

Constitutional Metaphysics

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I.

Modern constitutionalism is not a historical achievement that an emancipated society should retain.¹ The practice of constitutionalism cannot be abstracted from its historical context in order to serve as a model for how this or that community should be organized. This is especially the case when it comes to envisioning a society that has been substantially emancipated from the domination, compulsion, and exploitation that are inherent to capitalism. In what follows I offer some reasons for doubting that a society in which “[the free development of each is the condition for the free development of all](#)” should or could be a constitutional polity sharing features with currently existing liberal democracies.

When describing a polity, “constitutional” can refer (1) to something in a normative political-theoretic sense—that is, an effective means for empowering collective decision-making, creating institutional safeguards for those same collective decision-making processes, and explicitly guaranteeing social, political, and legal rights; or it can refer (2) to the form of the polity itself, its “material constitution.”² The second meaning can be used to articulate the view that an emancipated polity should not *have* a constitution but *be* a constitution: the well-formed polity will be one in which institutional design will not frustrate mass political participation, but enable it in the context of a robust democratic culture.³ There won’t be a gap between constitutional text and constitutional reality. Political relations will be constituted such that this gap will always already be collapsing under the pressure of counter-hegemonic contestation, thereby preventing—so the argument goes—the formation of concentrations of power or patterns of domination in households, workplaces, or society at large.

¹These are far from my final considered judgments on the matter. [I welcome criticism and feedback](#), and I might make revisions in the (entirely likely) event that my mind is changed about something. The annotated version history of this essay may be found [here](#).

²An analysis of the concept of the “material constitution” is thoroughly developed in Marco Goldoni and Michael A. Wilkinson, “[The Material Constitution](#),” *Modern Law Review* 81, no. 4 (2018): 567–97, DOI: [10.1111/1468-2230.12352](#).

³For an important recent articulation of this view, see Étienne Balibar, [Citizenship](#) (Cambridge: Polity, 2015).

The first meaning can be found in many social-democratic proposals for reforming capitalism; they can be grouped together under the name View 1. View 2—the view that we should inscribe the form of the polity on our social relations, and not just on a piece of paper—is far more interesting. It is based on a recognition of the reality of social antagonism and its role in structuring our social world. Unlike so much of liberal constitutional theory, it attends to actual social relations. Étienne Balibar argues for such a view because it “crystalliz[es] a balance of social forces and not a normative logic.”⁴ (I will return to Balibar’s curious image of crystallization below.) View 2 does not trade on *a priori* constitutional principles; nor does it imagine that the social relations adequate to its achievement will simply spring up out of the ground.⁵ (Those looking for a textual warrant for this view can find one in the young Marx: “In democracy, the constitution, the law, the state itself, insofar as it is a political constitution, is only the self-determination of the people, and a particular content of the people.”⁶) But does View 2 hold up? And does it describe an attractive goal?

I don’t think that either View 1 or View 2 survive critical examination. For one thing, they tend to trade on fetishized or hypostatized conceptions of “democracy,” “law,” “state,” and so on. (Not for nothing did Du Bois deride “constitutional metaphysics” and “fetich-worship [*sic*] of the Constitution.”⁷) These concepts are not timeless principles; they are historically specific. That is, they are the forms taken by definite social relations in particular circumstances. We should not treat them as if they’re floating somewhere outside of time, waiting to be plucked from the ether and placed in this or that institutional design; to treat them as essences that subsist prior to their own appearance in determinate social relations. As the exponents of View 2 would themselves agree, social transformation doesn’t happen just because we can imagine that it’s possible; nor is it ever a matter of changing one aspect of society while all others remain the same. But beyond the problem of fetishism there is a more elementary problem. Is such a constitutional order even possible on its own terms? I don’t

⁴Étienne Balibar, *The Philosophy of Marx*, trans. Chris Turner and Gregory Elliott (London: Verso, 2017), 176.

⁵In a revealing passage, John Rawls attempts to have it both ways, acknowledging the historically-specific character of liberal constitutional values, and yet confident that they are in some sense historically invariant: “The virtues of political cooperation that make a constitutional regime possible are, then, very great virtues. . . . When these virtues are widespread in society and sustain its political conception of justice, they constitute a very great public good, part of society’s political capital. . . . The term *capital* is appropriate in this connection because these virtues are built up slowly over time and depend not only on existing political and social institutions (themselves slowly built up), but also on citizens’ experience as a whole and their knowledge of the past. Again, like capital, these virtues depreciate, as it were, and must be constantly renewed by being reaffirmed and acted from in the present.” John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005), 157 (emphasis in original).

⁶Karl Marx, “Contribution to the Critique of Hegel’s Philosophy of Right” [1843], in *The Marx-Engels Reader*, ed. Robert Tucker (New York: Norton, 1978), 21.

⁷W. E. B. Du Bois, *Black Reconstruction: An Essay toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880* (New York: Harcourt, Brace, 1935), 267, 336.

think so. In fact, I think that a full development of View 2 sees it collapsing back into View 1.

II.

Rather than abstracting constitutionalism from its historical context so that it can serve as a model for a well-designed polity, we should recognize that modern constitutionalism effaces, constrains, and depoliticizes social antagonism. The capitalist state is not a mere tool wielded by capitalists, and constitutionalism is not simply a piece of bourgeois chicanery. Instead, the practice of constitutionalism should be understood as an appearance of the depoliticization of capitalist society—a society that is constituted by and through antagonism and contestation. Depoliticising practices are inherently political practices. Modern constitutionalism is such a practice, one in which conflict is deflected, suppressed, or shifted into different registers—from the street to the courtroom, for example.⁸

Modern constitutionalism posits the historically-specific form of appearance taken by politics in bourgeois society: the seeming separation of the political and the economic. Far from being fictive, such a separation is a “real appearance.”⁹ It really is the case that society appears to be doubled up into society (civil society: the relations of production and exchange) and the state (bourgeois right: parliamentary politics and the rule of law). Capitalist society—in which the buyers and sellers of labor-power encounter one another as juridical equals—is reproduced, in part, through the maintenance of the status of ‘the economy’ as a private and natural realm that is properly beyond the reach of public power. Constitutionalism may be understood as a mode through which that separation of the political and the economic is reproduced. As such, constitutions are “both declarations and effacements of class struggle.”¹⁰ Constitutions can be more or less progressive or democratic to greater or lesser degrees. But such degrees are limited to the sweep of possibility that is marked out by the historically-specific social form of capital. The practice of modern constitutionalism features bills of rights and charters of liberties, but the rights and liberties that are spelled out in constitutional documents are the rights and liberties that are specific to capitalist society, and are enforceable only by the very state violence that can violate them.

Let’s grant, provisionally, an assumption that informs both Views 1 and 2 above. This is the assumption that there are historically-invariant goods that a normatively desirable polity can and must secure in order to be well-formed. These goods include collective decision-making in which individuals can participate meaningfully, effective rules for protecting individuals from coercion,

⁸Rob Hunter, “Marx’s Critique and the Constitution of the Capitalist State,” in *Research Handbook on Law and Marxism*, ed. Paul O’Connell and Umut Özsü (Cheltenham: Edward Elgar, 2021), 190–208, DOI: [10.4337/9781788119863.00018](https://doi.org/10.4337/9781788119863.00018).

⁹Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (Cambridge: Cambridge University Press, 1995), 23.

¹⁰Hunter, “Marx’s Critique,” 200.

minimally frequent elections that incumbents stand real chances of losing, and so on. Even if we suppose that an emancipated society must somehow instantiate these values, it would be question-begging to claim that it must do so through constitutionalization. Constitutionalization is the institutional hardening, and juridical manifestation, of the social boundary insulating production and exchange relations from contestation. In the last instance that boundary is policed by organized violence. The adoption of a bill of rights necessarily entails the consolidation of an organized apparatus of violence standing over against society. It is not possible to affirm a bill of rights without also affirming the institutionalization of organized violence that is apparently separate from society.

State guarantees of constitutional rights presuppose the existence of state violence that is inherently capable of violating those rights. A socialist polity appearing in the form of a constitutional republic would feature constant counter-hegemonic struggles against—wait for it—its own constitution. That’s hardly the most efficient means to institutionalize social relations undominated by the real abstractions of capital. Affirming it amounts to imagining that class struggle is a constituent element of reality as such, rather than an appearance of a particular social reality.

We can’t abstract capitalist institutions away from capitalist society. We can’t seek to refine and perfect such institutions on their own terms. We should not fetishistically regard such institutions as “givens” (as [Wilfrid Sellars](#) would have put it), such that political possibility is simply a matter of rearranging them. We should, instead, critique them and seek an adequate explanation of them, so that we can transform, abolish, and escape them. The conceit that their good bits may be retained while their bad bits may be discarded is just that—a conceit.

Marx [cautions against](#) the notion that capitalist immiseration can be overcome through the affirmation of capitalist economic categories. We should also be wary of claims that emancipation can be accomplished through the preservation of capitalist political categories. This is not to say that words like “freedom” or “justice” are inherently meaningless—far from it. They are only meaningless—more precisely, they lack any specific meaning—when they invoked as timeless abstractions or unmediated mediators.

III.

Capitalism appears as the society of “freedom” *par excellence*. We are free from being directly coerced into working. Neither individual capitalists nor the state compel me to sell my labor-power to anyone in particular. Moreover, we are free from externally-imposed relations of reciprocal obligation. Simply being a capitalist subject doesn’t entitle me to any goods, services, or relationships. The abundance of such things is available to me only if I have the money to buy them

as commodities and the owners of those commodities are willing to sell them. Such freedom is universal, or at least has a tendency toward universalizing; those who do not control or have access to the means of production or subsistence are free to claim a portion of the social product, so long as they can pay for it. If they can't, they are nevertheless free to sell their labor-power in order to acquire money; and employers are free to decide whether to buy labor-power, and from whom. These freedoms are never absolute, of course—it is no accident that laws regarding workplace safety and employment discrimination consistently attract the opposition of, and are routinely violated by, capitalists. But such freedoms are nevertheless distinctive to, and broadly characteristic of, capitalist society.¹¹ Workers are exploited by (but not cheated by) capitalists, who buy labor-power that workers sell freely.¹² In capitalist society, we're all free to make our own decisions: to buy, to sell, or to starve.

Marx is certainly being ironic when he characterizes generalized commodity exchange as “a very Eden of the innate rights of man [*sic*],” a place where “Freedom, Equality, Property and Bentham” rule.¹³ But he does not adopt an ironic register in order to claim that freedom or equality are somehow absent in capitalist society. Instead, he emphasizes that they assume certain forms and not other forms. Bourgeois juridical subjectivity assumes forms of appearance that are specific to a particular society (a society that has a particular history and is not simply the natural shape of human sociality). Like all of capitalism's essential determinations, they are inverted or perverse forms (*verrückte Formen*). But they are no no less real for being inverted, and no less positively present in our lives for being perverse.

Of course, freedom and equality as they are found in capitalism end at the threshold of “the hidden abode of production,” above which is hung a sign saying, “No admittance except on business.”¹⁴ To the mind of the bourgeois, this is as it should be. We should all be as free and as equal as possible, and that naturally includes the freedom of property-owners to dispose of their property as they see fit—including the commodity labor-power that they have purchased from workers. Capitalist society does not lack freedom and equality; it simply gives them their proper scope—the realm of exchange. What's more, the “concentration of bourgeois society in the form of the state” ensures that freedom and equality are maintained in the realm of exchange—and limited to

¹¹There are many local exceptions to this general state of affairs, of course. For example, production that exploits unfree labor can still be formally subsumed under capital, even in the absence of capital's real subsumption of the production process. Cf. Jairus Banaji, *Theory as History: Essays on Modes of Production and Exploitation* (Leiden: Brill, 2010), 67–71, 277–82.

¹²On the distinction between exploitation and a crude “surplus theft” understanding of the wage relation, see Kirstin Munro, “‘Social Reproduction Theory,’ Social Reproduction, and Household Production,” *Science & Society* 83, no. 4 (October 2019), 453, DOI: 10.1521/siso.2019.83.4.451.

¹³Karl Marx, *Capital: A Critique of Political Economy*, trans. Ben Fowkes, vol. I (London: Penguin Books, [1876] 1990), 280.

¹⁴Marx, *Capital*, 279–80.

it.¹⁵ The separation of the political and the economic is intimately linked with the appearance of bourgeois society as an association of juridically free and equal individuals.

The point is that the abolition of capitalist unfreedom is not accomplished through the affirmation of transhistorically valid categories—like “freedom,” “equality,” or “justice”—but through the practical activity of transforming or abolishing (through struggle and antagonism) historically-specific categories that presently mediate our social relations. It is far better to think clearly about the forms that an emancipated society might assume, than it is to imagine that the key to bringing about the new society is to affirm or to perfect features of the old. What needs affirming in our present society is not one or more of its form-determinations, but the satisfaction of currently unmet needs and desires.¹⁶

Nor should we imagine it will be adequate to take on such a task by distinguishing between an allegedly (and merely) “formal” freedom in actually existing capitalist society and a notionally “substantive” freedom in the emancipated society to come. The distinction between formal and substantive freedom—frequently found in liberal legal thought¹⁷—effaces a critical insight, articulated by Marx throughout *Capital*, and crucial to many subsequent traditions of critiquing capitalism. Capitalist unfreedom is not the absence of freedom (*à la* the [privatization theory of evil](#)). It is the presence of real abstractions that dominate us (even as we ourselves make them). It is the presence of the mediation of our social relations by concepts like commodities, money, and capital—concepts with social validity and objectivity such that it’s impossible to escape them and their mediation of our relations with each other, ourselves, and nature.

The problem with such freedom as we do enjoy in capitalism is not that it’s a sham or a formality. The harmfulness of bourgeois freedom is that it’s very real. A capitalist society in which such freedom is given the widest possible scope is still a capitalist society—still exploitative, still saturated with domination (domination that is no less oppressive for being abstract and impersonal, unlike the direct domination of earlier societies), and still ecocidal in its inexorable compulsions toward endless expropriation, expansion, and extraction.

Meanwhile, a socialist polity in the form of a constitutional republic is a polity in which the fetishism of distinguishing between “politics” and “the economy” has not been abolished.¹⁸ (Those who retort that such a polity would be a republic

¹⁵Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy*, trans. Martin Nicolaus (London: Penguin Books, [1857/1858] 1973), 108.

¹⁶“It is not by gradually preparing an organization for a future struggle, but by creating new modes of action in response to immediate needs and goals that it has proved possible to break with the forms of thought and modes of behavior” that prevail in contemporary society. Paul Mattick, Jr., “Introduction,” in *The Council Communist Reader* (Pattern Books, 2021), *ix*.

¹⁷Cf. Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman, “Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis,” *Yale Law Journal* 129, no. 6 (2019): 1784–1835.

¹⁸On the state as the political form of appearance of society see Werner Bonefeld, “On the

of labor, rather than a bourgeois dictatorship, are advised to reflect on whether a “republic of labor” is self-evidently desirable.¹⁹) There is no *prima facie* reason to suppose that the bourgeois state is unlike the other form-determinations of capitalism and can be preserved unchanged through a transition away from capitalism (and the burden is on proponents of socialist constitutionality to present a convincing argument for this exceptionality). Moreover, the separation of the political and the economic rests on a “profound category mistake,” would it not then be the case that an emancipated polity would need to be one in which this category mistake had been rectified?²⁰ And, if so, would it not also be the case that its political appearance would be one in which relations of production have been repoliticized rather than *depoliticized*?

The skeptical reader might ask whether a polity in which the “balance of social forces” has been “crystallized”—as Balibar puts it—is really one in which *depoliticization* is taking place. After all, the skeptic asks, isn’t the persistence and pervasiveness of conflict inherently political? The answer is that yes, of course, it is; but the only politics that are possible in such a situation would occur within fetishized parameters. Social antagonism outside the parameters of the constitution would tend to be seen not as “properly” political but as aberrant or even dangerous. The twentieth century provides no shortage of examples of popular attempts to deepen and extend the revolutionary transformation of social relations—attempts that were vilified as deviationist, criminal, or counter-revolutionary. We all know what happened next.

At this point, it’s hard to see what View 2 offers that can recommend it as a critical theory of constitutionalism. Much like Poulantzas’s notion of the “[material condensation of the relation of forces between classes](#),” Balibar’s crystal metaphor inadvertently points up the limits of a mode of analysis that views capitalist society as a dynamically self-equilibrating class relation, rather than as an inverted totality whose catastrophic reproduction is governed by the compulsory self-expansion of a real abstraction—capital²¹. (In other words, accounts that focus exclusively on class domination—an essential determination of capitalist society, to be sure—often miss the features of capitalist domination that make it specifically *capitalist*.) In this sense, the notion of socialist constitutionality

State as Political Form of Society,” *Science & Society* 85, no. 2 (April 2021), 177–184, DOI: [10.1521/siso.2021.85.2.177](#).

¹⁹The *locus classicus* for this line of critique is Moishe Postone, *Time, Labor, and Social Domination: A Reinterpretation of Marx’s Critical Theory* (Cambridge: Cambridge University Press, [1993] 2003). It is worth comparing Postone’s critique with Rosa Luxemburg’s pamphlet on “[The Socialisation of Society](#)” (1918), which outlines an altogether more hopeful vision of emancipation through the establishment of a workers’ commonwealth.

²⁰Tony Smith, *Beyond Liberal Egalitarianism: Marx and Normative Social Theory in the Twenty-First Century* (Leiden: Brill, 2017), 189.

²¹For a critique of Poulantzas’s theory of the state, see Simon Clarke, “[Marxism, Sociology and Poulantzas’s Theory of the State](#),” in *The State Debate*, ed. Simon Clarke (London: Palgrave Macmillan, 1991), 70–108, DOI: [10.1007/978-1-349-21464-8_2](#). For a defense, see Rafael Khachatryan, “The State as Social Relation: Poulantzas on Materiality and Political Strategy,” in *Research Handbook on Law and Marxism* ed. Paul O’Connell and Umut Özsu (Cheltenham, Edward Elgar, 2021), 173–188, DOI: [10.4337/9781788119863.00016](#).

appears quite liberal; there is more of Montesquieu than of Marx about it. What is emancipatory about a theory that treats the class struggle as eternal? The fetishization of bourgeois politics allows View 2 to slide back into View 1 (trying to tame capitalist domination from within capitalist institutions, rather than abolishing it together with its institutional expressions).

Perhaps preserving modern constitutionalism would seem like a good idea if we thought that the struggle to abolish capitalism is best pursued by a party of order (as opposed to, say, “[the real movement that abolishes the present state of things](#)”). I suspect that some would find it comforting to imagine that an emancipated society whose political appearance is a workers’ commonwealth would be the solution to the “*riddle of all constitutions.*”²² But emancipation does not consist in the affirmation of either the political economy or the bourgeois values of the Enlightenment.²³ I address myself first and foremost to those who either also don’t think that way, or who are at least doubtful about such [Whig history](#).

IV.

Of course, we don’t have to relate to institutions solely in terms of chemistry. We are not restricted to crystals (for which we can substitute “stasis”), condensates (“equilibria”), and other examples of frozen conflict. For example, William Clare Roberts has argued that the mature Marx should be read as both a social republican and a confirmed radical democrat.²⁴ Roberts (rightly, in my view) understands democracy not as a form of collective self-rule but as a mode of struggle against domination. Democracy, in this sense, is *not* the answer to the riddle of all constitutions. It is not the ultimate principle animating a socialist constitution. It cannot “constitute a political condition in which ‘the whole rather than a part’” rules over itself entirely and indivisibly, as “the post-Rousseauvian tradition of popular sovereignty” would have it.²⁵ Such an understanding of democracy is not decisive when it comes to the question of how we can anticipate the form of an emancipated society. In any event, if you ask me, the key takeaway from reading the later Marx’s political interventions is that he clearly understood the futility (and worse) of trying to identify emancipatory struggle with the political institutions that it confronts.

A society in which class, money, and the state have been abolished will still have a definite form—if you like, you can say that its social relations would still be institutionally mediated—even if that form is no longer totalizing; it would not be an undifferentiated condition of pure possibility. But this is not a license to claim that, in the struggle to abolish the domination of capital, we

²²Marx, “[Critique of Hegel’s Philosophy of Right](#),” 20 (emphasis in original).

²³Cf. Gáspár Miklós Tamás, “[Telling the Truth About Class](#),” *Socialist Register* 42 (2006), 228–68.

²⁴William Clare Roberts, “[Marx’s Social Republic: Political not Metaphysical](#),” *Historical Materialism* 27, no. 2 (2019), 41–58, DOI: [10.1163/1569206x-00001870](https://doi.org/10.1163/1569206x-00001870).

²⁵Roberts, “[Marx’s Social Republic](#),” 55, 54.

can pick and choose among the features of capitalist society, taking only the ones that we like and refusing others as we work our way down the buffet at the Emancipation Cafeteria. The form-determinations of the bourgeois state are historically specific. They are moments in a determinate (but inverted and contradictory) totality; they are neither self-subsistent nor transhistorical. Put more simply: they exist only in a historical context, and can't simply be transported out of their historical context. They're definite forms of real social relations—relations that we're trying to overcome. Having overcome them, why would we want to reintroduce them—for example, by adopting a bill of rights enforceable only by institutionalized violence capable of violating those rights?

This is not to say that questions of institutional design are irrelevant when it comes to thinking about an emancipated society. Take [planning](#), for example. In capitalist society, commodity production is validated as socially necessary through the money-mediated exchange relation, such that commodities can be said to have been made through abstract, value-positing labor if and only if they are sold by capitalists at a profit. The socially-necessary time spent engaging in commodity-producing and capital-valorizing labor—the exploitative labor that workers are compelled to engage in by the mute compulsion of economic relations, such that they must sell their labor-power to survive—can be universally represented only through money. Part of the objective irrationality of capitalism, and one of the many contradictions of the value-form, is that production can only be validated as socially necessary through monetary exchange. Profitability—not need, not want, not care, not kindness, not even prudence or self-interest—is the alpha and the omega of capitalist social reproduction. The satisfaction of social individuals' wants and needs is mediated through their possession or lack of money. Most people's abilities to indicate their preferences for, and secure access to, portions of the total social product are vitiated by poverty, marginalization, and abandonment. To overcome this, by achieving the anterior (rather than posterior) validation of production through deliberate and socially-inclusive planning, no small amount of institutional mediation (to say nothing of novel forms of organizing our social world) will be necessary. This *a fortiori* the case when considering the forms of mediation necessary for modes of community that are in any way ecologically sane.²⁶ But such planning would be of a very different kind than bourgeois right; and we are far from any level of consensus about what it actually could or would look like.²⁷

It will be objected that the term “constitution” can serve as a convenient shorthand for the institutional mediation of social relations in an emancipated society. In other words, while the political appearance of a society emancipated from capitalist domination cannot be adequately characterized using bourgeois vocabulary, it is nevertheless possible to gesture at the general outlines of its institutions and social relations. However, at this level of generality, the term

²⁶Mike Davis, “Who Will Build the Ark?,” *New Left Review* 61, January–February (2010), 29–46.

²⁷For an introduction to contemporary debates about planning, see the featured articles in *South Atlantic Quarterly* 119, no. 1 (January 2020).

“constitutionalism” begins to lose specific meaning. At best it’s simply the use of an older meaning of the word “constitution,” one that doesn’t capture the specificity of the contemporary practice going by the same name.

But enthusiasm for the idea of a socialist constitution isn’t predicated on a renewed interest in descriptive constitutional theory. It’s predicated on an abiding interest in the normative appeal of the trappings of modern constitutionalism—bills of rights and charters of liberties, the independence of particular offices or functions from parliamentary or electoral pressures, and so on. These trappings may not simply be retained while scrapping the rest of the bourgeois state, which would have to abolish itself in order to abolish capital’s domination.²⁸ We don’t suppose that capitalist production can be perfected into being non-exploitative and non-dominating; why should we suppose that the capitalist state can be perfected to (and past) the point that it abolishes itself of its own accord?

V.

Constitutionalism is not compatible with the forms of freedom that critics of capitalism hope to see in an emancipated society. (In fact, plenty of liberal theorists have argued compellingly that constitutionalism is not even compatible with bourgeois freedom.²⁹) Although I have presented a critique of the notion of socialist constitutionality, I am sympathetic with many of its exponents’ desire to see a revival of contestatory politics on a mass basis and an antagonistic footing with respect to the domination, exploitation, and misery characteristic of capitalism. I’m just not persuaded that such politics could assume a constitutional form and still retain much emancipatory content.

If, by saying that an emancipated society will have a constitution, we are merely saying that it will have a determinate political form, then we are simply flirting with a truism. But proposals for socialist law and socialist constitutionalism aren’t just descriptions of the forms assumed by social relations; they’re proposals for how those social relations should be structured. Invocations of socialist law and socialist constitutionalism are, in the same breath, appeals to abstract principles as well as attempts to smuggle in the historically-specific normative content of currently-prevailing understandings of liberal constitutionalism. But we can’t escape the [negative totality](#) of capitalist society by affirming its historically-specific categories. Neither socialist political economy nor socialist constitutionalism will emancipate us, precisely because they are premised on the affirmation of moments of that totality, rather than on overcoming them.

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²⁸Smith, *Beyond Liberal Egalitarianism*, 190.

²⁹Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge: Cambridge University Press, 2007); Andrei Marmor, “[Are Constitutions Legitimate?](#)” *Canadian Journal of Law and Jurisprudence* 20, no. 1 (2007): 69–94.