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## Real constitutional law: A revised Madisonian perspective

### The received contrast

Of major concern to modern constitutionalism is the question of what it takes to sustain the authority of the constitution as law. In their requisite attempts to answer this question, both the common and the civil law tradition have gravitated towards the judiciary and either embraced generalized judicial review or accorded special status to constitutional tribunals. While merely on the patient leaves of academic controversy the jury is still out on the merits of judicial review<sup>1</sup> it is by now taken for granted in many jurisdictions. Attempts to tinker with constitutional courts are regularly met with great anxiety and utter revulsion.<sup>2</sup> These existing habits may explain why the question is scarcely asked whether it is wise or even possible to entrust this guardianship of constitutional law to merely *one* institution within a political system, even if that institution is a court. The alternative that is by now all but forgotten is to view the protection of the law of the constitution always and already handed over to the real constitution and to regard this as a good thing, too.

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<sup>1</sup> Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1347-1406.

<sup>2</sup> See various entries on Poland and Hungary on <https://verfassungsblog.de>.

A “real” constitution is the opposite of its “formal” counterpart. Of course, it is not entirely clear what we understand by a “formal” constitution beyond and aside from an authoritative constitutional text; but the matter is even less clear when it comes to the real constitution. The candidates eligible to receive this appellation range, ontologically speaking, from the parsimonious to the opulent.<sup>3</sup> The ordinarily sparse semantics uses the term to mark the contrast between legal norms and the manner in which institutions and actors employ these in order to get things done. Richer vocabularies of the real constitution appeal to broader historical and social contexts.

The following remarks embrace and defend the parsimonious approach. They do so, however, in a somewhat “dialectical” fashion. The defense grows into reclaiming the relevance of a richer understanding of the real constitution that has been eclipsed in the course of the ascendancy of modern constitutional law. This richer understanding is more specific than notions of the “real constitution” that invoke social conditions of unity or substantive objectives.

The path leading to this conclusion begins with viewing the real constitution not at all as “external” to its counterpart. It will be argued that the real constitution is intrinsic to the formal constitution. The former is, indeed, the latter’s very own mode of being what it is by growing beyond itself.

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<sup>3</sup> For the latter see, under the name of the “material” constitution, Marco Goldoni & Michael A. Wilkinson, ‘The Material Constitution’ (2016) 20 LSE Law, Society and Economy Working Papers, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2875774](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875774).

### Using constitutional law

A straightforward and rather thin understanding of the real constitution views constitutional *norms as means* used by socially powerful agents to pursue political objectives. It does not matter whether these agents exercise official law-making functions or whether they are recognized as public bodies. The instrumental nexus with either guaranteed liberties or the exercise of public authority makes their existence and acts relevant to the real constitution.

A good example for what counts as an element of the real constitution is the social partners—representatives of labor and capital—that may have enormous impact on the design of government policies and legislation. Even though the relevant collective bodies are not recognized in this capacity by the constitution, their role in the formation of public policy is decisive for the functioning and success of the political system. From this perspective, the real constitution comprises relations of real power and influence within a space established by formal constitutional norms. The normative force of law becomes thus supplemented with the inevitable relevance of those who are socially too powerful to be ignored. Only by paying attention to how their influence and social power is funneled into parliamentary law-making can one perceive clearly who is calling the shots in a constitutional system. The norms of the constitution would never reveal such influence, not least because they are not intended to “describe” political realities. Rather, it takes political science to perceive this.

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### Prudent conventions

Another, slightly different example for the real constitution in such a parsimonious sense are *constitutional conventions* that emerge in the shadow of formal norms. For example, the President of the Austrian Republic is supposed to commission with the task of putting together a government the leader of the party that has emerged as strongest from the most recent national election. This is a constitutional convention. Departing from it would not amount to a breach of constitutional law. It would, however, definitely raise eyebrows concerning the stability of the republic, for it would be considered entirely improper. The convention reflects a formal allocation of power that makes the government dependent on the support of the majority in parliament. If it lacked such support, it would be subject to recall by a vote of no confidence. In the midst of the formal constitution grows a convention that facilitates good state practice against the backdrop of a potential of disruption that the constitution permits.<sup>4</sup>

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<sup>4</sup> Arguably, the emergence of this convention is an “invisible hand” effect. It is of human making, but not of human design. See Edna Ullmann-Margalit, *Normal Rationality: Decisions and Social Order* (ed. A. Margalit & C. Sunstein, Oxford: Oxford University Press, 2017) at 130: “The basic picture underlying invisible-hand explanations, then, is that of a bird’s eye view that encompasses numerous individuals, each busily doing his or her own narrow private bit, such that an overall design, unsought as well as unforeseen by them, is seen to emerge. The point, of course, is that the emergence of the overall design is not left mysteriously unaccounted for, nor, specifically, is it attributed to accident or chance: it is the detailed stages of the invisible hand process which are meant to supply the mechanism that aggregates the dispersed individual actions into the patterned outcome.” Ullmann-Margalit later (139-140) distin-

Of course, neither the status of such a convention nor the standing of social partners, such as the trade unions and associations of businesses, are expressions of formal constitutional law. Taking heed of both is a matter of prudence and, using old-fashioned parlance, of statecraft.

### Enter Madison

And, yet, there is more to the real constitution than a set of prudent practices and influential institutional players. The real constitution is that which allows the formal constitution to exercise its force.

Most prominently, we encounter this idea, even if only implicitly, in *Federalist* No. 51, where Madison offers, famously, his solution to the problem of sustaining the authority of the constitution *as law*.<sup>5</sup> As is well known, there are a number of institutional alternatives that Madison dismisses one at a time: Frequent appeals to the people, regular constitutional conventions or the Pennsylvanian Council of Censors.<sup>6</sup> None of these appear apt, for none can guarantee what Madison wishes to achieve.

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guishes this “aggregative” account with its “evolutionary” counterparts, which she does not regard as mutually exclusive (140).

<sup>5</sup> See Alexander Hamilton, James Madison & John Jay, *The Federalist* (ed. C. Sunstein, Cambridge, Mass: Harvard University Press, 2009) 339-345. For an introduction, see John Ferejohn, ‘Madison’s Separation of Powers’ In *James Madison: The Theory and Practice of Republican Government* (ed. S. Kernell, Stanford: Stanford University Press 2003) 126-155.

<sup>6</sup> See Robert F. Williams, ‘The Influences on Pennsylvania’s 1776 Constitution of American Constitutionalism During the Founding Period’ (1988) 112 *Pennsylvania Magazine of History and Biography* 25-48.

What he intends to find is essentially twofold:<sup>7</sup> First, the provisions of the constitution are to amount in practice to more than to mere “parchment barriers”. The constitution is made up of mere words. How can they, even if they are not devoid of content, constrain human conduct in a field in which passion and ambition are not unlikely to wreak havoc?<sup>8</sup> Second, an answer must be found to the question whether the organ of the institution that is supposed to exercise this real constraint vis-à-vis others is either immune to interest group capture or invariably, using more old-fashioned language, disposed to fall prey to factional interests. Madison believes the second alternative to be correct. This explains why he finds all the proposals that he discusses to be wanting, for they refer the resolution of the constitutional question to *one* special body even though it cannot be ruled out that this body is likely to be seized with passion or partisan zeal. Not even referring all constitutional questions to the people at large would do the trick. If the interval separating the incidence in question and vote of the people were short the passionate atmosphere of partisan struggle would be carried over into the resolution of the constitutional question; if the interval were long, the people would not longer care.<sup>9</sup>

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<sup>7</sup> See Federalist, note 5 at 325, 338.

<sup>8</sup> In other words, this is not the field of “Brandonian scorekeepers” where people aspire to keep track faithfully of their deontic inferential commitments. Rather, it is the field in which people regularly manipulate those commitments. See Robert B. Brandom, *Making it Explicit: Reasoning, Representing and Discursive Commitment* (Cambridge, Mass.: Harvard University Press, 1994) at 157, 180.

<sup>9</sup> See Federalist, note 5 at 336.

Madison believes that members of bodies such as the Council of Censors<sup>10</sup> are not disposed to listen to the cool voice of reason and thus to direct their attention to what the constitution says. The only solution he finds convincing consists of fully integrating the preservation of legality into the quotidian operation of the constitution.

This is the core intuition underlying the system of “checks and balances”. It rests on the quite ingenious *holistic* idea. No special institution, not even, for example, a constitutional court, is a reliable candidate for sustaining legality. Rather, the only force that can maintain the law of the constitution is the system of acting and counteracting forces that is unleashed by the constitution itself.

These forces are very human.<sup>11</sup> The chief and relatively simple idea of sustaining the authority of the constitution through a system that separates powers is to link the legal authority of offices with the individual ambition of office-holders.<sup>12</sup> The eagerness to throw one’s weight around is supposed to be the force driving the assertion of the powers associated with the office itself. The well-known strategy is to have ambition counteract ambition. Linking

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<sup>10</sup> See Section 47 of the Pennsylvania Constitution of 1776, available at <http://www.phmc.state.pa.us/portal/communities/documents/1776-1865/pennsylvania-constitution-1776.html> (last visited April 23, 2019).

<sup>11</sup> Even though the debate over whether Madison just faithfully adopted Hume’s ideas concerning faction or departed from them is not terribly interesting it should be noted that Madison shifted the emphasis from keeping faction at bay to their multiplication as a result of which the forces are supposed magically to cancel each other out. See Mark G. Spencer, ‘Hume and Madison on Faction’ (2002) 59 *William and Mary Quarterly* 869-896 at 883, 886.

<sup>12</sup> See *Federalist*, note 5 at 341.

the interest of the person with the interest of the place is the chief means of upholding the authority of the constitution.

### Matching *de facto* and *de jure*

Of course, the idea sounds drearily mechanistic. Worse, still, upon closer inspection, it even turns out to be rather mystical.<sup>13</sup> It is not terribly convincing on its face, for it fails to take into account that members of multimember bodies may encounter serious obstacles in mustering the support of others when it comes to asserting the power and prestige of their institution. It may also be the case that many members have very little interest in boosting its standing. Hard-core conservatives, for example, may not really have the supremacy of the legislature *via-à-vis* the executive branch at heart. Moreover, there is no rational choice explanation for why people holding temporary appointments should have an interest in expanding or asserting the standing of their institution. What would it be that they would thereby personally gain? The greatest mystery, however, inherent in the idea appears to be that there is no guarantee that the equilibrium of forces that emerges, if at all, *de facto* from the competitive struggle matches exactly with what had been anticipated *de jure* by the constitution *qua* proper allocation of powers. What Madison does not and cannot explain is why the patterns of constitutional practice that emerge at coordination points<sup>14</sup> between and among self-interested agents<sup>15</sup> would coin-

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<sup>13</sup> On the following, see Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010) at 18, 24.

<sup>14</sup> From the perspective of rational choice theory, such a point is an arrangement, institution or convention from which no individual has an incen-

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cide with constitutional norms that are independent of such interactions. Why would, for example, the allocation of legislative powers within a federal system coalesce at a point that is equal to what the constitution legally requires?<sup>16</sup> Have we not seen enough examples of constitutions in which the allocation of powers developed in a matter that had not been anticipated by the founders?<sup>17</sup>

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tive to defect. See Thomas Christiano, ‘Is Normative Rational Choice Theory Self-Defeating?’ (2004) 115 *Ethics* 122-141 at 127. It is easy to imagine how the interpretation of powers conferred by the constitution can indeed be based upon coordination points. They are reached when the organs involved mutually understand that any attempt to push the envelop further in their favor might invariably result in chaos or destruction. At this point, they lose any incentive to do so, unless they want to change the system.

<sup>15</sup> The patterns themselves would be amenable to an invisible hand explanation. As Ullmann-Margalit, note 4 at 127, so aptly explains such an explanation replaces the judgment according to which a pattern appears to be of human design with an account that demonstrates how the pattern *could have* been or *has* been brought about by the separate actions of many individuals who mind their own business and do not intend to produce the ultimate outcome.

<sup>16</sup> Vermeule has a slightly different take on the issue. He regards, correctly, Madison’s optimistic view of the separation of powers as an instance of an “invisible hand argument” (see above notes 4 and 15). He points out that Madison’s view of the separation of powers—should he have been concerned about aggregate social welfare—cannot rely on prices and fails to explain why an invisible hand effect comes about. See Adrian Vermeule, *The System of the Constitution* (New York: Oxford University Press, 2011) 17-18, 39.

<sup>17</sup> The American constitution and the importance that accrued to the office of the President is a case in point. See Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge: Mass.: Harvard University Press, 2005).

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### Reason over passion

Several questions arise here.

The *first* concerns the relation of reason and passion. Madison clearly contrasts one with the other and associates the partisan energies of factions with the latter. He also leaves no doubt which one ought to rule over the other:<sup>18</sup>

But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.

No matter how much this terminology may be due to the influence of Scottish enlightenment philosophy on Madison's thinking,<sup>19</sup> the whole contrast is perfectly consistent with how ancient political philosophy would have looked at the major task of a constitution. Any successful constitution has to make sure that the reasonable part of the human souls governs another that, even though amenable to reason, is in itself driven by desires and emotions. From an ancient perspective, hence, one would expect a well-ordered constitutional system to establish the control of passion by reason. In the context of politics, reason is more than an ethereal quality of thinking (or a matter of "deontic scorekeeping"). Rather, it is embodied in a group, notably in an aristocracy.<sup>20</sup> One would have concluded, from that angle, that in order for rea-

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<sup>18</sup> See Federalist, note 5 at 335.

<sup>19</sup> See Spencer, note 11 for the relevant influence of David Hume and Adam Smith.

<sup>20</sup> See Federalist, note 5 at 414-420 (on the Senate and its quasi-aristocratic function).

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son to rule over passion an aristocratic body must have decisive influence on the interpretation of law.<sup>21</sup>

This is not, however, the idea underlying modern separation of powers.<sup>22</sup> The idea appears to be, rather, that any power stays within its proper sphere if the right amount of ambition—not too much, not too little—from another power keeps the ambitious office-holder in check (for example, a president threatening to pardon the criminal defendants that the judiciary wishes to convict). In other words, passion is supposed to constrain passion. Reason is the desired result.<sup>23</sup> It is however, unclear, which mix of passions is necessary or sufficient to give rise to a reasonable result.

From an ancient perspective, this is nothing short of miraculous. While the double negation of passion is supposed to bring about reason, it remains inexplicable how this would work. It

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<sup>21</sup> Even *Federalist* 78, in which Hamilton defended judicial review of legislation, abstained from making this argument. See *Federalist*, note 5 at 508-520. The virtues of the judiciary are, however, already in this essay the “passive virtues” (neither “force nor will”) that allegedly make the judiciary the least dangerous branch.

<sup>22</sup> It was quite clear to Madison that a constitutional system cannot be built on the expectation that one public-spirited class will dominate the political process in virtue of its commendable character. See Randal Strahan, ‘Personal Motives, Constitutional Forms, and the Public Good: Madison on Political Leadership’ In *James Madison: The Theory and Practice of Republican Government*, note 5, 63-91 at 73.

<sup>23</sup> There is a “naturalism” presupposed by this argument in the sense that what is desirable from the perspective of practical reason is supposedly brought about by causes that are not amenable to practical reason. For a discussion of such naturalism in the context of Kant’s philosophy of history, see Christoph Horn, *Nichtideale Normativität: Ein neuer Blick auf Kants politische Philosophie* (Berlin: Suhrkamp, 2014) 240, 256-270.

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seems, however, as though the core idea is the same that underlies the creation of “the extended republic of the United States”.<sup>24</sup> The multiplicity of contending forces and the insecurity whether any coalition of opponents may not be capable of at least *temporarily* ascending over others gives rise to uncertainty with regard to the position of each. While nobody can be assured to be immune to attacks and oppression, the potential oppressors cannot be confident about being spared future defeat by the oppressed. This resembles the situation of a Rawlsian veil of ignorance,<sup>25</sup> at any rate, as viewed by rational choice theorists.<sup>26</sup> If the parties involved are sufficiently risk averse then they will agree to pursue a strategy of fair play in which no one will suffer insufferable defeat.<sup>27</sup> They will play by the rules that they can accept *ex ante*.<sup>28</sup> Perhaps this matches with how Hume assumed the “artificial virtue” of justice to arise as part of a strategy to pursue mutually one’s long-term interest.<sup>29</sup>

Such solutions are notoriously plagued with the difficulty that there will always be opportunities for defection.

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<sup>24</sup> See Federalist, note 5 at 344.

<sup>25</sup> See John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971) 136-142.

<sup>26</sup> For the difference, see John Rawls, *Justice as Fairness: A Restatement* (ed. E. Kelly, Cambridge: Mass.: Harvard University Press, 2001) at 106-107.

<sup>27</sup> See Edna Ullmann-Margalit, *The Emergence of Norms* (Oxford: Oxford University Press, 1977) 25, 41.

<sup>28</sup> Part of the self-interested reason may be that they want to appear trustworthy. See Christiano, note 14 at 136-137.

<sup>29</sup> For a reconstruction, see Brian Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), 148-149.

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## Demigods

But perhaps checks and balances are based upon a slightly different idea. Possibly, limits on powers are of human design and merely appear to be an unplanned aggregate by-product of action. It may well have been intended by the framers of a constitution to make the organs interact in a manner that brings about these limits even though it is by no means part of the intention of the organs to do so.<sup>30</sup> Conceivably, the interaction of passions can be calibrated by some ingenious constitution-maker—a sibling, as it were, of Rousseau’s *legislateur*—in such a manner that the emerging balance matches exactly what the constitution requires as law. Outward pressure would make each branch of government stay within its proper channel. This idea presupposes, of course, that the legal requirements of the constitution can be grasped, in principle, independently of the interaction of constituted powers. This explains why a *second* question must arise, namely, whether for reasons of the inevitable corrupting effect of passions on constituted bodies no particular office or institution within a constitutional system can ever be entrusted with the exclusive task to say what the constitution says from a legal point of view and whether, conversely, divining true constitutional meaning untarnished by the perspectivism of an office or personal ambition is possible only by stepping outside the system.

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<sup>30</sup> Invisible hand mechanisms can be part of a deliberately chosen institutional design. See Ullmann-Margalit, note 4 at 141. This would then be a case of the planned emergence of a spontaneously formed order. Arguably, it would be also a very special case. Planners may simply plan to have *some* spontaneous order. In this case, however, they would intend to have agents unwittingly bring about a *particularly patterned* spontaneous order.

By definition, the only ones unaffected by the maelstrom of political strife that engulfs all branches are the demi-divine founders. They stand outside of the system and have a fair chance at designing a system that in its actual operation will inadvertently give rise to the desired result. What is susceptible to being designed from the outside on the basis of pure practical reason can be attained on the inside *only* by giving free rein to passionate conflicts. Such conflicts produce constitutional limits as their side effect. The framers are in a position to anticipate the invisible hand mechanism and use it to enforce the norms of the constitution.

It is obvious, though, that the belief in such cunning constitutional mechanics commits one also to believing in the exceptional wisdom of the founders. If the founders failed at designing a system of checks and balances that in the final result converged with the original constitutional meaning, there would be no reason to trust such a system to begin with. Belief in the founder's wisdom is the *conditio sine qua non* of allegiance to the constitutional system. It must be the *transcendental faith* of those participating in the political process.

#### A tacit intrasystemic preference

The *third* question implicitly challenges this view. It objects that the very idea of a disembodied and disinterested perspective on the constitution is already tacitly complicit with the *judicial* exposition of law. The purportedly external perspective on the constitution is merely a generalization of one particular institutional outlook that embraces what Hart memorably called the "internal

point of view”.<sup>31</sup> It presupposes that the constitution has a meaning that is fixed from the outset and is therefore capable of guiding judicial expositions of law, unless this law is not sufficiently clear.

The objection suggests that viewing the framers ascribe to the constitution a stable meaning that is to be realized as a side effect of passionate struggles betrays an intra-systemic bias in favor of the judiciary. It indicates what the judiciary would have the framers intend in order to boost the authority of judicial expositions of law. The premise that there is stable meaning to begin with is already biased in favor of the judicial perspective on constitutional law. From the perspective of Federalist No. 51, this premise is false and unfair. It implies partisanship with one specific branch of government. Hence, Federalism No. 78, which defends the role of the “least dangerous” branch<sup>32</sup> of the constitution qua purveyor of authoritative constitutional meaning, appears to be in tension with Federalist No. 51, which does not rest its hope on the judiciary, even though an emphasis is laid in Federalist No. 78 on the comparatively harmless nature of the judiciary, an emphasis that reflects the spirit of No. 51.

If the third question has to be answered in the affirmative and it has to be admitted that positing stable constitutional meaning is a partial perspective on securing the legality of the constitution then the *fourth* and perhaps final question needs to be asked whether sustaining the authority of the constitution by means of the separation of powers does not have to let go of the idea that

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<sup>31</sup> See H.L.A. Hart, *The Concept of Law* (2d ed., ed. P.B. Bulloch & J. Raz, Oxford: Clarendon Press, 1994) 89-91.

<sup>32</sup> See Federalist, note 5 at 509.

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there must be something like a meaning of the constitution outside of the mechanics of the separation of powers. Plainly and simply, the score of each game of passion v. passion would determine the meaning of the constitution in the sense of constraining or facilitating action.<sup>33</sup> It would thus be basically up to game theory to explain how such meaning and its authority are generated.<sup>34</sup> Any normative order that arises as a result of settlement would be entirely unplanned. The irony ought to be noted. The instrument that represents, as the first American constitutions had it, the “plan of government” would work in practice in a way that is inaccessible to human design.<sup>35</sup>

Actually, this is the direction into which the revision of the Madisonian conception has to move. It has to *drop* the belief in the existence of an original normative meaning. But it will be seen that this is not tantamount to debunking all normative commitments.

#### The external is the internal

This matter needs to be stated as clearly as possible. The formal constitution establishes offices and institutions and invests them with requisite powers. It is possible to arrive at different constructions of the scope of these powers. The necessary condition for the system to operate is that the office-holders mutually recognize one another in their capacity. In Brandomian terms this means that

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<sup>33</sup> The final score would mark the relevant “coordination points”. See above note 14.

<sup>34</sup> See the classical contribution by Ullmann-Margalit, note 27.

<sup>35</sup> This is consistent with a major claim of public choice theory, namely that political institutions are not of human design. See Christiano, note 14 at 124-125, 135.

they consider each other entitled to speak on behalf of their position and to assert how what they *take* to be their powers fits into the overall framework. What is, however, basically up for grabs is whether their relevant assertions will also stick. Of course, the relevant interpretations will usually draw a line between what the power associated with an office *permits* or what it legally facilitates and what would be, even if it were possible, an *imprudent* course of action (see the convention mentioned above according to which the President has to appoint the leader of the strongest party to the position of the Prime Minister). The interpretive claims concerning what is or is not either possible or permissible are in most cases arrived at against a backdrop of a range of options.

From the Madisonian perspective, which is arguably consistent with modern rational choice and game theory, the office holders are by definition eager to arrive at interpretive constructions that promise to maximize the scope of their own powers. The chief executive, for example, may want to support interpretations of her powers to adopt ordinances that are likely to be to the detriment of the powers of the legislature.<sup>36</sup> The legislature, in turn, may contemplate reacting to what it perceives to be an encroachment of its powers by declaring the relevant ordinances null and void. Whether or not the legislature decides to react in this manner depends on several factors, such as, whether there is a chance to have such declarations recognized in administrative offices and courts or whether the subject matter merits creating the risk of un-

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<sup>36</sup> This is, of course, not at all a fictional example. See Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, Mass: Harvard University Press, 2010) 87-116.

certainty and upheaval or whether it is prudent to challenge and thereby possibly to weaken the executive branch. Several or all of these factors may influence the decision by the legislature. They are therefore decisive for whether or not what the chief executive takes to be her powers is likely to prevail and to be accepted, at least for the time being, as a plausible construction of constitutional law. Some kind of “equilibrium” may well be achieved so long as the persons and institutions involved are interested in avoiding system disintegration. Under this condition, each may have sufficient incentive to settle for “less” power than they might be able to exercise on the basis of frequent appeals to the people, mobilizing the street, prolonged government deadlock or violent conflict.

Now, from the perspective of garden-variety legal positivism the factors mentioned above would have to be regarded as “external”. In and of themselves they seem to have nothing to do with the question whether the constructions of powers arrived at by the chief executive are correct, legally speaking. Rather, they seem to concern the altogether different question whether pursuing a counter-strategy of nullification promises to be crowned with success. They seem to be relevant not for legal, but for prudential purposes.

The great lesson to be learned from revising the Madisonian perspective slightly by dropping the belief in predetermined limits is, however, that these factors are indeed *internal* factors. They are internal because the system of checks and balances permits them to be relevant for the purpose of constitutional construction. They cannot be ignored. Even though they seem to concern only the question of additional conditions that have to be met by interpretations in order to be *successful*—an interpretation that is *taken to be* correct by several or all branches—the correctness or incorrect-

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ness of a constitutional interpretation *cannot* be determined independently of such additional conditions. Within a context where assertions of powers are pit against one another competing ambitions are the key to determining what the constitution really *means*. They are the constitutionally warranted context of constitutional interpretation.

This is the radicalism of the Madisonian idea.

*Ex facto ius oritur*

The real constitution is set into motion by a mutually *recognized* formal distribution of the offices and branches of government. The formal constitution then comes to mean what the real constitution permits it to mean.

Indeed, this represents what social system's theorists call a "virtuous circle".<sup>37</sup> Alternatively, constitutional law can be characterized as an emergent property or a systemic effect of the existence of the constitution.<sup>38</sup>

If, for example, a government, aided and abetted by a legislative majority, signals its ability and readiness to repack a constitutional court in order to alter its jurisprudence, then changes in the case law undertaken by this court with a view to avert such repacking are the constitutionally warranted result. They are unobjectionable because they reflect how checks and balances work. It would be wrong to say that the old jurisprudence was right and the new is wrong simply because the judiciary yielded to political pres-

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<sup>37</sup> See Gunther Teubner, 'Breaking Frames: Economic Globalisation and the Emergence of *lex mercatoria*' (2002) 5 *European Journal of Social Theory* 199-217.

<sup>38</sup> See Vermeule, note 16 at 4-5.

sure. The old jurisprudence was just a reflection of a different equilibrium of forces. There is no right or wrong in how the constitution operates as long as it operates.

Constitutionalism has to confront the sobering truth that questions of interpretation are eventually settled *de facto*. What works and what does not work within a constitutional system is not just determined by appeal to the text and fundamental ideas, but also with an eye to what is likely to fly and to be considered palatable to others.

#### Two genuine normative constraints

It may be objected that the revised Madisonianism defended here sells the normativity of the constitution short and deflates into mere superficial refraction of the interaction of political forces. It no longer captures what Madison must have had in mind when he introduced checks and balances as means of sustaining the authority of the constitution *qua* law.

This objection can be countered by taking into account that the interactive process of constitutional interpretation is subject to two genuine normative constraints,<sup>39</sup> one of which has been briefly mentioned above. If there is anything normative about constitutional law, it is inherited from them rather than inherent in one or the other norm of the constitution.

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<sup>39</sup> In speaking of “genuine” normative constraints a contrast is made to how game and rational choice theorists believe normativity to “emerge” in situations that are “prone” to give rise to norms in order to overcome cooperation or coordination problems. See Ullmann-Margalit, note 34 at 22. Norms presuppose real commitments; they are not merely invisible hand effects.

The first normative constraint is about avoiding disintegration.<sup>40</sup> Constitutional interpretation takes place in a context that is politically prone to crisis. Depending on the expectations that parties harbor about what others accept without revulsion it is possible to arrive at mutual understandings. Of course, the most powerful actors are calling the shots.<sup>41</sup> On this level, the construction of the constitution is indeed a matter of political compromise.

The second normative constraint involves the core idea of modern constitutionalism, which consists of submitting the exercise of public authority to the discipline of law. In his otherwise troubling and highly polemical book *Legality and Legitimacy* Carl Schmitt<sup>42</sup> observed entirely correctly that in a liberal constitutional democracy a major legitimating factor of political action is to observe the constitution as law. The subject of legitimacy is, of course, the people. Hence, modern constitutional law is not just a tangled web of dyads asserting their influence and striking deals in the field of constitutional construction; actually, it is based upon a *triadic relation*. While the organs are keen to assert, either through the use of arguments or by means of threats, their powers and privileges vis-à-vis others, it is decisive from the perspective of the people that the constitution is adhered to by public authority since

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<sup>40</sup> The approach defended here shares with “political constitutionalism” the belief that the democratic process has to be self-sustaining. See Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007) at 5.

<sup>41</sup> See Russell Hardin, *Liberalism, Constitutionalism and Democracy* (Oxford: Oxford University Press, 1999) at 3.

<sup>42</sup> See Carl Schmitt, *Legality and Legitimacy* (trans. J. Seitzer, Durham: Duke University Press, 2004).

that is the only safeguard against their being “enslaved” by their rulers.<sup>43</sup> The organs of the constitution point out to one another what the constitution says, but their saying and explaining is determined by their interest to assert and to augment their power. In the relation to the people, however, they have to observe the constitution as though it were a valid law.<sup>44</sup> A compromise needs to be *cast* as an application or observance of a norm. As a result of the triadic relation the organs are linked to one common perspective.

This second constraint does no manner subordinate jurisdictional deal-making to some method of constitutional interpretation. The most fundamental norm of constitutional law is to avoid disintegration. Compromises are struck in light of this end. It is, however, necessary to present tacitly negotiated results in the language of the normative.

This is not to say that the interpretive construction of constitutional law is bound to remain mere window dressing. Indeed, it is conceivable to adopt conventions of constitutional interpretation as media to make out uncontroversial middle ground, for example, by appeal to acts of founding in which representatives of the relevant parties participated. The general acceptance of a “passivist” style of interpretation can actually serve as a medium of conflict avoidance. Hence, the determining influence can run not only

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<sup>43</sup> See James Madison, ‘Memorial and Remonstrance against Religious Assessments’ In *Writings* (ed. J. Rakove, New York: Vintage Books, 1999) 29-35 at 30-31.

<sup>44</sup> Students of the late Kelsenian theory of norms will recognize the tacit reference to Kelsen’s final characterization of the *Grundnorm* as a true fiction in Vaihinger’s sense. See Hans Kelsen, *General Theory of Norms* (trans. M. Hartney, Oxford: Oxford University Press, 1991).

downstream from compromise to interpretation, but also in the reverse direction.

### Strategic legalism and objectivity in interpretation

Constitutional practice begins, however, with a prototype of law, namely, the establishment of organs with powers. Owing to their mutual recognition as players within the system, the system of checks and balances is set into motion. It results in determinations of powers that are cast as interpretations.

Drawing on an idea explored by Adrian Vermeule, it can be said, therefore, that all legalism has to be strategic.<sup>45</sup> Even if one were to believe sincerely in the correctness of one particular method of constitutional construction—in other words, an interpretive approach that does not take competing claims by other branches into account—one would still have to choose, within the embedded context of checks and balances, the one method that is most likely to attain the result that would follow from the preferred approach. For example, an avowed originalist who joins a bench composed of living constitutionalists may have to articulate what in her view the original meaning requires in a vocabulary that ap-

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<sup>45</sup> See Vermeule, note 16 at 135. As Vermeule explains (137, 153-4): “From the standpoint of any given judge, choices by other judges create constraints that implicate the logic of *second-best adjudication*: what is best to do given the constraints arising from others’ choices may well differ from what it would be best to do of all other judges adhered to the same theory. [...] [E]ven judges who decide strictly according to law must consider the possibility that the best attainable legal outcomes, by their own lights, will occur if they vote differently than they would if other judges agreed with their views.”

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peals to social morality, evolving understandings or moral background principles.<sup>46</sup>

More generally, the belief that constitutional construction has to arrive at disembedded interpretations—interpretations, that is, that do not anticipate and accommodate the potentially disruptive interventions of other players in the constitutional system—is wrong-headed, for it misunderstands the nature of a constitutional system. Within the context of checks and balances one needs to anticipate that the “coordinate branches” will do everything to assert their power and hence develop interpretive stances and vocabularies that they find appropriate.

From this follows that constitutional construction is necessarily a political process that involves anticipating the reactions of others and the readiness to accommodate their views even at the expense of compromising one’s own preferred perspective. This readiness engages deeply held political beliefs. What must count, at the end of the day, is the good faith effort to comply with one’s own best understanding of political morality.<sup>47</sup>

#### The constitution determines its own interpretation

Upon closer inspection, it turns out that there is no unresolved tension between Federalist No. 51 and Federalist No. 78 (see above p. 24) after all. Judicial review and checks and balances are fully compatible with one another. Whether or not constitutional courts enjoy greater or lesser authority depends on how much authority is conceded to them by other branches. When they lose this

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<sup>46</sup> For a similar example see Vermeule, note 16 at 150-151,

<sup>47</sup> See Martin Loughlin, *Political Jurisprudence* (Oxford: Oxford University Press, 2017) at 6.

authority, as it arguably happened in Bavaria in the wake of the crucifix case, they need to reflect on whether constitutional disobedience can be regarded as a one-time occurrence, and consequently be ignored, or has to give rise to adaptations in the case law. Dealing with this question is almost the daily business of the European Court of Justice. The *Taricco II* case is an example in which the Court arrived at a particularly amazing interpretation of supremacy in order to accommodate a challenge by the Italian Constitutional Court.<sup>48</sup>

Most interestingly, given that constitutional interpretation takes place in a systemic context it becomes actually difficult to say whose interpretation ultimately counts. If, for example, the European Court of Justice needs to determine whether an interpretation of European Union law, for example, the Framework Decision on the Arrest Warrant,<sup>49</sup> could potentially offend the constitutional essentials (“identity”) of a Member State and arrives at a milder interpretation of European Union law (as it happened in the *Taricco* case)<sup>50</sup> it is no longer clear whose interpretation it is,

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<sup>48</sup> See Case C-42/17, *M.A.S. and M.B.*, Judgement of the Grand Chamber of 5 December 2017, EU:C:2017:936), a move that remained unresponded by the ECJ. For a discussion, see Clara Rauchegger, ‘National constitutional rights and the primacy of EU law: *M.A.S.*’ (2018) 55 *Common Market Law Review* 1521-1548 at 1541-2.

<sup>49</sup> 2002/584/JHA, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision.

<sup>50</sup> This case, I hasten to add, did not concern the European arrest warrant but rather whether observing a statute of limitation is essential to Italian constitutional law because of the principle of the “legality” of punishments. See

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namely, the European Court's or the Member State's. It is one in reaction to the anticipated reaction of the other. It becomes, thus, the interpretation of the *system* of the constitution.<sup>51</sup> Moreover, it is not possible to say that one court prevails. Just as in a case of a parallelogram of forces the interpretation becomes remarkably *impersonal* and, with an eye to the constitution, *objective*.<sup>52</sup> This is how the real constitution allows the formal constitution to speak. The meaning of the latter is the product of the former even though the former could not exist without the latter. Again, it is a *systemic* relation that one encounters here.

#### The question of reason

The revised Madisonian perspective on sustaining the authority of the constitution is utterly persuasive. It allows us to realize that the belief in disembodied judicial supremacy is partial vis-à-vis the judiciary and totally oblivious to the political realities of constitutional law. The formal constitution facilitates the emergence of the real constitution that lends the former its voice. Putting the matter

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Federico Fabbrini & Oreste Pollicino, *Constitutional Identity in Italy: European Integration As the Fulfillment of the Constitution* (2017). EUI Department of Law Research Paper No. 2017/06. Available at SSRN: <https://ssrn.com/abstract=2930106> or <http://dx.doi.org/10.2139/ssrn.2930106>

<sup>51</sup> See Vermeule, note 16 at 16, who would possibly call it a “fallacy of division” if one attributed an interpretation by an organ of the constitution arrived at within a systemic context to this organ rather than to the real constitution as a whole.

<sup>52</sup> It is “objective” in a dual sense. It is not arrived by the subject speaking but rather by the subject qua element of a systemic context. In addition, it is a social reality and not just a view developed by someone.

bluntly, without being supported by political compromises that have to be repeatedly struck between the branches, the formal constitution could not assert its authority. And by giving the matter a more dialectical twist it can be said that the formal constitution needs to be mute in order to speak through the actually operating branches of government.

As we have seen above (see p. 10), the Madisonian approach nevertheless fails to explain how the system of checks and balances can ensure that reason will rule over passion.<sup>53</sup> We have not yet come beyond the point at which nothing but the unexamined faith in the superior wisdom of the anointed framers would warrant the conclusion that the antagonism of passionate assertions of powers effectively sustains the rule of law (and, a fortiori, “reason”).

It has also already been mentioned that from an ancient perspective, which may have had some impact on Madison’s thinking, the overall objective of the constitution is to facilitate the rule of reason over passion. How that might be possible is what Madison left unexplained, at any rate, in the context of the separation of powers. Instead he came up with elementary ideas concerning representation in a large or “extended” republic. As is well known, he

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<sup>53</sup> Vermeule, note 16 at 48-49, pursues an easy way out. He views overall social welfare as the equivalent of reasonableness and focuses on the representativeness of the overall system even if it involves interactions between and among some highly imperfectly representative institution. The view of constitutional democracy underlying this perspective is rather narrow. The constitutional system is believed to be a vehicle for preference aggregation and tied to a perspective on political morality that is notoriously insensitive to distributive concerns. What is more, Vermeule loses track of the problem to have reason rule over passion and thus renders the challenge inherent in designing a constitutional system less complex than it is.

believed that it would be impossible within a larger constituency for local factions to dominate the legislative process. The futility of all attempts to pursue a partial agenda would lead representatives to support impartial designs.

We do not need to discuss the soundness of Madison's idea. What matters, for the purpose of our analysis, is that Madison shifts the constitutional focus on reasonableness from the interaction between and among various branches of government to one branch, namely, the legislature. As a result, the reasoning about constitutions undergoes a profound transformation.

#### Ancient and modern constitutionalism

Ancient political thought perceived practical reason to be embodied in a particular group, such as Aristotle's *mesoi*,<sup>54</sup> or to be distributed unevenly across constituencies. Practical reason is something that has to be acquired and internalized into habits of behavior.<sup>55</sup> Overstating the point a bit, whether or not a polity avails of a good constitution depends on the character of its citizens. If the citizens are virtuous, the whole polity is in good shape.

Modern constitutional law, by contrast, works with a disembodied understanding of practical reason. It is manifest in the quality of the will of the collective. This will is expressed in legislation, not least because its quality depends on the generality of

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<sup>54</sup> See Aristotle, *Politics* (trans. C. Lord, 2d ed., Chicago: University of Chicago Press, 2013) 1295b 8-9 (p. 114).

<sup>55</sup> See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (2d ed., Notre Dame: Notre Dame University Press, 1984) at 155.

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norms.<sup>56</sup> The practical reason underpinning the will of a collective is considered to be the outcome of a process that has to meet conditions of impartiality. Universal suffrage, electoral accountability, adequate systems of representation and the weight of public opinion are supposed to secure these conditions. Thus understood, legislation becomes the main, if not the sole, fountain of practical authority in the political sphere.<sup>57</sup>

Unsurprisingly, the executive branch and the judiciary are demoted to a relatively lower status, namely, to that of loyal and humble servants of the legislature. They do not contribute to the constitutional system by adding some form of reasonableness that is originally their own. The judiciary, in particular, is supposed to serve as the tractable agent (“*la bouche*”) of legislation.<sup>58</sup>

This centralization of all reason in the legislature is, of course, fully consistent with conceiving of constitutional authority through the lens of sovereignty. *Lex est quod suprema potestas iussit*. The law can be reasonable only as long as the sovereign is reasonable.

### The inconsistency

This shift of emphasis from the reason that is embodied in the players composing the system to the reason articulated in legisla-

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<sup>56</sup> See Franz Neumann, *Die Herrschaft des Gesetzes: Eine Untersuchung zum Verhältnis von politischer Theorie und Rechtssystem in der Konkurrenzgesellschaft* (trans. A. Söllner, Frankfurt aM: Suhrkamp, 1980).

<sup>57</sup> For a similar observation, see Carl Schmitt, *The Crisis of Parliamentary Democracy* (trans. E. Kennedy, Cambridge, Mass.: MIT Press, 1985) 42-47.

<sup>58</sup> See Montesquieu, *The Spirit of the Laws* (trans. A. M. Cohler, B.C. Miller & H.S. Stone, Cambridge: Cambridge University Press, 1989) at 160, 163.

tion may explain why Madison fails to answer the question how the mechanics of passion is able to be generative of reason. This failure is intrinsic to the project of modern constitutional law and definitely not one of its accidental features.

Modern constitutional law attempts to overcome the imaginary of the mixed constitution (to which John Adams was then still clinching)<sup>59</sup> and to replace the relevance of estates (lords, commoners, the Crown) with mere functional specifications of sovereign power. Undeniably, this was a major prerequisite for reconciling the idea of mutual checks, which was an old staple of the theory of the mixed constitution, with popular sovereignty. No longer are the branches of government associated with various groups or players that each avail of their own virtues and vices (or embody aspects of practical reasonableness, such as judgment, determination or love of liberty). No longer is it a hallmark of constitutional prudence to arrange these players such that the presence of one creates an obstacle for others whenever they are tempted to stray from the path of virtue. No longer is a constitution an instrument that arranges groups in a manner that averts the corruption of their character and harnesses the beneficial energies of each for the benefit of all. No longer is the cooperation of the separate branches through the combination and aggregation of virtues (courage, wisdom, love of liberty) considered to be conducive to the common good.<sup>60</sup> The modern constitutional law that we en-

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<sup>59</sup> See John Adams, *Revolutionary Writings* (ed. C. B. Thompson, Indianapolis: Liberty Fund, 2000) 287-288.

<sup>60</sup> All these ideas are summarized in one of the most wonderful documents of modern constitutional history, namely, in Charles I. Answer to the Nineteen Propositions. The "Nineteen Propositions" were made by Parlia-

counter in Madison's work breaks away from the ancient foundations that had until then been sustained in the theory of the mixed constitution.

This gives rise, however, to a severe inconsistency concerning the legality that undergirds the constitution as law. Transforming the legislature into the sole well-spring of practical reason in the political sphere involves either of two inferential commitments. One can endorse the view that legal norms are more than mere "parchment barriers" and hence amenable to faithful application in a constitutional context. This will only be the case if those in charge of applying constitutional constraints engage in good-faith efforts to draw out their true meaning. But Madison believed this view to be politically naïve. Alternatively, one may subscribe to the idea that in virtue of some mysterious invisible-hand mechanism the meaning of the constitution that emerges from the incessant jostle among organs is destined to coincide with its true meaning. This idea presupposes, however, the belief that the founders were demigods possessing immense intellectual abilities (see above p. 14). While the first commitment is politically implausible, the second must strike one as outright bizarre.

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ment in 1642 in order to contain an increasingly defiant king. They included matters such as approval of the appointment of ministers and parliamentary involvement in the conduct of foreign affairs. Had the king accepted this proposal and not cleverly given his famous reply, England would have been transformed into a parliamentary monarchy. See the text of the Answer to the Nineteen Propositions in *The Stuart Constitution 1608-1688* (ed., J.P. Kenyon, 2d. ed. Cambridge: Cambridge University Press, 1986) at 223-225. Viscount Falkland and Sir John Colepeper prepared the king's answer to the Nineteen Propositions. See Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005) at 91.

If the operation of checks and balances works in the manner in which it has been sketched above and if, therefore, the revised Madisonian perspective is plausible, then the interpretation of norms cannot be regarded as a transmission belt conveying the practical reason embodied in legislation to the resolution of singular cases. If the interpretation of the constitution and of statutes is eventually tied to political compromise and sustainable only under this condition, then the practical reason inherent in legislation is *systematically* threatened to become eclipsed by the mechanics of checks and balances.

We are now in a position to appreciate *the loss* that modern constitutionalism has incurred vis-à-vis the theory of the mixed constitution. This theory offered an explanation for how reason can rule over passion and how a constitution can be conducive to the common good by having each player counteract others or by forcing several into relations of cooperation. While the potential vices supposedly cancel each other out, reason is in the position to predominate in virtue of the combination of actually embodied virtues—or, put differently, in virtue of the real constitution.

More disturbingly, perhaps, vesting all reasonableness in the legislature makes liberal democracy vulnerable to all kinds of attacks that try to expose the working of the deliberating body as a mere sham.<sup>61</sup> The debunking of legislative wisdom is then often trailed with viewing wisdom or political ability vested in a different branch of government, notably, the executive branch.<sup>62</sup>

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<sup>61</sup> See, most famously and infamously, Carl Schmitt, *The Crisis of Parliamentary Democracy* (trans. E. Kennedy, Cambridge, Mass.: MIT Press, 1985).

<sup>62</sup> For a more recent installment, see Adrien Vermeule, *Law's Abnegation* (Cambridge, Mass.: Harvard University Press, 2016).

Taking up a core idea of Vermeule's systemic approach to constitutionalism it can be said that our faith in modern constitutional democracy is guilty of a "fallacy of composition".<sup>63</sup> It suggests that only if the institution that makes, owing to its design and operation, its members disposed to arrive at reasonable results plays a leading role and dominates subordinate institutions then the constitutional system as a whole can be reasonable, too. The system can only be as good as its constituent elements. But this is a mistake, for the supervening systemic properties can be different from the constituent parts.<sup>64</sup> Modern constitutional law, in contrast to its ancient predecessor, fails to take into account that the interaction of imperfect institutions and groups that are not public spirited can lead to the supervenient reasonableness of the overall system.

#### A Machiavellian revival

The real constitution in the parsimonious sense explains how constraints emerge from having constitutional law determined by the forces that the constitution allows to unfold. This is consistent with the Madisonian approach. But this approach needs to be complemented with a critical perspective on the reasonableness of constitutional arrangements. Without such a perspective one would have little or no reason to rest one's faith in the mechanics of the separation of powers.

In order to develop such a perspective, we need to return to the point at which Madison left off when he perceived all reasonable-

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<sup>63</sup> See Vermeule, note 16 at 9, 16, 26.

<sup>64</sup> See Vermeule, note 16 at 14.

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ness as concentrated in the legislative branch. This means that an exploration of the real constitution in a richer sense needs to take up central themes of ancient constitutional thinking. Two themes come to mind, not least because they have figured most prominently in the ancient tradition. The first theme is to view the constitution as an arrangement that protects communities against the corrosive impact of time.<sup>65</sup> A good constitution prevents disintegration that results from civic strife. The second theme concerns the participation of different groups with different ambitions and temperaments.

The concluding observations focus on this second theme. It concerns types of people—groups or individuals—that participate in the political process, broadly understood, and what they contribute, if they do, to joint action that is supposed to be conducive to the common good. In the ideal case, the habits of the groups and the character of its members are embodiments of practical reason. This explains why, from the ancient perspective, reason is not enshrined in texts and commands. The interpretation of utterances is therefore also not considered to be the main business of constitutional analysis.

Modern constitutional law altered the picture profoundly. The people supposedly are the wellspring of all authority. The people are one because the sovereign is one. Owing to the presupposed unity of the people it becomes an anathema for constitutional law to take it for granted that the people are split into two different so-

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<sup>65</sup> See, generally, J.G.A. Pocock in his *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975) 31-47.

cial classes, namely, the rich, who are few, and the poor, who are many. Moreover, modern constitutional law ignores, consistently and persistently, that each group is characterized by different *umori*, as Machiavelli would have put it. These different moods or temperaments are the desire to dominate and to exploit others, on the one hand, and the desire to be left alone and to live an unruffled ordinary life, on the other.<sup>66</sup>

Quite remarkably, we have recently seen a revival of the second element of ancient constitutional thinking in the context of a critical analysis of the European Union. Wolfgang Streeck points out that in Europe's postwar situation capitalism and democracy have simultaneously mutually supported and undermined each other. Democracy needs capitalism for the reason that social wealth is the fruit of private profit maximization. Capitalism needs democracy in order to make private wealth accumulation socially acceptable. The concept designating the reconciling element is that wealth would "trickle down" from the top to the bottom. At the same time, democracy is opposed to capitalism. The inequalities of wealth that capitalism gives rise to and its hierarchical organization of production would not find the support of majorities if these were able to control production and distribution effectively. The reason that such effective control is out of reach is, again, owing to the fact that capital is opposed to democracy, for capital owners are quick in evading constraints by moving to other places

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<sup>66</sup> See Niccolò Machiavelli, *The Prince* (trans. H.C. Mansfield, Chicago: University of Chicago Press, 1985) ch. 9, p. 39.

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or to react to political interference with divestment.<sup>67</sup> Streeck sums his observations up as follows:<sup>68</sup>

[W]hile an economic equilibrium is necessary for a democratic society to reap the collective benefits of private capital accumulation, it is put at risk by the very same policies that are needed to make private capital accumulation socially acceptable; and while a political equilibrium is needed to generate consent also with capitalism, it is threatened by the policies that are required for economic equilibrium.

It is not by accident, then, that democratic societies are caught in a circle of crises in which the resolution of a political crisis triggers economic crisis and the other way round. Increasing the tax revenue with the aim of funding social programs diminishes investor confidence in the amount of expected returns; boosting economic performance by making labor markets less “rigid” is likely to give rise to resistance by trade unions.

The uneasy relationship between capitalism and democracy can be linked to two different constituencies to which policies are addressed. Streeck refers to them, roughly speaking, as citizens and creditors.<sup>69</sup> What he appears to have in mind when speaking of “creditors” are not merely those owning government bonds or other debt instruments, but everyone having a stake in a consolidated budget and a “lean state” that does not spend too much on public programs. A consolidated budget—a not excessively grow-

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<sup>67</sup> See Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press, 1988) 44-49.

<sup>68</sup> Wolfgang Streeck, *How Will Capitalism End?* (London: Verso, 2016) 192.

<sup>69</sup> See *ibid.* 124.

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ing public debt—is a major factor for creating confidence that the state is capable of servicing this debt and not creating more money by mere fiat. The measures taken in order to attain consolidation targets usually do not involve the raising of revenues, for example by increasing the rate of the income tax, but the cutting of expenditures. For the consolidation state it is the supreme law to rank, at least outwardly, its obligations to the debtors above all other obligations. According to Streeck, the people of the state (*Staatsvolk*)—*i.e.*, those depending on the state’s intervention into the economy—systematically lose out against the people of the market (*Marktvolk*):<sup>70</sup>

[...] [V]oters range below creditors, the results of elections are less important than those of bond auctions, public opinion matters less than interest rates and citizen loyalties less than investor confidence, and debt service crowds out public services.

In this way, the rights and obligations of citizenship become subordinated to commercial market obligations. The traditional relation between the state and civil society is turned on its head. Market signals—credit ratings—advance to the level of guideposts of public policy.<sup>71</sup> The interest on the part of the few in profitable returns on investments trumps the pursuit of social justice.

Each of the two colliding regimes comes with different embodiments of reasonableness: the rational profit-maximizing investor, on the one hand, and the loyal and sympathetic citizen, on the other. It is as though one encountered the Machiavellian *humori* in

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<sup>70</sup> See *ibid.* at 124.

<sup>71</sup> See Joseph Vogl, *Der Souveränitätseffekt* (Berlin: diaphanes, 2015).

different guises:<sup>72</sup> the ambitious wealthy that kick others around for their own benefit and the many who want to live safe and moderately comfortable lives.

In the European Union it is quite clear that the market people are represented, in particular, in the context of monetary union and free movement of capital. It is in this context that the intense scrutiny with which supranational institutions supervise the creation and structure of the national budget tends to put the national political process in the position of receivership. These institutions are in a better position than democratically responsible governments to impose on “unreliable” electorates a “market-conforming fiscal policy”.<sup>73</sup> The task of macro-managing the economy becomes thereby decoupled from popular democracy. Streeck perceives quite clearly that this real constitution influences heavily how the powers of supranational bodies (the Council, the ECB) are interpreted by Courts and how state practice adopts quickly to changed circumstances, for example by appointing reliable technocrats to prime ministers. The “troika” has intervened massively into domestic politics (in particular in the case of Greece) and has thereby not at all been supportive of any redistributive ambitions of national governments. Governments are no longer able to behave like states that are capable of overriding markets and act more like firms that respond to market signals. State citizens find it increasingly difficult to find an outlet for protest. Not by accident, they are then inclined to join “irresponsible” populist movements.

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<sup>72</sup> See already my *The Cosmopolitan Constitution* (Oxford: Oxford University Press, 2014).

<sup>73</sup> See Streeck, note 68 at 130.

The citizens of the market are not restricted to creditors, narrowly understood. They are composed of all of those who stand to gain from more austere government policies, which means less public and more private provision, the privatization of state activity and the substitution of individual effort for collective solidarity.<sup>74</sup> This means that entrepreneurs, managers, well-educated professionals or people working in all kinds of “bullshit jobs”<sup>75</sup> stand to gain from this development while the rest is likely to lose. The only arena that is responsive to concerns of the rest is the national polity, for it is there that ordinary people are given a voice.

Alterations in the real constitution give rise to shifts in the formal constitution. This concerns the margin of appreciation, broadly understood, in particular with regard to Art. 7 European Union Treaty and the precautionary soft law procedures for strengthening the rule of law. In the face of the power of populist movements, there is next to nothing that has been accomplished with these.<sup>76</sup> In the context of the internal market it remains to be seen whether and how the obstacle approach will be scaled back in order to avoid in the future such offensive results<sup>77</sup> as *Viking* and

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<sup>74</sup> See *ibid.* at 134.

<sup>75</sup> See David Graeber, *Bullshit Jobs: A Theory* (London: Penguin Books, 2018).

<sup>76</sup> See Christoph Möllers & Linda Schneider, *Demokratisierung in der Europäischen Union* (Tübingen: Mohr, 2018).

<sup>77</sup> See, for example, Florian Rödl, ‘Transnationale Lohnkonkurrenz: Ein neuer Eckpfeiler der “sozialen” Union?’ In A. Fischer-Lescano et al. (eds.), *Europäische Gesellschaftsverfassung: Zur Konstitutionalisierung sozialer Demokratie in Europa* (Baden-Baden: Nomos, 2009) 145-160.

*Laval*.<sup>78</sup> The most recent case law on citizenship has indeed seen a retreat from the emphasis on the rights of citizenship that were at the center of the *Ruiz Zambrano* revolution.<sup>79</sup> There is movement in the real constitution of Europe, and the final movers are the constituencies: the market people and the state people.

### Conclusion

Madison took from the separation of powers the core idea that reason and normative force arise from an antagonism of forces. But he abandoned the broader perspective on the real constitution. He took the gold from the ancient constitutional tradition in order to forge the magical ring of modern constitutional law. What was thereby eclipsed was the perspective on the broader context of class conflict from within which any viable constitution needs to be built. With the rise of populist opposition to the institutions of liberal internationalism, such as the European Union, its relevance has finally returned to us with a vengeance.

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<sup>78</sup> Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP [2007] ECR I-10779; Case C-341/05 *Laval*, un Partneri Ltd, of 18 December 2007.

<sup>79</sup> Case C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm).