

RESEARCH ARTICLE

Claude Lefort in the age of the total constitution

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Abstract

In contradistinction to totalitarianism, Claude Lefort theorised a democratic form of society as one primarily characterised by indeterminacy, absence of ground, and by extension openness to the event. In maintaining this form of society, Lefort reserved a key role for human rights. The aims of this paper are twofold: first, I argue that, despite the fact that Lefort never developed a theory of constitutions, an important role can nonetheless be ascribed to them. I hypothesise constitutions to be key in democratic society's symbolic representation of itself to itself. Second, I then examine what the repercussions are for this idea when Martin Loughlin's account of constitutionalism is taken into account. Loughlin's argument suggests that, while constitutions may have been important safeguards against totalitarianism, constitutions today threaten to become total themselves. I conclude by indicating the populist response as a point of convergence between Lefort's and Loughlin's analyses.

Keywords: constitutionalism; democracy; Lefort; populism; representation; totalitarianism

Introduction

In 1931, Carl Schmitt announced the advent of the total state. The years to come would seemingly vindicate the frequent warnings offered by Schmitt's interlocutor, Hans Kelsen: Schmitt's own politicization of the Weimar constitution contributed to undermining its authority and ultimately its ability to protect a flawed democracy from its demise into totalitarianism. Almost a century later, the constitutional scholar Martin Loughlin in a recent book on constitutionalism highlights a different problem: not the state, but the constitution threatens totalization. What might this mean for democracies which are, admittedly, still flawed, though more resilient than that of Weimar Germany?

In this paper, I want to examine this problem by viewing constitutions, and specifically their totalization, through the lens of the democratic theory offered by Claude Lefort. The main victim of a potentially totalizing constitution, argues Loughlin, is democracy itself. Yet, as the example of Weimar Germany amply shows, a constitution unable to defend itself will also not do, ultimately dragging democracy down with it. This makes Lefort an excellent candidate to contribute to constitutional theory. His theory of democracy is characterized by an emphasis on the dynamic and groundless nature of democracy, while remaining acutely aware of the necessity of institutional protections. Lefort theorized

such protections most extensively in terms of human rights. My wager is that constitutional theory may benefit from an engagement with Lefort, with the added benefit of extending understanding of what a Lefortian notion of constitutions might look like – an element clearly relevant, but underdeveloped in the current literature.

To bring Lefort into constitutional theory, I will develop an analogy between a democratic constitution and two key elements from Lefort's oeuvre. First, I will propose viewing the role of a constitution in relation to the state and society, respectively, to run parallel to the mediating role Lefort ascribed to the Prince in his reading of Machiavelli (Lefort 2012a). In this way, constitutions help ensure the separation of state and society. Second, more integratively, I want to suggest that constitutions play an important role in society's symbolic representation of itself to itself. In so doing, they help maintain society's view of itself as *one* society despite the absence of foundations that could stabilize such unity. My argument is occasioned by Loughlin's analysis of the threats a totalizing constitution might pose to democracy. This paper's engagement with Lefort, on the other hand, is motivated by his nuanced account of democracy, taking stock of its ungrounded and dynamic nature as well as its need for institutional safeguards. Ultimately, this paper aims to contribute to the constitutional-theoretical and legal-philosophical question of the balancing and trade-offs between the dynamic and open character of democracy, and the stabilizing constitutional framework, which democracy needs, but which may also impede it.

Positioning constitutions and constitutionalism in the perspective of a Lefortian democratic framework may also be beneficial to that framework itself by demonstrating how Lefort's philosophical reflections can be given a more concrete (constitutional) form. To my mind, therefore, this paper contributes to Lefortian democratic theory in two ways. First of all, although Lefort's detailed analysis of Machiavelli is often taken to be a stepping stone in his transition from a Marxist theorist to a democratic theorist (Erfani 2008), its philosophical contributions generally do not take pride of place in Lefort's oeuvre. The interpretation and deployment of Lefort's analysis of Machiavelli I defend in this paper goes beyond the historical importance of *Machiavelli in the Making* to highlight its philosophical centrality to Lefort's understanding of democracy. Second, although no doubt aware of their political importance, in Lefort's work institutions are often alleged to suffer from a degree of 'institutional marginalization' (Conti 2018: 136). By attempting to utilize resources germane to Lefort's own thought to theorize a notion of constitutions and their role therein, this paper thus also seeks to clarify what Lefortian institutions might look like.

I will begin in Section II by bringing Lefort's position closer to endorsing a democratic constitution. Section III then further examines Schmitt's announcement of the total state as well as Lefort's analysis of totalitarianism. Section IV subsequently brings the previous sections together by specifying the function of a constitution in protecting democracy against its ghosts. Section V proposes to locate the resources to begin theorizing a Lefortian notion of constitutions in his analysis of the role of the prince in Machiavelli. Section VI then specifies that by considering the role of the constitution as society's symbolic representation of itself, before moving on to discuss the threats posed to this role and democracy more generally by what Loughlin dubs the ideology of constitutionalism.¹

¹Loughlin's designation of the phenomena he describes with the term 'constitutionalism' is far from uncontroversial. For example, Hans Lindahl uses the term as a broad placeholder for a view that understands law as authoritative collective action (Lindahl 2018). More narrowly, Joel Colón-Ríos defines 'weak constitutionalism' as an approach to constitutions that remains open to democratic participation and amendment.

I will discuss these developments through the lens of a threefold process constitutive for a democratic form of society in Lefort's framework: society's *mise en forme*, its *mise en scene*, and its *mise en sens*.

Lefort and limited government

Lefort occupies a somewhat idiosyncratic position in contemporary democratic theory. On the one hand, his insistence on indeterminacy as the defining characteristic of modern democracy aligns his thought with that of many poststructuralists and radical democratic theorists – and more generally with the late 20th-century French left. On the other hand, unlike many of his contemporaries, Lefort places much more emphasis on the crucial role of institutions and, specifically, human rights as indispensable guarantors of democratic society. Indeed, Lefort seems to combine a typical conception of democratic society characterized by groundlessness with the somewhat atypical awareness of the danger of totalitarianism concomitant with this groundlessness. It is not without good reason that James Ingram places Lefort's democratic thought 'between liberalism and radical democracy' (Ingram 2006).

Situating Lefort in relation to Castoriadis may be illustrative in this regard. Both Lefort and Castoriadis understand a democratic form of society to be primarily characterized by the absence of determinate grounds or limits. For Castoriadis, this is linked to the possibility of autonomy, which requires that there be no 'extrasocial standard for society' (Castoriadis 1997: 281). As a consequence, anything can be done, even though citizens ought to be aware that not everything should be done (*ibid.*, 282). Unlike Lefort, however, Castoriadis offers little in the way of institutional benchmarks to ensure that those things he believes a citizenry ought not to do are not carried out regardless. In this sense, Castoriadis stays closer to many of his contemporaries, whereas Lefort will here insist especially on the centrality of human rights to sustain a democratic society.

I believe part of their divergence might be explained by where Castoriadis and Lefort, respectively, identify the historical genesis of the form of society they describe. Castoriadis' analysis homes in on the ancient Greek *polis*, suggesting that it is a germ whose way of conceiving its own institution resonates still today. Lefort, by contrast, believes that democratic society as he analyses it is a distinctly modern phenomenon, emerging out of the ashes of 17th- and 18th-century absolutism, though already anticipated by Machiavelli (Lefort 2012a). For Lefort, the demise of absolutism and the consequent dissolution of the markers of certainty gives rise to two distinctly modern answers to the ensuing open question of the grounds of society: democracy and totalitarianism (Lefort 1988: 19).

A key difference between Castoriadis and Lefort that follows from their distinct historical foci lies in the roles they reserve for institutions. For Castoriadis, Athenian democracy was carried out by a *polis* which was itself understood as *praxis*. What we understand today as bureaucratic institutions were mostly confined to administrative tasks and carried out by slaves, possessing no real political function (Castoriadis 1997: 278). Lefort however locates the origin of modern democracy in the revolutions of the 18th and 19th centuries that spelled the downfall of absolutism. There, constitutions and the institutional mechanisms they established were furnished with the explicit purpose of

My aim here is not to engage in a comparative perspective or definitional quarrels. Rather, I seek to analyse the political-constitutional trend Loughlin identifies, and for the sake of simplicity simply adopt his terminology so as to contextualize these phenomena from a Lefortian perspective.

limiting the power of the state in favor of that of society. In short, the historical scene from which Castoriadis' conception of democracy emerges is the self-institution of a political community; in Lefort's history, modern democracy began with the need for and practice of limited government.

Seen in this light, it is unsurprising that Lefort's conception of democracy shares distinctive affinities with constitutional democracy. Although Lefort never developed a comprehensive theory of constitutions, he alludes to them with some regularity in contradistinction to totalitarianism. For example, he explicitly contrasts the Soviet 'regime of the monopolistic party' to the 'constitutional-pluralist regime', specifying that the difference is 'essential' (Lefort 2007: 141). Additionally, Lefort's studies of classical 19th-century liberals such as François Guizot strongly influenced the development of his theory of democracy (Selinger 2023: 11). For Guizot, constitutions served primarily to limit the possible exercise of power. Such limits, Guizot held, are equally needed whether the sovereign is a monarch or the people. Though Lefort recognized the conservatism that gave rise to Guizot's reservations about democracy, which Lefort himself does not endorse (Lefort 2000: 83), he simultaneously finds in him the emphasis on the necessity of representation for democracy which Lefort would come to echo (*ibid.*, 103).

What role might constitutions play in a Lefortian democratic society? Below, I will argue that we can ascribe a twofold role to constitutions: integrative and regulative. For the former, I will argue that we might view a society's constitution as its symbolic representation of its own unity. The latter, regulative function, aligns more clearly with the classical, liberal view of constitutions foregrounded by the likes of Guizot. Placed in Lefortian terms, a constitution then serves to protect a democratic society against the threat of devolving into totalitarianism. I now first briefly turn to tracing this development.

The total state

Carl Schmitt's proclamation of the total state may seem dauntingly prophetic coming from the theorist who would, a short while later, enthusiastically endorse the Third Reich. But the way Schmitt goes about theorizing the total state is particularly striking in light of Lefort's later analysis of totalitarianism and democracy. Schmitt distinguishes between three abstract forms of state, classified according to the sphere of activity in which they locate their center: jurisdictional, executive, and legislative (Schmitt 2015: 127–28). The legislative state, which is most important here, finds its hallmark in the bourgeois constitution and the legislative function of parliament. In this model, parliament is 'the stage on which society appeared' to antagonistically face a strong and often monarchical state (*ibid.*, 127).² Requiring state neutrality in principle towards economy and society, its success relies on the separation of state and society. From a Lefortian perspective, however, the legislative state still exists primarily to ascertain the functioning of an economic system (Lefort 1986: 278).

The total state emerges when this form is taken to its ultimate completion, the state becomes 'the self-organization of society', and the dualism of state and society loses its tension and dissolves (Schmitt 2015: 131). If society organizes itself into the state, it becomes impossible to distinguish between matters that concern the state and matters

²Schmitt's primary example here is pre-WWI Germany which, though not a democratic state by any contemporary standard, did indeed have an elected parliament facing a strong executive.

that do not, and potentially everything becomes a concern for the state. The total state thus comes about as a result of the full identity of the state and society. Schmitt elaborated this theory in the context of his debate with Kelsen on whether the guardian of the Weimar Constitution should be the executive or a constitutional jury (Kelsen 2015). Without delving into the juridical arguments traded by Schmitt and Kelsen, what matters presently is this debate's afterlife. Martin Loughlin suggests that both have been vindicated. Constitutional juries as guardians of the constitution are now commonplace, but as Schmitt admonished only at the cost of becoming highly politicized institutions merely veiled in legality, more akin to masters than guardians of the constitution (Loughlin 2022: 129). Rather than the total state, today appears the era of the total constitution. Before exploring that argument in more detail, I now first turn to Lefort's analysis of totalitarianism.

For Schmitt, the re-establishment of the full substantial identity between state and society, rulers and ruled, restores democracy. (Schmitt 1988: 36). In marked contrast, for Lefort modern democracy begins from an originary *division* which he first identifies in the work of Machiavelli. It is succinctly captured in the dictum that 'the people do not wish to be commanded or oppressed by the nobles, while the nobles desire to command and oppress the people' (Machiavelli 2005: 35; see also Lefort 2012a: 140). This opposition is constitutive of the political. Both terms of this antagonistic relation, Lefort continues, only exist in their being related rather than as self-sufficient substances (*ibid.*, 160). In Lefort's reading, Machiavelli combines this constitutive conflict dividing society with a new ontology disconnected from nature (Flynn 2018: 404–5), proceeding instead from the diversity of regimes responding to the contingent forms the aforementioned conflict takes (Lefort 2012a: 180–81).

In Machiavelli, the prince's authority derived from his success in mediating between the opponents in this class conflict (Lefort 2012a: 164). In modern democracy, this task falls to democratic institutions, which must do so without natural or theological foundations (Flynn 2018: 407). In Farhang Erfani's words, this captures the value that Lefort finds in Machiavelli: making sense of politics despite the absence of foundational metaphysics while refusing nihilism (Erfani 2008: 204). For Lefort, unlike Marx and following Machiavelli, this conflict is constitutive and cannot be dialectically resolved (Alagna 2020: 689). His detailed reading of Machiavelli marked Lefort's transition from a Marxist theorist to a democratic theorist in the 1960s and 70s. Recognizing the permanence of conflict makes democracy the 'historical society *par excellence*' (Lefort 1988: 16), and therefore open to the event. This openness to the event – the surprising, the new, the unpredictable – underlines the '*denaturation*' Lefort finds in Machiavelli (Lefort 2012a: 180). The absence of foundations and the rift at the basis of society furnishes the openness to the event because it does away with the idea of a history that is given in advance. Society has neither a transcendent determinant outside, nor, due to this originary division, an immanent one inside it. Therefore, its legitimization and reproduction rely on the agency of members of society themselves.

Despite the rift at its basis, a democratic society is still *one* society. This is because despite the real – the empirical sum of its parts marked by conflict (Flynn 2005: 158) – society symbolically represents itself to itself as unified. What this means more precisely is that the real webs of relations between members of a society can only be grasped in light of a symbolic image of that society as a whole (Geenens 2008: 270). However, since no society can fully coincide with itself, this symbolic image is never fully co-extensive with society. Samuel Moyn's metaphor of a mirror usefully illustrates this, as the mirror represents me as me to myself, but to do so it must necessarily be external to me

(Moyn 2012: 44). Hence, the mirror demonstrates my identity, but it could not do so if it fully coincided with me. As a consequence, there exists a gap between the real and the symbolic, whose sustenance is a prerequisite for the continued existence of the political. This gap is manifest in conflicts of wills of society's own representation and reproduction (Lefort 1988: 18). In modern democracy, power refers neither exclusively to something fully external to society (God, via the monarch) nor to something fully internal (a shared substance, as in Schmitt), but rather to its constitutive division itself. Therefore, it is the only form of society that deliberately keeps open and nourishes this constitutive void (ibid., 225–26).

By contrast, whereas democracy cultivates indeterminacy, totalitarianism responds by producing 'a metamorphosis of society itself in which the political ceases to exist as a separate sphere' (Lefort 1986: 79). In this early 1956 analysis in *Totalitarianism without Stalin*, Lefort defined totalitarianism by the negation of any separation between different domains of social life and the absolute predominance of one single system of values. Among the most important developments in Lefort's concept of totalitarianism after the 1950s is the elaboration of the concepts of representation and the originary division, both of which are denied by totalitarianism.

Representation, first, is important because it is the condition of Lefortian democracy (Näsström 2006). Democratic society keeps the place of power symbolically empty by linking it to the symbolic image of 'the people' which never fully coincides with itself. This representative character means that power gestures to something outside itself. Totalitarianism, by contrast, attempts to actualize this image by claiming to embody the 'true' image of the people (Lefort 1986: 280). The logic by which this transpires is defined by the condensation of the spheres of power, law, and knowledge.³ In totalitarian logic, power is embodied by an agent – usually a party, in extreme cases an individual – that possesses ultimate knowledge of the ends of society, lending it a supposed legitimacy, which places it above the law (Lefort 1988: 13). Because here, '[p]ower makes no reference to anything beyond the social' (ibid.), it must maintain that neither does there exist something beyond the social, nor divisions within it. It has, in other words, become total.

Second, in replacing representation with embodiment, totalitarianism also denies 'the principle of division internal to society' (Lefort 1986: 285). This division is negated on two levels. Abstractly, totalitarianism rejects '[t]he distinction between power as a symbolic agency and power as a real organ' (Lefort 1988: 233). Power as a real organ inheres in offices of state and in public organs. While in democracy these seats can be occupied, they can be so only temporarily, and they persist at the behest of the symbolic agency which permeates society but belongs to no one and therefore cannot be appropriated. Totalitarianism posits a really existing totality that embodies the symbolic agency of society. This totality itself is embodied by the party which has now become coextensive with the state. More concretely, totalitarianism denies this division by actualizing an image of the People-as-One which is held to be self-sufficient: it permits neither internal divisions, nor requires any reference to something outside itself for its legitimization (Lefort 1986: 286).

Besides its denial of social heterogeneity, totalitarianism also differs from democracy in the concept of history it deploys. In Lefort's view, the French Revolution deployed a new, more open notion of history which supposedly enabled the creation of an entirely new society. Modern totalitarianism supplements and largely supplants this with the idea

³It is worth remarking that Lefort also inherits the precise usage of this triad from Machiavelli (Howard 2023: 245).

of a ‘radiant future’ in whose service all contemporary socio-political activity stands (Lefort 1986: 288). On the one hand, a society operating with this view of history mobilizes all its resources in the service of hurtling towards the realization of its essence, thus rendering it the opposite of static and lending it a historical façade. On the other hand, however, such a society resolutely rejects ‘any innovation that might transgress the limits of an already known future’ (ibid.). Refusing any characteristic that Lefort’s student Miguel Abensour dubbed ‘savage’ (Abensour 2002), totalitarianism thus paradoxically places itself outside of history.

Revolutions and constitutions: the birth of modern democracy

As we have seen, both modern democracy and totalitarianism are real, conceptual, and historical possibilities ensuing from the demise of the natural hierarchies that were embodied by absolutist monarchies. Lefort recognizes that some of the key logics of totalitarianism are already latent tendencies in a democratic form of society (Lefort 1986: 287). The question is how a democratic society can *remain* democratic while simultaneously insulating itself from the threat of totalization. Those at the forefront of the birth of modern democracy were acutely aware of its vulnerability. It is no coincidence that the two key revolutions at the dawn of modern democracy – the American of 1776 and the French of 1789 – went on to ratify constitutions and propagate registers of individual rights. The new relation between the state and society had to be institutionalized. It should at this point be noted, however, that the democratic credentials of both those classical cases are dubitable at best. Enslavement was very widespread in the newly formed United States and would remain so for another century. France, meanwhile, spiraled into Terror only 2 years after the publication of the Universal Declaration of the Rights of Man and the Citizen; a declaration which moreover did not stop it from attempting to reimpose slavery in Haiti, then still called Saint Domingue, during that same period. France was once again ruled by an emperor a little more than a decade after this declaration. In both cases, moreover, when it existed at all suffrage was limited to men, and usually those with property.

Although Lefort places much more emphasis on rights than he does on constitutions, my hypothesis is that a properly democratic constitution may nonetheless play a key role in a Lefortian notion of democracy, analogous to the role he himself ascribed to rights. I highlight three main reasons for this. First, historically, constitutional revolutions frequently went hand in hand with revolutions in human rights (Sartori 1962). Second, conceptually, human rights and democratic constitutions share a strong similarity in the manner of their institution: rather than bestowed from above, it is their essence to be taken or declared from below, and likewise be retaken and redeclared, lending both a distinctly democratic character (Honig 2003: 99).⁴ Indeed, quite explicitly, for Lefort law ‘is born of the excessiveness of the desire for freedom’ (Lefort 2012a: 229). Because they do not rely on a higher authority, both therefore help establish the independence of society by

⁴As a matter of history, it is of course true that constitutions were often bestowed from above rather than given from below. This notwithstanding, the point here is primarily conceptual, and in any case from at least the French Revolution onwards the idea that the constitution’s authority – and by extension that of the government – could only derive from the people gained wider currency (Sieyès 2003). Additionally, even though it is empirically true that monarchs and governments often were the ones to issue constitutions, they frequently only did so after popular pressure from below, and it is doubtful that they would have otherwise.

circumscribing a sphere of activity and relationality which cannot be appropriated by the state (Lefort 1986: 246). Third, many early proponents of constitutions ascribed to them the same function as Lefort does to human rights. On this interpretation, a constitution constructs and legitimizes the responsibilities and structures of government, whereas a register of rights establishes and maintains the independence and freedom of political society. In this sense, constitutions and human rights are internally connected and originated in the same aspiration for political freedom.

More precisely, I want to propose that constitutions in modern democracy may play a role that is analogous to the Prince in Lefort's Machiavelli, mediating between state and society, and that in so doing they may furnish the basis of society's symbolic representation of its own unity. I mean this in the sense that Hans Lindahl understands the practice of law as a species of authoritative collective action. Borrowing from Margaret Gilbert, Lindahl highlights that collective action presupposes an understanding of 'we, together' as opposed to 'we, each' (Gilbert 1992; Lindahl 2015: 166). Both use the same word, but the latter takes the 'we' in its mere aggregative form, whereas the former supposes some form of collective intentionality. A central problem of contemporary mass democracies that Lefort was well aware of is how, in the absence of natural foundations, one could possibly establish such collective intentionality to ensure that a pluralistic society of millions nonetheless understands itself as *one* society. Grappling with this question, Lefort posited the need for a symbolic representation of society's unity in the face of its infinite diversity in response. My suggestion here is to conceptualize the constitution as the more concrete expression of that symbolic representation. More specifically, in the next section I want to propose viewing Lefort's analysis of Machiavelli's prince in analogy to the constitution.

Constructing constitutions out of princes

A first inevitable difficulty when trying to conceptualize the contemporary role of constitutions as analogous to the Prince is that throughout *Machiavelli in the Making* it is frequently unclear who is speaking: Machiavelli, Lefort, or Lefort with Machiavelli. In most cases, it will likely be a mixture of all three. A second, related issue is the question of the accuracy of Lefort's reading. However, for the purposes of this paper, I am less interested in the precise historical exegesis of Machiavelli's thought. Rather, my aim is to give an account of where we might position a modern political constitution in a Lefortian democratic framework. No matter the accuracy of Lefort's reading of Machiavelli, there is no doubt that it was instrumental in the development of his own thought. This is further reinforced by the fact that his reading of Machiavelli marked Lefort's transition from a Marxist theorist to a democratic theorist (Erfani 2008). Therefore, what matters primarily is the picture of Machiavelli's thought Lefort paints, and how it might help develop a concept of a Lefortian democratic constitution.

Before going into the key conceptual features of the prince, and how they may also be found in modern constitutions, I want to highlight two reasons why I believe this is a worthwhile exercise to begin with. Why, that is, would we look to writings more than half a millennium old to learn something about contemporary political philosophy, or indeed democracy? First of all, Lefort believed that Machiavelli was the first to have properly understood a defining feature of modern politics, or perhaps politics as such, in the form of the originary division (Lefort 2012a: 140). This made conflict an ingredient feature of politics and necessitated the prince to perform a mediating role between the parties to the conflict. If the need for this mediating role is a key feature of modern politics, it will not

have disappeared no matter if the empirical figure of the prince has. This thus inevitably raises the question of what may have replaced the prince.

Second, in his analysis of the *Discourses on Livy*, Lefort remarks that Machiavelli's use of the term *principi* has become so indeterminate as to be equally applicable to the directors of a republic as to a king or tyrant (Lefort 2012a: 393). If so, there is no necessary reason why its use could not be extended further. Moreover, this extension from a concrete person, or set of persons, to something impersonal and empirically harder to identify – a constitution – dovetails with the disincorporation that Lefort insists is essential for the transition from absolutism to modern democracy (Lefort 1988: 17). This means that while the function of the prince may persist, it can no longer be embodied in one person. Before further explaining how I propose understanding constitutions in analogy to the figure of the prince, below I first elaborate on what I see as the most important features of the prince for Lefort, distinguishing between structural and functional features. While drawn from and inspired by Machiavelli, the account below can be assumed to first and foremost be Lefortian.

The most important structural feature of the prince is its⁵ mediating role. In Lefort's Machiavelli, the prince mediates between the opposing desires of the nobles and the people, respectively. These desires are asymmetrical: the nobles' desire to oppress is directed at a clear object and therefore positive, whereas the people's desire for freedom amounts to not being oppressed and is negative (Di Piero 2023: 162). This division, which Lefort occasionally frames as a class division (Lefort 2012a: 240), is constitutive of the political and therefore an ineluctable feature of society (*ibid.*, 140). However, neither term of the opposition is defined by an essence. Rather, they are defined and exist only in relation to one another as confronting *appetites* (*ibid.*, 180). Because the prince is constituted qua prince by this mediating role, the prince itself is thus structured by this opposition (*ibid.*, 164).

It may be tempting to analogies this division to Rancière's famous opposition between politics and police (Rancière 1999). Although a similarity exists in that for both, division characterizes politics with neither side of the division being fixed or essentialized, the key difference lies in the fact that for Lefort this division is internal to society. Lefort is careful to note that this does not mean that power is fully immanent (Di Piero 2023: 175), but the division in principle plays out within society and is knowable to power. For Rancière, by contrast, the part of those without part is outside what is ordinarily understood as society, and unintelligible from a fully internal perspective.

A second important structural feature of the prince is its contingency. In Lefort's later democratic theory, this contingency is usually expressed as the groundlessness of society. In his analysis of Machiavelli, Lefort points out that remarkably, Machiavelli does not position the relation between the prince and his subjects in the more general framework of a universal or natural relation of humans with god (Lefort 2012a: 90). Furthermore, in Lefort's estimation, one of Machiavelli's key aims in the *Discourses* was to '[strike] at the heart of the political illusions of his time' (*ibid.*, 219), most importantly the supposedly Roman origins of the Florentine Republic, whose alleged indisputability was used to mask

⁵Partially as a matter of interpretation and partially in anticipation of the later transition to constitutions, I think of the prince in an impersonal sense in this section, that is as a figure within a conceptual framework rather than a concrete person to be addressed with personal pronouns. As for the interpretive part, I have no doubt that Machiavelli himself did consider the specific individuals he addressed or described important. Lefort, for his part, time and again stresses that Machiavelli makes the concrete individuals subordinate to the wider philosophico-historical picture he was painting (Lefort 2012a: 387).

the contingent origins of the republic (Di Piero 2023: 157). By contrast, Machiavelli – and Lefort with him – foregrounds the conspirator: a figure whose place in the republic is contingent through and through, and whose legitimacy depends fully on the agency involved in actively seeking that legitimacy (Lefort 2012a: 360).

Specifically, this reading enables Lefort to reverse the order of progression between authority and consensus. While at first glimpse, he suggests, it may appear to be the case that '[t]he authority of the prince appeared *bound* to winning a consensus', instead 'action proves to be in the precinct of an authority that does not have consensus' (Lefort 2012a: 360 [emphasis added]). In other words, the prince's authority is not self-evident given that can only result in the prince gaining the consensus of the people. Rather, it is precisely the absence of consensus that not only enables but demands that the prince exercises agency in order to even hope to ever reach something approaching consensus.

The contingent nature of the position of the prince feeds directly into the most important functional feature: the receptiveness of the prince to pressure from below. Having established the originary division between people and nobles, Machiavelli now considers how the prince can best relate to either of them in order to secure his own position. But in Lefort's view, this is a question of legitimacy rather than of morality: it concerns not the virtues a prince needs, but the question of what constitutes the prince *qua* prince in relation to his subjects (Lefort 2012a: 164). This question is inseparable from that of perception: how, and in virtue of what, will the prince be *considered* legitimate? For Lefort, the answer is clear: time and again, he stresses that the prince is far better off siding with the people to secure his position (e.g. *ibid.*, 231; 271; 336). The reason for this is quite simple: since the people's desire is negative – to not be oppressed – it may be true that it cannot be fully realized and therefore always remains excessive, but it need not in itself threaten the position of the prince. The nobles desire to oppress; by contrast, if given free reign, ultimately leads to usurpation (*ibid.*, 140–141).

Now, it is true that Machiavelli's emphasis on perception has often been taken as an appraisal of manipulation, but in the democratic interpretation foregrounded by Lefort, this amounts to 'a way to make sure that the pressure of the people becomes obligating for power' (Rosanvallon 2012: 8).⁶ The consequence is that while the people, strictly speaking, do not wield power (at least not in the same institutionalized sense as the prince does, or the state in later, modern adaptations of the theme), they are indispensable to its exercise. The power wielded by the prince can be no more than provisional. In his analysis of the *Discourses*, Lefort remarks that the Roman Tribune had a similar function 'of impeaching the occupation of power by one person' (Lefort 2012a: 228). This highlights the early genesis of what is perhaps Lefort's most famous conceptual innovation: the empty place of power. Lefort captures its meaning succinctly when arguing that '[e]very institution and the very exercise of power [...] must be periodically challenged and reconsidered [and] power belongs to nobody' (Lefort 2012b: 10). Finally, this also helps relate the present functional feature of the prince – the need to be conciliatory and receptive to demands issued by the people – to the first structural feature mentioned above. Given that the prince exists as a mediating third element in the division between nobles and people its existence is explicitly dependent on the terms of that originary division, and the prince cannot wield power without taking them into account.

⁶The quote is taken from an interview with Lefort conducted by Rosanvallon, and specifically Rosanvallon characterizing Lefort's position, to which Lefort subsequently agrees. For clarity's sake, Rosanvallon and Lefort are referred to separately; Lefort's answers are cited (Rosanvallon 2012).

Finally, and related to all the above features, the second functional feature of the prince already anticipates what was later to become a key element in Lefort's conception of democratic society. As the third element, the prince is defined by the division that characterizes the society. Because it is constitutive, moreover, the prince cannot hope to overcome this division. Yet despite the irreducible nature of the division, its very existence still implies a relation between the opposed terms. Put differently, the society at whose root lies an insurmountable division is still *one* society. The prince must therefore posit the unity of society, but can only do so in terms of a symbolic representation of that unity. Now, for Machiavelli and Lefort, this initially has two related functions, to which I add a third in the context of my present argument. First, if the prince were to be fully aligned with either the people or the nobles, the ensuing result would be either secession or revolt, respectively. Second, in a more clearly recognizable Lefortian formulation, 'the prince asserts himself [...] by situating himself at a distance from the mass' because given the prince's representative role, it can never fully coincide with what it represents (Lefort 2012a: 188). Hence, as a 'symbolic focal point of the imaginary unity of the community', the prince conceived as a symbolic representation remains subject to persistent questioning and must incessantly seek legitimacy (Di Pierro 2023: 175–76).

Third, for present purposes, I take this role as symbolic representation to be a key step towards theorizing a modern-day constitution as functioning analogously to the prince in Lefort's Machiavelli. Recall that, in Lefort's analysis, one of the principal elements that set totalitarianism apart from modern democracy is its denial of the distinction between power as a real organ (the state) and power as a symbolic agency (society). Totalitarianism, in short, seeks to deny the originary division by positing a power that fully coincides with itself and a unity and identity that is no longer symbolic but substantial (Lefort 1988: 233). Lefort furthermore posited human rights as an important element in protecting the independence of society from the encroachment by a state which had itself been usurped by a single party claiming to embody the true unity of the people. If, as I have suggested above, we can ascribe to constitutions a similar role as Lefort did more explicitly to human rights, this means that the prince's function of symbolically representing the unity of society in the face of its actual division while maintaining this division now falls to the constitution.

The constitution as the symbolic unity of society

If constitutions are to help establish a democratic form of society by mediating between state and society analogously to the prince as elaborated above, this yields the following basic characteristics. First, like the prince, the role of mediator between state and society now befalls the constitution. This also means that the nature of the state as well as that of society must be seen in a fully de-essentialized way, such that they are only defined by their mutual relation. The constitution assumes an important role in structuring this relation, but it is crucial to emphasize that the constitution itself, as was Lefort's prince, is in turn itself defined by this relation. Therefore, I would propose viewing the state, society, and constitution as co-constitutive in such a model. In more overtly Lefortian terminology, power is found in both state and society: the state wields power as exemplified by its ability to implement and enforce laws. But state power cannot be legitimized without the power as a symbolic agency, which inheres in society. Likewise, the constitution is only democratically legitimate insofar as it performs its mediating function satisfactorily *and* maintains a degree of balance in this co-constitutive relation.

Second, in the form of society, a democratic constitution may aid in setting up, that constitution itself is not impervious to change. As we have seen, Lefort found the hallmark of modern democracy in its embrace of indeterminacy and historicity. He also detected a first historical point of reference for this indeterminacy in the ‘denaturation’ which Machiavelli first intimated (Lefort 2012a: 180). A prince who is consistently out of tune with the people or with the nobles is unlike to be long-lived. Likewise, a constitution that remains wholly unresponsive, or even insufficiently responsive, to demands inhering in society and therefore loses its touch with the opposition between state and society cannot hope to maintain its legitimacy. A permanently unchangeable constitution would thus be inconsistent with this position. At a minimum, thus, constitutions should uphold what Joel Colón-Ríos calls ‘democracy at the level of fundamental laws’ (Colón-Ríos 2012: 38). Hence, no different from the prince, this means that democratic pressure must remain obligating for power.

Third, the prince’s contingency as explained above extends to the constitution. Both as a written document and as a symbolic representation of society, there is nothing inevitable about the contents or character of the constitution. In Loughlin’s words (referring to the U.S.), ‘the Constitution is an imperfect compromise reflecting the political circumstances of the time’ of its adoption (Loughlin 2022: 117). Accordingly, altered circumstances may amplify demands for a modified constitution or role thereof. A critical consequence of this is that the legitimacy of the constitution cannot be taken for granted. Running parallel to the prince, at stake is thus the question of what constitutes the constitution *qua* constitution in relation to society. Constitutional legitimacy is then also partially a matter of perception.

Fourth, the constitutional equivalent of the role that Lefort allotted the conspirator deserves special attention here. Recall that the main reason for Lefort’s appraisal of this figure was the fact that, by definition, a conspirator cannot take their legitimacy for granted, as a consequence of which they must always actively seek and solicit said legitimacy. In a less abstract, more politically concrete sense, then, the conspirator serves a twofold role. First, and perhaps most straightforwardly, it may signal a reactivation of the constituent power. If successful, this may directly lead to the creation of a new constitutional order which, like the conspirator, will have to actively seek legitimacy. For example, Rodrigo Cordero uses insights drawn from Lefort to examine constitutional creation in Chile as constituent moments manifest in conceptual struggles over the form of society (Cordero 2019). Second, even when doubts concerning constitutional legitimacy fall short of abrogating the extant constitutional order, the very fact of constitutional meaning and legitimacy being questioned may institute a crisis of meaning that forces society to reexamine the relations of which it consists and how these are instituted by the triad of state, society, and constitution. Hans Lindahl’s concept of a-legality, specifically though not exclusively in its ‘weak’ form, is a productive way of understanding this possibility (Lindahl 2013).

Following Loughlin’s analysis, constitutionalism departs from such an idea of constitutions in major ways. For present purposes, its most important innovations are, first, that constitutionalism seeks to subject *all* political power to the discipline of a text (Loughlin 2022: 3). Crucially, second, this text is intended to set up a *permanent* framework of government that is legitimate in view of it ‘expressing the authentic will of the people’ (ibid., 4). Third, like Lefort, classical constitutionalism also distinguished between state and society, but unlike the former it aspires to transcend this division, regulating not only the conduct of government but also the workings of society. Fourth, and building on the former, constitutionalism assigns a dual function to the constitution. The above aspects

testify to its *regulative* function. Additionally, the constitution acquires an *integrative* function according to which it figures as the symbolic representation of social unity (ibid., 112). I should stress here that, in light of my proposal to conceptualize the constitution in analogy to the prince, its acquisition of an integrative function is not problematic *per se*; rather, as will become clear below, at issue is the rigid circumscription assigned to it by constitutionalism. Constitutionalism thus modifies the relation between the constitution and society in major ways and ultimately produces a gradual *totalization* of the constitution.

The form, meaning, and staging of society

Below, I will address these transformations by investigating how they alter the three co-constitutive processes which in Lefort's view articulate the character of society: its *mise en forme* (shaping or forming), its *mise en sens* (giving meaning), and its *mise en scène* (staging). Though co-constitutive, society's *mise en forme* is something of a first among equals here, as the shaping of social relations partially determines the modes and extent of meaning-making and staging that are subsequently available. Its staging thus determines society's mode of social relations, of which the presence of hierarchies and their origins is probably the most important feature. Premised on the absence of any ground to decide who is entitled to rule and who only to be ruled, democracy's form remains similarly indeterminate, as it cannot avail of any natural hierarchy to help structure its relations.

Its *mise en sens* articulates how certain terms and relations are understood and given meaning within a given society. It renders intelligible, for example, distinctions between legitimate and illegitimate, just and unjust, and true and false (Lefort 1988: 11). The way society understands key terms with which it defines itself is not self-evident. The U.S. Constitution, for example, was proclaimed in the name of 'We, the People'. But from enslavement through the Civil War and Jim Crow to women's suffrage and the Civil Rights Movement, the U.S.'s understanding of who counts as 'the people' has changed substantially. Society's *mise en scène* concerns its representation of itself to itself. It is the means by which society gives itself an image of itself and shows its self-understanding. This is particularly important in a democratic form of society because it lacks any transcendently fixed point of reference or an immanent embodiment. Despite the conflict at its heart, therefore, a democratic society must stage itself as *one* society. Constitutions may play an important role in this staging, as they not only construct channels to foster productive democratic conflict but also provide unified symbolic points of reference whose role and importance can attain consensus despite persistent disagreement over its meaning.

I emphasize this triad here because they are helpful points of reference to analyze whether constitutionalism amounts to a meaningful mutation in society's symbolic order. Because of the absence of unconditional ground and the concomitant indeterminacy at its heart, modern democracy retained all three aforementioned processes *as processes*. This bears emphasizing particularly with regard to society's *mise en forme*: the very reason why democracy configures and maintains its own shaping as a dynamic process is because it accepts that no grounds exist on whose basis one might fix social relations in any hierarchical fashion. The consequence is that society's *mise en forme* can only be a process because in the absence of a fixed point, it can only shape social relations as its own endless elaboration in which no one has a particularly privileged position or role.

For my purposes here, constitutionalism has produced five significant mutations in this order. First, most generally, the constitution is converted from a mediating point between a mutually antagonistic state and society, as was the Prince in Lefort's Machiavelli, into an entity that exists for its own sake, achieving its independence from both state and society. Second, this independence is established by elaborating a new transcendence, of which a constitution is seen as a particular instantiation and to whose meaning the judiciary is presumed to have privileged access. Third, the relationship between society's *mise en scène* and its *mise en sens* becomes increasingly tenuous. Fourth, as noted before, constitutionalism seeks to subject *all* power to the discipline of a text. As a consequence, constitutions no longer only limit the conduct of government, but also the power of society. This is made possible by the aforementioned independence, as the constitution no longer needs the power of society to sustain its own legitimacy. Fifth, constitutionalism maintains a shaping of social relations that, on the surface, has much in common with a democratic form, but simultaneously falls short of and goes beyond this. Below, I begin by elaborating on the first, most general change, before moving on to explain changes two through five, all of which help realize the increasing independence of the constitution from society.

The independence of the constitution

If we reconceptualize the figure of the prince into that of the constitution, Machiavelli's aforementioned dictum must likewise be reformulated: the state wishes to command and enforce its laws, while the people wish not to be commanded. The constitution stands over these two sides as a mediating force, structuring their relations and integrating them by lending them a symbolic representation. Society, state, and constitution in this scheme are co-constitutive, with neither pre-existing the others. The resulting productive tension drives democratic politics.

Constitutionalism attempts to transform this relation by enhancing the constitution's level of independence. Convinced that the elevation of humanity lay with society, not government, classical constitutionalism was born from the belief that the operation of the *natural laws* of society must be protected from their debasement by the interference of government (Loughlin 2022: 111). Constitutionalism views democracy as an expression of the identity of society, postulating an implicit yet comprehensive notion of the absolute constitution (ibid., 6). The absolute concept of the constitution concerns the constitution of the state, expressing the political unity and identity of a people (Schmitt 2008: 59). The relative concept of the constitution specifies its fundamental laws and the workings of its offices of government, and cannot coherently exist without the former (ibid., 67–68). We need not accept Schmitt's position to find the distinction he draws instructive. Because constitutionalism maintains that the constitution expresses the identity of society and specifies this society to operate by means of natural laws, it ends up simply 'assuming the legitimacy of the established social order' and by extension that of the absolute concept of the constitution (Loughlin 2022: 58). This directly contravenes one of the features of a Lefortian constitution I have explained above, as constitutionalism seeks to insulate the constitution from the need to seek legitimacy.

The constitution here acquires the task of constructing this social order and maintaining its systemic integrity, and hence its integrative function (Loughlin 2022: 10–11). This explains, Loughlin suggests, why historically the U.S. Constitution gained this role much earlier than its European counterparts, as the fledgling American republic had no

self-evident source of national identity from which it could draw (*ibid.*). Hence, the task of furnishing that identity with the aim of constructing and maintaining social cohesion fell to the constitution. Today, rather than ‘an imperfect compromise reflecting the political circumstances of the time’, the U.S. Constitution figures as an eternal and revered symbol of national identity and the engine of social integration (*ibid.*, 117).

Perhaps the most expansive example of an integrative and independent constitution today is the German Basic Law. Like its American counterpart, the German constitution cannot be understood in isolation from the historical circumstances of its creation. Unlike its neighbors, the horrors of the Holocaust and Nazi dictatorship had made recourse to a pre-existing national identity unavailable to post-war Germany. Embracing what he calls *constitutional patriotism*, Habermas suggests that the constitution provides a much-needed ‘symbolic expression for [Germans’] political self-understanding’ (Habermas 2006: 43). While the U.S. Constitution is already notoriously difficult to amend, Article 79(3) of the German Basic Law takes this a step further still. This so-called eternity clause categorically prohibits the amendment of the basic structure of the state or of the articles providing for fundamental individual rights. In other words, the German Basic Law explicitly realizes the constitutionalist goal of establishing a *permanent* framework of government.

In a landmark 1958 ruling, the Federal Constitutional Court asserted that its Basic Law ‘embodies an objective order of values’ that ‘applies to all areas of law’.⁷ In this way, the German Basic Law expresses constitutionalism’s aspiration to permanence as well as its claim to universalism (Loughlin 2022: 7). The FCC’s competence includes ‘promoting the collective values of society’ (*ibid.*, 128). In short, if the constitution expresses the symbolic unity of society and the German Basic Law contains an ‘objective order of values’ whose promotion is an explicit task of the constitutional court, the courts are now endowed with the competence of defining the unity of German society. This is exemplary of the constitution’s increased independence from society, and concomitantly the judiciary’s growing social, non-legal power.

This dramatic expansion of the social power of the judiciary is not unique to Germany. Formulated by the Supreme Court of India, the influential ‘basic structure doctrine’ holds that several core constitutional features are immune to amendment or abrogation. These include regulative features of the constitution, such as constitutional supremacy and judicial review, but also integrative ones, including federalism and secularism. The most striking fact of this doctrine is the manner of its institution. Rather than being formally adopted as part of the written constitution of India, it was handed down by the Supreme Court, single-handedly elevating the position of the constitution vis-à-vis society and by extension its own. Analogous doctrines have since been adopted elsewhere (Loughlin 2022: 132). Noteworthy is that only the Constitution of Bangladesh specifically includes the basic structure doctrine as part of the written text of its constitution in the form of Article 7B. Even there, however, the doctrine was first affirmed by a ruling of the Supreme Court of Bangladesh in 1989 before being formally adopted in a constitutional amendment in 2011 (Ahmed 2023). In all these cases, by asserting the decisive supremacy of constitutional juries, the link between the contents and legitimacy of the constitution and the constituent power of the people is increasingly strained.

This structurally changes the relation between society and the constitution. If classical constitutionalism saw constitutions as expressions of a pre-existing identity of society,

⁷BVerfGE 7, 198 ff (1958).

this meant that the character of the constitution was in principle still amenable to the agency inherent in society. A democratic constitution must allow society to stage itself in the face of the state by providing institutional channels for such staging and preventing the state from interfering with it. If contemporary constitutionalism has been successful in ensuring that the state does not determine the play to be staged and the social relations to be enacted, it also does not leave this task to society itself: it is now the constitution, and its guardians, who increasingly write the script. Formulated in terms of the prince, from the position of its role as mediator, the constitution usurps part of the role that the state had in this opposition. Therefore, it is no longer able to act as a mediator, since it has now itself assumed the role of one of the terms of the opposition between which it was meant to mediate. Moreover, these clear attempts to insulate the constitution from potential change, itself already inconsistent with Lefortian constitutions as defended above, also papers over its ultimate contingency. As a consequence, finally, its need to seek legitimacy vanishes as this is taken to rest on an ultimate given. It is to this that I now turn.

A new transcendence?

Constitutionalism achieves the increasing independence of the constitution from society by reintroducing the order of the transcendent. But rather than restoring the transcendence of the state characteristic of absolutism, constitutionalism seeks to elevate the constitution itself to a transcendent position. To speak of the state as a transcendent power, Lefort writes, is to say that it has its own *raison d'être* that is in principle independent of society, and in whose absence society itself would have neither coherence nor unity (Lefort 1988: 231). By severing the link between the people's constituent power and the constitution, invoking abstract concepts such as universal values or public reason as its justificatory grounds, and leaving their elaboration in the hands of the judiciary, constitutionalism increasingly insulates the constitution from society. Hence, by rendering it self-sufficient and independent of society, constitutionalism raises the constitution to the status of a transcendent power at the expense of democracy.

Its reference to a transcendent source of legitimacy carries the function of maintaining a façade of popular legitimization. Constitutionalism does so by transforming *actual consent* into an idea of public reason and *hypothetical consent*. What is lost here is one of the central categories of democracy: popular agency, or, formulated as democracy's normative underpinning, the idea that the people can act. These ideas accompanied constitutionalism from the start. Loughlin identifies the *Federalist Papers* as the founding documents of constitutionalism, and in *Federalist* 49 James Madison argues that there are 'insuperable objections against the proposed recurrence to the people' (Hamilton et al. 2008: 250). Even more explicitly, in *Federalist* 63 Madison argues that the decisive superiority of the U.S. government lies in 'the total exclusion of the people in their collective capacity' (ibid., 313). Having recourse to the people, Madison explains, would do a poor job of 'maintaining the constitutional equilibrium of government' (ibid., 251), as it would let public *passions*, not public *reason*, decide on key matters of state. Tellingly, Madison reveals the purpose of the constitution to be upholding governmental equilibrium, not enabling the expression of popular will or the execution of the people's self-government.

Consequently, constitutionalism removes the link to the will of the people and replaces it with a façade of popular assent determined by a standard of public reason (Loughlin 2022: 150). The judiciary becomes invested with the task of discerning what public reason

dictates (ibid., 5). If the constitution reflects the identity of society and the task of discerning what public reason dictates regarding the constitution falls to constitutional courts, those courts are now in the business of *determining the identity of society*. While maintained as a representative symbol of society's unity, thus, the constitution is increasingly insulated from public scrutiny and impervious to popular political will. Originally a representation of a pre-existing identity, the constitution now increasingly determines what it was initially meant to represent. Constitutionalism achieves this by replacing the reference to the people that accompanies democratic forms of society with a reference to transcendent and universal sources of legitimacy, such as public reason and what it claims to be the natural laws of society.

The constitution as the symbolic unity of society

As noted above, constitutions may play a vital role in society's *mise en scène* by offering a symbolic representation of its unity. It is worth dwelling on this point because I believe the rich notion of representation that Lefort offers is part of what makes his theory so valuable. Despite Guizot's deep conservatism, the insight that Lefort adopts from him is the indispensability of representation for modern politics, including democratic politics (Lefort 2000: 100). In the most straightforward sense, this involves representative institutions such as parliaments, but also those less strictly institutionalized such as labor unions and social movements (Lefort 2019: 109; Conti 2018: 143). Framed in terms of Hanna Pitkin's famous typology, this primarily concerns representation as *acting for* (Pitkin 1967: 117–18).

In addition to this, Lefort also deploys a notion of *constructivist* representation. This corresponds to Pitkin's representation as *standing* for something. Mathijs van de Sande clarifies that this supposes that representation is a constitutive part of what it represents (van de Sande 2020: 404). In Lisa Disch's formulation, representation in this sense 'consists in making something present', with an 'emphasis on the "making" rather than the "presence"' (Disch 2019: 9). This is precisely the function of the Prince in Lefort's Machiavelli, and by extension of the constitution in my argument: it is 'an imaginary representation that solves the intrinsic fragmentation of society' by constructing, by means of this representation, the symbolic unity of society (Alagna 2020: 689). Although the Prince or the constitution thus symbolically represents unity, underneath it society remains defined by conflict. Indeed, this representation itself is the object of conflict: society's 'representation is itself, in its dependence upon a political discourse and upon a sociological and historical elaboration, always bound up with ideological debate' (Lefort 1988: 18).

Its modification by constitutionalism must be understood in relation to this constructivist representation. Specifically, its relation to society and to its *mise en sens* changes in important ways. Persistent conflicts over society's representation of itself and the indeterminable nature of these representations are part of why Abensour called Lefortian democracy 'savage', likening it to a wildcat strike (Abensour 2002). The type of staging appropriate to democracy is thus unpredictable and features a high degree of improvisation, which is not conducive to the neoliberal economic system Loughlin identifies as the driving force behind contemporary ordo-constitutionalism (Loughlin 2022: 20). Constitutionalism restrains this staging by increasingly furnishing its stage with a predetermined script. Hence, rather than this stage being the place where the meaning of certain key terms with which society understands itself is being elaborated through a dynamic process

in which society is staged and restaged, constitutionalism increasingly congeals and imposes the meaning of such terms with reference to the aforementioned transcendence. The result is that the relation between society's *mise en scène* and its *mise en sens* of society becomes increasingly tenuous.

By way of illustration, consider the 2022 overturning of *Roe v. Wade* by the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization*.⁸ Part of what was at stake was the meaning of foundational concepts of an open and democratic society, including equality, freedom of choice, and bodily autonomy. By removing women's bodily autonomy as a constitutionally protected right and devolving this matter to individual states, *Dobbs* effectively submits that the extent to which women may have and exercise their bodily autonomy is something to be decided by states. The Court ruled in this way, moreover, with the full knowledge that several states were ready to pass draconian restrictions on abortion as soon as the Court had handed down its judgment. Given this knowledge, the Court's ruling effectively amounted to the Court itself restricting abortion rights – something which Justice Kagan also noted in her dissenting opinion.⁹

Defending the majority opinion, Justice Alito writes that '[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision'.¹⁰ Significantly, Alito partly based his defense on *Washington v. Glucksberg* (1997), which held that the Constitution only guarantees rights it does not explicitly grant if they are 'objectively, deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty'.¹¹ Alito is also at pains to assert what he appears to consider the indisputably objective nature of the Court's opinion, which employs a 'fixed standard' to determine the constitution's meaning.¹² Revealingly, he contends that the Court's 'opinion is *not based on any view* about if and when prenatal life [sic] is entitled to any of the rights enjoyed after birth'.¹³ Furthermore, concerns regarding the public perception that the Court's rulings are based on principles rather than facts are dismissed on the grounds that it 'cannot allow [its] decisions to be affected by extraneous influences such as concern about the public's reaction'.¹⁴

There are two elements of these fragments that I would particularly like to focus on. First, the Court's striking claim to objectivity is illustrative of its allegedly privileged position. The idea that the Court does not hold any view about if and when 'prenatal life' is entitled to any rights is useful to accentuate its claimed objectivity. However, it plainly ignores that the very idea of 'prenatal life' as a coherent concept, and one demanding judicial consideration, absolutely amounts to a 'view', and one with far-reaching political implications to boot. Alito continues to allege that the dissent, by not extending basic human rights to 'prenatal life', deploys a 'theory of life' which is authorized neither by the constitution nor by the nation's legal traditions.¹⁵ It is difficult to see how, in contrast to the dissent, the majority would supposedly not hold a 'theory of life'.

⁸To engage in a comprehensive analysis of *Dobbs* would be far beyond the scope of this paper. However, for reasons enumerated below, I do believe the case presents a useful if problematic illustration of my argument.

⁹*Dobbs v. Jackson Women's Health Organization* 597 U.S. 215 (2022) (Kagan E. dissenting opinion), 3.

¹⁰*Ibid.*, (Alito S. majority opinion), 5.

¹¹*Washington v. Glucksberg* 521 U.S. 702 (1997) (Rehnquist W. majority opinion), 703.

¹²*Dobbs v. Jackson Women's Health Organization* 597 U.S. 215 (2022) (Alito S. majority opinion), 9.

¹³*Ibid.*, 38 [emphasis added].

¹⁴*Ibid.*, 67.

¹⁵*Ibid.*, 37–38.

Second, the prerequisite for granting rights not explicitly stated in the Constitution is twofold: either such a right is deeply rooted in the nation's history, or it is implied by the concept of ordered liberty. Arguably, the latter would offer a degree of leeway, as one could imagine the level of order required to be adopted according to shifting public opinions. Explaining ordered liberty as 'set[ting] limits and defin[ing] the boundary between competing interests', Alito goes on to consider a broad range of cases invoking the right to autonomy.¹⁶ He concludes that attempts to justify a right to abortion through this strategy 'prove too much', as their justification could extend to illicit drug use and prostitution.¹⁷ This cannot be right, the Court believes, because none of these are deeply rooted in the nation's history. Strikingly, thus, this argument reveals that the concept of 'ordered liberty' is apparently of little consequence; any potential variation in the concept's meaning is immediately overruled by the nation's history, to whose objective nature the Court is presumed to have privileged, if not exclusive access.

This is important for two reasons. First, it rhetorically aligns the Constitution with the very being of the nation and does so with reference to history, supporting constitutionalism's aspiration to permanence. Second, and equally consequentially, it asserts the Court's right to determine what is, 'objectively', part of that history and tradition. In doing so, the Court asserted that its ruling restores democracy by returning the initiative to the people's elected representatives.¹⁸ Yet it does so in direct contravention of the expressed opinion of the majority of U.S. Citizens (Gallup 2023; Pew Research Center 2022). Instead, the Court pays more heed to centuries-old legal provisions or 'the debates in Congress about the adoption of the Fourteenth Amendment'.¹⁹ The apparently superior democratic relevance of congressional debates that took place over two centuries ago over contemporary public opinion is puzzling. Although the Court may be forgiven for its failure to consider Lefort's concept of representation, its emphasis on returning the initiative to elected representatives is nevertheless telling. Regardless of the Court's omission, the Constitution's constructivist-representative function remains, but the determination of that representation and its meaning remains wholly in the Court's hands. The Court's invocation of distant history is also reminiscent of the 'political illusions' (Lefort 2012a: 219) that Machiavelli criticized, referring to the Florentine Republic's supposed authority bestowed upon it by its alleged foundations in ancient Rome (Di Piero 2023: 157). Framed in terms of society's *mise en sens*, *Dobbs* illustrates that the Court apparently considers its own authority, rooted in history and its allegedly objective view thereof, decisive. This dramatic expansion of the judiciary's social power is, clearly, a far cry from any role the Constitution or its courts might have in a Lefortian framework.

The total constitution

If constitutionalism limits the extent to which society directly partakes in deciding on the meaning of its constitution, it does not stop there. As noted above, constitutionalism goes beyond the limited ambition of government subject to constitutional constraints by aspiring to subjugate *all* power to the discipline of a text. This is a natural consequence

¹⁶Ibid., 31.

¹⁷Ibid., 32.

¹⁸Ibid., 6.

¹⁹Ibid., 12–13.

of the fact that constitutionalism no longer views constitution, state, and society as co-constitutive, but has elevated the constitution into a position of independence from and supremacy over the other terms. It should be stressed here that this does not mean that, as would the state in totalitarianism, constitutionalism claims that the constitution 'hold[s] the principle of all forms of socialization and all modes of activity' (Lefort 1986: 246). But constitutionalism *does* maintain that the constitution in principle has a *say* in the forms of socialization inherent in society. This becomes clearest in its annexation of private law and the concomitant advent of what Matthias Kumm has called the *total constitution* (Kumm 2006).

In 1931, Schmitt characterized the total state in a reformulation of Clausewitz's famous dictum: law as the continuation of politics by other means. Elaborating on the total constitution, Matthias Kumm reverses this image: politics as the continuation of law by other means (Kumm 2006: 343). Likewise, Kumm summarizes the main features of the total constitution as the mirror image of Schmitt's concept of the total state. First, rather than being fully politicized, the relations between private citizens become fully constitutionalized. Second, all political conflicts as well as their resolutions must refer to and be formulated in the language of constitutional rights. Third, if the total state was characterized by the intense politicization of all legal precepts up to and including constitutional essentials, the total constitution insulates its own basic structure against too extensive, or even any, change (ibid., 344–45). Yet if this amounts to politics as the continuation of law by other means, the practice of law in turn seems to increasingly come down to politics veiled in legality. My brief analysis of *Dobbs* illustrates this. As I have already elaborated on the third point of Kumm's summary above, I will focus here on the second and especially first features of the total constitution.

Focusing on Germany, Kumm's analysis most clearly reveals the advent of the total constitution in the transformation of negative rights into positive entitlements. In a landmark 1979 ruling the FCC reformulated individual rights as entitlements to specific actions by the state (Kumm 2006: 350).²⁰ Though this appears only to increase the demands that society may make vis-à-vis the state, such demands can be raised only if they pass through the channels formulated by the constitution. This goes hand in hand with the constitutionalizing of private law. Whereas public law regulates the relation between individuals and the state, whereas private law concerns the relations between individuals *inter alia*. When seen as defensive rights against the state, it follows logically that constitutional rights primarily matter to public law. However, since courts ruling on private law cases are themselves seen as public authorities and therefore subject to constitutional constraints, cases can be brought against these courts asserting that by ruling in this or that way, they have failed their constitutional duty of protecting and enforcing individual rights (Kumm 2006: 352).

There are two key things to note concerning the total constitution and its relation to democratic society. First, parallel to Loughlin's claim that constitutionalism severs the link between the constituent power and the constitution, the connection between political will or public political action and social change or policy becomes increasingly tenuous here. By framing all political disputes in the language of constitutional rights, social change and political resolutions no longer come about as government policies expressing popular political will, but as executions of judicial rulings. Kumm in fact appraises such constitutionalizing of politics, highlighting that it renders the legitimacy of political or

²⁰BVerfGE 39, 1.

legal decisions dependent on whether they ‘can reasonably be understood as a good faith effort to take into account and give respect to the interests of all’ (Kumm 2006: 367). This supplants popular participation and democratic will-formation with an abstract concept of ‘the interests of all’ whose meaning is determined by the judiciary.

Second, and most consequentially, in light of the co-constitutive triad of state, society, and constitution, this way of operating is no longer consistent with the role of mediator I have proposed. Recall that the opposing desires of the people and the nobles, and by extension society and the state, are constitutive of the political. The prince, and hence the constitution, depends on this relation for its own existence. But the totalization that Loughlin points out with reference to Kumm’s analysis clearly signals a departure from this model where the judiciary class’ own desire to command becomes decisive and the appetites of either society or the state at best secondary. Indeed, in Loughlin’s words, rather than the constituting offices of government, the total constitution amounts to the constitution of a *regime*, with its influence clearly extending far beyond the state alone (Loughlin 2022: 146).

Free markets and society’s mise en forme

The final mutation that constitutionalism seeks to bring about concerns society’s *mise en forme*. Loughlin identifies neoliberalism as the key driving force behind *contemporary* constitutionalism, and its constitution ‘imposes duties on public authorities to safeguard the operation of the private market system’ (Loughlin 2022: 73). This clearly represents a substantial encroachment of the power of the constitution and judiciary over the shaping of social relations. The United States again exemplifies this logic. In a landmark 2010 ruling in *Citizens United v. Federal Election Commission*, the Supreme Court held that free speech protections enshrined in the First Amendment extend to corporate spending on electoral campaigns. This prohibited any legislation restricting corporate spending on donations to political campaigns and candidates. Two elements are especially noteworthy here. First, the Court recognized no legally significant difference between citizens and corporations; second, it equated monetary *spending* with free speech.

As William Selinger explains, in Lefort’s view society encompasses all individual agents moving about therein, but also the associations they constituted and which allowed them to exercise their agency collectively (Selinger 2023: 11). As noted above, this forms an important part of the role of representation in Lefort’s theory. At first glimpse, the Court’s ruling may not immediately seem particularly problematic, especially given its applicability to civil society organizations and labor unions. In voicing the majority opinion, Justice John Roberts argues that it would be unlawful to place restrictions on ‘certain disfavored associations of citizens – those that have taken the corporate form’.²¹ The Court thus asserts that no relevant differences exist between various associations of citizens, be they labor unions, social movements, or business corporations.

But the function of such associations for Lefort is to offer a broader spectrum of representations, ‘put society in communication with itself’ and ‘procure for society an image of its general layout without this image being able to become fixed’ (Lefort 2000: 104). From that perspective, the social role of private corporations does not seem so obvious after all, much less the assertion that no relevant differences exist between these and other associations of citizens. *Even if* one would maintain that corporations have

²¹*Citizens United v. Federal Election Commission* 558 U.S. 310 (2010) (Roberts J. majority opinion).

some representative role to play in a democratic society, the resources available to them and the equation of spending with speech would lend them an extremely disproportionate degree of power. Justice John Paul Stevens acknowledges as much in his dissenting opinion, accentuating the 'need to prevent corporations from undermining self-government'.²² By affirming the status of corporations as social agents like any other and finding no fault with the imbalance due to their immense spending power, the Court thus postulates a form of social relations that is seriously out of step with a Lefortian understanding of democracy.

A note on contestability

Before concluding, I should address one interpretative difficulty regarding Lefort, summarized by Ingram's situation of Lefort 'between liberalism and radical democracy' (Ingram 2006). For one, Conti offers a less radical Lefort, suggesting that despite his own admissions Lefort was closer to liberalism than to democracy, or in any case radical democracy (Conti 2018). Rosanvallon similarly outlines a model of democratic legitimacy whose philosophical bases ring distinctly Lefortian, but which seems nonetheless at odds with my analysis (Rosanvallon 2011). In marked contrast, Abensour characterizes Lefort as a radical democrat by drawing attention to the 'savage' character of Lefortian democracy (Abensour 2002, 2011).

I cannot settle which reception is more accurate within the confines of this paper. Lefort himself was frequently ambivalent. Therefore, I will indicate resources germane to Lefort's writings demonstrating the consistency of his view with the effort undertaken in this paper, and to a large extent with Loughlin's and my reservations about constitutionalism. Crucially, this also serves the further purpose of clarifying the boundary between constitutions as vital protections against democratic backsliding and co-optation, and constitutions and their courts engaging in such co-optation themselves – what one might call their pathological variant.²³ As I noted at the beginning of Section IV, a key question facing modern society is that of remaining democratic while insulating itself from totalization. If constitutions play a key role therein, an obvious further question is thus how we can delineate constitutions that perform this function well from those that themselves threaten totalization.

For reasons of space, I focus here on Rosanvallon's defense of constitutional courts and their role in what he calls reflexive democracy. I cannot do justice to the entirety of his view within the confines of this paper, so my remarks here will necessarily be brief. Succinctly, reflexive democracy corrects flawed assumptions in the 'electoral-representative' model of democracy (Rosanvallon 2011: 123). Of these flaws, the most important are its assumption of one locatable people and its conflation of the majority with the whole (ibid., 143). These are indeed distinctly Lefortian themes. Rosanvallon allots an important role to constitutional courts in compensating for these flaws 'through the multiplication of the expressions of social sovereignty' and increasing the complexity of the democratic subject (ibid., 6). Constitutional courts do so by increasing the power citizens have over institutions and subjecting the legislature more strongly to the will of the people. The idea is that elections and courts together exercise social control over the

²²*Ibid.*, (Stevens J. P. dissenting opinion).

²³I am thankful for one of *Global Constitutionalism's* anonymous reviewers for stressing this point.

legislature (*ibid.*, 139–40). Constitutional courts, in Rosanvallon's eyes, thus increase rather than decrease the exercise of popular democratic agency.

I cannot elaborate extensively on the ways in which they do or do not do so here. I will instead just note two prerequisites for this function that Rosanvallon himself indicates. First, he is concerned with the possible politicization of the judiciary (Rosanvallon 2011: 161). This is a familiar theme: as we have seen, Schmitt warned that giving constitutional courts the role of guardians of the constitution would ineluctably lead to their politicization. Second, Rosanvallon remarks that reflexive institutions such as the judiciary can only carry out the functions he ascribes to them if they do not set themselves up as a genuine power (*ibid.*, 165). The judiciary's restraint in this matter is precisely what Loughlin contests.

Rosanvallon refers primarily to the French Constitutional Council, whose operation Loughlin also notes differs significantly from many others.²⁴ In the absence of explicit comments on constitutional courts, I look for clues to identify constitutions having crossed the line from democratic to pathological by returning to Lefort's comments on human rights, whose role runs parallel to that of constitutions. Like his theory of democracy more generally, the pivot of his theory of rights is the disappearance of the markers of certainty that come about as a result of the disincorporation of the traditional loci of power and legitimacy. As a consequence, right is deprived of a fixed point and is no longer embodied in the medieval monarch but testifies to a sphere that remains fully external to power (Lefort 1986: 256–57).

The most immediate consequence is that 'no authority could hope to take hold of them' (Lefort 1986: 258). This feeds directly into how Lefort envisages the relation between rights and state power: obliquely, struggles for rights and contestation over them 'touches the center from which [the state] draws the justification of its own right to demand the allegiance and obedience of all' (*ibid.*, 265). These passages are decisive. Several processes discussed above – constitutionalism's attempt to subject all power to the discipline of a text; the U.S. Supreme Court's assertion of its objective determination of the nation's history, the German FCC's insistence on the objective order of values embodied in the Basic Law – are examples of precisely an authority attempting to take hold of the constitution. Moreover, attempts to insulate the constitution and its courts from contestation, like the basic structure doctrine, clearly fly in the face of contestation whose challenges go to the core of the locus of political legitimacy. By shielding itself from challenges and asserting its authority over the constitution and its meaning, a constitutional court most certainly '[sets] itself up as a genuine power', to use Rosanvallon's words (Rosanvallon 2011: 165). Here is the crux of the matter: in a genuinely democratic society, nothing is beyond the pale of the political; a court's claim to objectivity or insulation of its legal text from political contest is, then, a political assertion *par excellence*.

Conclusion

Ultimately, no clear-cut delineation between a democratic constitution and its pathological form will be possible. However, Lefort's remark concerning the necessity of political and rights-struggles to 'touch' the center of legitimacy provides some yardstick: to what extent do constitutions, and their courts, enable themselves to be questioned? If

²⁴A unique feature of the French Constitutional Council is that, situated within a tradition historically hostile to judicial review, it operates by way of parliamentary initiative (Loughlin 2022: 128)

Loughlin's argument and mine hold water, the democratic credentials of many are now dubitable. None of this need mean, I should stress, that states and constitutions from whose examples I have drawn are now on the brink of totalitarianism. It does however highlight worrying trends across many polities in all parts of the world, signaling democratic societies being hollowed out from within by the power of society being co-opted by judiciaries.

One reason why these trends might be concerning is that Loughlin identifies a common societal and electoral response to them in populism, which is '[b]orn of dissatisfaction with the ways in which constitutional structures and party politics are working' (Loughlin 2022: 199). While certainly different from totalitarianism, the populist claim asserts the insufficiency of established institutions because they 'represent a power not consubstantial with the people' (Selinger 2023: 10). Populism asserts in contrast to truly represent 'the people' and seeks to return its power to its rightful place in state institutions, rejecting the dissociation of state power and social power (Lefort 2019: 113). Seen from within the perspective of a Lefortian democratic theory, whereas constitutionalism already upsets the balance between the co-constitutive elements of society, state, and constitution, its consequence may be that this balance is disturbed still further.

In this paper, I have attempted to provide a richer philosophical grounding for Loughlin's argument by formulating a theory of constitutions consistent with Lefort's democratic theory. A close analysis of Lefort's reading of Machiavelli, coupled with his remarks on human rights in particular, reveals a complex and rich picture of what a Lefortian constitution – including its 'guardians', to borrow from the Schmitt-Kelsen debate – might look like. Constitutions, in that view, mediate between the antagonistic powers of state and society and thus depend on their contingent relation. By extension, the constitution itself is similarly contingent. To be sure, this does not mean that a democratic society as I have sought to represent it has a constitution as a contingent feature. I do not think it does. However, the precise form it takes, like the precise form the opposition between state and society or nobles and people takes, has no predetermined form or limitation. The institutions connected to it must reflect this dynamism.

This contingency also means that the constitution's legitimacy is no given. No constitution or constitutional court can definitively disempower any exercise of the constituent power – however fleeting – because its legitimacy is supposedly eternal and unsusceptible to questioning. It must remain, like Lefort's prince, sensitive to pressure from below. If the constitution is to play a part in society's symbolic representation of itself to itself, the form, staging, and meaning of that representation, and therefore the constitution, must remain open to democratic contestation. No constitution exists for its own sake or independently of the society and state it applies to. Society, state, and constitution, I have argued, are co-constitutive. It is above all this openness, and the constitutive division at the root of democracy, that is being hollowed out by constitutionalism as Loughlin has defined it.

One might wonder whether rendering the constitution more susceptible to democratic wills would not undermine its stabilizing function and ultimately risk democracy consuming itself. I would like to conclude by indicating two avenues of response to this concern. First, a plainly Lefortian reply would point out that 'stabilizing' democracy according to one institutional arrangement or other is hardly more democratic. It would be to assume that there is one specific institutional design that is beyond question and thus, beyond the political. If it does not do so, a position that nonetheless seeks to fix a

specific arrangement while alleging its democratic character cannot justify why that arrangement would not be susceptible to democratic contestation. Second, Joel Colón-Ríos has suggested that constitutional entrenchment is a poor measure of democratic vitality, sustainability, or the protection of fundamental rights. Far more revealing, he argues, is the political and legal culture animating democratic politics (Colón-Ríos 2012: 26). Lefort suggested something similar by highlighting the importance of a growing awareness of rights (Lefort 1986: 260). This is no essentialization claiming that democracy is incompatible with some cultures while successful in others. It calls to action: if democracy is to work and be sustained, we must make it work, and foster the political culture that sustains it.

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