

# Marx's critique and the constitution of the capitalist state\*

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## 1 Introduction

Constitutionalism is a globally distributed practice of depoliticisation that appears as the regulation of governance and the structuration of formal political and legal institutions. Constitutional law institutionalises the depoliticisation of the capitalist state, typically by restricting the legislative pursuit of legal or institutional change.<sup>1</sup> It thereby secures the conditions for capital accumulation against the politicisation of capitalism's inverted and antagonistic social relations. The constitutional state is both conditioned by, and a form of, class struggle and social antagonism.<sup>2</sup> It is bound up with the reproduction of 'the notional separation of political and economic power'<sup>3</sup> (or the 'bifurcation of the political'<sup>4</sup>),

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<sup>1</sup>Constitutionalism erects and patrols the 'boundaries of "politics" and the law'. Simon Clarke, 'The State Debate' in Simon Clarke (ed), *The State Debate* (Macmillan 1991) 1, 33. Often, the most consequential kind of constitutional constraint is that of constitutional courts exercising powers to review the constitutionality of legislation. On constitutional review see Michel Troper, 'The Logic of Justification of Judicial Review' (2003) 1 *International Journal of Constitutional Law* 99; Víctor Ferreres Comella, 'The Rise of Specialized Constitutional Courts' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 265; Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *The Journal of Law, Economics, & Organization* 587; Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (OUP 2014).

<sup>2</sup>On the capitalist state as the political form of capitalist social relations, see Simon Clarke, 'State, Class Struggle, and the Reproduction of Capital' in Simon Clarke (ed), *The State Debate* (Macmillan 1991) 183. For additional perspectives, see Werner Bonefeld, 'Social Constitution and the Form of the Capitalist State' in Werner Bonefeld, Richard Gunn, and Kosmas Psychopedis (eds), *Open Marxism 1: Dialectics and History* (Pluto Press 1992) 93; Soichiro Sumida, 'Die Zusammenfassung Der Bürgerlichen Gesellschaft in Der Staatsform' (2018) 2017 *Marx-Engels Jahrbuch* 41; Alex Demirović, 'The Capitalist State, Hegemony, and the Democratic Transformation Toward Socialism' in Jean-Numa Ducange and Razmig Keucheyan (eds), *The End of the Democratic State: Nicos Poulantzas, a Marxism for the 21st Century* (Palgrave Macmillan 2019) 43, 56 ff.

<sup>3</sup>Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 *Modern Law Review* 567, 583.

<sup>4</sup>Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations* (Verso 1994).

in which social relations of production and exchange are depoliticised<sup>5</sup>—while, simultaneously, a set of formal institutions and practices centred on the state are regarded as comprising the full scope of politics—an ‘institutionalised illusion’<sup>6</sup> that defines the capitalist state form<sup>7</sup> and is characteristic of liberal constitutional polities. Constitutionalism is best understood as a specific form of struggle over the reproduction of capitalist social relations, not simply as an apparent ‘legal technology for structuring state power’.<sup>8</sup> The critique of the constitution of the capitalist state form consists in the study of legal and political institutions’ formation through the dynamics of antagonistic social relations—not the study of the putative power of constitutions to constrain social antagonism.

Within the constrained analytic framework of liberal constitutional theory, however, constitutionalism consists in systems, practices, and imaginaries<sup>9</sup> through which public power and political authority are both constituted and limited; or it consists in formal texts, social contracts, or collective decisions that delimit power through the specification of legitimate authority. In the former case, constitutions are held to subsist in logics and rationalities of symbols, meanings, and the representation or objectification of reality; in the latter, constitutions are abstracted from the social relations in which they are embedded and with which they are mutually constitutive. In either case, liberal constitutional theory has a pronounced ‘normativist’<sup>10</sup> bent. It is preoccupied with the reconciliation of the contrary poles of ‘democratic constitutionalism’: the affirmation of both individual rights and majoritarian legitimation of public power.<sup>11</sup> As such, it evinces an enduring preoccupation with the project of justification, not critique.

This chapter rejects such conceptions of constitutionalism and traces the outline of a critique of constitutionalism and of liberal constitutional theory. Constitutionalism must be investigated as part of the broader project of interpreting, elaborating, and critically engaging with Marx’s critique of capitalist society. Constitutionalism is a form of struggle, not a formal puzzle. Liberal constitutional theory’s inability to forgo an ‘obscurantist celebration of

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<sup>5</sup>The reproduction of the separation of formal politics from the (inherently political) domination inherent in relations of production and exchange is immanent to the concept of the capitalist state. Tony Smith, *Beyond Liberal Egalitarianism: Marx and Normative Social Theory in the Twenty-First Century* (Brill 2017) 187–89. See also Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (CUP 1995) 10–12, 19–48.

<sup>6</sup>Patrick Murray, *Marx’s Theory of Scientific Knowledge* (Humanities Press 1988) 32.

<sup>7</sup>Clarke, ‘State Debate’, 9–10.

<sup>8</sup>Asli Bâli and Aziz Rana, ‘Constitutionalism and the American Imperial Imagination’ (2018) 85 *University of Chicago Law Review* 257.

<sup>9</sup>On images, symbols, and the representation of social reality in constitutional theory, see Charles Taylor, *Modern Social Imaginaries* (Duke University Press 2004); Zoran Oklopčić, *Beyond the People: Social Imaginary and Constituent Imagination* (OUP 2018); Jiří Příbáň, ‘Constitutional Imaginaries and Legitimation: On *Potentia*, *Potestas*, and *Auctoritas* in Societal Constitutionalism’ (2018) 45 *Journal of Law and Society* S30.

<sup>10</sup>Martin Loughlin, ‘The Concept of Constituent Power’ (2014) 13 *European Journal of Political Theory* 218.

<sup>11</sup>Nimer Sultany, ‘The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification’ (2012) 47 *Harvard Civil Rights–Civil Liberties Law Review* 371.

the “paradoxes” of constitutionalism<sup>12</sup> can be overcome only by apprehending constitutionalism as a form of social antagonism.

Constitutional texts prescribe institutional boundaries and describe legal frameworks<sup>13</sup> in order to mediate the exercise of formal political power, but constitutions—in the senses of political communities or legal orders—are themselves constituted only through struggle and antagonism. Texts like constitutional provisions, statutes, and doctrines figure prominently in constitutional theory, but they do not exhaust its scope. Adequately apprehending constitutionalism is possible only by situating constitutional law in its historical specificity, and by illuminating the ways in which law and the state are reproduced as specific moments in the totality of capitalist social relations. Some of the roots of such a critique are already present in constitutional theory. The study of constitutionalism has often been characterised by a contradictory duality between formality and materiality<sup>14</sup>—not just between constitutional text and constitutional form, but also between the fragmentation of constitutional law among and within national and international jurisdictions, on the one hand, and the global scope of constitutionality concomitant with the reach of the world market and the global expansion and intensification of capital accumulation, on the other. The territorial fragmentation of nation-states is the political expression of the global unity of value relations.<sup>15</sup> The constitution of this form of social relations must be subject to further critique—critique that is articulated with Marx’s critique of political economy.<sup>16</sup>

In this chapter I present the outline of such a critique as a contribution to the sustained critique of constitutionalism conjoined with the Marxian critique of political economy. I adumbrate the theoretical traditions and debates that I consider to be the most important for the critique of the capitalist state in its appearance as a constitutional state. I then explore the reproduction of constitutionalism as a practice of depoliticisation, with a focus on the constitution of political and legal relations (including the constitution of juridical relations

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<sup>12</sup>Oklopcic, *Beyond the People*, 350.

<sup>13</sup>The prototypical case is the empowerment of a constitutional court to conduct constitutional review. This model necessarily privileges the drafting, interpretation, and elaboration of legal texts. The contrast with the Westminster model—legislative sovereignty and the persistence of an ‘unwritten constitution’—has been blurred by the adoption of bills of rights and moves toward constitutional review in Commonwealth countries. Mark Tushnet, ‘The Rise of Weak-Form Judicial Review’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 5; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013).

<sup>14</sup>Goldoni and Wilkinson, ‘Material Constitution’.

<sup>15</sup>Simon Clarke, ‘Class Struggle and the Global Overaccumulation of Capital’ in Robert Albritton and others (eds), *Phases of Capitalist Development: Booms, Crises and Globalizations* (Palgrave Macmillan 2001) 76; Rodrigo Pascual and Luciana Ghiotto, ‘The State and Global Capital: Revisiting the Debate’ in Ana Cecilia Dinerstein et al. (eds), *Open Marxism 4: Against a Closing World* (Pluto Press 2020) 109.

<sup>16</sup>For a broad, introductory overview of this articulation, see Emiliós Christodoulidis and Marco Goldoni, ‘Marxism and the Political Economy of Law’ in Emiliós Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 95.

and subjects), and the link between constitutionalism and the reproduction of the capital relation. Inquiry into these processes and relations is necessary for a critical understanding of constitutionalism. I also argue that crises are constitutive of and central to constitutionalism, rather than inimical to it. I conclude by briefly considering the broader implications of the critique of constitutionalism.

## 2 Background theoretical considerations

My approach in this chapter is informed by the contributions to critical state theory found in the perspective of Open Marxism<sup>17</sup> as well as by proponents of form-analytic approaches to the critique of capitalism.<sup>18</sup> According to the former, the state is the political form of capitalist society. Capitalist social relations appear as a fragmented and contradictory unity in which social individuals experience impersonal domination through the mediation of abstract social forms—a theme that I elaborate by drawing upon form-analytic theories that stress that capitalist society is constituted by ‘historically specific social forms’.<sup>19</sup> My aim is not to gloss Marx’s scattered remarks on constitutionality and democratic institutions, but rather to explore the ways in which a critical analysis of constitutionalism can draw upon—and inform and extend in turn—the critique of capitalist social relations.

The critique of capital requires the critical apprehension of the dominating forms assumed by capitalism’s constituent social relations in their contradictory and conflict-laden reproduction. Within the critique of capital, both capitalists and workers are regarded as personifications of historically specific social categories.<sup>20</sup> Their relations with one another are mediated by value,<sup>21</sup> the production of which is socially validated through money-mediated exchange.<sup>22</sup> The relations of the production and realisation of value are global in scope, and are extended

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<sup>17</sup>See e.g., Bonefeld, ‘Social Constitution’; Simon Clarke, ‘The Global Accumulation of Capital and the Periodisation of the Capitalist State Form’ in Werner Bonefeld, Richard Gunn, and Kosmas Psychopedis (eds), *Open Marxism 1: Dialectics and History* (Pluto Press 1992) 133. For a contemporary perspective, see Chris O’Kane, ‘Capital, the State, and Economic Policy: Bringing Open Marxist Critical Political Economy Back into Contemporary Heterodox Economics’ (2020) 54 *Review of Radical Political Economics* 684.

<sup>18</sup>See esp. Murray, *Marx’s Theory*, 31–33, 35–39; Werner Bonefeld, *Critical Theory and the Critique of Political Economy: On Subversion and Negative Reason* (Bloomsbury 2014) 165–92; Smith, *Beyond Liberal Egalitarianism*, 183–91; Paul Mattick, *Theory as Critique: Essays on Capital* (Brill 2018), 72–122.

<sup>19</sup>Use of the term ‘form’ in this context does not connote a featureless universality; rather, it is an acknowledgement that all social relations assume ‘historically specific social forms’. Patrick Murray, *The Mismeasure of Wealth: Essays on Marx and Social Form* (Brill 2016) xi.

<sup>20</sup>Karl Marx, *Capital: A Critique of Political Economy*, vol 1 [1867] in Karl Marx and Frederick Engels, *Collected Works*, vol 35 (Lawrence & Wishart 1996) 10; Mattick, *Theory as Critique*, 106.

<sup>21</sup>Smith, *Beyond Liberal Egalitarianism*, 83–4.

<sup>22</sup>Michael Heinrich, *An Introduction to the Three Volumes of Karl Marx’s Capital* (Monthly Review Press 2012) 48–70; Mattick, *Theory as Critique*, 102–22.

and consolidated by state violence.<sup>23</sup> Under capitalism, social production is undertaken, not in order to fulfil human needs, but on an antagonistic basis among capitals that are structurally compelled to compete with one another. The imperative to valorise capital<sup>24</sup> compels capitalists to purchase labour-power as cheaply as possible (and to pursue commodity production on a private basis—that is, without regard to the risk of crises). Most individuals are separated from the means of production; their access to any portion of the total social product—which ‘presents itself as an “immense accumulation of commodities” ’<sup>25</sup>—is mediated by money. They can reproduce themselves only by obtaining money, by selling labour-power to those who own the means of production. And yet both capitalist and worker contribute to the reproduction of the capital relation and capitalism’s constituent social forms—the essential determinations of capitalism that mediate social individuals’ activity (and dominate them). These include commodities, money, capital—but also law and the state as well.<sup>26</sup>

Within capitalist society, the political is fragmented, such that relations of production and exchange are commonly represented as merely economic and outside the realm of politics—the latter being reduced to a depoliticised state form that is abstracted from the social relations with which it is mutually constitutive. The capitalist state is in no way a mere agent of a unified ruling class. Nevertheless, the capitalist state is immanent to value relations, such that state actors must seek to maintain the conditions for capital accumulation.<sup>27</sup> As such, the capitalist state is directly implicated in the reproduction of the separation of producers from the means of production;<sup>28</sup> in the struggles that attend the reproduction of the capital relation;<sup>29</sup> and in the maintenance of the depoliticising separation of the political and the economic (the ‘bifurcation of the political’).<sup>30</sup> Through its maintenance of the bifurcation of the political, the capitalist state is crucial to the reproduction of capital as a social relation. It ‘insulates’<sup>31</sup> capitalist production and exchange relations from political contestation—indeed, it cannot do otherwise and remain a capitalist state.<sup>32</sup>

Law and the state are moments in the contradictory totality of capitalist social relations.<sup>33</sup> A ‘moment’ in this sense is not a temporal unit. It is ‘an element

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<sup>23</sup>Bonefeld, *Critical Theory*, 79–95, 165–85.

<sup>24</sup>Smith, *Beyond Liberal Egalitarianism*, 106–8 ff.

<sup>25</sup>Marx, *Capital*, 45.

<sup>26</sup>Smith, *Beyond Liberal Egalitarianism*, 183–92.

<sup>27</sup>Heinrich, *Introduction*, 203–13.

<sup>28</sup>Bonefeld, *Critical Theory*, 79–100.

<sup>29</sup>Clarke, ‘State, Class Struggle’.

<sup>30</sup>Smith, *Beyond Liberal Egalitarianism*, 187–91.

<sup>31</sup>Werner Bonefeld, ‘European Integration: The Market, the Political and Class’ (2002) 26 *Capital & Class* 117, 118.

<sup>32</sup>Smith, *Beyond Liberal Egalitarianism*, 190.

<sup>33</sup>‘[T]he capitalist mode of production can only be grasped as a complex totality. However, this is not the complexity of relations of structural interdependence, it is the complexity of an historical process, a process of class struggle which develops on the basis of contradictory historical foundations’. Clarke, ‘Global Accumulation of Capital’, 149.

considered in itself that can be conceptually isolated and analysed as such but that can have no isolated existence' in actual social life outside of a broader totality.<sup>34</sup> But law and the state are not only moments in the contradictory totality of capitalist social relations; they are also, themselves, sites of the constitution of social relations (including those of production and exchange). Relations of production and exchange are mutually constitutive with legal and political relations. They are neither natural nor trans-historically valid.<sup>35</sup> The critique of capitalist society is incomplete without critical inquiry into the legal constitution of juridical subjects, relations of property and contract, and the legal articulation of production and exchange relations. Since they number among capitalism's essential social forms; the analysis and critique of law and the state are neither secondary to, nor separable from, the analysis and critique of capital.

Some Marxists have recommended viewing law and the state as 'relatively autonomous'<sup>36</sup> from other social relations<sup>37</sup>—meaning that the content of political relations at the level of the state is neither fully separate from, nor fully determined by, relations of production and exchange. But the endeavour to specify the limits of the state's autonomy is fraught. There is always the danger of reproducing liberalism's fetishistic conception of the state as an institution standing apart from value relations.<sup>38</sup> This risk can be avoided by viewing the state as the political form of capitalist social relations, as one moment in a contradictory social totality. The capitalist state is not anterior to capitalist production; it is mutually constitutive with exchange relations, the world market, and the global expansion of capital accumulation.<sup>39</sup> It is necessary to resist the temptation to accept liberal thought's naturalisation of its own categories. We must not accept the separation of state and civil society as a brute fact. It is

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<sup>34</sup>Geert Reuten, 'The Difficult Labor of a Social Theory of Value' in Fred Moseley (ed.), *Marx's Method in Capital: A Reexamination* (Humanities Press 1993) 89, 92. See also Geert Reuten, 'An Outline of the Systematic-Dialectical Method: Scientific and Political Significance' in Fred Moseley and Tony Smith (eds.), *Marx's Capital and Hegel's Logic: A Reexamination* (Brill 2014) 241, 249 (noting that, although moments must be presented sequentially, when it comes to apprehending totalities 'we always have the simultaneity of all moments').

<sup>35</sup>'The capitalist state is neither independent from the economy nor does it derive from it, nor does the economy comprise a structured system of independent economic laws'. Bonefeld, *Critical Theory*, 182.

<sup>36</sup>Christopher Tomlins, 'How Autonomous Is Law?' (2007) 3 *Annual Review of Law and Social Science* 45.

<sup>37</sup>Nicos Poulantzas, *State, Power, Socialism* (Verso 1978); Bob Jessop, *State Theory: Putting the Capitalist State in Its Place* (Polity 1990) 24–47; Sonja Buckel, 'The Juridical Condensation of the Relations of Forces: Nicos Poulantzas and Law' in Alexander Gallas et al. (eds.), *Reading Poulantzas* (Merlin Press 2011) 154.

<sup>38</sup>Simon Clarke, 'Marxism, Sociology, and Poulantzas's Theory of the State' in Simon Clarke (ed), *The State Debate* (Macmillan 1991) 70 (arguing that Poulantzas' approach tends to reproduce the categories of bourgeois social thought rather than produce immanent critiques of them); Bob Jessop, 'Globalization and the National State' in Stanley Aronowitz and Peter Bratsis (eds.), *Paradigm Lost: State Theory Reconsidered* (2002) 185, 198–200. See also E. P. Thompson, *The Poverty of Theory, or, An Orrery of Errors* (first published 1978, Merlin Press 1995) 130–32.

<sup>39</sup>Cf. Clarke, 'State, Class Struggle'; 'Global Accumulation of Capital'; and 'Class Struggle'; Bonefeld, *Critical Theory*, 79–95, 147–85.

constituted by and valid for (and only for) capitalist social relations.<sup>40</sup> It is important to attend to the specificity of the political and the legal within the totality of capitalist social relations. The constitutional state is not a distinct level of society, but neither is it smoothly continuous with other social relations. State and law are forms of struggle and domination in their own right, ones through which the depoliticisation of society obtains, and the conditions for the reproduction of capital accumulation are secured.

### 3 The practice of constitutionalism

Constitutionalism warrants sustained critical inquiry in conjunction with the critique of political economy. A number of contradictions in liberal social thought converge within the scope of constitutional theory. It is formal and prescriptive, but it is also focused on the material contours of the social constitution of the state. Critical constitutional theory's task is to apprehend the relationship between the formal and the material constitution in the context of the critique of political economy. It must illuminate the ways in which constitutionalism is implicated in attempts to constrain or delimit struggles over the reproduction of capitalist social relations. Normativist theories of constitutionalism tend to become ensnared by 'constitutional fetishism'<sup>41</sup>—the tendency for constitutional theorists to abstract constitutional provisions and structures from the social relations which alone provide them with meaning. Constitutional fetishism is closely related to the conceit that formal and normative constitutional systems are self-reproducing and self-referential,<sup>42</sup> rather than manifested in, and reproduced through, contradictory and conflictual social relations. A consequence of constitutional fetishism is the belief in, or the desire for, the routinisation of the political through constitutional order and thoughtful institutional design. Rather than prescribe constitutional measures to contain conflict, the critique of constitutional theory must apprehend the constitutive role of struggle in the constitutional state.

Happily, such a critique can draw—selectively—upon more recent and innovative trends in comparative constitutional scholarship, which balance attention to constitutions as formal-juristic constructs with attention to questions of political economy, social movements, and the study of culture.<sup>43</sup> These trends are

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<sup>40</sup>John Holloway and Sol Picciotto, 'Introduction: Towards a Materialist Theory of the State' in John Holloway and Sol Picciotto (eds.), *State and Capital: A Marxist Debate* (Edward Arnold 1978) 1, 3–10. Cf. Bonefeld, *Critical Theory*; Smith, *Beyond Liberal Egalitarianism*.

<sup>41</sup>Franz L. Neumann, *The Democratic and the Authoritarian State: Essays in Political and Legal Theory* (Free Press, 1957) 199. W. E. B. Du Bois first explored the fetishism of 'constitutional metaphysics' in 1935 in his magisterial *Black Reconstruction*. W. E. B. Du Bois, *Black Reconstruction in America* (first published 1935, The Free Press 1998) 366 and passim; see also Allison Powers, 'Tragedy Made Flesh: Constitutional Lawlessness in Du Bois's *Black Reconstruction*' (2014) 34 *Comparative Studies of South Asia, Africa and the Middle East* 106.

<sup>42</sup>See e.g., Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993).

<sup>43</sup>Ran Hirschl, 'The Realist Turn in Comparative Constitutional Politics' (2009) 62 *Political*

welcome correctives to the formalist and normative-justificatory impulses that, historically, have dominated constitutional theory. Importantly, contemporary scholars of comparative constitutionalism refuse to be limited by territorial and jurisdictional boundaries and include international institutions and networks of capital, firms, and organisations within their ambit of study.<sup>44</sup> Such attentiveness to the inadequacy of textually- and territorially-bound analysis is salutary. Additionally, much of this scholarship stresses constitutionalism’s insulation of markets from mechanisms of democratic decision-making, accomplishing the extension of state capacities through the elevation of market discipline as a political rationality or embedding states in transnational frameworks;<sup>45</sup> or it stresses that constitutionalism is not merely political but social—such that rules and norms can never be adequately apprehended in abstraction from their social context.<sup>46</sup> Finally, some contributions to this scholarship acknowledge constitutions as ‘conscious projects to insulate the economy and private power from any potential for democratisation of control and, if necessary, to do so with punitive disciplinary measures’.<sup>47</sup> These ‘conscious projects’ are accomplished through various means, such as the elaboration of regimes of property relations, the judicialisation of policy, or the insulation of accumulation regimes from democratic oversight through the transference of regulatory competencies from national parliaments to supranational institutions. Nevertheless, such contributions do not conduce to a critique of constitutionalism articulated with the critique (rather than the application of) political economy.<sup>48</sup> The task remains to apprehend and elucidate the systematic character of constitutionalism

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*Research Quarterly* 825; Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011); Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (CUP 2019).

<sup>44</sup>See e.g., Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010); Christine E. J. Schwöbel, ‘Situating the Debate on Global Constitutionalism’ (2010) 8 *International Journal of Constitutional Law* 611; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012); Stephen Gill and A. Claire Cutler (eds.), *New Constitutionalism and World Order* (CUP 2014); Turkuler Isiksel, *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State* (OUP 2016); Marco Goldoni, ‘Introduction to the Material Study of Global Constitutional Law’ (2019) 8 *Global Constitutionalism* 71.

<sup>45</sup>See e.g., Jessop, ‘Globalization and the National State’, 207 ff.; Gill and Cutler (eds), *New Constitutionalism*.

<sup>46</sup>Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (CUP 2011); Paul Blokker and Chris Thornhill (eds.), *Sociological Constitutionalism* (CUP 2017).

<sup>47</sup>Stephen Gill and A. Claire Cutler, ‘New Constitutionalism and World Order: General Introduction’ in Stephen Gill and A. Claire Cutler (eds), *New Constitutionalism and World Order* (CUP 2014) 1, 11.

<sup>48</sup>Many such contributions are premised on the claim that the extension of the world market and the expanding scope of capital accumulation (and the legal insulation of both) are recent phenomena. Werner Bonefeld, ‘Social Constitution and the Spectre of Globalization’ in Andreas Bieler and others (eds.), *Global Restructuring, State, Capital and Labour: Contesting Neo-Gramscian Perspectives* (Springer 2006) 45. However, ‘capital’s process of internationalisation is inherent to capitalism and not a novelty’. Pascual and Ghiotto, ‘The State and Global Capital’, 117. As Marx emphasised, ‘[t]he tendency to create the world market is inherent directly in the concept of capital itself’. Karl Marx, ‘Economic Manuscripts of 1857–58’ in Karl Marx and Frederick Engels, *Collected Works*, vol. 28 (Lawrence & Wishart 1986) 335.



as a form of continuing struggles over the reproduction of capitalist social relations; in other words, the task is to engage in the critique of constitutionalism with reference to, and for the sake of, the critique of political economy and the emancipatory abolition of capitalist social relations.

Constitutional theory—in any register, whether justificatory or critical—requires an appreciation of tensions and oppositions. It ‘deals with the structure of relationships *within* the state ... [as well as] the relationship *between* the state and the other organizations and associations in society’.<sup>49</sup> The term ‘constitutional’ may be applied to a form of government, but also to a particular and historically-specific pattern of social relations. That is, constitutionalism, like the state, cannot be posited *a priori*.<sup>50</sup> This remains a challenge for liberal constitutional theory, which is an intensely normative and prescriptive affair. It focuses on questions of institutional design, prescriptions for drafting and interpreting texts, and prescribing specific practices and norms. It places special emphasis on the normative justification of constitutional constraints on public power for the sake of securing the endurance of formal democratic politics. Liberal constitutional theory is vexed by the contradiction between the containment of politics by law and the breaching of legal boundaries by politics.<sup>51</sup>

Even so, constitutions persistently wobble between the political and the legal.<sup>52</sup> They define institutional boundaries and the rights and duties of subjects; they are treated (or are intended by their drafters to be treated) as wellsprings of legal validity and legitimate authority; and they place obstacles in front of the legislative pursuit of legal change. There is a ceaseless tension between the material constitution (a matrix of social relations in which the formal constitution is embedded and through which the constitutional norms, meanings, and institutions are manifested)<sup>53</sup> and the formal constitution (of juridical rationality and discursive resources).<sup>54</sup> The formal constitution is definitional, but it is definitional for the sake of material ends. The material constitution

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<sup>49</sup>John Dearlove, ‘Bringing the Constitution Back in: Political Science and the State’ (1989) 37 *Political Studies* 521, 533.

<sup>50</sup>‘Constitutions do not form but rather follow from social situations’. David T. ButleRitchie, ‘Organic Constitutionalism: Rousseau, Hegel and the Constitution of Society’ (2005) 6 *Journal of Law and Society* 36.

<sup>51</sup>Some liberals insist on the primacy of ultimate normative principles in order to reject a dualism between law and politics. See e.g., David Dyzenhaus, ‘The Politics of the Question of Constituent Power’ in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 129.

<sup>52</sup>Goldoni, ‘Introduction’, 80.

<sup>53</sup>As an example, the materiality of the constitution may be understood with reference to the contested political membership of wage labourers in industrialising societies—as when E. P. Thompson referred to the unemployed who resorted to Luddism against liberalised labour relations as having been ‘thrust beyond the pale of the constitution’. E. P. Thompson, *The Making of The English Working Class* (Victor Gollancz 1963) 546. On ‘[t]he admission of the working class to the constitution’ see Simon Clarke, *Keynesianism, Monetarism and the Crisis of the State* (Edward Elgar 1988) 19 ff.

<sup>54</sup>Goldoni and Wilkinson, ‘Material Constitution’, 569. ‘[T]he material constitution is not the opposite nor the hidden engine of the formal constitution. ... [T]he relation ... is one of integration, not of stark opposition’. Goldoni, ‘Introduction’, 85.

is constituted through social relations; but it can also be, in its own way, as resistant to change as the formal constitution, and contributes to the demarcation of the boundaries of social validity.<sup>55</sup>

A considerable degree of policy variation is possible within constitutional boundaries (institutional as well as jurisdictional). This variability illustrates the duality of constitutions, the contradictory character of which appears in liberal constitutional theory as a paradox. Constitutions are at once rigid and plastic—rigid because they are expressed and socially recognised as formal containers for permissible political activity, and plastic insofar as regimes and orders must constantly be reproduced through struggle and political antagonism. Such a contradiction between the formal and the material is perpetually obscured by the analytic frame of liberal constitutional theory, which tends to privilege the former.

The scope of constitutional theory is not exhausted by jurisprudence and institutional design. In neither their legal nor their political valences can constitutions be reduced to basic laws. Nor are constitutional orders blunt instrumentalities of elite rule. As such, critical inquiry into constitutionalism must also attend to questions of the production of subjectivity, the specification of the content of the state and legal forms, and the trajectory of class struggle. Examining these processes illuminates constitutions' mediation between politics and law within the context of unfolding struggles over the reproduction of capitalist social relations. Constitutions' formal characters do not exhaust their materiality.

On the liberal account, constitutions ground the legal and constrain the political. They discipline the exercise of public power, establish the parameters of legal validity, and legitimate governance. The mechanisms for accomplishing these tasks include the specification of institutional boundaries, powers, and competencies through inscriptive formalisation (such as the separation of powers, schedules of rights and privileges, and amendment procedures); constitutional review of legislation for constitutional validity; and discourses and rationalities of constitutional identity, values, or patriotism. This account may be given additional texture by apprehending constitutionalism as a complex of institutions and practices—as a field within which regimes pursue legitimation, and in which subjects are encouraged to identify with (or are disassociated from) the social order.<sup>56</sup> Indeed, it has been suggested that constitutions may be seen as vehicles of hegemonisation—that is, that they are the juridico-political entrenchment of settlements of social conflict.<sup>57</sup> In this sense, constitutions could be clues to the

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<sup>55</sup>On social validity and its boundaries, see Bonefeld, *Critical Theory*, 25.

<sup>56</sup>On law's role in constituting subjects and integrating them into capitalist social relations, see Robert Knox, 'Law, Neoliberalism and the Constitution of Political Subjectivity: The Case of Organised Labour' in Honor Brabazon (ed.), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2016) 92.

<sup>57</sup>'Every political-constitutional doctrine (or ideology) has an enemy or, more precisely, a threat that it seeks to avert'. Pasquale Pasquino, 'One and Three: Separation of Powers and the Independence of the Judiciary in the Italian Constitution' in John Ferejohn, Jack N.

dynamics of past and continuing political conflicts.

Settlement is a mirage, however. Constitutionalism is contestation.<sup>58</sup> Constitutional texts bear the marks of histories of antagonism and contestation, but they also fulfil specific roles in the antagonism that is constitutive of capitalist social relations. This is not to reduce them to merely technical instruments—far from it. Constitutionalism is a practice of depoliticisation, in which capital accumulation is secured and relations of production and exchange are fetishised. The illumination that is cast by a strategic conception of constitutions as fields or terrains does not extend to the full scope of constitutionalism. Constitutionalism is not just a field for struggle; it is, itself, struggle. Consider three examples:

First, constitutions are, quite simply, relations of struggle over the constitution, disposition, and reproduction of the capital relation. It is true that constitutions are often understood as defining state capacities—for example, through the separation of powers (explicitly demarcating institutional competencies and boundaries); the identification of juridical subjects (citizens, aliens, the marginalised and the excluded); and the specification of procedures whereby constitutional provisions may themselves be altered. But these are not mere limits on state capacities. Constitutional restrictions on state power may (or, in the event, may not) restrain domination by particular fractions; but they refine and reproduce capital's social domination of individuals. The separation of powers can serve to conceal—rather than eliminate—the production and operation of power in capitalist society.<sup>59</sup> More fundamentally, however, the formal separation of powers should not be considered a fiction; it is a constitutive determination of bourgeois society. The demarcation of institutional boundaries—which must be understood as an ongoing and contested process rather than an event—is a regularly celebrated achievement of political liberalism. Separated powers do not map neatly on to discernibly distinct power blocs. Rather, their creation and contested reproduction are gambits in the contest over whether and how capitalist society shall be reproduced. In that contest, dispersing formally specified administrative or bureaucratic capacities, or entrenching particular institutional boundaries, can be of decisive importance. The activity of placing formal barriers in front of legal change through parliamentary politics is always a potent tool in the struggle over the continuity and content of the capital relation.

The production of subjectivity is another example. The marks of juridical

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Rakove and Jonathan Riley (eds.), *Constitutional Culture and Democratic Rule* (CUP 2001) 205, 214.

<sup>58</sup>'The fact that constitutions serve a contradictory role—simultaneously limiting and empowering—opens spaces for political contestation'. Nimer Sultany, 'Arab Constitutionalism and the Formalism of Authoritarian Constitutionalism' in Helena Alviar García and Günter Frankenberg (eds.), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar 2019) 292, 293.

<sup>59</sup>Cf. Jules Lobel, 'The Political Tilt of Separation of Powers' in David Kairys (ed.), *The Politics of Law: A Progressive Critique* (3rd ed., Basic Books 1998).

subjectivity are typically foregrounded in constitutional texts. In fact, constitutional law does not simply address subjects; it purports to name them into being. In truth, however, constitutions are made through social activity.<sup>60</sup> Constitutional texts and international treaties may describe juridical subjects, but the reproduction of capitalist social relations is what actually produces them (and it is produced by them in turn).<sup>61</sup> It would be better to say that constitutional law consists, in part, in patterns of subjectivation that yield juridical persons who may or may not be citizens, and who become bearers of the social categories constitutive of capitalism.<sup>62</sup> Constitutions, as relations of struggle, encompass citizens and the excluded alike.

As a third example, consider constitutional amendment. The specification of amendment procedures is crucial to any attempt at constitutional formalisation.<sup>63</sup> Such procedures are both an acknowledgement of the inevitability of legal change and an attempt to control (or at least regularise) it. They are technical expedients for marginal changes to constitutional provisions or structures—but at the same time, they are also obdurate barriers to the extension or intensification of political antagonism. The bare existence of amendment procedures can be made to serve as a legitimisation discourse in its own right. Amendment procedures are also implicit acknowledgements of the awkward contradiction produced by the merger of constitutional law and political liberalism through which ‘peoples’ allegedly authorise their self-rule.<sup>64</sup> At the conceptual level, amendment is closely related to constitutional fetishism—the notion that constitutions are self-reproducing rather than socially determined, informing the conceit that they are persistently stable during periods between drafting and amendment. But constitutions are not final events—although they are often construed as such by their authors and interpreters, through reliance on performances of finality and fixity in inscriptive spectacles of drafting and ratification. Instead, constitutions are social relations, reproduced through social activity. The articulation of liberalism with formal democracy that is characteristic of many (though not all) periods in the historical trajectories of capitalist polities is managed through constitutionalism.

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<sup>60</sup>James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995) 30 ff. Constituent power is, in other words, constantly exercised by a variety of actors in many different ways. See e.g., Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007); Richard Albert and Joel I Colón-Ríos (eds.), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications* (Routledge 2019).

<sup>61</sup>Cf. Chris Thornhill, ‘Contemporary Constitutionalism and the Dialectic of Constituent Power’ (2012) 1 *Global Constitutionalism* 369, 374 and passim (arguing that constituent power is ‘juridified’ and not anterior to law).

<sup>62</sup>Goldoni and Wilkinson, ‘Material Constitution’, 587; on capitalism’s social categories, see Mattick, *Theory as Critique*, 102–22.

<sup>63</sup>Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017); Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019).

<sup>64</sup>Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983); Oklopcic, *Beyond the People*.

Constitutions are both declarations and effacements of class struggle. Constitutionalism naturalises and obscures social domination and state violence—through appeals to the fictive unity of popular sovereignty<sup>65</sup> or popular constituent authority; through the invocation of trans-historical principles of rights and justice; or through the construction of ideological objects such as the general interest. Constitutionalism depoliticises politics. It channels social conflict into technical questions. It anticipates and constrains democratic and emancipatory contestation from below.<sup>66</sup> It also furnishes alternative narratives about the origins, purposes, and justifications of state power. Constitutionalism’s partisans present it as a self-evidently good thing, as the necessary form of the institutionalisation of a well-ordered democratic polity (rather than an historically-specific form of struggle). However, far from simply being obdurate and rigid bulwarks, constitutions are potent and generative in their capacity to produce power relations, subjectivities, and the porous border between the political and the legal. Their reproduction is susceptible to contestation and transformation.

## 4 The reproduction of constitutionalism

The totality of capitalist social relations is not a harmonious whole. Its constituent moments and relations are reproduced through contingent and contradictory historical processes: the formal constitution of politics (including the production of constitutional subjectivity) as well as the reproduction of the capital relation itself. In this section I explore the conjoined reproduction of the constitutional state and capitalist social relations more generally.

Constitutional texts present themselves as sources of—or guides to—legal validity and political authority. But the specification of formal power is closely bound up with the production and reproduction of juridico-political relations. This is true not simply for constitutional jurisprudence, but for the social relations that are intended to be governed by—and are purportedly logically subsequent to—constitutional provisions. The practice of constitutionalism is crucial to the reproduction of the ‘radical separation of the state from civil society’.<sup>67</sup> This occurs not only at the national but at the international level. Political institutions and communities are indeed constituted through public law, but this is not, as liberal theory imagines, because constitutional law is the product of exercises of constituent power, affirmed by popular sovereigns. Rather, the constitutional state—an historically specific instantiation of the political form of capitalist society<sup>68</sup>—is constituted through (and constitutive of) social relations.

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<sup>65</sup>On the historical development of ‘popular sovereignty’ (rather than democracy) see Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (OUP 2016).

<sup>66</sup>The Indian experience presents a particularly vivid example; see Sandipto Dasgupta, ‘India’s Constitution and the Missing Revolution’ in Alf Gunvald Nilsen, Kenneth Bo Nielson, and Anand Vaidya (eds.), *Indian Democracy: Origins, Trajectories, Contestations* (Pluto Press 2019) 13.

<sup>67</sup>Clarke, ‘Global Accumulation of Capital’, 140.

<sup>68</sup>[C]apitalist society is fundamentally a world-market society and the national state is the

Formality must be distinguished from writtenness. The production and mediation of legal relations through textuality—through practices of meaning-making, and through inscription and interpretation—are always social acts and hence subject to contestation and transformation. Constitutional texts are not self-enacting or self-enabling. A text is no sure guide to the structure of a polity.<sup>69</sup> Nevertheless, textuality remains central to contemporary constitutional practice and the production of constitutional forms within and across state boundaries. Within the liberal constitutional imagination, obvious departures from what is commanded or required by comparatively unambiguous texts are often treated as aberrant pathologies. Constitutional texts are potent resources in the symbolic economy of politics. Stories about constitution-drafting are crucial episodes in state and regime legitimisation narratives. In many polities, appeals to constitutional patriotism or constitutional morality are crucial to the production of constructs such as the ‘national interest’. To understand this phenomenon more fully, however, it must be considered in conjunction with the production of subjectivity.

The production and reproduction of juridico-political relations is not an achievement of institutional design or constitution-drafting. It is a process that is bound up with the reproduction of social relations in their historical specificity. The constitutional orders of liberal states produce individuated legal subjects, and they articulate contradictory unities among those subjects, in forms such as peoples and nation-states. Such unities are riddled with contradictions—and the statist rhetoric of political unity privileges social cohesion over the satisfaction of particular collective claims on or against the polity as a whole. What’s more, the construction of constitutional law can be as much the product of mass activity as it is the product of elite draftspersonship<sup>70</sup>—such that it is also possible to speak of subjects producing constitutions. That is, constitutional subjects also make constitutions, but this does not occur through idealised moments of unmediated constitutional creation through constituent assemblies. Rather, it is immanent to the practice of constitutionalism. For example, the peculiar character of US constitutionalism—a ‘covenantal’ cultural project, complete with saints and hagiographies<sup>71</sup>—cannot be explained without reference to the subjectivities it shapes and the subject experiences that sustain that project.<sup>72</sup> The study of constitutions as forms of social relations includes the investigation of constitutional subjectivation: ‘the formation of collective political actors and their contribution to constitutional change’.<sup>73</sup> Constitutional orders, basic laws,

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political form of this society’. Bonefeld, *Critical Theory*, 197–98.

<sup>69</sup>‘[N]o constitutional document long remains coextensive with the constitutional order’. Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Johns Hopkins University Press 2007) 14.

<sup>70</sup>See e.g., Rohit De, *A People’s Constitution: The Everyday Life of Law in the Indian Republic* (Princeton University Press 2018).

<sup>71</sup>Roxanne Dunbar-Ortiz, *An Indigenous Peoples’ History of the United States* (Beacon Press 2014) 47.

<sup>72</sup>Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (Alfred A. Knopf 1986); Sanford Levinson, *Constitutional Faith* (Princeton University Press 1988).

<sup>73</sup>Goldoni and Wilkinson, ‘Material Constitution’, 587.

and the arrangement and competencies of institutions are often claimed to be the products of the expression of popular sovereignty—but historical examples of such exercises of constituent power can be hard to find.<sup>74</sup> The constitutional state persists through mutual constitution with juridical subjects. This, in turn, may only be understood by attending to the contested and contradictory reproduction of capitalist social relations.

In their capacity as legal constructs, constitutional forms provide the appearance of mass consent to capitalist social relations within a given polity.<sup>75</sup> Moreover, constitutional law, particularly in countries with courts exercising constitutional review, tends to acquire its own justificatory logic over and against formally democratic institutions. However, constitutionalism's historical emergence as a political ideal and a social fact is inseparable from the conflicts constituting political liberalism and bourgeois society.<sup>76</sup> Constitutional law, in other words, is not self-grounding. Constitutional states are not exogenous or anterior to social relations. They can neither ignore, nor disarticulate themselves from, capitalist social relations of production. The capitalist 'state form restricts the (nonetheless indeterminate) range of state policies in the following sense: *the capitalist state cannot introduce reforms that overcome the bifurcation of the political without dismantling itself*'.<sup>77</sup> Put differently, the capitalist state 'is the political form of capitalist society'.<sup>78</sup> It is inextricable from the capitalist mode of production. It engages in primitive accumulation; it (re)produces (and coercively regulates) the working class and guarantees the formal equality of capital and wage-labour.<sup>79</sup> Constitutional states and capitalist production are co-constitutive.

Investigation of this relationship hinges, of course, on questions of historical specificity. To say that state and capital are co-constitutive is not to suggest that their reproduction is an orderly process that is free of contradiction. The capitalist state does not simply serve a putative 'general interest' of capital or capitalists—something which may be illustrated by attending to the constitution of class through struggle.<sup>80</sup> No unambiguous 'general interest' of all capitalists obtains within capitalism; there are only the particular and contingent interests

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<sup>74</sup>András Sajó, 'Constitution without the Constitutional Moment: A View from the New Member States' (2005) 3 *International Journal of Constitutional Law* 243.

<sup>75</sup>'The constitutional state (*Rechtsstaat*) is a mirage, but one which suits the bourgeoisie very well, for it replaces withered religious ideology and conceals the fact of the bourgeoisie's hegemony from the eyes of the masses'. Evgeny B. Pashukanis, *Law and Marxism: A General Theory* (Pluto Press 1989) 146. Compare with Niklas Luhmann, *Law as a Social System* (first published 1993, Klaus A. Ziegert tr., Fatima Kastner et al. ed., OUP 2004) 381.

<sup>76</sup>See e.g., R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (CUP 1995) 194–247; Thornhill, *Sociology of Constitutions*, 77–251.

<sup>77</sup>Smith, *Beyond Liberal Egalitarianism*, 190 (emphasis in original).

<sup>78</sup>Bonefeld, *Critical Theory*, 166.

<sup>79</sup>Bonefeld, *Critical Theory*, 165–192. For another perspective of primitive accumulation, see William Clare Roberts, 'What Was Primitive Accumulation? Reconstructing the Origin of a Critical Concept' (2020) 19 *European Journal of Political Theory* 532.

<sup>80</sup>Richard Gunn, 'Notes on "Class"' (1987) 2 *Common Sense* 15; Salar Mohandesi, 'Class Consciousness or Class Composition?' (2013) 77 *Science & Society* 72.

of various fractions, whose interests must be constituted and moulded through conflict.<sup>81</sup> All the same, the fact that capitalist states do not simply busy themselves with carrying out the edicts of the ruling class<sup>82</sup> does not mean that such states lack a class character. Contestation over policy and conflict within the state do not indicate the absence of a constitutive relationship between the state-form and other social relations. This could only be the case if there were an objectively discernible class interest shared by all possessors of capital, frustrated by the state's apparent failure to manifest it.

The apparent disjuncture between state action and class interests is a manifestation of the contradictions attending capitalist social relations' constitutive antagonisms. Interests must always be articulated; they are not discovered or revealed. Identities, solidarities, and alliances are not ready-made; they are produced through the contingency and conflict of politics. The constitutional state is as much the stage for such contestation and antagonism as is any other moment in the totality of capitalist social relations. The continuous reproduction of direct producers' separation from the means of production,<sup>83</sup> the expansion of the world market, and the global scope of value relations all entail the continued relevance of 'the state form of the class struggle'<sup>84</sup> even if it assumes distinctive or novel appearances. Social antagonism is instead cabined and transformed, through the mediation of social relations such as juridico-political boundaries and structures—much like the continued reproduction of the capital relation is accomplished through the dull compulsion of the market (including competition among wage-labourers) rather than direct coercion on the part of the controllers of the means of production. Constitutionalism disciplines and curtails political conflict, securing the order in which it is possible for state activities such as bureaucratic administration, dispute adjudication, and the deployment of repressive violence to maintain the necessary conditions for continued accumulation.

However, it is not sufficient to merely posit the state as the administrator of social reproduction.<sup>85</sup> This would seem to entail that the state is logically anterior to its own constitution through historically specific processes. It is indisputable that bourgeois states are implicated in the reproduction of capitalist society. But arguments that are expressed logically rather than with reference to historical experience risk becoming 'schematic' or otherwise susceptible to 'politicism'.<sup>86</sup> Charting the specification of the roles of constitutional states in the reproduction of capitalist sociality remains a major task for critical inquiry into law and state. It is indeed the case that '[t]he state cannot stand above value relations, for the simple reason that the state is inserted in such relations as one moment of

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<sup>81</sup>Heinrich, *Introduction*, 208–9.

<sup>82</sup>Pashukanis, *Law and Marxism*, 139.

<sup>83</sup>Bonfeld, *Critical Theory*, 79–100.

<sup>84</sup>Clarke, 'State, Class Struggle', 194. Cf. Clarke, 'Global Accumulation of Capital'.

<sup>85</sup>Cf. Joachim Hirsch, 'The State Apparatus and Social Reproduction: Elements of a Theory of the Bourgeois State' in John Holloway and Sol Picciotto (eds.), *State and Capital: A Marxist Debate* (Edward Arnold 1978) 57.

<sup>86</sup>Clarke, 'State Debate', 13–16.



the class struggle over the reproduction of capitalist relations of production'.<sup>87</sup> But such a proposition can only serve as the beginning and not the end of an attempt to trace the specificity of constitutionalism.

There is another sense in which the logical must not be allowed to crowd out the historical: constitutional states frequently fail to produce political order or constrain contestation. Here it must be remembered that the possibility of crisis is always present in the reproduction of the capital relation. 'The reproduction of capitalist social relations of production is only achieved through a class struggle in which their reproduction is always in doubt'.<sup>88</sup> Constitutional law is an example of such uncertain struggle. No critique of the place of constitutional states in the reproduction of capital as a totality of social relations is adequate without an account of constitutional crises.

## 5 Crisis

Conflict and antagonism are constitutive of the practice of constitutionalism. Constitutional codification and amendment are both responses to, and manifestations of, conflict.<sup>89</sup> In other words, crisis is immanent to the concept of constitutionalism. Marx's own critique highlights the socially constitutive character of conflict and contradiction.<sup>90</sup> Capitalist production's contradiction-driven tendency toward crises—episodes 'when value considerations block the production and use of use values'<sup>91</sup>—'is a necessary form of capitalist social reproduction'.<sup>92</sup> Similarly, the perpetuation of the constitutional form of appearance of the capitalist state is in no way immune from crisis tendencies. Elaborating the ways in which crisis is internal to the constitutional dynamics of the capitalist state is a major task for the critique of constitutionalism.

In liberal constitutional theory, crises are often viewed as pathologies to be anticipated, managed, or thwarted. Indeed, liberal social theory tends to pathologise conflict, at least when it breaches certain parameters. And yet constitutional design is rarely equal to constitutional ambition; one study indicates that the average lifespan of a national constitution is only 19 years.<sup>93</sup>

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<sup>87</sup>Clarke, 'State Debate', 51.

<sup>88</sup>Clarke, 'State Debate', 63. Compare with Alexander Gallas, 'Reading "Capital" with Poulantzas: "Form" and "Struggle" in the Critique of Political Economy' in Alexander Gallas et al. (eds.), *Reading Poulantzas* (Merlin Press 2011) 89, 96.

<sup>89</sup>Cf. Bob Jessop, *The State: Past, Present, Future* (Polity Press 2016) 56; Demirović, 'Capitalist State', 56.

<sup>90</sup>'For Marx, crises were not the ultimate truth of capitalism. . . Crises were the superficial and transient expression of the most fundamental contradiction of the capitalist mode of production. But at the same time, the tendency to crisis is inherent in every aspect of the everyday reality of capitalist social existence. . .' Simon Clarke, *Marx's Theory of Crisis* (Palgrave Macmillan 1993) 280.

<sup>91</sup>Mattick, *Theory as Critique*, 57.

<sup>92</sup>Bonefeld, *Critical Theory*, 155.

<sup>93</sup>Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (CUP 2009) 129.

Constitutional codification and entrenchment are pursued in the context of specific conflicts and disputes. Moreover, the invocation of the notion of crisis is often merely a gambit in the cut-and-thrust of parliamentary politics, not an expression of dismay at constitutional infidelity. Indeed, constitutional crises must also be distinguished from constitutional violations. The latter occur frequently, both in the polity at large and within the formal boundaries of the state. In neither case are such violations necessarily harbingers of crisis. The internal logic of constitutionalism itself presupposes the regularity of conflict across institutional boundaries. Far from being accidental to the reproduction of constitutionality, constitutional violations are integral to it. And so are constitutional crises themselves. Nevertheless, many liberal constitutional theorists often insist on demarcating mere constitutional conflicts from constitutional crises, denying any smooth continuity between conflict and crisis; they ‘reserve the term for a more special class of situations’.<sup>94</sup>

Constitutional crises might be thought of either as occurring either (i) *within* or (ii) *over* the reproduction of constitutionalism. That is, (i) struggle and contestation may intensify within the parameters of established constitutional forms, such that the reproduction of constitutionality is possible only through its (perhaps profound and destructive) reorganisation; or (ii) struggle and contestation may disrupt the continuity of the reproduction of a particular constitution. In both cases political struggle breaches constitutionalism’s boundaries of depoliticisation—be it (i) political struggles within and about constitutions or (ii) political struggle over and against the reproduction of capitalist social relations. It should be remembered, however, that such politicisation does not automatically conduce to struggle over capitalism’s social form. Indeed, it is more often likely to conduce to struggles to refashion capitalist social relations rather than to overcome them.

In no instance is crisis mere illegality. Nor is constitutionality simply legality; it is not unmade by coercion or violence—not least because coercion and violence are constitutive of legal orders.<sup>95</sup> The constitutional state ‘makes order by means of the force of law-making violence’.<sup>96</sup> Laws are routinely broken and yet the reproduction of social relations endures. Antagonism is constitutive rather than corrosive of the social. Constitutional crises are periods in which constitutions, as relations of struggle, are contested from within and without. As such, it is not necessarily a straightforward exercise to ascertain whether or not a crisis is a catastrophe or a strategic opportunity.

Constitutional crises are continuous with constitutional conflict, not sharply demarcated from it. Constitutions sometimes fail to delimit the scope of political conflict. As forms of depoliticisation they are susceptible to the politicisation

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<sup>94</sup>Sanford Levinson and Jack M. Balkin, ‘Constitutional Crises’ (2009) 157 *University of Pennsylvania Law Review* 707, 712.

<sup>95</sup>‘[S]tate illegality is always inscribed in the legality which it institutes . . . The activity of the State always overflows the banks of law. . .’. Poulantzas, *State, Power, Socialism*, 84–85.

<sup>96</sup>Bonefeld, *Critical Theory*, 184.

of social antagonism. But the possibility of that happening is immanent to the practice of constitutionalism, not a threat to it. Recently bruited concerns<sup>97</sup> about the stability or longevity of constitutionalism notwithstanding, crises and extra-legality are central to the endurance of constitutionalism. In the present moment, it is not constitutionalism itself that is at risk, but rather particular constitutional orders, regimes, norms, and practices. Indeed, constitutionalisation is likely to be central to projects to further delimit and constrain the already truncated space of politics in capitalist society. It is possible that democratic institutions will be etiolated to the point that a ‘minimalist’ conception of democracy<sup>98</sup> seems hopelessly maximalist. If this comes to be, it will be accomplished in part through the strengthening, not the erosion, of constitutional constraints on democratic politics. The eclipse of constitutional democracy does not betoken the abandonment of constitutionalism. It betokens the strengthening of constitutional constraints (both formal and material) on politics—at the expense of democracy within social relations writ large.<sup>99</sup> A crisis in the institutions of parliamentary democracy need not be a crisis of constitutionalism.

Ultimately, constitutional crises disclose the contradictory character of constitutionalism: it is made and re-made through social relations, interests, and experiences—and consequently reproduced through antagonism and conflict, not stasis.<sup>100</sup> Constitutionalism consists simultaneously in the social objectivity of particular relations and in subjective experience.<sup>101</sup> As such, the possibility of crisis is always present in the practice of constitutionalism. Crises are possible both within constitutionalism and in the reproduction of constitutionalism. The full strategic and normative implications of this claim cannot be explored fully here, but it is important to note that it clearly forbids the critical constitutional theorist from treating crises as pathologies or defects, either in a given constitution or in constitutionalism *per se*. Crisis is an essential property of both constitutionalism (as the mediating form between political and legal relations) and of the material constitution (as the conjunction of state- and legal-form with subjectivity). Abstract analysis of the stakes of crises in general have some role to play, but they have important limitations: whether a given crisis represents a strategic opportunity, a moment of confusion, or a threat—and for whom—cannot be known outside of historical experience. In turn, that experience must itself be interpreted and theorised.

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<sup>97</sup>Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018); Mark A. Graber, Sanford Levinson, and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (OUP 2018); Kim Lane Scheppele, ‘The Opportunism of Populists and the Defense of Constitutional Liberalism’ (2019) 20 *German Law Journal* 314.

<sup>98</sup>Adam Przeworski, ‘The Minimalist Conception of Democracy: A Defense’ in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy’s Value* (CUP 1999) 23.

<sup>99</sup>‘The great danger for the democratic state is the democratization of society’. Bonefeld, *Critical Theory*, 180.

<sup>100</sup>Dysfunctional, contested, or failing constitutional orders are all possibilities in ‘the general condition of constitutions’. Sultany, ‘Arab Constitutionalism’, 295.

<sup>101</sup>The concept of crisis links social form and subjective experience. Brian Milstein, ‘Thinking Politically about Crisis: A Pragmatist Perspective’ (2015) 14 *European Journal of Political Theory* 141.

Recognising that crisis is constitutive of constitutionalism entails acknowledgment that crises are neither aberrant nor unusual. They are not even infrequent. They express the contradictions of constitutionalism—which both presupposes and suppresses conflict—and are, in a sense, banal. Recent constitutional changes, conflicts, and struggles in India,<sup>102</sup> Turkey,<sup>103</sup>

the European Union<sup>104</sup> (including the departure of the United Kingdom,<sup>105</sup> as well as the consolidation of authoritarian regimes in Hungary<sup>106</sup> and Poland<sup>107</sup>), and elsewhere have attracted considerable attention in contemporary constitutional scholarship, much of which emphasises that constitutions are not exclusive to liberal polities, and that liberalism and authoritarianism are by no means necessarily in opposition.<sup>108</sup> But the conflicts attending the crisis-prone reproduction of the US constitution ought to attract attention as well—in spite of the self-congratulatory register adopted by most US constitutional theorists.<sup>109</sup> The US constitution was created and has been reproduced through struggles to preserve specific social relations, including settler colonialism, chattel slavery, and domination through ascription to hierarchies of race.<sup>110</sup> Its reproduction is attended by crisis tendencies, and it is presently articulated with the coercive reproduction of global capital accumulation through state violence.<sup>111</sup> Such articulation also suggests that the concept of constitutional crisis cannot be neatly mapped onto territorial or jurisdictional frameworks. Nor are they independent or separate from crises attending the reproduction of capitalist social relations more generally. Within capitalism, constitutional

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<sup>102</sup> Alf Gunvald Nilsen, Kenneth Bo Nielson, and Anand Vaidya (eds.), *Indian Democracy: Origins, Trajectories, Contestations* (Pluto Press 2019).

<sup>103</sup> Pinar Bedirhanoglu, Çağlar Dölek, Funda Hülügü, and Özlem Kaygusuz (eds.), *Turkey's New State in the Making: Transformations in Legality, Economy and Coercion* (Zed Books 2020).

<sup>104</sup> Michael A Wilkinson, 'Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism' (2019) 45 *Critical Sociology* 1023; Werner Bonefeld, 'European Economic Constitution and the Transformation of Democracy: On Class and the State of Law' (2015) 21 *European Journal of International Relations* 867. See also Eva Nanopoulos' contribution to the present volume.

<sup>105</sup> Tawihda Ahmed and Elaine Fahey (eds.), *On Brexit* (Edward Elgar 2019).

<sup>106</sup> Adam Fabry, *The Political Economy of Hungary: From State Capitalism to Authoritarian Neoliberalism* (Palgrave Macmillan 2019).

<sup>107</sup> Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019).

<sup>108</sup> Alviar García and Frankenberg, *Authoritarian Constitutionalism*.

<sup>109</sup> In a classic statement, Karl Llewellyn noted that a wide (and hence crisis-prone) fissure between grand constitutional narratives and the realities of constitutional functioning has been a persistent feature of the US as a polity. Karl N. Llewellyn, 'The Constitution as an Institution' (1934) 34 *Columbia Law Review* 1.

<sup>110</sup> Beard's 'economic interpretation' is woefully inadequate precisely because of its inattention to these essential elements of US constitutionalism. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (The Free Press 1913). Du Bois provided posterity with the closest thing to a definitive critique of US constitutional culture in his *Black Reconstruction*. For background see Robert L. Tsai, *America's Forgotten Constitutions* (Harvard University Press 2014); Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (OUP 2016); Adam Dahl, *Empire of the People: Settler Colonialism and the Foundations of Modern Democratic Thought* (University Press of Kansas 2018).

<sup>111</sup> Báli and Rana, 'Constitutionalism'.

crises are always global. As of this writing, interlaced and contagious crises of production, debt, and novel pathogens are demonstrating the planetary scope of the subordination of the social good to the valorisation of capital, and are exposing the contradictions that inhere in constitutionalism’s depoliticisation of society. And yet this is just one thread out of many in the tapestry of catastrophe.

## 6 Conclusion

Contemporary constitutionalism is riven with contradictions. Antidemocratic projects of depoliticisation are pursued through the constitutionalisation of policy, such as judicial supremacy,<sup>112</sup> ‘juristocracy’,<sup>113</sup> or the legal insulation of particular relations of production and exchange in supra- or transnational institutions or international legal frameworks.<sup>114</sup> Liberal constitutional frameworks are currently in free fall in numerous polities, both established and relatively new. Often, many of those who criticise liberal constitutionalism from the left find themselves defending constitutional law—despite its manifest flaws and contradictions—against a global tide of reaction.

At one point Marx did, of course, identify democracy as the solution to the ‘*riddle* of all constitutions’.<sup>115</sup> As always, it must be remembered that the democratisation of social relations (which must not be confused with parliamentary democracy) is inseparable from the struggle to transform capitalist social relations. Defences of liberal constitutionalism against reaction—whether they are strategic or sincere, principled or instrumental—are not themselves adequate tactics of emancipatory contestation. Constitutions are relations of struggle and made through struggle. The barriers they erect in the place of the democratisation of social relations can themselves only be unmade through struggle.

Constitutional law is a rich area for further analysis and inquiry by students of Marx’s critique. But, as ever, it remains the point to change the world and not only to interpret it—necessary though the latter may be to the former. All too often, constitutional theorists go no further than the contemplation of the puzzles and riddles posed by the practice and theory of constitutionalism. Leaning back in contented repose does not become those who inquire into the law for the purposes of emancipatory social transformation. The critique of

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<sup>112</sup>Gordon Silverstein, *Law’s Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (CUP 2009).

<sup>113</sup>Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP 2004).

<sup>114</sup>For a recent example see Tom Chodor, ‘The Rise and Fall and Rise of the Trans-Pacific Partnership: 21st Century Trade Politics through a New Constitutionalist Lens’ (2019) 26 *Review of International Political Economy* 232.

<sup>115</sup>Karl Marx, ‘Contribution to the Critique of Hegel’s Philosophy of Law’ [1843] in Karl Marx and Frederick Engels, *Collected Works*, vol. 3 (Lawrence & Wishart 1975) 3, 29 (original emphasis). Cf. Igor Shoikhedbrod, *Revisiting Marx’s Critique of Liberalism: Rethinking Justice, Legality and Rights* (Palgrave Macmillan 2019) 191–205.

constitutionalism is not simply an exercise in debunking. It should be undertaken with the transformation of social relations and emancipatory struggle in mind.