

Marx and Critical Constitutional Theory

Nimer Sultany

[Draft 2 Feb 2021; forthcoming in Paul O'Connell and Umut Özsu (eds.), *Research Handbook in Law and Marxism* (Edward Elgar, 2021)]

Introduction

The poverty of contemporary liberal constitutional theory is evident. It misdescribes political reality because it deploys anachronistic principles like the 'separation of powers'.¹ It also proffers a limited range of institutional templates that are tilted towards domesticating popular mobilisation and containing 'the transformative uses of governmental power'.² This limited ambition for reform and fear of democracy are also evident in the 'single-minded focus' on developing theories and arguments addressing higher judges and supreme courts.³ They are also palpable in the absence of a macro-level analysis of the role of concentrated wealth in politics, the class-based and unequal allocation of power and privilege, and the disempowerment of the poor.⁴ Conse-

¹ Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers', (2006) 119(8) *Harvard Law Review* 2311; Daryl J. Levinson, 'Foreword: Looking for Power in Public Law', (2016) 130 *Harvard Law Review* 33; Mogens Herman Hansen, 'The Mixed Constitution versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy', (2010) 31:3 *History of Political Thought* 509; Kate Andrias, 'Separations of Wealth: Inequality and the Erosion of Checks and Balances', (2015) 18 *University of Pennsylvania Journal of Constitutional Law* 419.

² Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (Verso 1996) 16; Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press 1983) 28-29.

³ Unger, *What Should Legal Analysis Become?* 73, 112.

⁴ Ganesh Sitaraman, 'The Puzzling Absence of Economic Power in Constitutional Theory', (2016) 101 *Cornell Law Review* 1445; Stephen Loffredo, 'Poverty, Inequality, And Class In The Structural Constitutional Law Course', (2007) 34 *Fordham Urban Law Journal* 1239; William E. Forbath, 'Caste, Class and Equal Citizenship', (1999) 98 *Michigan Law Review* 1.

quently, liberal constitutional theory does not adequately address the ‘social question’.⁵ Nineteenth-century reformers and revolutionaries expressed their dissatisfaction with the status quo, partly through the ‘social question’, and highlighted the discrepancy between ‘ruling ideas’ and the reality of poverty, inequality, and injustice that pervaded the conditions of the working classes since the advent of wage labour.⁶ Contemporary constitutional debates reduce the ‘social question’ to the desirability of judicially enforced ‘social rights’ in a counter-majoritarian constitution. In other words, the attempt to improve the conditions of the working class is not accompanied with a democratisation of political structures in order to ensure the effective attainment of these rights.⁷ Progressive constitutionalists often reduce constitutional theory to constitutional interpretation to the detriment of examining persistent and inhospitable structures.⁸ They offer progressive interpretations of constitutions without much attention to the ‘institutional prerequisites of social democracy’.⁹ Similarly, while progressive liberals like John Rawls recognise that welfare state capitalism is unjust, they continue to defend constitutional arrangements that enable the injustices they decry.¹⁰ The critique of these arrangements is even more urgent today in light of the emergence of transnational regulations (the ‘new constitutionalism’ or ‘supra-

⁵ Marx prefers ‘the existing class struggle’ to ‘the social question’. Marx, ‘Critique of the Gotha Program’ in Tucker 525, at 536.

⁶ See, eg, Holly Case, ‘The “Social Question,” 1820-1920’, (2016) 13:3 *Modern Intellectual History* 747; Jan Breman, Kevan Harris, Ching Kwan Lee, and Marcel van der Linden (eds), *The Social Question in the Twenty-First Century: A Global View* (University of California Press 2019).

⁷ Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (OUP 2013) 138; Roberto Gargarella, *The Legal Foundations of Inequality: Constitutionalism in The Americas, 1776-1860* (Cambridge University Press 2014) 246. For a discussion of the difficulties facing rights-based attempts to tackle economic inequality within liberal constitutionalism see: Rosalind Dixon and Julie Suk, ‘Liberal Constitutionalism and Economic Inequality’, (2018) 85:2 *The University of Chicago Law Review* 369.

⁸ Mark A. Graber, ‘Social Democracy and Constitutional Theory: An Institutional Perspective’, (2001) 69 *Fordham Law Review* 1969, 1975, 1977-1978.

⁹ Graber, ‘Social Democracy and Constitutional Theory’, 1977.

¹⁰ Nimer Sultany, ‘What Good is Abstraction? From Liberal Legitimacy to Social Justice’, (2019) 67(3) *Buffalo Law Review* 823; Tony Smith, *Beyond Liberal Egalitarianism: Marx and Normative Social Theory in the Twenty-First Century* (Brill 2017).

constitutionalism’) that entrench capitalist economic structures, constrain democratic politics, and shape domestic constitutions.¹¹

This impoverished state of constitutional theory requires critical scholars to bring Marx to constitutional theory. Surprisingly, Marx is rarely discussed in connection with questions of constitutional law and theory. Nevertheless, throughout his life, Marx examined the subject of the constitution, both theoretically and historically. On the basis of these interventions, this chapter argues that Marx proffers important resources to develop a critical constitutional theory that questions the fetishism and mystifications of modern constitutionalism and whose goal is to deepen democracy. In particular, it argues that Marx’s critical theory of constitutional law is political, social, socialist, and anti-systemic.

Marx’s theory of constitutional law is political in three ways. First, it analyses constitutional puzzles as socio-political rather than as mere theoretical puzzles, because the latter mystify reality. Second, it is anti-foundationalist in the sense of discarding the constitution’s ‘sacred origins’, ‘singular foundings’, and venerated ‘founding fathers’, who are supposed to impose moral or structural limits on future generations. Instead of elevating the constitution above the people, Marx insists on openness and experimentation. Third, it rejects normative reductionism (the view that the constitution constitutes a ‘higher’ law or a ‘normative contract’ that binds ordinary politics) and conceives the constitution as embedded in a web of social relations and as an outcome of class struggle.

¹¹ David Schneiderman, ‘Investment Rules and the New Constitutionalism’, (2000) 25:3 *Law & Social Inquiry* 757; Danny Nicol, *The Constitutional Protection of Capitalism* (Hart Publishing 2010); Christine Schwöbel-Patel, ‘The Political Economy of Global Constitutionalism’, in Anthony F Lang, Jr and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017).

Marx's theory is social because it subjects abstractions to critical scrutiny and insists on concrete analyses as the basis for theoretical elaboration.¹² In particular, Marx argues 'that the activities and agencies of the state are human activities', and that they are 'nothing but the modes of existence and operation of the social qualities of men'.¹³ In order to avoid mystification, one needs to start from 'real subjects as the bases of the state'.¹⁴ In the context of constitutional law and politics, Marx questions invocations of the 'people' and its 'constituent power' by analysing social locations, competing interests, and power struggles. Of particular relevance here is the relation between Marx and the tradition of political and legal republicanism that grounds political legitimacy in popular sovereignty and encourages political participation by public-spirited citizens who pursue the common good. Marx is often accused of being committed to two contradictory propositions, neither of which is accurate: either he is accused of having neglected the impact of the republican tradition by emphasising possessive individualism,¹⁵ or his thought is reduced to a republican critique of liberal constitutional orders.¹⁶ Yet while Marx draws upon republican dis-

¹² Following Hegelian dialectics one may distinguish between 'abstraction' and 'critical abstraction' (or dialectical abstraction). The former (which is characteristic of one-sided 'understanding') is a flight from reality. Empiricist and positivist critics of abstraction err in reducing reality to appearances and 'common sense'. On the other hand, dialectical abstraction (which is characteristic of 'reason') 'is the reduction of the diverse forms and relations of reality to the actual process in which they are constituted' and to their essence. Herbert Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* (Routledge 1955) 44-47, 156-158. Marx distinguishes between abstractions that mystify and those that represent real knowledge. See Etienne Balibar, *The Philosophy of Marx* (Verso 2007) 36.

¹³ Karl Marx, *Critique of Hegel's Philosophy of Right* (Joseph O'Malley ed, Cambridge University Press 1970) 22.

¹⁴ Marx, *Critique of Hegel's Philosophy of Right*, 23, 24. See also Thesis VIII in Marx, 'Theses on Feuerbach' in Robert C. Tucker (ed), *The Marx-Engels Reader* (2nd edn, WW Norton & Company 1978) 145 ('Social life is essentially practical. All mysteries which mislead theory into mysticism find their rational solution in human practice and in the comprehension of this practice').

¹⁵ JGA Pocock, 'Authority and Property: The Question of Liberal Origins', in B Malament (ed), *After the Reformation: Essays in Honor of J. H. Hexter* (University of Pennsylvania Press 1980) 350.

¹⁶ Recent scholarship that seeks to frame Marx within the republican tradition highlights that Marx's is an 'alternative republicanism' or 'radical republicanism'. See William Clare Roberts, *Marx's Inferno: The*

course and participated in its debates and struggles, he recognises and highlights its limitations in order to develop a socialist critique of republicanism.¹⁷

Republicans and liberals routinely argue about institutional arrangements within the constitutional democratic state and the meaning of democracy and constitutionalism (eg reform of the House of Lords in the United Kingdom and the Senate in the United States; the counter-majoritarian difficulty; political versus legal constitutionalism).¹⁸ These debates, however, have been ‘wholly inattentive to the realities of elite economic domination in politics’.¹⁹ Both defenders and critics of judicial empowerment overlook ‘the overwhelming influence of unequal wealth’ on the political system in capitalist societies.²⁰ Marx, in contrast, goes beyond these debates’ limited framework by examining the ideologies that they embody, the frameworks they justify or obscure, and the political economies they enable. Bringing Marx to constitutional theory is even more crucial today because ‘liberal constitutional theorists have largely abandoned the poor’,²¹ and because liberal republicans—whose institutional prescriptions are hardly distinguishable from those of most other liberals—have deradicalised republicanism.²² Indeed, the absence of adequate atten-

Political Theory of Capital (Princeton University Press 2018) 8; Michael J. Thompson, ‘The Radical Republican Structure of Marx’s Critique of Capitalist Society’, (2019) 47:3 *Critique* 391.

¹⁷ Jeffrey Isaac, ‘The Lion’s Skin of Politics: Marx on Republicanism’, (1990) 22:3 *Polity* 461.

¹⁸ For a criticism of the US constitution see Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford University Press 2008).

¹⁹ Sitaraman, ‘The Puzzling Absence of Economic Power in Constitutional Theory’, 1477-1488, at 1488.

²⁰ Loffredo, ‘Poverty, Inequality, And Class In The Structural Constitutional Law Course’, 1250.

²¹ Loffredo, ‘Poverty, Inequality, And Class In The Structural Constitutional Law Course’, 1243.

²² See, eg, Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2013); Cass R. Sunstein, ‘Beyond the Republican Revival’, (1988) 97 *Yale Law Journal* 1539. But see Bruno Leipold, Karma Nabulsi, and Stuart White (eds), *Radical Republicanism: Recovering the Tradition’s Popular Heritage* (Oxford University Press 2020).

tion to class may be explained, in part, by the ‘republican revival’ that privileged an ideological analysis over an economic analysis of constitutional thought and history.²³

As this chapter shows, Marx’s overall critique diverges from liberal and republican criticisms of the extant political order. Marx is a democrat who criticises both authoritarian centralism (of the Jacobins, Louis Bonaparte, Simón Bolívar, and others) and judicial empowerment. Yet he does not presuppose a Weberian state that is separate from society,²⁴ or a Hegelian state whose universality transcends social conflict in ‘civil society’ (the sphere of economic relations). His critique is not merely concerned with the separation of powers within the state or with inclusion (ie struggle over access to the state). Rather, it is concerned with extending democracy to the economic and not only the political sphere.²⁵ It thus seeks both social control of the state and ‘free and associated labour’ in order to overcome ‘alienation’.²⁶ Democracy thus becomes synonymous with socialism, and Marx’s critique is driven by the necessity and possibility of establishing an alternative to capitalism.²⁷

Consequently, a project of critical constitutional theory is not merely one of internal critique of constitutionalism, but one that seeks to overcome its limitations in a ‘political constitution’.

Marx expresses this approach when he states, ‘We, gentlemen, are not constitutionalists, but we take up the standpoint of the gentlemen who are accusing us in order to beat them on their own

²³ Sitaraman, ‘The Puzzling Absence of Economic Power in Constitutional Theory’, 1492-1493.

²⁴ Bob Jessop, *The State: Past, Present, Future* (Polity 2010).

²⁵ Terry Eagleton, *Why Marx Was Right* (Yale University Press 2011) 201.

²⁶ Marx, ‘Critique of the Gotha Program’, in Tucker 537; Marx, ‘The Civil War in France’ in Tucker, 635-636; Marx, ‘Contribution to the Critique of Hegel’s *Philosophy of Right*: an Introduction’, in Tucker 53, 54; Marx, *Capital: A Critique of Political Economy, vol I* (Ben Fowkes tr, Penguin Books 1976) 173.

²⁷ Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (Verso 2016).

ground with their own weapons. Hence we appeal to constitutional usage'.²⁸ Accordingly, Marx's theory is anti-systemic because it foregrounds persistent alienation under capitalism in the face of invocations of constitutional legitimacy or the common good. Rather than searching for a stable form of constitutional legitimacy, this critical constitutional theory seeks to overcome alienation.²⁹ Thus, Marx puts forward a radical critique of existing arrangements that goes further than liberal and republican criticisms of extant constitutional arrangements within the capitalist mode of production.³⁰

This chapter is organised as follows. The first section highlights Marx's attention to the antinomy of constitutionalism in his engagement with Hegel's theory of the state. In the course of this engagement, Marx contrasts the political constitution (both monarchical and republican) with 'democracy' in order to foreground the constitution's limitations and point the way toward the resolution of the paradox by centering the people's constituent power and subjecting the constitution to popular will at all times. The second section examines alienation and the abstraction of popular sovereignty under a political constitution that emanates from the separation of state and 'civil society'. The third section argues that the limitations and mystifications of 'the paradox of constitutionalism' are rooted in the political (or partial) revolution that generates the constitution. Instead of a class-neutral constituent power leading a political revolution, Marx envisions a social revolution in which the proletariat is the constituent power. In order to illustrate the false

²⁸ Marx, 'The First Trial of the Neue Rheinische Zeitung, Speech by Karl Marx (7 February 1849)', in Karl Marx and Frederick Engels, *Collected Works*, vol 8 (Lawrence & Wishart 2010) 304, 307.

²⁹ Marx, 'Contribution to the Critique of Hegel's *Philosophy of Right: an Introduction*', 54.

³⁰ For the argument that Marx condemns capitalist exploitation as 'unjust' despite his aversion to moralistic discourse, see Norman Geras, 'The Controversy About Marx and Justice', (1985) 150 *New Left Review* 47; Geras, 'Bringing Marx to Justice: an Addendum and Rejoinder', (1992) 195 *New Left Review* 37.

promises of political revolutions, the fourth and fifth sections focus on the failings of constituent assemblies. These constitution-making assemblies do not live up to the ideal of constituent power, either because their politics is non-revolutionary or because the pre-revolutionary constitutional order imposes constraints on their work to prevent revolutionary rupture. The sixth section highlights Marx's analysis of the incoherence and contradictions of the political revolution's constitution. The fact that the constitution is ultimately based on *modus vivendi* because it accommodates competing interest and embodies a class compromise generates this incoherence. The seventh section returns to the paradox of constitutionalism in order to highlight Marx's conclusion, following his analysis of bourgeois revolutionary constitutions, that the fundamental contradiction consists in the blockage of social emancipation, and that the constitutional incoherence and instability are better understood as emanating from the unresolved paradox of constitutionalism. The eighth (and penultimate) section explores elements of an alternative radical constitutionalism that Marx identifies in the experience of the Paris Commune in order to chart a path beyond the alternatives of despotism and class rule.

The Antinomy of Constitutionalism

Long-running debates in constitutional law and legal theory identify and then purport to resolve 'paradox of constitutionalism' arising from efforts to reconcile the people's unlimited power to establish their mode of government with its subjection to the constitution it has created.³¹ In these debates, the distinction between constituent power and constituted power responds to the question of the legitimacy of the constitutional order (who authorizes the constitution?) by

³¹ Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007).

grounding it in an originary power and separating it from the question of legality once constitutional legitimacy is established.³²

The paradox of constitutionalism is central to Marx's early engagement with Hegel's theory of the state.³³ Hegel's dialectical theory is highly critical of the resignation to facts and customs, and the reification of the world through 'common sense' and traditional logic.³⁴ It is not content with surface appearances but highlights the gap between existence and essence, reality and potentiality.³⁵ Hegel rejects the two dominant methods of German constitutional law, the normative-idealist and the positivist-empiricist.³⁶ The first of these two approaches is content with the 'ought', pronouncing principles. The latter, for its part, is concerned with the 'is', describing the status quo. Hegel is further credited with shifting political philosophy's focus from legitimacy to historicity and change, and away from single and legendary founders or legislatures who legitimate the polity.³⁷

Yet, Marx finds Hegel's attempt to resolve the paradox wanting. In Hegel's formulation, the paradox relates to the role and status of the legislature, whose power lies both outside and inside the constitution. On the one hand, legislative power is the 'power to determine and establish the uni-

³² EJ Sieyès, 'What is the Third Estate?', in his *Political Writings: Including the Debate Between Sieyès and Tom Paine in 1791* (Michael Sonenscher ed, Hackett Publishing 2003) 136; Hannah Arendt, *On Revolution* (Penguin Books 1990) 162-163.

³³ Marx, *Critique of Hegel's Philosophy of Right*.

³⁴ Marcuse, *Reason and Revolution*, 16-20, 112-113.

³⁵ Marcuse, *Reason and Revolution*, 44-47.

³⁶ Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge University Press 1972) 39.

³⁷ See, eg, Avineri, *Hegel's Theory of the Modern State*, x.

versal’,³⁸ and is thus the ‘power of the constitution’ (which is understood as the universal determination of rational will).³⁹ On the other hand, the legislature presupposes the constitution and is a constitutional power, as one of the branches of the state within the separation of powers.⁴⁰ It is the whole, but it is part of the whole (or the ‘organic unity’ of the state).⁴¹ Historically, legislatures presuppose constitutions they did not themselves make. Yet the constitution, Marx says, is ‘certainly not self-generating’.⁴² Thus, there must be a lawmaker that precedes the constitution and stipulates legislative powers: ‘A legislature must exist or have existed before and outside of the constitution. There must exist a legislature outside of the actual, empirical, established legislature’.⁴³

Hegel’s resolution of this antinomy, the ‘opposition between constitution and legislature’, simply restates the question, Marx argues.⁴⁴ Formally, according to Hegel, the legislature cannot alter the constitution. But ‘materially’, it effectively and indirectly amends it through legislative clarification and application of constitutional norms. Thus, there is a contradiction between constitutional form and ‘constitutional effect’, or between the ‘is’ and the ‘ought’ (the empirical reality and the normative ideal of legislative power).⁴⁵

³⁸ GWF Hegel, *Elements of the Philosophy of Right* (Allen W Wood ed, HB Nisbet tr, Cambridge University Press 1991) 308 (para. 273).

³⁹ Marx, *Critique of Hegel’s Philosophy of Right*, 55.

⁴⁰ Hegel, *Elements of the Philosophy of Right*, 336 (para. 298); Marx, *Critique of Hegel’s Philosophy of Right*, 55.

⁴¹ Hegel, *Elements of the Philosophy of Right*, 339 (para. 300).

⁴² Marx, *Critique of Hegel’s Philosophy of Right*, 55.

⁴³ Marx, *Critique of Hegel’s Philosophy of Right*, 55.

⁴⁴ Marx, *Critique of Hegel’s Philosophy of Right*, 56.

⁴⁵ Marx, *Critique of Hegel’s Philosophy of Right*, 56.

In light of this gap between the constitution's form and its actuality, it is difficult to explain constitutional change. Marx objects to the view of 'gradual' constitutional change. According to Hegel, the organic constitution 'advances and matures' through legislative work, without a need to make this change formally explicit. Yet, for Marx, 'the category of gradual transition is, first of all, historically false; and secondly, it explains nothing'.⁴⁶ It explains nothing because it does not explain the legislature's ability to do informally what it is not supposed to do formally, and because resultant constitutional change is unconscious. The formal and actual constitution will correspond only when it is understood that the people are the 'real corner stone of the constitution', and that constitutional change is a product of conscious democratic will. With the achievement of such correspondence, 'progress' (ie 'the movement of the constitution') will become 'itself ... the constitution'.⁴⁷ In other words, the constitution should always be subject to the people's power to establish it and change it.⁴⁸

Conscious change invites the role of the legislature as a constitution-maker. The gradual transition thesis is historically false because Marx is alive to the necessity of revolutionary ruptures in the presumed linearity of historical time. This position differs from Hegel's attempt to 'legitimize the revolutionizing of reality, while discounting the revolution itself',⁴⁹ or his preference for 'revolutions from above'.⁵⁰ While 'entire state constitutions' have been modified when new conditions arise, Marx argues, a 'new constitution' has historically required a 'real revolu-

⁴⁶ Marx, *Critique of Hegel's Philosophy of Right*, 57.

⁴⁷ Marx, *Critique of Hegel's Philosophy of Right*, 57.

⁴⁸ Stathis Kouvelakis, *Philosophy and Revolution: From Kant to Marx* (GM Goshgarian tr, Verso 2003) 298.

⁴⁹ Jürgen Habermas, *Theory and Practice* (John Viertel tr, Beacon Press 1974) 131.

⁵⁰ Kouvelakis, *Philosophy and Revolution*, 296.

tion'.⁵¹ The French Revolution illustrates this point because the legislature 'produced' the revolution and rejected the 'antiquated constitution'.⁵² It also illustrates the difference between the legislature, which represented popular will, and executive power, which represented particular interests and 'produced the small, retrograde revolutions'.⁵³

In light of this, the opposition between the legislature and the constitution is in fact an internal paradox to the very idea of the constitution (revolutionary or antiquated, actual or formal, universal or particular, changing or fixed, democratic or non-democratic):

Posed correctly, the question is simply this: Does a people have the right to give itself a new constitution? The answer must be an unqualified yes, because the constitution becomes a practical illusion the moment it ceases to be a true expression of the people's will.

The collision between the constitution and the legislature is nothing more than a conflict of the constitution with itself, a contradiction in the concept of the constitution. The constitution is nothing more than an accommodation between the political and non-political state [ie civil society]; hence it is necessarily in itself a treaty between essentially heterogeneous powers. Here, then, it is impossible for the law to declare that one of these powers [namely, the legislature], which is part of the constitution, is to have the right to modify the constitution, which is the whole. In so far as we speak of the constitution as a particular thing, however, it must be considered a part of the whole...

⁵¹ Marx, *Critique of Hegel's Philosophy of Right*, 57.

⁵² Marx, *Critique of Hegel's Philosophy of Right*, 57-58.

⁵³ Marx, *Critique of Hegel's Philosophy of Right*, 58.

The resolution of this conflict has been attempted by differentiating between *assemblée constituante* and *assemblée constituée*.⁵⁴

Republicans' answer to the dilemma at the basis of Hegel's paradox of the legislature is to split the power of the legislature into a constituent assembly (the power to establish the constitution) and a legislative assembly (a constitutional power within the established constitution). For republicans, constituent power to establish the mode of government belongs to the people.⁵⁵ Yet the distinction between constituent power and constituted power (between making the constitution and being constrained by it, between the revolutionary power of the people to reconstitute their polity and the forms of government they create) does not resolve the mystery. As the following sections illustrate, the paradox of constitutionalism is an antinomy because it fails to illuminate the historical realities of social and political conflicts. It idealises constituent power by abstracting it from class conflict, and by portraying it as an unlimited creative power, notwithstanding limitations of constituent assemblies during revolutionary processes. Despite these limitations, constituent power is conceived as a one-time event that imposes—by laying down the constitution—a 'pre-commitment' or a 'dead hand' of the past generations that limits the openness of the social and constitutional order to conscious transformation. Theoretical attempts to resolve the paradox through a reconciliation that leads to a universally accepted or normatively acceptable constitution mystify these realities. This is so given the debates' limitation to a 'political consti-

⁵⁴ Marx, *Critique of Hegel's Philosophy of Right*, 58.

⁵⁵ Sieyès, 'What is the Third Estate?', 136.

tutional' paradigm in which the people's constituent power is class-neutral, popular sovereignty is abstract, and the political is separated from the economic.⁵⁶

Alienation and the Abstractions of Popular Sovereignty

One of the primary abstractions that grounds and legitimates the 'political constitution' is 'popular sovereignty'. Marx shares with the republican tradition the rejection of monarchical sovereignty and the endorsement of popular sovereignty, but he parts with republicanism by refusing to fetishise either the people or sovereignty. Marx's criticism of the monarchical constitution is analogous to his criticism of the republican constitution; one abstraction simply replaces another. Modern republicanism criticises the first abstraction, monarchy, but not the second, the people. In fact, 'the struggle between monarchy and the republic' is limited, because it is 'still a struggle within the abstract form of the state'.⁵⁷ Both cases evidence a state formalism in which the state's form is separated from its materiality, and the state's content (namely, the rules of property and contract that govern relations within civil society) is external to the constitution (because they are isolated from state intervention).⁵⁸ A 'democratic' state is different from all other forms of state. In non-democratic forms, 'the state, law, constitution is dominant without really governing, that is, materially permeating the content of the remaining non-political spheres'.⁵⁹

⁵⁶ For a critical discussion of the debates on the paradox of constitutionalism see, Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press 2017) (ch. 10).

⁵⁷ Marx, *Critique of Hegel's Philosophy of Right*, 31.

⁵⁸ Marx, *Critique of Hegel's Philosophy of Right*, 31.

⁵⁹ Marx, *Critique of Hegel's Philosophy of Right*, 31.

In contrast to Hegel's conception of sovereignty as embodied in the monarch who represents the unity of the state, Marx argues that sovereignty belongs to the people because the 'state is an abstraction; the people alone is the concrete'.⁶⁰ Monarchical sovereignty and popular sovereignty are 'two completely opposed concepts of sovereignty'.⁶¹ While Marx considers monarchical sovereignty a 'fiction' or 'illusion', he recognises that it is an 'existing fiction'—in other words, a fiction that has socio-political consequences.⁶² In particular, this fiction disempowers the people. The state is mystified, the constitution becomes mysterious, and sovereignty turns monarchical, but only if one abstracts these concepts from their bases in historical reality and concrete human activity. Instead of analysing them as the 'free product of men', they are conceived as products of abstract universal rationality. Instead of representing the 'whole', they present the 'part' as if it were the 'whole':

In monarchy the whole, the people, is subsumed under one of its modes of existence, the political constitution; in democracy the constitution itself appears only as one determination, and indeed as the self-determination of the people. In monarchy we have the people of the constitution, in democracy the constitution of the people. Democracy is the resolved mystery of all constitutions. ... The constitution appears as what it is, the free product of men. ... here the constitution is in general only one moment of the people's existence, that is to say the political constitution does not form the state for itself.⁶³

⁶⁰ Marx, *Critique of Hegel's Philosophy of Right*, 28.

⁶¹ Marx, *Critique of Hegel's Philosophy of Right*, 29.

⁶² Marx, *Critique of Hegel's Philosophy of Right*, 28-29.

⁶³ Marx, *Critique of Hegel's Philosophy of Right*, 29-30.

The ‘mystery of all constitutions’ is resolved by ‘democracy’. This is because the monarchy denies the people their right and power to determine their constitution—that is, to organise their polity. Thus, the constitution constitutes the people (‘the people of the constitution’). In democracy, however, the people determine the constitution and it belongs to them (‘the constitution of the people’). Moreover, the monarchical constitution is ‘political’, and as such is a partial representation of reality. Indeed, the people is the ‘whole’ (the social totality), and under a democratic rule the political constitution (ie the organisation of the state) is only one part of this social totality. The constitution becomes reified under a monarchy because the part (the monarch) seeks ‘to determine the character of the whole’.⁶⁴ Democracy ‘is the generic constitution’ and the monarchical constitution is a perversion of this constitution. The democratic constitution is the only one that gives an account of the social totality and resolves the contradiction of monarchy (a rule without demos; a misplaced sovereignty; a constitution unfreely determined).⁶⁵ Under popular sovereignty, there is a unity of ruler and ruled in the sense that the people author the constitution under which they live. Under monarchical sovereignty, however, the monarch usurps sovereignty from the people and they are ruled by an alien constitution.⁶⁶

Democracy resolves the paradox of constitutionalism because it ‘redefines politics in terms of constitutive power’ or ‘permanent revolution’.⁶⁷ In other words, it maintains the people’s constituent power (revolution is a process rather than an event) and the constitution is always subject to the people’s revolutionary power to change it. Other political forms, however, elevate the con-

⁶⁴ Marx, *Critique of Hegel’s Philosophy of Right*, 29.

⁶⁵ Marx, *Critique of Hegel’s Philosophy of Right*, 29.

⁶⁶ Marx, *Critique of Hegel’s Philosophy of Right*, 28.

⁶⁷ Kouvelakis, *Philosophy and Revolution*, 297.

stitution above the people as a fetter on their power. Thus, the constitution is fetishised when it is thought to have powers it does not possess:

Just as it is not religion that creates man but man who creates religion, so it is not the constitution that creates the people but the people which creates the constitution. ... Man does not exist because of the law but rather the law exists for the good of man. Democracy is *human existence*, while in the other political forms man has only *legal existence*. That is the fundamental difference of democracy.⁶⁸

Under democracy a 'socialised' person exists.⁶⁹ In other constitutional orders (eg liberal and republican), there is only the abstract legal person. The socialised person represents the full range of human existence, whereas the legal person represents only a formal part of this existence. Marx's position on the bifurcation of human consciousness and political organisation, which generates alienation, differs from Hegel's position.

At the centre of Hegel's theory of freedom, and his criticism of the French Revolution's inability to achieve this freedom,⁷⁰ is an account of alienation that offers an alternative to conceptions of sociological legitimacy,⁷¹ and that Marx takes up and develops. For Hegel, alienation of this kind arises when public institutions and practices no longer command citizens' allegiance. Citizens come to be alienated because they are unable to identify with the norms these public institutions

⁶⁸ Marx, *Critique of Hegel's Philosophy of Right*, 30 (emphasis in original).

⁶⁹ Marx, *Critique of Hegel's Philosophy of Right*, 30.

⁷⁰ Joachim Ritter, *Hegel and the French Revolution: Essays on The Philosophy of Right* (Richard Dien Winfield tr, The MIT Press 1984).

⁷¹ Charles Taylor, *Hegel and Modern Society* (Cambridge University Press 1979), 122-124.

and practices embody.⁷² In other words, there is a mismatch between the constitution and its social and political basis. The constitution, the political organisation of social life, is experienced as something foreign and as a fetter on free human development. Accordingly, Hegel rejects the superficial Enlightenment view of rational engineering of society, in which a model constitution is designed and then imposed externally.⁷³

For Marx, humans alienate their powers to the state, and thus the political constitution is the sphere of alienation.⁷⁴ They attribute to (or project onto) the political sphere and to their citizen status what they lack in real life: equality, fraternity, and community. Thus, the political constitution plays in the political sphere an analogous role to religion's role in civil society—a role that involves self-estrangement and projecting upon an external entity the powers that we actually possess. In civil society, the sphere of the war of all against all, humans are separated from themselves: they lose their communal being, reduce themselves into means, and treat others as means for their material pursuits.⁷⁵ Instead of freeing humans from religion, the political constitution grants freedom of religion. Instead of freeing them from egoism, it grants them freedom of business. And instead of freeing them from property, it grants them freedom of property.⁷⁶ The liberal state presents itself as universal and sovereign. However, all these premises are false: this universality is unreal: the public is separated from the private, and the human leads a double life, as a citizen and private individual. And this sovereignty is imaginary, since political freedom is

⁷² Taylor, *Hegel and Modern Society*, 88-89; Hegel, *Elements of the Philosophy of Right*, 311-313.

⁷³ Hegel, *Elements of the Philosophy of Right*, 311-313 (paras 273 and 274); Taylor, *Hegel and Modern Society*, 120.

⁷⁴ Marx, *Critique of Hegel's Philosophy of Right*, 31.

⁷⁵ Marx, 'On the Jewish Question', in Tucker 34.

⁷⁶ Marx, 'On the Jewish Question', 45.

separated from the reality of economic dependence and exploitation, and thus citizens are not equal partners in popular sovereignty.⁷⁷

The reason for the difference between democracy and other forms of political organisation is that democracy alone challenges the separation between political and civil society, between the ‘political’ and ‘private’ human. Hegel recognises the separation between citizen and private person, following the necessary separation between state and church.⁷⁸ Nevertheless, for Hegel, this separation of state and civil society is not to be transcended. Classes are part of the division of labour within the social totality, and as such are not to be overcome.⁷⁹ Importantly, there is no account of the working class in Hegel’s account of social classes.⁸⁰

For Marx, in contrast, democratising the constitution would require not only returning it to its creators (the demos) and extending self-government,⁸¹ but also resocialising members of the community by recognizing that they are embedded in social structures and that their abstract legal status conceals class inequality, so that they can ‘reclaim in their daily lives the powers that the state had appropriated from them’.⁸² The negation of ‘political alienation, unlike that [of] religious alienation, requires a real revolution—a collective act whereby the citizens repossess the social power externalized in state institutions’.⁸³ In democracy the formal status attends to the

⁷⁷ Marx, ‘On the Jewish Question’, 33-34. Concerning alienation, see also the alienation of labour: Marx, ‘Economic and Philosophic Manuscripts of 1844’, in Tucker 66 at 74-77.

⁷⁸ Avineri, *Hegel’s Theory of the Modern State*, 32.

⁷⁹ Avineri, *Hegel’s Theory of the Modern State*, 104.

⁸⁰ Avineri, *Hegel’s Theory of the Modern State*, 108-09.

⁸¹ Marx, *Critique of Hegel’s Philosophy of Right*, 32 (‘Monarchy is the fullest expression of this estrangement. The republic is the negation of this estrangement within its own sphere’).

⁸² Eagleton, *Why Marx Was Right*, 202.

⁸³ Tucker, ‘Introduction’ in *The Marx-Engels Reader*, xxiv.

material conditions. In contrast, other ('political') regimes institutionalise a gap between formal status and material conditions.⁸⁴ The abstraction of the state, Marx argues, is a modern evolution. Only in the modern state is there an abstract opposition between material and political life, and thus the 'political state' appears 'as the form of the material state'.⁸⁵

There are two main difficulties with the separation between political and civil society, as presented in Hegel's exposition.⁸⁶ The first is that Hegel assumes this separation and then essentialises it in thought. While this separation certainly exists, it is not an eternal and historically universal necessity. Rather, it emerged as part of the historical development of modern states and capitalist societies. A theoretical exposition should not transform the historically contingent into the essential and necessary expression of universal rationality. Second, despite taking this separation for granted, Hegel presents the state as a unity. He does this although it is merely a part of this dualism. Thus, he ends up reproducing the same dualism in the sphere of the state by including elements of civil society ('the Estates') in the sphere of legislative and parliamentary activity. In the course of theoretical exposition, the initially presupposed dichotomy collapses. Rather than resolving the dualism between civil and political society, it is merely reintroduced. In democracy, this dualism needs to be dialectically sublated.

The experience of the French Revolution illustrates these criticisms. Both Hegel and Marx argue that the French Revolution's liberal abstractions are inimical to the creation of a community.⁸⁷

They also criticise the Jacobins for their authoritarian centralism and for the state's invasion of

⁸⁴ Marx, *Critique of Hegel's Philosophy of Right*, 30.

⁸⁵ Marx, *Critique of Hegel's Philosophy of Right*, 32.

⁸⁶ Marx, *Critique of Hegel's Philosophy of Right*, 72-74.

⁸⁷ Kouvelakis, *Philosophy and Revolution*, 29-33; Marx, 'On the Jewish Question'.

civil society. For Hegel, the centralisation of all aspects of social life and the stifling of voluntary associations exhibit the continuity between the republic and the monarchy.⁸⁸ The Reign of Terror embodies a one-sided negative freedom ('freedom of the void'), in which all particular differences are obliterated in the pursuit of abstract universality: 'This is why the people, during the French Revolution, destroyed once more the institutions they had themselves created, because all institutions are incompatible with the abstract self-consciousness of equality'.⁸⁹

For Marx, the Jacobin terror is a misguided 'attempt to realize a political order still lacking its socio-economic preconditions'.⁹⁰ The Jacobins' efforts to forcibly 'overcome the antagonism between state and civil society' are 'one-sided' endeavours to impose universality, as opposed to a dialectical resolution of the conflict 'by the recognition of the universality of the individual'.⁹¹ Instead of merely negating civil society, what is needed is a dialectical incorporation and transcendence of its achievements.⁹²

Between Political Constitution and Social Revolution

In light of this separation between the political constitution and the socio-economic reality, the main mystifying abstractions in constitutional debates are the 'people' and its 'constituent power'. Early republican theorists presented a 'class-specific', as opposed to class-neutral, under-

⁸⁸ Hegel, 'The German Constitution', in his *Political Writings* 22-25, 89; Avineri, *Hegel's Theory of the Modern State*, 48-49.

⁸⁹ Hegel, *Elements of the Philosophy of Right* 38-39 (para. 5); Taylor, *Hegel and Modern Society*, 115-116.

⁹⁰ Shlomo Avineri, *The Social and Political Thought of Karl Marx* (Cambridge University Press 1968) 188.

⁹¹ Avineri, *The Social and Political Thought of Karl Marx*, 189.

⁹² Avineri, *The Social and Political Thought of Karl Marx*, 190-191.

standing of the people.⁹³ By contrast, modern republican constitutions ‘invariably treat the people as a homogenous unit: the people are a unitary and socio-economically anonymous collection of individual citizens, formally equal under the law’.⁹⁴ More generally, it is rare for contemporary constitutions or constitutional courts’ jurisprudence to recognise the existence of social classes.⁹⁵ This lack of attention to class (in anti-discrimination law, for instance) overlooks the ways in which the class structure gets reproduced and social apartheid persists (such as through private education). It thus ‘deflects attention from the institutional structure of society to which our interests, ideals, and group identities remain fastened’.⁹⁶

Against this modern trend, Marx highlights that in a bourgeois revolution the republican bourgeoisie exercises constituent power and establishes a constitution that embodies the achievements—and limitations—of this revolution. The invocation of an imaginary, class-neutral ‘people’ founders on the reality of ‘*real* people [,]... that is, representatives of the different classes into which it falls’.⁹⁷ Universal suffrage and direct elections bring forward this reality and undermine the ‘*cult of the people*’, in French republicanism for instance, which posits ‘at least in the majority of Frenchmen, *citoyens* with the same interests, the same understanding, etc.’⁹⁸

⁹³ John P. McCormick, ‘People and Elites in Republican Constitutions, Traditional and Modern’, in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Martin Loughlin & Neil Walker eds, 2007) 107.

⁹⁴ McCormick, ‘People and Elites in Republican Constitutions’, 107.

⁹⁵ Günter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar 2018) 246-247; Unger, *What Should Legal Analysis Become?*, 83-104; Mario L. Barnes & Erwin Chemerinsky, ‘The Disparate Treatment of Race and Class in Constitutional Jurisprudence’, (2009) 72 *Law and Contemporary Problems* 109.

⁹⁶ Unger, *What Should Legal Analysis Become?*, 95.

⁹⁷ Marx, ‘Class Struggles in France’, in Karl Marx and Frederick Engels, *Collected Works*, vol 10 (Lawrence & Wishart 2010) 45, 65 (emphasis in original).

⁹⁸ Marx, ‘Class Struggles in France’, 65 (emphasis in original).

The paradox of constitutionalism is unresolvable because constituent power is conceived within a ‘partial, *merely* political revolution which leaves the pillars of the building standing’. In a political revolution, ‘a *section of civil society* emancipates itself and attains universal domination; a determinate class undertakes, from its *particular situation*, a general emancipation of society’.⁹⁹ However, the claims of one class to represent the general interests of the people in a political revolution generate an unresolved tension between the particularity of the liberating class and the universality of its claims. The only way for this tension to be resolved is for the dehumanised proletariat to lead the revolution towards emancipation and a ‘*total redemption of humanity*’:

A class must be formed which has *radical* chains, a class in civil society which is not a class of civil society, a class which is the dissolution of all classes, a sphere of society which has a universal character because its sufferings are universal, and which does not claim a *particular redress* because the wrong which is done to it is not a *particular wrong* but *wrong in general*. ... This dissolution of society, as a particular class, is the proletariat.¹⁰⁰

The proletariat ‘is the right name, discovered at last (and substituted for “Third Estate”, “people”, “*sans-culotterie*”, etc.) for the antagonism immanent in modern society’.¹⁰¹

⁹⁹ Marx, ‘Contribution to the Critique of Hegel’s *Philosophy of Right: an Introduction*’, 62 (emphasis in original).

¹⁰⁰ Marx, ‘Contribution to the Critique of Hegel’s *Philosophy of Right: an Introduction*’, 64.

¹⁰¹ Kouvelakis, *Philosophy and Revolution*, 236.

Marx does not draw a rigid distinction between political and social revolution. Instead, he conceives each as part of a process that requires going beyond political emancipation toward human emancipation:

Every revolution dissolves the *old society* and to that extent it is *social*. Every revolution overthrows the *old power* and to that extent it is *political*... Revolution in general—the *overthrow* of the existing power and *dissolution* of the old relationships—is a *political act*. But *socialism* cannot be realised without *revolution*. It needs this *political act* insofar as it needs *destruction* and *dissolution*. But where its organising activity begins, where its *proper object*, its *soul*, comes to the fore—there socialism throws off the *political cloak*.¹⁰²

This ‘political cloak’ is inclusive of liberal and republican political constitutions. In fact, despite the emancipatory potential of these abstractions, they too have negative consequences. For Marx, republicanism is an ideology whose ‘notions of citizenship and community are constitutive of reality at the same time that they misdescribe it’.¹⁰³ By emphasising formal citizenship, ‘[i]t functions as an ideological legitimation of the *bellum omnes contra omnes* which constitutes civil society, compensating for the practical debasement of ordinary life by elevating the alienated man to the status of species-being’.¹⁰⁴

¹⁰² Marx, ‘Critical Marginal Notes on the Article “The King of Prussia and Social Reform”’ in Tucker 126 at 132 (emphasis in original).

¹⁰³ Isaac, ‘The Lion’s Skin of Politics: Marx on Republicanism’, 475.

¹⁰⁴ Isaac, ‘The Lion’s Skin of Politics: Marx on Republicanism’, 476.

Accordingly, the call to overthrow this cloak is an invitation to go beyond the struggle over access to the state toward transforming the state and its relation to society. The following section shows that constituent assemblies in political revolutions often fail to produce the required social change and democratisation.

Constituent Assemblies during a Political Revolution

Marx agrees with republicans that ‘sovereign dictatorship’ is necessary during a revolution.¹⁰⁵ In a moment of founding, popular sovereignty cannot be limited by pre-existing procedures and principles.¹⁰⁶ Power struggles between opposing parties cannot be regulated, let alone resolved, through existing institutions and principles. Marx’s commentary on the 1848 revolutionary process in Germany sets out this view, but it also highlights his scepticism about constituent power in concrete historical contexts, given the performance of actual constituent assemblies that fail to attain the ideal of constituent power. In contrast to this ideal, which presumes unlimited power to reconstitute the polity and enact the new constitution, constituent assemblies do not act in a vacuum and do not create the constitution *ex nihilo*.¹⁰⁷

The Frankfurt Assembly is a case in point. As the assembly attempted to purify the army of officers who were not sympathetic to the revolution, the cabinet—backed up by Frederick William IV—refused to pass these measures and consequently resigned. The constitutional crisis thus in-

¹⁰⁵ Compare with Andrew Arato, ‘The link between revolution and sovereign dictatorship: Reflections on the Russian Constituent Assembly’, (2017) 24:4 *Constellations* 493.

¹⁰⁶ Sieyès, ‘What is the Third Estate?’, 139.

¹⁰⁷ Compare with Claude Klein and András Sajó, ‘Constitution-Making: Process and Substance’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 421.

volved a struggle between the king and his executive power on the one hand and the elected assembly on the other. For Marx, this struggle presents a stark choice between ‘recognition of popular sovereignty’ and ‘sham constitutionalism’, between democratic freedom and military dictatorship. In particular, Marx argues that the monarch does not have the right to dissolve the Frankfurt Assembly on the basis of the pre-existing constitutional order. This is because the assembly as a revolutionary constituent power is tasked with writing the constitution. In other words, pre-existing constituted bodies cannot limit its power. It is akin to a sovereign dictator reconstituting the polity:

[I]t has been convened not on the basis of a Constitution, but on that of a *revolution*. It received its mandate by no means from the Crown or from the Ministers answerable to the Crown, but from those who elected it and from the Assembly itself. The Assembly was sovereign as the legitimate expression of the revolution. ... A sovereign assembly ... cannot be dissolved by anybody, and cannot be given orders by anybody.¹⁰⁸

In light of this position, Marx mocks the invocation of ‘constitutional principles’. The cabinet and the monarchists argued that the assembly violated the principle of separation of powers, usurping the executive branch’s powers. But these arguments conflate the constituent assembly (during a revolution) with a legislative assembly (under an established constitution). They thereby ignore the fact that the revolution is a process rather than an event, and that the new constitutional order is yet to emerge. As such, the revolution is still underway and requires reconstitution

¹⁰⁸ Marx, ‘The Crisis and the Counter-Revolution’ (September 1848), in Karl Marx and Frederick Engels, *Collected Works*, vol 7 (Lawrence & Wishart 2010) 427, 428-429.

of the polity rather than reliance upon the very constitutional order whose bankruptcy the revolution foregrounds and whose substance it seeks to change.¹⁰⁹

The ‘constitutional fantasies’ that Marx criticises are prevalent during ‘ordinary’ times. Even under such conditions, these principles are myths that conceal the actual operation of the state.

Consider, for instance, liberal constitutionalists’ admission that the ‘rule of law’ is ‘merely a slogan’, and ‘mere rhetoric’, and that the ideal of ‘government of laws and not of men’ is ‘an impossibility’.¹¹⁰ In capitalist states, neoliberal austerity undermines minimal promises of the rule of law (such as in criminal procedure),¹¹¹ and wealth inequality leads to unequal application of the law and the privileging of the affluent (such as the financial sector).¹¹² Consider further that the principle of separation of powers is ‘outdated’ and ‘must be scrapped’ because it is not consistent with constitutional democratic practice and does not accurately reflect political reality.¹¹³ Indeed, Madisonian political theory is ‘clearly anachronistic’ with respect to its ‘vision of legislative-executive separation of powers’.¹¹⁴ Thus, ‘constitutional law and theory have been looking for power in the wrong places’,¹¹⁵ because ‘the distribution of power at the structural level sel-

¹⁰⁹ Marx, ‘The Crisis and the Counter-Revolution’, 430-431. Marx makes a similar point elsewhere arguing that the struggle between the Assembly and the monarch is not a constitutional power struggle between two branches or authorities (executive versus legislature). Rather, in the absence of a constitution, the Assembly is a sovereign and unlimited power tasked to establish the constitutional order. Marx, ‘The Trial of Rhenish District Committee of Democrats’ (Speech delivered on 8 February 1849), in Karl Marx and Frederick Engels, *Collected Works*, vol 8 (Lawrence & Wishart 2010) .323

¹¹⁰ Martin Loughlin, *Foundations of Public Law* (OUP 2010) 312-313.

¹¹¹ The Secret Barrister, *Stories of the Law and How It’s Broken* (Pan Macmillan 2018).

¹¹² Joseph E. Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future* (WW Norton 2012) 496-541.

¹¹³ Hansen, ‘The Mixed Constitution versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy’, 516.

¹¹⁴ Levinson and Pildes, ‘Separation of Parties, Not Powers’, 2313.

¹¹⁵ Levinson, ‘Foreword: Looking for Power in Public Law’, 38.

dom bears any systematic relation to the distribution of power at the level of interests'.¹¹⁶ Thus, 'the problem of concentrated wealth and its organization to achieve political ends' is the primary reason for the failure of effective 'checks and balances', rather than partisanship.¹¹⁷ Maintaining this constitutional fiction is even less justifiable under revolutionary conditions, when the reconstitution of the polity requires redistribution of power.¹¹⁸ In fact, such assertions of constitutional continuity often seek to delimit the potentialities of revolutionary change.

Marx defends constituent power against constitutional arguments that seek to constrain it, but he is cognisant of the fact that the 1848 constituent assembly failed to assert itself as a constituent power with sufficient force. It was, he suggests, a 'parody' of constituent power.¹¹⁹ This lack of constituent action emboldens counter-revolutionary forces. Marx also criticises the lack of early action by the GL Comphausen government (March-June 1848) to destroy the remnants of old institutions.¹²⁰ Marx reminds his reader that pre-revolutionary governments did not shy away from invoking public interest—through appeals to 'public safety'—against democratic forces. The government could have done the same in 1848 against the revolution's enemies. Yet the cabinet refrained from following this course of action during a revolutionary process.¹²¹ Indeed, the resurgence of the reactionary forces turned out to be only a matter of time. By April 1849, the

¹¹⁶ Levinson, 'Foreword: Looking for Power in Public Law', 40.

¹¹⁷ Andrias, 'Separations of Wealth: Inequality and the Erosion of Checks and Balances', 421.

¹¹⁸ See eg Nimer Sultany, *Law and Revolution* (on the struggle over 'judicial independence' and 'rule of law' in the Arab Spring).

¹¹⁹ Marx, 'The Crisis and the Counter-Revolution', 432.

¹²⁰ Marx, 'The Crisis and the Counter-Revolution', 431. Similarly, Engels criticizes the Frankfurt Assembly for its failure to promptly and clearly endorse the principle of popular sovereignty as the basis for the new constitutional order and to act against reactionary counter-revolutionary forces. Friedrich Engels, 'The Assembly at Frankfurt' (June 1848).

¹²¹ Marx, 'The Crisis and the Counter-Revolution', 431.

revolution was defeated and monarchical regimes were restored in Germany and elsewhere in Europe.

This weakness in the performance of constituent assemblies invites the question of the limits to their mandate. By November 1848 Marx was thoroughly disillusioned with the Frankfurt Assembly. In particular, it decided to rebuke the Berlin assembly by rejecting its determination that the refusal to pay taxes is a method of lawful resistance to the king. Such a decision was a betrayal of the German people and an endorsement of the very monarchical regime against which they had revolted. Marx declared that the representatives ought to be put on trial, and also called upon them to resign.¹²² For Marx, who defends the masses' right to pressure constituent assemblies by attending their deliberations,¹²³ the people maintain their right to step forward if a constituent assembly violates the terms of its mandate, namely by establishing a new constitution that befits the new social order that the revolution brought forward: 'If the Assembly does not act in accordance with the mandate it has received, then this mandate lapses. The people then takes stage itself and acts on its own'.¹²⁴

Legal Continuity and the Counter-Revolution

The fact that constituent assemblies may fail to establish new orders under revolutionary conditions invites questions about the legal and institutional continuities that impede their action. On

¹²² Marx, 'The Assembly at Frankfurt' (November 1848), in Karl Marx and Frederick Engels, *Collected Works*, vol 7 (Lawrence & Wishart 2010) 16.

¹²³ Marx, 'Freedom of Debate in Berlin' (17 September 1848), in Karl Marx and Frederick Engels, *Collected Works*, vol 7 (Lawrence & Wishart 2010) 436-438.

¹²⁴ Marx, 'The Trial of Rhenish District Committee of Democrats', 339.

the one hand, it is sobering as it enables a realistic assessment of the work needed for the revolutionary change to materialise. On the other hand, the imposition of legal continuity is objectionable (because it relies on a fiction and seeks to abort revolutionary change) and thus should be rejected.

In his speech during the ‘Tax-Refusal Trial’, Marx discussed the legal ramifications of the power struggle between the crown and the constituent assembly, the question of legal continuity, and the relation between taxes and constitutionalism. His prosecution related to the public ‘appeal’ he had published in the *Neue Rheinische Zeitung* on 18 November 1848, on behalf of the ‘Rhenish District Committee of Democrats’.¹²⁵ This appeal had invoked the Prussian National Assembly’s resolution and urged ‘all democratic associations in the Rhine province’ to refuse to pay taxes and to resist ‘their forcible collection ... everywhere and in every way’.¹²⁶

The prosecution relied on two organic laws enacted in April 1848, following the 1848 March Revolution. Marx disputed the validity of these organic laws on two grounds. First, even if one assumes *arguendo* that the organic laws were procedurally valid, they were suspended by the fact of the counter-revolution (the overthrow of the constitutional order that the March Revolution brought into place). More importantly, they were null and void because they had been enacted by unauthorised bodies that did not possess sovereign power, and were in fact overthrown by the revolution. The attempt to ‘preserve a semblance of legal continuity’ despite this rupture was absurd, Marx argued.¹²⁷

¹²⁵ ‘Appeal’, in Karl Marx and Frederick Engels, *Collected Works*, vol 8 (Lawrence & Wishart 2010) 41.

¹²⁶ ‘Appeal’, 41.

¹²⁷ Marx, ‘The Trial of Rhenish District Committee of Democrats’, 326.

The monarchy had effectively suspended the legal order by its counter-revolutionary act. As a result, Marx stated, 'it cannot appeal to the laws it has itself so scandalously annulled'.¹²⁸ The organic laws were not mere ordinary laws, and by violating them the monarchy had invalidated the constitutional order they embodied. This included the fact that the electoral and parliamentary system, which the organic laws prescribed, was not respected. The monarchy had introduced an upper chamber in the legislative branch based on property qualifications. Marx's argument was that although these legal instruments could still be formally valid (since they were not annulled), they were effectively or substantively invalid (since they lacked factual power and social efficacy during a societal upheaval or revolutionary turmoil). The government could not pick and choose among legal provisions, treating some as valid while ignoring and violating others.

If a revolutionary change occurred, then the monarchy was better off invoking 'necessity' (violating 'legal formula to save the country').¹²⁹ Instead, the monarchy chose the opposite route of assuming the 'pretense of legality': rather than executing its opponents, the regime chose to prosecute them; rather than considering them political enemies, it sought to criminalise them.¹³⁰ According to Marx, the regime could not prosecute him because he was its political enemy and his call for resistance (his refusal to pay taxes) was part of the struggle between the monarchy and the constituent assembly. In such a struggle, 'only power can decide between two powers'.¹³¹ Marx sided with the National Assembly because it represented the people.

¹²⁸ Marx, 'The Trial of Rhenish District Committee of Democrats', 324.

¹²⁹ Marx, 'The Trial of Rhenish District Committee of Democrats', 324.

¹³⁰ Marx, 'The Trial of Rhenish District Committee of Democrats', 324.

¹³¹ Marx, 'The Trial of Rhenish District Committee of Democrats', 325.

Marx's second argument was that the laws in question were *formally* invalid. Institutionally, the Universal Provincial Diet was not an authoritative legislative organ because it represented the old social order (namely, the landed gentry and feudal lords) which the March 1848 Revolution had overthrown along with the absolute monarchy.¹³² Substantively, this obsolete state organ represented anachronistic interests. Maintaining legal continuity in this context meant preserving the interests of the old social order in the face of the emerging social order (given industrialisation and the rise of the bourgeoisie). This did not make sense for Marx, who thought that law should maintain its relation to social needs and interests.¹³³ Otherwise, priorities were flipped and law was fetishised:

Society is not founded upon the law; this is a legal fiction. On the contrary, the law must be founded upon society, it must express the common interests and needs of society—as distinct from the caprice of individuals—which arise from the material mode of production prevailing at the given time.¹³⁴

The maintenance of legal continuity, then, meant that the law advanced minority over majority interests, despite changing social bases, and that there was a disconnect between law and 'the conditions of life'.¹³⁵ The law became unfit for purpose and could hamper social and economic developments, leading to crisis. This is why the March 1848 Revolution sought to reconstitute

¹³² Marx, 'The Trial of Rhenish District Committee of Democrats', 326-327.

¹³³ For Marx, the duty to bridge the gap between law and social needs is not merely the task of the constituent assembly, but also an interpretive duty on those who apply the law like the jury. Marx, 'The First Trial of the Neue Rheinische Zeitung, Speech by Karl Marx (7 February 1849)', in Karl Marx and Frederick Engels, *Collected Works*, vol 8 (Lawrence & Wishart 2010) 304.

¹³⁴ Marx, 'The Trial of Rhenish District Committee of Democrats', 327.

¹³⁵ Marx, 'The Trial of Rhenish District Committee of Democrats', 328.

the polity, establishing a new constitution befitting the new order.¹³⁶ The April 1848 organic laws sought to undermine the revolution and shackle the constituent assembly, which was tasked with establishing a new constitution for the new polity.

For Marx, legal continuity could not be maintained because the struggle was not a conflict within the same society or the same framework of principles.¹³⁷ Rather, it was a conflict between two opposing visions of social order, competing interests, and contradictory principles:

What took place was not a political conflict between two parties within the framework of *one* society, but a *conflict between two societies*, a social conflict, which assumed a political form; *it was the struggle of the old feudal bureaucratic society with modern bourgeois society*, a struggle between the society of *free competition* and the *society of guild system*, between the society of landownership and the industrial society, between a religious society and a scientific society.¹³⁸

This also showed that the National Assembly's conciliatory efforts to resolve the conflict amicably were misguided, since there could be no reconciliation in the context of such conflict with the monarchy. The assembly thereby underestimated the lurking danger of the monarchical counter-revolution, which was a 'constantly recurrent condition ... after every revolution'.¹³⁹

¹³⁶ Marx, 'The Trial of Rhenish District Committee of Democrats', 328.

¹³⁷ Thus, there can be no Dworkinian continuity based on a background of a shared scheme of abstract principles. See Sultany, *Law and Revolution*, ch. 5.

¹³⁸ Marx, 'The Trial of Rhenish District Committee of Democrats', 335 (emphasis in original).

¹³⁹ Marx, 'The Trial of Rhenish District Committee of Democrats', 336.

Hence no peace is possible between these two societies. Their material interests and needs bring them into mortal combat. One side must win, the other must lose. That is the only reconciliation possible between them.¹⁴⁰

Indeed, the 1848 revolution did not produce the kind of rupture necessary to ensure success, and different forms of institutional continuity undermined it. On February 1849 Marx would reflect as follows:

What caused the defeat of the *March revolution*? It reformed only the highest political summit, it left all the groundwork of this summit intact—the old bureaucracy, the old army, the old boards of prosecuting magistrates, the old judiciary which had been created, had developed and grown grey in the service of absolutism.¹⁴¹

Herein lies the limitation of the political revolution and the political constitution it engenders: it underestimates the magnitude of social struggle by wrongly assuming a shared abstract framework that ignores the conflicting material interests at stake, and it further limits its aspirations for reform, thus failing to achieve genuine rupture from the old regime.

The Political Constitution in Context

The limitations of the political constitution require further elaboration. Constitutional scholars often approach the constitution as a higher law or normative contract. Yet constitutional experi-

¹⁴⁰ Marx, 'The Trial of Rhenish District Committee of Democrats', 336.

¹⁴¹ Marx, 'The First Trial of the Neue Rheinische Zeitung', 316-317 (emphasis in original).

ences are varied and not reducible to this approach.¹⁴² Moreover, the ability of the abstract normative constitution to legitimate the juridico-political order, by subjugating it to a higher law of law-making, is questionable even within the frameworks of liberal thought.¹⁴³ The line between normativity and *modus vivendi* is often overstated, because abstract rights require social and political struggles to be actualised.¹⁴⁴ Constitutions are based on a *modus vivendi* because they are an outcome of class struggle rather than a binding normative agreement against the backdrop of a ‘social contract’ between the capitalist class and the working class.¹⁴⁵

For Marx, the constitution embodies a compromise.¹⁴⁶ This is not simply a matter of political compromise, in the sense of bringing a variety of different groups together for constitution-making purposes.¹⁴⁷ Instead, it is first and foremost a class compromise.¹⁴⁸ Thus, Marx’s answer to the question ‘what is a constitution’ is that the constitution is a class-based compromise. This

¹⁴² Jorge González-Jácome, ‘From Abusive Constitutionalism to a Multilayered Understanding of Constitutionalism: Lessons from Latin America’, (2017) 15 *International Journal of Constitutional Law* 447; Günter Frankenberg, ‘Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative’, (2006) 4:3 *International Journal of Constitutional Law* 439.

¹⁴³ Frank I. Michelman, ‘Human Rights and the Limits of Constitutional Theory’, (2000) 13 *Ratio Juris* 63; Michelman, ‘Is the Constitution a Contract for Legitimacy?’, (2003) 8:2 *Review of Constitutional Studies* 101; Michael Louis Seidman, *On Constitutional Disobedience* (Oxford University Press 2003).

¹⁴⁴ See, eg, Marx’s discussion of the class struggle over the regulation of the working day describing resistance, setbacks, and legal loopholes: Marx, *Capital*, 382, 390, 394-395, 404-405, 408-409. See also, Sultany, *Law and Revolution*, ch. 2.

¹⁴⁵ See, eg, Richard Miller, ‘Rawls and Marxism’, (1974) 3:2 *Philosophy & Public Affairs* 167, at 170; Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (Yale University Press 2001).

¹⁴⁶ Marx, *Critique of Hegel’s Philosophy of Right*, 58 (‘is nothing more than an accommodation between the political and non-political state; hence it is necessarily in itself a treaty between essentially heterogeneous powers’).

¹⁴⁷ Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr., Duke University Press 2008) 82–88, 112–24.

¹⁴⁸ See discussion in Ernst-Wolfgang Böckenförde, ‘The Historical Evolution and Changes in the Meaning of the Constitution’, in his *Constitutional and Political Theory: Selected Writings, vol. I* (Mirjam Künkler and Tine Stein eds, Oxford University Press 2017) 152, 162-65.

is reflected in his brief commentary on the uncodified British constitution.¹⁴⁹ For Marx, the ‘essential features’ of this constitution are not merely formal or textual.¹⁵⁰ In particular, he maintains that what distinguishes this constitution from others are not those rules that regulate political representation and the exercise of executive power. Rather, the British constitution is a historic compromise (‘antiquated and obsolete’) between the bourgeoisie and the landed aristocracy that was subsequently modified in accordance with changes in social relations to accommodate rising social powers, such as the financial aristocracy after the Glorious Revolution of 1688.¹⁵¹

In light of the fact that constitutions are based on a *modus vivendi* within a class-based social order, it is unsurprising that they generate contradictions and incoherence, or that they overpromise and under-deliver. Marx’s analysis of the French Constitution of 1848 reveals that such compromise is unstable and generates an incoherent constitutional order whose practice falls short of its proclaimed ideals, as evident in the disenfranchisement of the poor. The constitutional order thus seeks to stabilise itself through reliance on violence (such as through the deployment of emergency powers), constitutional entrenchment, and irremovability of judges.

To begin with, Marx takes note of the gap between constitutional texts and practices, the failure to deliver on the promises of formal rights of equality, and the existence of ambiguities and contradictions in constitutional orders. Although the 1848 French Constitution was a republican instrument, the legal order to which it gave expression limited universal suffrage through excluding criminals and stipulating a residency requirement that disenfranchised a large number of

¹⁴⁹ Marx, ‘The British Constitution’ (March 1855), in his *Surveys from Exile* (Verso 2010) 281-284.

¹⁵⁰ Marx, ‘The British Constitution’, 281-284.

¹⁵¹ Marx, ‘The British Constitution’, 281-284.

people.¹⁵² The revolution created a new constitution, but this constitution fell short of establishing a new polity. Constitutional discontinuity co-existed with continuity in state administration because the ‘old organisation of the administration’, such as the judiciary and the military, remained unreformed.¹⁵³ The constitution declared the rights of the citizen ‘absolute’, but the ‘equal rights of others’ and considerations of ‘public safety’ limited these rights, or they awaited further elaboration in legislation that effectively undermined them.¹⁵⁴ Constitutional practice was discriminatory: the organic laws privileged the bourgeoisie because their exercise of rights was not limited by the rights of other classes, and the ‘public safety’ proviso effectively meant ‘bourgeois safety’.¹⁵⁵

For Marx, these conditions show that the constitution is not simply a document, but also the web of laws that purport to implement it but may in fact undermine the rights and freedoms it ostensibly protects:

[T]he real ‘Constitution’ of France is to be found, not in the Charter we have recorded, but in the organic laws enacted on its basis The *principles* were there—the *details* were left to the future, and in those details a shameless tyranny was re-enacted!¹⁵⁶

As a result, it is not sufficient to agree on abstract principles, and it is necessary to be aware of the institutional organisation of the constitutional order: ‘People! Make up your minds as to *de-*

¹⁵² Marx, ‘The Eighteenth Brumaire of Louis Bonaparte’, 114.

¹⁵³ Marx, ‘The Eighteenth Brumaire of Louis Bonaparte’, 114

¹⁵⁴ Marx, ‘The Eighteenth Brumaire of Louis Bonaparte’, 114-115.

¹⁵⁵ Marx, ‘The Eighteenth Brumaire of Louis Bonaparte’, 115.

¹⁵⁶ Marx, ‘The Constitution of the French Republic Adopted November 4, 1848’, in Karl Marx and Frederick Engels, *Collected Works*, vol 10 (Lawrence & Wishart 2010) 567, 578.

tails, as well as to principles, before you come to power'.¹⁵⁷ Agreement on an abstract constitution may be meaningless.¹⁵⁸

The 1848 French Constitution was a site for conflicting demands and aspirations. It was utilised by different parties to achieve different ends. This was not because of abuse or violations of the constitution, but because the constitution itself contained contradictory provisions: 'For each paragraph of the Constitution contains its antithesis, its own Upper and Lower House'.¹⁵⁹ Indeed, 'from beginning to end it is a mass of fine words, hiding a most treacherous design. From its very wording, it is rendered *impossible* to violate it, for every one of its provisions contains its own antithesis—utterly nullifies itself'.¹⁶⁰

One of the principal conflicts Marx identifies is between different branches of government. Despite a well-crafted constitutional text, it was 'like Achilles, vulnerable in one point, not in the heel, but in the head, or rather the two heads'.¹⁶¹ Marx describes the deadlock to which the constitutional separation of powers led, discussing tensions between the presidential and parliamentary, executive and legislative, branches. The constitution 'not only sanctifies the division of powers', he writes, but also 'widens it into an intolerable contradiction'.¹⁶² It grants the president 'actual power', and the legislature (the National Assembly) a 'moral power'. According to Marx, there are two primary problems with this arrangement. First, 'it is impossible to create a moral

¹⁵⁷ Marx, 'The Constitution of the French Republic Adopted November 4, 1848', 578.

¹⁵⁸ See, eg, Michelman, 'Human Rights and the Limits of Constitutional Theory'.

¹⁵⁹ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 115.

¹⁶⁰ Marx, 'The Constitution of the French Republic Adopted November 4, 1848', 577.

¹⁶¹ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 115.

¹⁶² Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 115-116.

power by paragraphs of law'.¹⁶³ Second, by providing for direct election of the president, the constitution-maker (the constituent assembly) opened the door for undermining the constitutional order. This is because the president was the only constitutional power representing the unity of the people, whereas the divided legislative assembly represented a variety of competing interests. The assembly represented the nation in a 'metaphysical sense', but the president directly and 'personally' represented the nation.¹⁶⁴ This constitutional arrangement granted the president the upper hand in the battle against the assembly, and thus facilitated the overthrow of the constitution itself. A major reason for the inability to resolve the political conflict constitutionally was the difficulty in amending the constitution.

Marx critiques the constitutional entrenchment effort as a failed attempt to stabilise the political order. The ruling majority expected to lose power and wanted to immunise its achievements from the vagaries of electoral politics. It thus 'sought to cheat destiny by a catch in the Constitution'.¹⁶⁵ It placed a high threshold for constitutional amendment, making the constitution virtually unamendable.¹⁶⁶ This was one of the few constitutional provisions that Marx thought open to violation because it was not contradictory.¹⁶⁷ Yet the virtual impossibility of constitutional amendment prevented the possibility of changing the constitutional order without overthrowing the constitution. Indeed, these attempts to fix the constitutional order did not survive the political turmoil. The constitution lasted until 2 December 1851, when Louis Bonaparte staged a coup

¹⁶³ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 116.

¹⁶⁴ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 117.

¹⁶⁵ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 117.

¹⁶⁶ Article §111 quoted in Marx, 'The Constitution of the French Republic Adopted November 4, 1848', 577.

¹⁶⁷ Marx, 'The Constitution of the French Republic Adopted November 4, 1848', 578.

d'état after refusing to leave office at the end of his constitutionally prescribed (non-renewable) term.¹⁶⁸ The constitution, then, is not above politics, and it cannot be a guarantee against it.¹⁶⁹

Marx also points out the role of violence in stabilising the constitutional order. The constitution-making process co-existed with the declaration of the 'state of siege' in Paris. A state of siege empowers the military and its tribunals to suspend constitutional guarantees during an emergency period, thereby often allowing them to violate citizens' rights. For Marx, this is another demonstration for the fact that general proclamations in legal texts can be, and often are, superseded in practice. The role of violence suggests two further insights.

First, the constitution of the parliamentary republic was neither an exclusive outcome of the democratic exercise of free will, nor a product of a rational exercise of the human faculties. Rather, it was written during social unrest and supported by force and violence.¹⁷⁰ The 'state of siege of Paris was the midwife of the Constituent Assembly in its travail of republican creation'.¹⁷¹ Bayonets protected the establishment of the constitution, and bayonets overthrew it.¹⁷² Indeed, during the constitution-making process, the government ruthlessly crushed the working class's June 1848 insurrection.¹⁷³ However, this deployment of violence, far from stabilising the

¹⁶⁸ Eugénie Mérieau, 'French authoritarian constitutionalism and its legacy', in Helena Alviar Garcia and Günter Frankenberg (eds), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar 2019) 185, 196.

¹⁶⁹ See also Seidman, *Our Unsettled Constitution*, 7, 21-22.

¹⁷⁰ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 118. See also Marx, 'Freedom of Debate in Berlin', 436-438. For additional examples for this proposition see Jon Elster, 'Constitution-Making and Violence', (2012) 4:1 *Journal of Legal Analysis* 7; and Gregory Ablavsky, 'The Savage Constitution', (2014) 63 *Duke Law Journal* 999.

¹⁷¹ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 118.

¹⁷² Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 118.

¹⁷³ Marx, 'The Eighteenth Brumaire of Louis Bonaparte', 109-111.

political order, actually destabilises it. The state of siege was normalised because it was ‘periodically employed in every ensuing crisis in the course of the French Revolution’.¹⁷⁴ The risks of deployment by competing factions in the service of their own interests is that it may pave the way for the military itself to capture power by using the device of the state of siege.¹⁷⁵

Second, Marx takes up the question of prolonging the state of siege as preceding and accompanying constitution-making in order to distinguish between revolutionary and counter-revolutionary constitutions. Revolutionary constitutions sanction a social revolution once social relations stabilise and a compromise among different factions of the ruling classes is concluded to the exclusion of the masses. The counter-revolutionary constitution, however, affirms the ‘momentary victory of the old society over the revolution’.¹⁷⁶ Marx finds evidence for the counter-revolutionary orientation of the Constituent Assembly in the removal of the right to work and progressive taxation,¹⁷⁷ as well as the right to education and the right of orphans to state support, which appeared in an earlier draft that predated the June 1848 insurrection.¹⁷⁸

A final stabilising device, and another manifestation of the counter-revolutionary character of the constitution, is juristocracy—the rule of judges. Its objective is to immunise the old order from democratic elements by empowering the judiciary and isolating it from political influence:

¹⁷⁴ Marx, ‘The Eighteenth Brumaire of Louis Bonaparte’, 118. For an analysis of the contemporary normalisation of emergency powers see: Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception* (Edward Elgar 2014).

¹⁷⁵ Marx, ‘The Eighteenth Brumaire of Louis Bonaparte’, 118.

¹⁷⁶ Marx, ‘The Class Struggles in France’, 77.

¹⁷⁷ Marx, ‘The Class Struggles in France’, 78.

¹⁷⁸ Marx, ‘The Constitution of the French Republic Adopted November 4, 1848’, 567.

While the tricolor constitution ... was unable to win the attachment of any new social element to the new form of government, it hastened, on the other hand, to restore its traditional inviolability to a body that constituted the most hard-bitten and fanatical defender of the old state. It raised the *irremovability of judges*, which had been questioned by the Provisional Government, to an organic law. The *one* king whom it had removed rose again, by the score, in these irremovable inquisitors of legality¹⁷⁹.

Absent any social support for the constitutional order, the irremovability of judges—who are closely associated with the pre-existing regime and notions of law and order—becomes a primary stabilising mechanism. While the constitution grants universal suffrage, it excludes various classes, including the proletariat and peasantry, from the political process. It prevents these classes from gaining significant electoral and parliamentary power, or using such power to radically change the constitutional order or replace the professional class tasked with applying and interpreting the constitution. Such an anti-majoritarian juristocracy, which limits the efficacy of electoral and participatory politics, continues to be a major feature of modern constitutional orders.¹⁸⁰

From Conceptual Paradoxes to Material Conflicts

¹⁷⁹ Marx, 'The Class Struggles in France', 78-79.

¹⁸⁰ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007); JAG Griffith, *Politics of the Judiciary* (5th edn, Harper Collins Publishers 1997); Nimer Sultany, 'The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification', (2012) 47 *Harvard Civil Rights—Civil Liberties Law Review* 371.

These criticisms of disenfranchisement, constitutional entrenchment, judicial empowerment, and the role of violence may be familiar to those who object to anti-democratic measures and counter-majoritarian structures in liberal and republican constitutional orders. Marx, however, goes beyond the criticisms of counter-majoritarianism and authoritarian centralism. Unlike other commentators at the time, Marx is not content with analysing the power struggle between two branches of government—the legislative/ sovereign assembly (National Assembly) and the executive (president)—over the final decision-making authority.¹⁸¹ This is not, Marx argues, the constitution's 'fundamental contradiction'. He warns against conflating 'language of the struggle on the platform' with 'its real content'.¹⁸² As in the case of the German revolution, framing the revolutionary situation in constitutional terms is a misconception and amounts to an abdication of constituent power. Properly understood, the constitutional conflict is actually a conflict between two societies (and different interests) rather than within one society. Thus, and in contrast to liberal constitutional theory,¹⁸³ there is no harmonious unfolding of the relation between constituent power and constituted power. Instead, they may well be—and often are—in direct conflict. This is an historical conflict, and not merely a conceptual or logical puzzle. Accordingly, it is embodied in real conflict between different social forces that capture different state institutions and have competing visions of the social and constitutional order.

Marx argues that the fundamental contradiction is embodied in the separation between social and political emancipation. On the one hand, the French constitution entrenches the class-based so-

¹⁸¹ Marx, 'The Class Struggles in France', 79, 85.

¹⁸² Marx, 'The Class Struggles in France', 85.

¹⁸³ See eg Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 11.

cial order (under which workers are dependent on capital and forced into exploitative wage labour); on the other hand, it extends the right to vote to all citizens. It grants political emancipation but forestalls social emancipation:

The fundamental contradiction of this constitution, however, consists in the following: The classes whose social slavery the constitution is to perpetuate, proletariat, peasantry, petty bourgeoisie, it puts in possession of political power through universal suffrage. And from the class whose old social power it sanctions, the bourgeoisie, it withdraws the political guarantees of this power. It forces the political rule of the bourgeoisie into democratic conditions, which at every moment help the hostile classes to victory and jeopardise the very foundations of bourgeois society. From the ones it demands that they should not go forward from political to social emancipation; from the others that they should not go back from social to political restoration.¹⁸⁴

The contradiction thus is the one between capitalism and liberal democracy.¹⁸⁵ Capitalism increases the separation between class power and state power, ie economic structures of exploitation are divorced from direct political coercion.¹⁸⁶ In contrast to feudalism, the centralisation of the state dispossesses ‘the appropriating class of direct political powers... leaving them with pri-

¹⁸⁴ Marx, ‘The Class Struggles in France’, 79.

¹⁸⁵ See discussion in August H Nimtz, “‘Putting weapons into the hands of the proletariat’: Marx on the Contradiction between Capitalism and Liberal Democracy”, in this volume.

¹⁸⁶ Wood, *Democracy Against Capitalism*, 33-34.

vate exploitative powers purified of public, social functions'.¹⁸⁷ This is not merely a question of separating the economic and political as much as redrawing the boundaries of the political.¹⁸⁸

The very constitution that establishes an electoral democracy inhibits the ability of the masses' political power to fundamentally change the social order (such as in protecting property rights and erecting counter-majoritarian structures). Despite the achievements of the political revolution (democratising the constitutional order), it is an incomplete revolution that seeks to block further democratisation. It attempts to deprive the proletariat, peasantry, and petty bourgeoisie from the power to transform their society by democratising the economy. Put differently, the masses are denied their constituent power to expand the political and deepen democracy because the constitution entrenches the socio-political order and blocks a further revolution.

Marx adds that the nature of the constitutional contradiction between executive and legislative powers is better understood as originating in the unresolved paradox of constitutionalism—the struggle between constituent and constituted power in a revolutionary situation. On the one hand, the establishment of the constitution displaces the constituent assembly: 'The first day of the realisation of the constitution was the last day of the rule of the Constituent Assembly'.¹⁸⁹ On the other hand, the creator refuses to leave the political scene, constituent power seeks to remain active after the constitution of the new form of government:

¹⁸⁷ Wood, *Democracy Against Capitalism*, 39.

¹⁸⁸ Wood, *Democracy Against Capitalism*, 44.

¹⁸⁹ Marx, 'The Class Struggles in France', 80.

from the hour when the National Assembly had installed Bonaparte France stepped out of the period of republican constitution into the period of the constituted republic. And what place was there for a Constituent Assembly in a constituted republic? After the earth had been created, there was nothing else for its creator to do but flee to heaven. The Constituent Assembly was determined not to follow his example; the National Assembly was the last asylum of the party of the bourgeois republicans.¹⁹⁰

The reason for this is that the constitutional and legal guarantees installed by the drafters of the constitution failed to achieve the intended consequences. Despite setting a high threshold of number of votes (two million) for presidential candidates, Louis Bonaparte swept the vote and therefore nullified the need to resort to a choice of president by the Constituent Assembly itself.¹⁹¹ The drafters had an imaginary people in mind, but what the electoral process reflected was the ‘real people’ in their divisions, their perceived or even misconceived interests.¹⁹² For a variety of reasons, different classes of the people imagined Bonaparte to represent their interests.¹⁹³

The constituted power sought to wrest the polity away from the hands of constituent power. The latter, for its part, wanted to prevent the degeneration of its constitutional designs to trajectories it did not anticipate or welcome:

¹⁹⁰ Marx, ‘The Class Struggles in France’, 83-84.

¹⁹¹ Marx, ‘The Class Struggles in France’, 79.

¹⁹² Marx, ‘The Class Struggles in France’, 65.

¹⁹³ Marx, ‘The Class Struggles in France’, 80.

Louis Bonaparte as against the Constituent National Assembly—that was not one unilateral constitutional power as against another; that was not the executive power as against the legislative. That was the constituted bourgeois republic itself as against the intrigues and ideological demands of the revolutionary faction of the bourgeoisie that had founded it and was now amazed to find that its constituted republic looked like a restored monarchy, and now desired forcibly to prolong the constituent period with its conditions, its illusions, its language, and its personages and to prevent the mature bourgeois republic from emerging in its complete and peculiar form Thus on January 29 [1849], it was not the President and the National Assembly of the *same* republic that were face to face; it was the national assembly of the republic that was coming into being and the President of the republic that had come into being, two powers that embodied quite different periods in the life process of the republic.¹⁹⁴

Thus, this case is inconsistent with the general argument that constituent power finds its termination in the establishment of the constitution (and thus the paradox constitutionalism is resolved).¹⁹⁵ It is also inconsistent with the idea that constituent power (embodied in a popularly elected constituent assembly) brings forward a higher form of representation than in electoral politics because it overcomes the divisibility of the nation into competing interests.¹⁹⁶ In lieu of these mystifications of political conflict, Marx outlines the differences as follows:¹⁹⁷

¹⁹⁴ Marx, 'The Class Struggles in France', 85.

¹⁹⁵ For examples of this argument see: Arendt, *On Revolution*; Ulrich K. Preuss, 'Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution', in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press 1994) 143.

¹⁹⁶ Sultany, *Law and Revolution*, 292-293.

¹⁹⁷ Marx, 'The Class Struggles in France', 85-86.

	<i>Constituent power</i>	<i>Constituted power</i>
<i>Stage of development</i>	Becoming	Being
<i>Social force</i>	Republican bourgeoisie	Royalist bourgeoisie
<i>Institutional site</i>	National Assembly	President
<i>Nature of power</i>	Legitimacy (authorial powers/ authoritative source)	Legality (power to rule)
<i>Type of constitution</i>	Ideal constitution	Non-ideological (actual) constitution

The ‘overthrow of the parliamentary republic’ by Bonaparte meant executive usurpation of the ‘general will’.¹⁹⁸ While the ‘general will’ may be criticised as a universalization of the ruling classes’ interests, the republic can no longer be said to be self-governing after the coup.

In parliament the nation made its general will the law, that is, it made the law of the ruling class its general will. Before the executive power it renounces all will of its own and submits to the superior command of an alien will, to authority. The executive power, in contrast to the legislative power, expresses the heteronomy of a nation, in contrast to its autonomy. France, therefore, seems to have escaped the despotism of a class only to fall

¹⁹⁸ Marx, ‘The Eighteenth Brumaire’, 184.

back beneath the despotism of an individual, and, what is more, beneath the authority of an individual without authority.¹⁹⁹

Bonaparte finalised the process of state centralisation that the 1789 French Revolution inaugurated. Under his rule, the state machinery—the bureaucracy—increasingly separated itself from civil society.²⁰⁰ The fact that the French masses who initially propelled Bonaparte to power, consisting primarily of small-holding peasants, failed to articulate a coherent interest and represent themselves facilitated such domination of society by the state.²⁰¹ The bourgeoisie could not blame the ‘stupidity of the masses’ in Bonaparte’s ascendancy because they were complicit in it: their policies of punishing the peasantry through violent repression and the imposition of the states of siege undermined revolutionary forces within the peasantry and strengthened traditional and ‘imperial sentiments’.²⁰²

The critique of the concentration of power in the hands of the executive is a recurrent theme in Marx. For instance, Marx attacks (1858) the Latin American leader Simón Bolívar as a Bonapartist dictator who concentrated power in the executive branch.²⁰³ However, the Paris Commune provides Marx with an opportunity to illustrate the contours of the democratic constitution beyond the bad alternatives of authoritarian centralism (‘despotism of an individual’) and impersonal class rule (‘despotism of a class’). This constitutional experiment charts the path towards solving the ‘fundamental contradiction’ by expanding the political and deepening democracy. It

¹⁹⁹ Marx, ‘The Eighteenth Brumaire’, 184-185.

²⁰⁰ Marx, ‘The Eighteenth Brumaire’, 185-186.

²⁰¹ Marx, ‘The Eighteenth Brumaire’, 187-188.

²⁰² Marx, ‘The Eighteenth Brumaire’, 188-189.

²⁰³ Hal Draper, ‘Karl Marx and Simon Bolívar: a Note on Authoritarian Leadership in a National-Liberation Movement’, (1968) 7:2 *New Politics* 64.

also solves the paradox of constitutionalism because there is no mystery in the constitution (it is no longer a sphere of alienation) because it is subjected to the constituent power of the working class.

Marx and the Paris Commune 1870–71: Elements of the Radical Constitution

The radicalism of the Commune's short-lived constitutional experiment bears a family resemblance to radical experiments in the Americas during the eighteenth and nineteenth centuries. Radicals and republicans in the Americas espoused participatory, inclusive, majoritarian decision-making (as opposed to elitist and exclusionary decision-making).²⁰⁴ They distrusted the representative system and pursued a closer relationship between people and representatives (short mandates; annual elections; mandatory rotations; written instructions to representatives; large representative bodies; and unicameral rather than bi-cameral legislatures).²⁰⁵ They rejected the concentration of powers in the hands of the few, reserved the right of the people to abolish government, preferred a weak executive, and called for decentralisation.²⁰⁶ Their understanding of a strict separation of powers, as opposed to a mixed arrangement of 'checks and balances', implied an exogenous popular restriction rather than judicial review or other counter-majoritarian measures.²⁰⁷

²⁰⁴ Gargarella's survey of 'American constitutionalism' includes 'the constitutional developments that took place in the United States [1776-1801] and in nine Latin American countries, namely, Argentina, Bolivia, Colombia, Chile, Ecuador, Mexico, Peru, Uruguay, and Venezuela [1810-1860]'. Gargarella, *The Legal Foundations of Inequality*, 2.

²⁰⁵ Gargarella, *The Legal Foundations of Inequality*, 23-30, 45-49.

²⁰⁶ Gargarella, *The Legal Foundations of Inequality*, 48.

²⁰⁷ Gargarella, *The Legal Foundations of Inequality*, 58.

Theirs was a substantive, not procedural, majoritarianism.²⁰⁸ It was concerned with the necessary pre-conditions for the emergence of the general will and establishment of democracy. These included not only universal suffrage (right to vote) and social welfare (rights to guarantee people's subsistence) but also an objection to wage labor and large-scale manufacture as well as a demand for far-reaching redistribution of land to tackle economic inequality (by redistributing land to those who worked on them, taxing non-resident landowners, and imposing limits on land ownership).²⁰⁹ They highlighted the influence of different economic models on citizens' moral character (consumption; agrarian versus commercial). They thus employed the discourse of vice and virtue, and seek a moral re-generation of society.²¹⁰

While Marx shares (and even inspires) some of these positions,²¹¹ republicanism, populism, majoritarianism, and radicalism are occasionally used interchangeably in discussing these constitutional experiments and scholarly approaches.²¹² The Paris Commune echoes some of the above-mentioned constitutional proposals but it is clearly distinct from most approaches to republicanism in its social content. While the communitarian strand in republican conceptions may be also related to Hegel's view of the state as an ethical community, this ethical discourse can be employed as a republican defence of counter-majoritarian judicial power.²¹³ Rousseau's distrust of

²⁰⁸ Gargarella, *The Legal Foundations of Inequality*, 45.

²⁰⁹ Gargarella, *The Legal Foundations of Inequality*, 78-82.

²¹⁰ Gargarella, *The Legal Foundations of Inequality*, 33-38.

²¹¹ Such as the critique of wage labor: Marx, 'Critique of the Gotha Program'.

²¹² Gargarella writes: 'Radical or majoritarian or populist constitutions may be characterized by their political majoritarianism and their normally implicit defense of moral populism. They try to strengthen the authority of the people...'. Gargarella, *The Legal Foundations of Inequality*, 3. This lumping together is justified under the rubric of 'ideal types' of radicalism, conservatism, and liberalism. Gargarella, *The Legal Foundations of Inequality*, 4.

²¹³ Frank Michelman, 'Law's Republic', (1988) 97 Yale Law Journal 1493. See also Sultany, 'The State of Progressive Constitutional Theory', 394-399.

the representative system and his distinction between ‘general will’ and ‘will of all’ can also be deployed to justify judicial power as a vindication of past abstract commitments that limit the politics of the day.²¹⁴ In addition to these anti-majoritarian constitutional arrangements, republicanism underestimates the persistence of social and political conflict because it presumes ‘the existence of shared values and the possibility of a common good’, and thus envisages the emergence of ‘a social consensus’ through rational ‘deliberation by individuals... who are capable of abstracting from their private experiences’.²¹⁵ Finally, the concern with economic conditions cannot be reduced to a juridical question of social and economic rights in a generally liberal or conservative constitution. This not only leads to a hybridity or inconsistency and inefficacy,²¹⁶ but also leaves unanswered the economic structures that render these rights ineffective and unrealisable.²¹⁷ Thus, it is crucial to ground the different proposals for constitutional change in a comprehensive view of the socio-political order, and the role of the constitution in it, that seeks to radically transform it.

There are several key socialist and democratic elements that Marx extrapolates from the Commune’s experiment. First, Marx is clear that the Communal Constitution foregrounds social control over the state:

²¹⁴ Bruce A. Ackerman, ‘The Storrs Lectures: Discovering the Constitution’, (1984) 93 Yale Law Journal 1013. See also Sultany, ‘The State of Progressive Constitutional Theory’, 399-402.

²¹⁵ Derrick Bell & Preeta Bansal, ‘The Republican Revival and Racial Politics’, (1988) 97 Yale Law Journal 1609, 1610.

²¹⁶ Gargarella, *The Legal Foundations of Inequality*, 246.

²¹⁷ Paul O’Connell, ‘The Death of Socio-Economic Rights’, (2011) 74:4 Modern Law Review 532; Paul O’Connell, ‘On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights’, (2007) 7:3 Human Rights Law Review 483.

The unity of the nation was not to be broken, but, on the contrary, to be organised by the Communal Constitution and to become a reality by the destruction of the State power which claimed to be the embodiment of that unity independent of, and superior to, the nation itself, from which it was but a parasitic excrescence.²¹⁸

In other words, Marx calls for ‘popular control from below’.²¹⁹ This includes not only the election of all public servants but also community control of the police: instead of an agent of the government the police turns into a ‘responsible and at all times revocable agent of the Commune’.²²⁰

Second, the fiction of judicial independence impedes social control and democratisation of the state. Thus, judges should be elected in order to be politically accountable:

The Judicial functionaries were to be divested of that sham independence which had but served to mask their abject subserviency to all succeeding governments to which, in turn, they had taken, and broken, the oaths of allegiance. Like the rest of the public servants, magistrates and judges were to be elective, responsible, and revocable.²²¹

²¹⁸ Marx, ‘The Civil War in France’, 633. See also, Marx, ‘Critique of the Gotha Program’, 537

²¹⁹ Hal Draper, ‘Marx on Democratic Forms of Government’, (1974) 11 *The Socialist Register* 101, 111, 122.

²²⁰ Marx, ‘The Civil War in France’, 632. For contemporary calls to defund and disband the police in the US, see Alex S. Vitale, *The End of Policing* (Verso 2018); Anthony O’Rourke, Rick Su & Guyora Binder, ‘Disbanding Police Agencies’ (2021) 121 *Columbia Law Review* (forthcoming) available at SSRN: <https://ssrn.com/abstract=3733121> (last accessed 18 January 2021).

²²¹ Marx, ‘The Civil War in France’, 632.

Third, there are limits to the emancipatory potential of universal suffrage, including because of careerism and corruption in politics.²²² Thus, there is a need for a closer relationship between the people and their representatives: ‘each delegate to be at any time revocable [ie subject to recall] and bound by the *mandat impératif* (formal instructions) of his constituents’.²²³ The required form of representation is egalitarian and rejects attempts ‘to supersede universal suffrage by hierarchical investiture’.²²⁴

Fourth, this egalitarian governance is clear in Marx’s call for decentralisation. It should be clear, however, that what he means is not a federalism of state units. The concern is not merely with centralisation and the existence of an over-powerful executive (that would be a question of internal organisation of the state or of separation of powers) but in the negation of the alienation by bringing state structures under social control:

[T]his new Commune, which breaks the modern State power, has been mistaken for a reproduction of the medieval Communes, which first preceded, and afterwards became a substratum of, that very State power. The Communal Constitution has been mistaken for an attempt to break up into a federation of small States, as dreamt by Montesquieu and the Girondins, that unity of great nations which... has now become a power coefficient of social production. The antagonism against the State power has been mistaken for an exaggerated form of the ancient struggle against over-centralisation.²²⁵

²²² Marx, ‘The Civil War in France’, 628.

²²³ Marx, ‘The Civil War in France’, 633.

²²⁴ Marx, ‘The Civil War in France’, 633.

²²⁵ Marx, ‘The Civil War in France’, 633-634.

Fifth, what is distinctive about the constitution is the emancipation of labour which Marx calls a ‘thoroughly expansive political form’ as opposed to other ‘repressive’ forms of government.²²⁶

This democratic form is a working class rule:

Its true secret was this. It was essentially a working-class government, the produce of the struggle of the producing against the appropriating class, the political form at last discovered under which to work out the economic emancipation of labour. Except on this last condition, the Communal Constitution would have been an impossibility and a delusion. The political rule of the producer cannot coexist with the perpetuation of social slavery. The Commune was therefore to serve as a lever for uprooting the economical foundations upon which rests the existence of classes, and therefore of class-rule. With labour emancipated, every man becomes a working man, and productive labour ceases to be a class attribute.²²⁷

The nature of this emancipation lies in the transformation from ‘private property’ to ‘free and associated labour’:

the Commune intended to abolish that class-property which makes the labour of the many the wealth of the few. It aimed at expropriating the expropriators. It wanted to make individual property a truth by transforming the means of production, land and capi-

²²⁶ Marx, ‘The Civil War in France’, 634.

²²⁷ Marx, ‘The Civil War in France’, 634-635.

tal, now chiefly the means of enslaving and exploiting labour, into mere instruments of free and associated labour.²²⁸

Finally, and in contrast to the settled legitimacy of revolutionary constitutions in liberal and republican thought, which presuppose a singular act of founding and a sacred origin,²²⁹ and seek to settle political conflict by theoretical constructs and meta-rules that subordinate politics,²³⁰ Marx emphasises that there are no ready-made utopias. Instead, there is only continuous struggle and openness to self-questioning, improvement, and experimentation:

The working class did not expect miracles from the Commune. They have no ready-made utopias to introduce *par décret du peuple*. They know that in order to work out their own emancipation, and along with that higher form to which present society is irresistibly tending by its economic agencies, they will have to pass through long struggles, through a series of historic processes, transforming circumstances and men.²³¹

Similarly, in 'The Eighteenth Brumaire', Marx writes that unlike the 'short-lived' bourgeois revolutions of the eighteenth century,

proletarian revolutions, like those of the nineteenth century, criticise themselves constantly, interrupt themselves continually in their own course, come back to the apparent-

²²⁸ Marx, 'The Civil War in France', 635.

²²⁹ Angelica Maria Bernal, *Beyond Origins: Rethinking Founding in a Time of Constitutional Democracy* (Oxford University Press 2017).

²³⁰ Seidman, *Our Unsettled Constitution*, 21-22.

²³¹ Marx, 'The Civil War in France', 635-636.

ly accomplished in order to begin it afresh, deride with unmerciful thoroughness the inadequacies, weaknesses and paltriness of their first attempts ... until a situation has been created which makes all turning back impossible and the conditions themselves cry out: Hic Rhodus, hic salta!²³²

The historical struggle thus continues in order to create the conditions that facilitate the emergence of the new society that would enable human flourishing, without exploitation or alienation, here and now.

Conclusion

Legal and political developments since Marx's death both vindicate his insights and show the importance of bringing those insights into constitutionalism. Recent research illustrates Marx's continued relevance as it showcases the general historical tendency of capitalist societies to increase inequality in wealth and income.²³³ It thus shows a persistent failure of capitalist constitutional democracies to address the question of poverty and inequality. Although the lines between the political and economic, public and private, have been redrawn in order to justify state intervention in the economy, these achievements were momentary. Political and economic developments in the last few decades have rolled back many of the welfare state's achievements, and welfare state capitalism increasingly looks like a short-lived experiment.²³⁴

²³² Marx, 'The Eighteenth Brumaire', 106-107.

²³³ Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer trans., 2014).

²³⁴ See generally David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005).

In legal theory, private law—the traditional sphere of ‘freedom and equality’—was transformed through its ‘socialisation’ (the sociological criticism of the formalism of classical legal thought to justify social law, such as labour law) and its subsequent ‘politicisation’ (the legal realist criticism of *laissez-faire* capitalism and of the public/private distinction).²³⁵ For instance, legal realists point out that coercion is ubiquitous under capitalism both in the public sphere and the private sphere, and the seemingly free contract to sell labour power conceals the coercion of property.²³⁶ Indeed, the legal protection of private property is a form of delegation of sovereignty to private owners of the means of production.²³⁷ This legal protection has constrained redistributive policies in capitalist societies like the United States, which have ‘featured a continuing struggle between majority will and property rights’.²³⁸ Despite this politicisation of private law, attempts to reconstruct the distinction between the public/private and political/economic persist. This persistence merely undermines the coherence of the distinction and underscores the futility of reconstruction.²³⁹

Crucially, these developments in legal theory after Marx led to the ‘constitutionalisation’ of private law, and thus empowered the judiciary to police the public/private distinction, thereby invit-

²³⁵ Gonçalo de Almeida Ribeiro, *The Decline of Private Law: A Philosophical History of Liberal Legalism* (Hart 2019).

²³⁶ Robert Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’, (1923) 38 *Political Science Quarterly* 470.

²³⁷ Morris Cohen, ‘Property and Sovereignty’, in his *Law and the Social Order: Essays in Legal Philosophy* (1933).

²³⁸ Michael J. Klarman, ‘The Degradation of American Democracy—And the Court’, (2020) 134 *Harvard Law Review* 1, 135.

²³⁹ Duncan Kennedy, ‘The Stages of the Decline of the Public/Private Distinction’, (1982) 130 *University of Pennsylvania Law Review* 1394.

ing the specter of juristocracy.²⁴⁰ They thus increase the importance of constitutional debates because the argument turned ‘from substance to procedure—from the content of the law to the authority to make laws’.²⁴¹ These debates over the paradox of constitutionalism have failed hitherto to produce conclusive answer to the question of political justification. The crisis of private law becomes the crisis of public law, and the question of legitimacy of the constitutional order remains unresolved.²⁴² The ideological nature of contemporary debates over the paradox, which pits majoritarian democrats against constitutionalists, is evident in their limited and narrow scope, as well as in the attempt to wish away contradictions and quiet anxieties about the incoherence of the constitutional order.²⁴³ Yet the legitimacy question is disquieting precisely because of the coercive power of the law and repressive function of the capitalist state, which through policing, surveillance, and incarceration subdues ‘collective forms of opposition to corporate power’ and controls ‘discarded workers and marginalized populations’.²⁴⁴

It is against this backdrop that Marx offers important contributions to critical constitutional analysis. Such analysis is crucial because it exposes the poverty of liberal constitutional theory. Liberal scholarship presents constitutionalism as a departure from the excesses of right-wing conservatives and left radicals alike. It positions itself as a theory and practice that possesses the best of both worlds, or at least as a kind of optimal centre.²⁴⁵ This idealised portrait merely cements

²⁴⁰ Mattias Kumm, ‘Who’s Afraid of the Total Constitution—Constitutional Rights as Principles and the Constitutionalization of Private Law’, (2006) 7 *German Law Journal* 341.

²⁴¹ Ribeiro, *The Decline of Private Law*.

²⁴² Sultany, ‘The State of Progressive Constitutional Theory’, 455; Ribeiro, *The Decline of Private Law*;

²⁴³ Sultany, ‘The State of Progressive Constitutional Theory’ 455.

²⁴⁴ Harvey, *A Brief History of Neoliberalism*, 77.

²⁴⁵ See, eg, Gargarella, *The Legal Foundations of Inequality*. For a classical statement of this position see Arthur Schlesinger, Jr., *The Vital Center: The Politics of Freedom* (first published 1949, Transaction Pub-

the ‘dictatorship of no alternatives’, preventing the kind of radical change that alone may transform social reality.²⁴⁶ It papers over the incoherence and contradictory character of liberal constitutionalism itself.²⁴⁷ If anything, the experience of the past decades shows that the view of the liberal constitution as non-ideological and stable is no longer, if it ever was, tenable.²⁴⁸ Even prior to the appearance of Donald Trump and far-right populism, scholars in the United States had noted that their own liberal ‘triumphalism’ is misplaced in light of the structural deficiencies of the liberal order,²⁴⁹ and that the distinction between liberal democracy and dictatorship ‘is greatly overstated’.²⁵⁰ At root, then, liberal theory is yet to respond convincingly to Marx’s challenge.

One of the weaknesses of liberal claims is exhibited in the unreflective mantra that the far right and far left coincide, in their basic concerns and strategies.²⁵¹ Yet it cannot be seriously argued that because Marx and Edmund Burke are both critics of the abstraction of rights that they aspire to the same social and political order, or that their claims are equally objectionable.²⁵² Burke and most other conservatives are fundamentally anti-egalitarian, seeking to preserve inherited social privileges and exclusionary political orders. Marx, on the other hand, is a radical democrat who

lishers 1997) (defending ‘the free society’ against the ‘totalitarian temptation’ of progressives and conservatives).

²⁴⁶ Roberto Mangabeira Unger, *The Left Alternative* (Verso 2005).

²⁴⁷ Mark Tushnet, ‘Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies’, (1979) 57 *Texas Law Review* 1307.

²⁴⁸ Sultany, ‘What Good is Abstraction?’; Klarman, ‘The Degradation of American Democracy—And the Court’.

²⁴⁹ Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press).

²⁵⁰ Sanford V Levinson & Jack M Balkin, ‘Constitutional Dictatorship: Its Dangers and Its Design’, (2010) 94 *Minnesota Law Review* 1789, 1790.

²⁵¹ For classical statement see: Schlesinger, *The Vital Center*, 278-279 (arguing that the opposition between left and right is not linear but circular).

²⁵² Edmund Burke, *Reflections on the Revolution in France* (L.G. Mitchell ed., Oxford University Press 1993).

attacks elite privilege and defends the rights of the poor, the excluded, and the dispossessed.²⁵³

The value of his critique of constitutional law and theory is to chart a path towards a more democratic and egalitarian organisation of political power and social order than is possible under the abstractions and ideological illusions of liberalism and republicanism alike.

²⁵³ Marx, 'Debates on the Law on the Theft of Wood', in Karl Marx and Frederick Engels, *Collected Works*, vol 1 (Lawrence & Wishart 2010) 224.