OXFORD CONSTITUTIONAL THEORY

The Cosmopolitan Constitution

ALEXANDER SOMEK

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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It furthers the University's objective of excellence in research, scholarship,
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First Edition published 2014

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

ISBN 978–0–19–965153–5

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Series Editors:
Martin Loughlin, John P. McCormick, and Neil Walker

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Preface

This is a book on constitutionalism. It explores its rise and transformation up to the point at which it becomes suddenly confronted with its potential demise. Mainstream discourse notoriously ignores this dialectical turn. It is blinded by the belief that the one remaining obstacle to human progress is the nation state. This book, by contrast, offers a cautionary tale. Against the strong current of contemporary scholarship that celebrates the consummation of constitutionalism at a global scale, the book reckons with the twilight of idols. Greater "constitutionalization" of supranational or even international law threatens to rob constitutionalism of its political core. This can only be avoided by conceiving of the cosmopolitan constitution as a national constitution that submits its operation to the supervision of international peer institutions.

Three distinguished institutions made the work on this book possible: the University of Iowa College of Law, the Berlin Institute for Advanced Studies, and Princeton University.

I am the lucky beneficiary of the veritable dream team providing stewardship for my home institution: Dean Gail Agrawal, whose energy and charisma are unmatched, and Associate Deans Eric Andersen and Todd Pettys, whose dedication to their community is very humbling for ordinary citizens like me. Had it not been for their unflagging support, I would have never been able to finish this book.

During the academic year of 2007–08 the Berlin Institute for Advanced Studies provided me with a perfect research environment by awarding me a fellowship. It allowed me to participate in a "focus group" on the constitution beyond the nation state. With gratitude I remember the countless conversations I had with the other members of this group: Petra Dobner, Dieter Grimm, Bogdan Iancu, Martin Loughlin, Fritz Scharpf, Gunther Teubner, and Rainer Wahl. We met at least once a week in order to give each other a really hard time: No pain, no gain. Giving each other a hard time is also what Mattias Kumm and I were frequently up to whenever we met in Berlin's Café Einstein during that year.

While the experience in Berlin helped me to recalibrate my project, a fellowship in the Law and Public Policy Program of Princeton University (2012–13) finally allowed me to write everything down. Indeed, teaching a Freshman Seminar at Princeton in the fall of 2012 reassured me of the soundness of the overall conception. Two of my students, Oren Fliegelman and Martin Page, subsequently became my research assistants and helped me with the sources for Chapter One. Luckily, Martin Loughlin turned out to be one of my fellow fellows again. It may well be that out of fear of his stern supervision I was able to finish the book rather quickly.

The Law and Public Policy Program is rightly reputed to be a true intellectual power house. It would not be what it is if it were not for the leadership provided by Kim Scheppele and Leslie Gerwin and the dedicated work by Judi Rifkin and Jennifer Bolton. While I was at Princeton, other people joined me in thinking about constitutional issues, among them, in particular, Christopher Eisgruber, Antonio Estella de Noriega, William Ewald, Lisa Miller, Mirjam Künkler, Jan-Werner Müller, and Yaniv Roznai.

Last but not least I would like to thank Raechel Bimmerle for excellent editorial work and meticulous proofreading. As always, I am grateful to John Bergstrom for being the dependable and capable librarian that he is.

My dear wife was willing to put up with the upheaval and disruptions involved in the nomadic life of a scholar. Her tolerance of my restlessness is only exceeded by her recognition of my immodest ambition to join a conversation that extends as far back as to antiquity.

A great deal of my thinking on constitutionalism went into preparatory essays that did not become part of this book. I would like to thank, in particular, the one and only Peer Zumbansen for providing me with the opportunity to publish a number of exploratory essays in the journal of *Transnational Legal Theory*.

My greatest personal debt is to my dear friend George Horacek and to his son Paul. I have known George for 47 years. We have been friends since our first day of elementary school. Over the last few years, he and Paul have provided my wife and me with a home in Vienna during our semiannual visits. They have done much more for us than one could ever reasonably expect from a friend. It goes far beyond what might be even considered the call of family duty. Dedicating this book to them is a modest attempt at expressing my gratitude.

Alexander Somek

Contents

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.[4] 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.