Introduction and Overview

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I Purpose of the Volume

This volume seeks to explore the limits of liberal constitutionalism, the belief that constitutions serve principally to constrain state power for the benefit of the individual. The architectural expression of this belief is a set of accompanying structural features: for example, the rule of law, judicial protection of both legal and fundamental rights, representative democracy, and the separation of powers. For convenience, we will refer to this constitutional belief and its institutional expression as 'structural-liberal'. In the literature it is sometimes referred to simply as 'constitutionalism'.[1]

The purpose of the volume is not to dismiss liberal constitutionalism. The focus is *beyond* liberalism, not *against* liberalism. Liberal analyses of constitutionalism, both inside and outside constitutional systems that are considered indigenously 'liberal', remain important.[2] There is much of value to the liberal constitutional tradition, concerning both its embodiment in 'Western' constitutional culture and as a broader human project. But as the structural-liberal vision of constitutionalism has grown to dominate constitutionalism in comparative and cosmopolitan terms, there is an increasing need to explore not just what it does, but also what it doesn't do and what it is unable to account for. In the following text we will explain why.

All perspectives have their limits. The structural-liberal vision developed in response to a particular set of social and political circumstances (see Dowdle and Wilkinson, Chapter 1). These circumstances and concerns are not unique to a particular time and place; they are ubiquitous companions of the modern human condition. Liberal constitutionalism

[1] See, e.g., J. Roland Pennock and John W. Chapman (eds.), *Nomos XX: Constitutionalism* (New York University Press, 1979); Jon Elster and Rune Slagstaad (eds.), *Constitutionalism and Democracy* (Cambridge University Press, 1993); Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998).

[2] See, e.g., Tom Ginsburg and Alberto Simpser (eds.), *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014).

therefore transcends its terrain of origin. But circumstances and concerns are not exhaustive of a polity's constitutional problems, nor are they necessarily always the most pressing concerns faced by a constitutional culture at a particular point in time. Liberal-constitutional remedies to social or political problems might become inappropriate or unduly limited even in a constitutional culture that venerates the values of freedom on which liberalism professes to be based. These limits are the subject of this volume.

The limited reach of liberal constitutionalism has, to some extent, been recognised from within Western liberal constitutional tradition itself. The liberal vision of constitutionalism today is quite different from that of the late nineteenth century, which is different still from that of the late eighteenth century. It has evolved as the circumstances that it is called upon to make sense of evolve. This evolution is the product of an internal, *self*-reflexive, phenomenon – what Neil Walker has termed 'reflexive constitutionalism'[3] (see also Dowdle and Wilkinson, Chapter 1). It involves the interlinking of an open constitutional structure with a shared *experience* (see also Teubner, Chapter 3), and experience always develops out of a particular time and place.

But liberal constitutionalism is increasingly becoming not simply a domestic but also a *cosmopolitan* project,[4] by which is meant that, across the globe, 'constitutionalism' is increasingly presented as a shared institutional *teleology*. This 'cosmopolitanisation' of liberal constitutionalism is expressed, for example, in the recently made claim that an Enlightenment faith in written constitutions and constitutional courts has 'swept the world'.[5] It is manifest in the academic practice of analysing and critiquing 'foreign' constitutions by cataloguing the presence or absence of canonical structural-liberal features. More practically, it is manifest in the growing influence of international organizations and international constitutional experts, often educated in North Atlantic law schools, in the drafting or reforming of constitutions in countries of the Global South,

[3] Neil Walker, 'EU Constitutionalism and New Governance', in Grainne de Burca and Joanne Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006), 15–37. Cf. 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, 2007), 9–27.

[4] Cf. Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014).

[5] Bruce Ackerman, 'The Rise of World Constitutionalism', *Virginia Law Review* 83 (1997): 771–797.

and, relatedly, in the growing interest in institutions of higher education in the North Atlantic in training constitutional activists from the Global South.[6]

And herein lies a problem. As stated at the outset, liberalism has its limits. In the context of a domestic liberal constitutionalism, these limits can be transcended in the dynamic of 'constitutional reflexivity' – constitutional reform prompted by collective self-reflection. But as we suggested, constitutional reflexivity also requires experience and knowledge that is 'local' in nature.[7] Cosmopolitan constitutionalism, by contrast, is free-floating, rather than locally rooted and delineated. Here, the local, experiential knowledge that is critical for the effectiveness of constitutional reflexivity is missing, and the limits of the liberal vision become more significant, both analytically and practically. Cosmopolitan constitutionalism then begins to look more like a new form of imperialism constitutionalism.[8] Hence the growing need to explore 'the limits of liberalism' in the context of the human project of constitutionalism.

Constitutional theory in the European tradition has evolved in large part as an alternative to the structural-liberal vision. European constitutionalism diverges in practice from the American because of the significantly greater influence of the French Revolution of the late eighteenth century, the (failed) continental revolutions of the nineteenth century, Marxism, totalitarianism, and the collapse of liberal constitutionalism in Europe between the two world wars (see Wilkinson, Chapter 2). Various strands of constitutional theory have recently surfaced with the aim of excavating traditions of European (including British) constitutionalism, which are as old (and sometimes older) and as developed and embedded as the US variant.

[6] Cf. Yves Dezalay and Bryant G. Garth (eds.), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002).

[7] See Clifford Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective', in *Local Knowledge: Further Essays in Interpretive Anthropology*. 3rd ed. (New York: Basic Books, 2000), 167–233; cf. Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (New York: Anchor Books, 1967), 47–92, 147–163.

[8] James Tully, 'The Imperialism of Modern Constitutional Democracy', in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007), 315–337.

Instead of focusing on particular constitutional structures, European constitutional theory thus returns to foundational constitutional concepts such as constituent power,[9] republicanism,[10] political constitutionalism,[11] organic constitutionalism,[12] and common law constitutionalism.[13] It sometimes adapts the ancient conception of the constitutional polity as a *corpus* (body), whose relevant dimensions include 'strength' and 'health'.[14] (Some of these conceptions, in turn or independently, have been rediscovered in the American constitutional landscape, albeit often as a variant of rather than challenge to liberalism.[15] Indeed, there are alternative readings of the North American constitutional tradition that build on the fact that its initial experiences and concerns at the time of its founding were authentically distinct from what might be implied by today's orthodox structural-liberal reading.[16])

The divergences and differences between European and American constitutionalism were partially masked in the aftermath of World War II, due both to Europe's existential uneasiness with the direction that German constitutionalism in particular, but also Continental European constitutionalism in general, had travelled in the inter-war period and to the extensive American involvement in and influence over the economic, political, and legal reconstruction of Western Europe.[17] Constitutional rights increasingly became a common point of reference in transatlantic comparative constitutional discourse.[18] But divergence has recently re-emerged, not

[9] See, e.g., Martin Loughlin, 'Constituent Power', in *The Idea of Public Law* (Oxford University Press, 2004), 99–113.

[10] See, e.g., Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005).

[11] See, e.g., Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

[12] See, e.g., David Ritchie, 'Organic Constitutionalism: Rousseau, Hegel and the Constitution of Society', *Journal of Law and Society* 6 (2005): 36–81.

[13] See, e.g., Thomas Poole, 'Back to the Future: Unearthing the Theory of Common Law Constitutionalism', *Oxford Journal of Legal Studies* 23 (2003): 435–454.

[14] See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Cornell University Press, 1958).

[15] See, e.g., Frank Michelman, 'Law's Republic', *Yale Law Journal* 97 (1988): 1493–1537; Bruce Ackerman, *We, the People, Volume 1: Foundations* (Cambridge, MA: Belknap Press, 1993).

[16] See, e.g., Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Vintage Books, 1993), 229–324; cf. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1996), 339–364.

[17] See Mark Mazower, *Dark Continent: Europe's Twentieth Century* (London: Penguin, 1999); Jan Werner Müller, *Contesting Democracy: Political Ideas in Twentieth Century Europe* (Princeton University Press, 2013).

[18] See, e.g., Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998); cf. Mitchell Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press, 2009).

only due to rediscovery of their different historical or conceptual foci, but also due to European resistance to the neo-liberal turn that American constitutionalism began to take and export in the 1980s. The 'new constitutionalism' that accompanied this neo-liberal turn could be identified not only in US-led international institutional developments,[19] but also in the process of European integration, which now appears to have drifted into a neo-liberal form of economic constitutionalism almost by default (through a judge-led process of 'constitutionalisation') (see also Wilkinson, Chapter 2).[20] As a nominally political constitution began to take shape in the move from 'Economic Community' to 'Political Union' through the Maastricht Treaty in 1992 (culminating, so far, in the [anti-] climax of Brexit and the failed attempt to make a European Constitution), and as Europe opened up after the fall of the Berlin Wall and subsequent collapse of the Soviet Union, foundational questions of constituent power and national constitutional identity were put firmly back on the agenda, not only insofar as more peripheral Central and Eastern Europe are concerned,[21] but also in the core of what is now 'political Europe'[22] (and ironically, even in the place where these concerns had most thought to have been laid to rest: the German Constitutional Court[23]).

Because the structural-liberal vision is associated primarily with US constitutionalism, European constitutional theorists, in exploring the possibility of a distinctly European constitutionalism (or otherwise arguing against it), had to engage with the American vision, even if 'from the outside', as it were. Some, to be sure, simply celebrated its perceived

[19] See David Gill, *Power and Resistance in the New World Order* (New York: Palgrave Macmillan, 2003); Gavin Anderson, 'Beyond Constitutionalism beyond the State', *Journal of Law and Society* 39 (2012): 359–383; cf. Andrew Lang, *World Trade Law after Neo-Liberalism: Re-Imagining the Global Economic Order* (Oxford University Press, 2011).

[20] See Martin Loughlin, 'What Is Constitutionalisation?', in Martin Loughlin and Petra Dobner (eds.), *The Twilight of Constitutionalism* (Oxford University Press, 2012), 47–69; Fritz Scharpf, 'The Asymmetry of European Integration: Or, Why the EU Cannot be a "Social Market Economy"' *Socio-Economic Review* 8 (2010): 211–250.

[21] Cf. Ulrich Preuss, 'Constitution-Making and Nation-Building: Reflections on Political Transformations in East and Western Europe', *European Journal of Philosophy* 1 (1993): 81–92.

[22] See, e.g., 2 BvE 2/08 *Treaty of Lisbon*, Judgment of 30 June 2009 (the so-called Lisbon Decision). See also Matthias Kumm, 'Rebel without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do about It', *German Law Journal* 15 (2014): 203–216.

[23] See Christoph Möllers, '"We Are (Afraid of) the People": Constituent Power in German Constitutionalism', in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007), 87–107.

triumph.[24] For the most part, however, that vision was embraced tentatively. It was often borrowed from, sometimes extensively, but even then constitutional scholars also had to explore if and why it applied to Europe, and if so, to which parts, to which levels of the European Union in its multi-level constitutional architecture, and to which of the many constitutions of Europe.[25] In seeking to understand European constitutionalism, constitutional scholars implicitly engaged with the question of the limits of the American, structural-liberal vision.

The wider implications of these challenges to structural-liberalism as a cosmopolitan project have been limited, however, because, at least to date, constitutional theory in the European tradition has tended to limit its analytical and critical focus to domestic, transnational, and supranational *European* developments. It has neglected to explore how its alternative constitutional insights might resonate outside of Europe: how European visions might compare and contrast with those in places other than the North Atlantic. In sum, if the problem with the structural-liberal vision is that it is cosmopolitan in intent but parochial in sensibility, the problem with the European tradition of constitutional theory is that it is cosmopolitan in sensibility but parochial in intent.[26]

This volume seeks to bring the cosmopolitanism of structural-liberal constitutionalism into communication with the 'post-liberalism' of (European) constitutional theory. In keeping with constitutional theory in the European tradition, it seeks to identify significant aspects of the human experience of constitutionalism that escape the structural-liberal perspective. Departing from this tradition, however, the volume seeks to explore alternatives to structural-liberal constitutionalism from the perspective of a diversity of constitutional perspectives, extending significantly beyond those of the North Atlantic. And unlike the structural-liberal vision of 'comparative constitutional law', this volume approaches these other visions and experiences, not from the perspective of a particular liberal teleotype, but by allowing them to speak, as much as possible, for themselves. In doing so, it seeks to show how listening to alternative

[24] Cf. Matthias Kumm, 'The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia' in Martin Loughlin and Petra Dobner (eds.), *The Twilight of Constitutionalism* (Oxford University Press, 2012), 201–220.

[25] See Kaarlo Tuori, 'The Many Constitutions of Europe', in Karlo Tuori and Suvi Sankari (eds.), *The Many Constitutions of Europe* (Farnham, UK: Ashgate, 2010), 3–30.

[26] But see, e.g., Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2001).

constitutional experiences will help us perceive the limits of liberalism while keeping track of the vitality of the constitutional project as a human endeavour.

II Organization of the Volume

Our volume is presented in four parts. Part I explores in more detail the limits of the structural-liberal vision, including not only its blind spots (see Chapter 1), but also its possible excesses (see Chapter 2). The remaining three parts explore in detail particular blind spots in the structural-liberal vision, and their implication for the application of that vision and its limits. These include blind spots regarding functional symbiosis (Part II), political construction (Part III), and solidarity (Part IV). Each part begins with a theoretical chapter framing the structural-liberal blind spot to be examined, which is then followed by two 'case-study' chapters exploring this particular blind spot specifically in the context of the constitutional system outside the North Atlantic – China and Pakistan in the context of political constitutionalism; Indonesia and India in the context of functional constitutionalism; and South Africa and Malaysia in the context of solidarity.

Part I explores the limits and problems with the structural-liberal vision. Chapter 1, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity', by Michael W. Dowdle and Michael A. Wilkinson, identifies three significant constitutional dynamics that are concealed by the structural-liberal vision. These include dynamics of state construction (liberalism focuses on constraint); dynamics of (spontaneous) evolutionary change (liberalism presumes that constitutionalism is driven by rationality); and the symbiosis between the formal constitution and other social systems (liberalism presumes that constitutionalism is normatively autonomous). These limits are the product of the particular time and place out of which the structural-liberal vision emerged. In other times and places in Europe, other constitutional visions emerged that addressed different experiences and concerns. Up until World War II, these different visions were cross-pollinating, an important cosmopolitan dynamic that helped compensate for the limited perspectives of each. The chapter concludes by arguing that the best way to get 'beyond liberalism' is to re-vitalise this kind of cross-pollination using a process characterised by a principle of charitable interpretation combined with a constitutional introspection that we term *reflexive constitutionalism*.

The second and concluding chapter in Part I, Michael A. Wilkinson's 'The Reconstitution of Postwar Europe: Liberal Excesses, Democratic Deficiencies', uses the experience of the attempt to forge a (regional) European constitutionalism to explore what we are calling the excesses of liberalism – the problems that arise when its limitations are overlooked. It first explores how several basic presumptions that underlie liberal constitutionalism – the relationship between liberalism and state sovereignty, democracy, and capitalism – were problematised first by the constitutional experience of the failure of liberalism of inter-war Europe, and later by Europe's post-war efforts to avoid another breakdown of liberal constitutionalism by forming first an economic and later a political 'union' among the states of Europe. But particularly since the Euro-crisis, these problematic vectors have combined with a short-sighted adherence to 'liberalism' in unexpected ways – ways that are increasingly reminiscent of a de-democratising constitutionalism that Hermann Heller, in the context of the decline of late Weimar Germany, termed 'authoritarian liberalism'. In this configuration, political and even legal liberalism are sacrificed for the purposes of maintaining a project of economic integration.

Part II then explores the problems that can result from structural-liberalism's inability to account for that fact that a constitutional system is not really autonomous, but is actually linked symbiotically to other regulatory systems within its domain (as described by Dowdle and Wilkinson in Chapter 1). It begins with a framing chapter by Gunther Teubner entitled 'Constitutional Drift: Spontaneous Co-evolution of Social "Ideas" and Legal "Form" ' (Chapter 3). This chapter evacuates the systemic nature of this symbiosis. It involves the nesting of three distinct epistemic feedback loops, what the chapter calls 'reflexive' epistemic systems. One of these systems involves interaction between the epistemology and experiences that construct the formal constitutional system; a second involves the interaction between the epistemologies and experiences that inform the construction of society, that is, the social system (which includes the political and economic). These two kinds of epistemic feedback loops are then brought into symbiosis by a third, 'meta' feedback loop in which social and constitutional epistemologies interact to generate a binary coding of social and political phenomenon as being either constitutional or unconstitutional (what Teubner refers to as a 'hybrid binary meta-coding'). The chapter then shows how the hybrid nature of this third form of coding – the coding that links the

formal constitutional to the social – is innately inter-dependent and co-evolutionary – showing that the social, economic, and political cannot be removed from the constitutional. All must constantly adjust to change in the others if the constitutional writ large is to maintain coherence and historical persistence.

The next two chapters in Part II explore how this symbiosis, and its problematic relationship with liberal constitutionalism, plays out in the particular constitutional understandings and experience of the Global South, specifically Indonesia and India. In Chapter 4, ' "Constitutionalism Beyond Liberalism" in Indonesian Competition Regulation: Recognising the Constitutional Role of Dominium', Michael W. Dowdle explores what a particular disagreement between an American antitrust attorney and Indonesian interlocutors over the proper role of Indonesia's competition agency exposes about the limits of the structural-liberal vision. It shows how competition regulation has a particular kind of constitutional character that Terence Daintith has termed 'dominium' – which describes a state pursuing state ends by distributing resources ('dominium') rather than by direct command ('imperium'). Liberalism's focus on state constraint means it has difficulty accounting for the constitutional character of dominium. Competition regulation involves an exercise of dominium, one that involves setting up a symbiotic interplay between the (public) constitutional system and the (private) economic system.

Consistent with liberalism's difficulty accounting for the constitutional quality of acts of dominium, the position adopted by the American antitrust attorney did not account for how distinctive aspects of Indonesia's economy rendered the North Atlantic form of antitrust regulation constitutionally problematic when applied to Indonesia. Not only was the Indonesian vision better suited for Indonesia's economic constitution, it also was consistent with the regulatory practices found in late nineteenth century America, whose economic structuring was consistent with that of present-day Indonesia.

Chapter 5, 'Social Intuitions in the Shadow of Liberal Constitutionalism: An Indian Perspective' by Mathew John, examines how India's liberal vision of constitutionalism has worked to perpetuate pluralist fragmentation of the polity, by preventing symbiosis developing between the formal constitutional understandings of the nature of that pluralism and autochthonous, civilizational intuitions of social identity. The issue of the relationship between India's distinctive

civilizational pluralism and its constitutional and national development extend well back into the colonial period. It is an issue that is very much defined by liberalism – liberal constitutionalism presumes a 'We the People' whose constituent members are juristically equal, and thus juristically uniform in constitutional character. England saw Indian society as being innately unequal, given its caste and religious divisions, and sought to pave the way for ultimate juristic equality and uniformity by using special legal 'minority rights' to induce some degree of greater political equality within India's polity. This practice continued after independence, driven by structural-liberal understanding that political equality, and hence political identity, has to be *juridically* constituted (compare Wilkinson, Chapter 2). But at the same time, such remedial juridical treatment conflicts with Indian civilizational understandings about the social meaning of one's cultural 'identity'. And consistent with the analysis in Chapter 3, the resulting disconnect between what Teubner calls the formal constitutional and the social systems prevents the constitutional system from developing a coherent symbiosis with the social system.

This brings us to Part III, which explores the problems that can result from structural-liberalism's inability to account for the innately political aspects of constitutional coherence. The framing chapter for this part is by Martin Loughlin, entitled 'On Constituent Power' (Chapter 6), which shows how these lacunae in the conceptual reach of structural-liberalism derives from that vision's structural focus on constitutional form. Constituent power – the constitutional 'We the People' – by contrast, ultimately defies formal delineation. Loughlin outlines three historical approaches to the idea of constituent power. The first, which he labels 'normativist', and which corresponds to what we call the 'liberal-structural model', attempts to disarm or even discard the idea of constituent power by associating constitutionalism with juridifiable rights. The second, the 'decisionist' approach, which developed in reaction to the normativist approach, equates the idea of constituent power with the expression of a sovereign will, but one that is utterly unbound by law. Loughlin concludes by advocating a third, 'relational' approach, which both preserves and goes beyond liberalism by conceptualising constituent power as inhering in the active tension between claims of juridical right and expressions of political will, producing a constitutional dynamic driven primarily by contestations over political right (*droit politique*) rather than juridical right. In contrast to both normativism (liberalism) and decisionism, the relational account of the constituent power is able to capture the innately paradoxical