consequence of a typically liberal dilution of political autonomy. The underlying intuition must

[118] On the concept of the "social imaginary" as "[…] ways in which [people] imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations," see Charles Taylor, "On Social Imaginary," available at <http://blog.lib.umn.edu/swiss/archive/Taylor.pdf>.

[119] For an extensive discussion, see Alexander Somek, "The argument from Transnational Effects" (2010) 16 *European Law Journal* 315–344, 375–395.

be that regardless of whether outsiders have legitimate interests or not, it is only fair to give them a voice. Only on the basis of their input can it be determined whether their concerns are relevant or not. In the liberal social imaginary, political rights provide opportunities for expression, but they do not confer powers to decide. Political autonomy is manifest, therefore, in freedom of speech or of the press, in the right to associate or in the right to petition. Within the same imaginary, public autonomy is often even more refined when its exercise is expected to exhibit certain deliberative qualities. Political autonomy is not treated as a right but is identified with the normative commitments intrinsic to its exercise.[120] It is political autonomy in *moralized* form, that is, a liberty that is already burdened with the normative expectation to behave well, to be reasonable and to do one's bit. This betrays the prevalence of a bureaucratic understanding of participation according to which all expression is to be directed at some form of constructive problem solving. Contributions by those who are affected by decisions are welcome, but they do not get to decide on the issues. None of this has anything to do with collective self-determination as sketched out above.

The incidence of the darling dogma indicates, therefore, that the cosmopolitan constitution also avails of an administrative face.

THE INTERNAL AMBIVALENCE

One may wonder what it is that is both "cosmopolitan" and "political" about the type of constitution reconstructed here. Ordinarily, political cosmopolitanism endorses the maxim that, since humans are in one and the same situation together, it is imperative to establish institutions that enable global political action. Presenting the equal treatment of disenfranchised foreigners as fulfilling the demands of cosmopolitanism must appear blatantly to sell cosmopolitanism short. What is more, it is not intuitively plausible to speak of a "political" cosmopolitanism by attributing great significance to inaction.

These doubts are unfounded. Ever since Diogenes,[121] cosmopolitanism has always had a strong negative component. It is manifest in rejecting membership to a bounded polity as too confining. Cosmopolitans are not at home in their own polity. They claim to be at home in the world. But the world is not a polis. Hence, they are foreign everywhere. Real cosmopolitanism requires reconstructing the political worlds from the perspective of foreigners. Moreover, since the world is not a polis, political cosmopolitanism is not really a political stance. It is a moral high ground, occupied by those who are particularly at ease making moral demands.[122]

[120] On this important difference, see, not least, Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt aM: Suhrkamp, 1992) 157. See also Christoph Menke, 'Subjektive Rechte und Menschenwürde: Zur Einleitung' (2009) 3 *Trivium* 2–6 at paras 4–5, available at <http://trivium.revues.org/3296>.

[121] Diogenes Laertius, *Lives of the Eminent Philosophers* (trans. R.D. Hicks, 2 vols, Cambridge, Mass.: Harvard University Press, 1925) VI, 63.

[122] See, for example, Peter Singer, *One World: The Ethics of Globalization* (New Haven: Yale University Press, 2002).

A cosmopolitanism that emphasizes not being at home where one is settled invites citizens to regard themselves as foreigners. Nevertheless, cosmopolitan self-determination—and, therefore, freedom—depends on the existence of bounded political units. Foreigners are collectively self-determining by virtue of political self-determination that respects the conditions of the cosmopolitan constitution. The political face of the cosmopolitan constitution can be sustained only as long as people conceive of themselves *simultaneously* as citizens and as foreigners.

However, such a dual conception is brittle. Political self-determination is an outgrowth of people's sharing a common form of life. At the same time, it serves as the *medium* for the realization of cosmopolitan autonomy. Viewed from that angle, it is an expedient for effecting virtual representation. It no longer avails of a substance but rather appears as merely *one* mode of realizing a social world that is hospitable to cosmopolitan subjects. More precisely, from the perspective of realizing human rights and non-discrimination, it does not matter which constellation of political forces mediates representation. One is as good as any other. But this implies that none has to be real. Owing to the universalization of virtual representation, the political process is itself susceptible to virtualization. All that matters is that there is some process capable of generating laws that pass cosmopolitan muster. Consequently, functional equivalents to democratic decision-making come into view. Cosmopolitan self-determination realizes that it can sever its mooring in political self-determination and align itself with other modes of rational choice and "good governance," in particular when the *rationality* of policies is of utmost concern. The situation is thereby profoundly altered. Indeed, it marks the transition to the administrative face of the cosmopolitan constitution, which is manifest in the increasing importance of executive authority. In this context, the cosmopolitanism that is tied, via virtual representation, to national polities is replaced with the accidental *internal* cosmopolitanism that emerges when life is no longer lived among others with whom one shares a place. Internal cosmopolitanism is the model of "belonging" that is consistent with the cosmopolitan constitution in its administrative form.

The political and the administrative faces of the cosmopolitan constitution are not mutually exclusive or clear-cut alternatives. They are—borrowing a famous image—two different perspectives on the same phenomenon. The administrative face emerges in the shade—or rather, *as* a shadow—of the political face. It offers a more sober perspective on the cosmopolitan constitution.

CONVENTIONS IN LIEU OF JUDGMENT

People who do not live among others are no longer political beings. This does not mean, however, that they do not need policies. They have to have smart regulators, and they have to have a police force. Arguably, they also need an administration of justice. Hence, they are perfectly content with having what Hegel once called the external state.[123] It is a system that serves the pursuit of self-regarding ends.

[123] G.W.F. Hegel, *Elements of the Philosophy of Right* (trans. H.B. Nisbet, Cambridge: Cambridge University Press, 1991) 221 (§183).

Internal cosmopolitans demand risk regulation and crisis intervention. They are completely indifferent as to whether it is national or international bodies that provide the solution. Whatever authority exists is underwritten not by their joint action, as would be the case for the traditional constituent power, but by their interpassivity.[124]

Interpassivity is the consequence of mutually unwarranted reliance on the judgment of others. How can citizens know that they can trust a regulating agency or some enforcing institution? The simple answer is that they can trust it by virtue of their judgment that regulators are in a better position to know what is best for them.[125] But how can they arrive at such a judgment? They can succeed by asking experts. How can they identify the best experts? They can by relying on the judgments of their peers, i.e. other private individuals. The judgment of their peers, however, can be reliable only if it eventually points to the one individual who is capable of finding the trustworthy expert body from whose judgment everyone is taking their cue. Yet, under conditions of pervasive complexity and uncertainty, nobody can identify, let alone be, such an individual.

Consequently, a substitute needs to be found for the unattainable judgment. This substitute is observance of various conventions established within a pluralist system for yielding to one or the other site of authority or for putting in stops at points where such yielding has to come to an end. Such conventions are the substitute for good judgment. The substitution is, of course, warranted only in cases where there would be no other way of coordinating action than by following conventions. But this is hardly the case for matters such as risk regulation. Following an arbitrary convention concerning the standard-setter for carbon-dioxide emissions would be in no manner rationally related to the goal of stopping global warming. Hence, at the hands of internal cosmopolitans, all authority becomes potentially irrational. The irrationality is a consequence of forsaking their political being.

This development is related to the ascendancy of neoliberalism, which rests its faith on collective private self-determination. One is privately collectively self-determining if one accepts the aggregate effect of countless individual market choices as one's own will. It is the basic principle of the private polity. This private polity needs the external state because the operation of markets gives rise to risks and crises. Crisis requires intervention, steering, management, and repairs. These acts have to be brought about by *some* managing and regulating body to whose acts private subjects yield. The collective "public" self-determination by internal cosmopolitans, which is manifest in the interpassive yielding to conventions, is merely the public face of collective private self-determination. Following can be rationalized even if the rationality of a convention remains unknown.

[124] I first encountered the notion of interpassivity in the work of Pfaller. Robert Pfaller, *Die Illusionen der anderen: Über das Lustprinzip in der Kultur* (Frankfurt aM: Suhrkamp, 2002) 27–41. But it may actually have been first developed by Slavoj Žižek.

[125] For a brief statement of the idea, see Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (2nd edn, Oxford: Oxford University Press, 1994) 347.

Trust in substantive rationality is reinforced by the existence of the convention ("If it has been around for a while, it cannot be wrong").

RESPONSIVENESS

The conventions of constitutionalism 3.0 cast a shadow on the remains of former constitutional authority. Soft law matters more than hard law. Private regulation crowds public regulation out of its place. Dispute-settlement and arbitration mechanisms for internet commerce, which have been created on the basis of private law, doom national regulation to irrelevance.[126]

But why should internal cosmopolitans care, so long as the relevant site of authority is sufficiently "responsive?" Such responsiveness can be brought about by providing dissatisfied clients with avenues for filing successful complaints. Responsiveness to needs or complaints is a reason to yield to authority if the authority in question is of assistance in getting what one wants.

It is, however, important to note what "voice" means in this context. The voice of a consumer is the alternative to consumer exit. Consumers exercise voice in order to obtain better services if exit is either unavailable or too costly. Otherwise, they would prefer exiting because it is less cumbersome. This does not imply that consumers who resort to voice in order to get what they want are necessarily successful. Often an organization will give the consumers reasons, perhaps even "good reasons," explaining why a request cannot be met. Consumers are thus invited to take the viewpoint of the organization without sharing in its profits.

By contrast, the voice of citizens is not the reverse of exit because, for them, staying is not the second-best option after exiting. Typically, a citizen is concerned about a place and resorts to voice for that reason. The complaint changes from "This should not happen to me" to "This should not happen here." The reference to the place mediates universalization. If staying comes first, "good reasons" are drawn into the political sphere, where reasons are always the reasons of someone. They cease to be technical or organizational. They are reasons of parties. Hence, citizens encounter reasons as reasons of concrete others.

THE QUESTION OF THE STATE

The major question confronting our age asks what is to become of the project of emancipation that is inscribed into the matrix of constitutionalism. The administrative face of the cosmopolitan constitution is historically associated with market integration, which does not, as pointed out above, mark a further advancement of this project. Market integration increases man-made necessity. Emancipation from jointly created necessity presupposes joint action. It requires acting upon and containing the aspects of mutual interdependence that threaten

[126] For a most comprehensive systematic study of the relevant transformations of authority, see Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart, 2010).

to undermine or even to obliterate the existential projects that are possible within the institutional contexts of social freedom.

This explains why the real polity is of enduring significance in a transnational setting. Every sophisticated theory of state authority distinguishes, either implicitly or explicitly, between two concepts of the state.[127] First, the extension of collective private self-determination gives rise to administrative authority that is necessary in order to stabilize criss-crossing systems of private transactions. This administrative authority was called by Hegel the external state and by Weber the *rationale Staatsanstalt*. The point of this type of state is to repair the damage done to structures of interdependence that arises as a result of a breakdown of safety, health, or public order. What this type of state does not offer is a perspective on a common life that is lived together. It merely secures a formal structure of transactions with variable substance. The second type of state, which might be called the real polity, is tasked with restoring the social freedom that is threatened with erosion pursuant to rampant market integration.

The formal universality of the market makes the pursuit of tasks dependent on their usefulness for others. This gives rise to "the hard discipline of the market."[128] The primary motive of action in such a commercial society, therefore, is fear of being left out or of falling behind. Fear, however, "is not a good motive with which to get an agent to identify with [one's] actions."[129] A life lived under the auspices of the first type of state is exposed to a great risk of being an alienated life.

There is next to nothing that individuals themselves can do in order to extricate themselves from such "hard discipline." Admittedly, market societies maintain their own myth about how individuals can rise above the market from within: the successful entrepreneur.[130] A person of this type is independent from demand by virtue of creating it. Entrepreneurs depend on what they have brought about themselves and are, hence, independent from the market that they depend on. They inject their independence into the market and rise above it from within. Aside from being an entrepreneur, however, there is nothing that individuals can do in order to rise above markets and to reconcile themselves with their alienating demands. More importantly, entrepreneurship cannot be universalized. Whether one comes close to being a successful entrepreneur is, at the end of the day, a matter of luck.

There is much that individuals can do *together*, however, in order to reconcile themselves with the self-alienating tendency of their private existence. This presupposes viewing their mutual dependence as *one whole* that enables their individual life and making attempts at bending it into a *universally defensible shape*.

[127] This is true, already, of the relation between Rousseaus' *Second Discourse* and his *Social Contract*.

[128] Friedrich August von Hayek, "Individualism: True and False" in *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948) 1–32 at 24.

[129] Terry Pinkard, *Hegel's Phenomenology: The Sociality of Reason* (Cambridge: Cambridge University Press, 1994) 310.

[130] Alexander Somek, "The Individualisation of Liberty: Europe's Move from Emancipation to Empowerment" (2013) 4 *Transnational Legal Theory* 258–282.

This is the point at which the second, political concept of the state emerges. The power to rise above everything else is as much a component of this concept as is its ethical dimension.[131]

The identification of the various relationships that individuals are involved in gives rise to viewing these relationships as elements of a common form of life.[132] Only collectively can individuals address the alienation they suffer by virtue of being private selves. The substance that they can work with is manifest in various ways of leading a life—forms of social freedom—that they consider to be valuable. As a result, certain occupations and endeavors will appear to be eligible for public support. Political support of occupations or of certain cultural ways is necessarily backwards looking. Only if certain activities are perceived as part of a larger totality that makes a particular individual life possible is it possible to translate individual identification with them into political self-determination. These occupations are seen as part of a whole within which individual life can be good.

Moreover, only collectively can individuals address their market-dependence in a manner that can be universalized. Participating in a market society goes along with constitutive risks of exclusion. Ill-health, old age or abating demand in the labor market can quickly lead to elimination from the social process. Whether one is or is not in the eyes of insurance providers a good or a bad risk is arbitrary from a moral point of view. In order to be morally defensible, insuring against these risks has to be a matter of common concern. Moreover, public insurance schemes make explicit—and lend moral articulation to—the fact that individual lives are inextricably intertwined. The healthy are better off in the job market because of the unhealthy; the younger are better off because there are others who are older. The unemployed are necessary for the employment of the employed.

The state, in the political sense of the real polity, is a major theme of constitutionalism 2.0. The question before us today is whether states may legitimately brace themselves against the disabling effects of widespread economic interpenetration. The answer to this question has to be in the affirmative. Otherwise, human dignity might suffer severe damage under the cosmopolitan constitution.

[131] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010) 146–156.

[132] Again, I am at this point indebted to Pinkard. See Pinkard, note 129 at 324.