

# European constitutionalism: The improbability of self-determination

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**A**s scholars of European Law and politics we find ourselves in a privileged position', were Kaarlo Tuori's opening words at the inaugural seminar of the Centre of Excellence in 'Foundations of European Law and Polity' research project in Helsinki.<sup>1</sup> We do indeed, not least for the wonderful opportunity to engage in interdisciplinary debate under the auspices and the hospitality of the Centre. And 'privileged' also because, as Kaarlo Tuori stresses, 'we are really witnessing the emergence of something genuinely new, a new European polity.' Against the background of that oldest of philosophical questions: *how does the new come into being?*, in this short paper I want to ask the question of the emergence of a 'new' European polity in *political* terms; I want to ask it as a question of *critical* legal theory; and finally I want to ask it in terms of what accounts for its *unity*, i.e., what accounts for its identity over time.

The last question perhaps affords the best entry point. What would it mean to take seriously the conjunction 'coherence and fragmentation' in the conference title ('Legal Europe: coherence and/or fragmentation')?<sup>2</sup> Coherence presupposes fragmentation in a crucial way. After all, any understanding of a coherent whole presupposes that some distinction is drawn, either by setting an external boundary between the whole and what it is not, or an internal boundary that carves it up in a certain way. In this latter sense the 'or' of the title may be a misleading disjunctive. A dominant understanding of the coherence of European Law presupposes the distinction European/national legal system, the first pole conceived as that which both presupposes and transcends the second pole. The need for distinctions comes from this: that nothing is observed or observable in a state of undifferentiated complexity, that is, before the drawing of distinctions and boundaries. This is not,

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<sup>1</sup> Kaarlo Tuori's opening speech in the Kick-off Seminar: Legal Europe – Coherence and/or Fragmentation, for the inauguration of the Centre of Excellence in Foundations of European Law and Polity Research.

<sup>2</sup> Editorial note: the text is based on a presentation in a conference in Helsinki in January 2008.

I think, particularly controversial, until it is tied to a political argument that focuses on how the deployment of *certain* distinctions facilitates a *certain logic of rule*.

But before we turn to the political question, let us take a closer look at ‘unity’. Tuori invites us to think of the question of the unity of the new polity as a *dialectic* of coherence and fragmentation. The dialectic crucially imports the dimension of time into our discussion. Unity, to put it simply, is how we understand identity over time. The focus on unity allows us to understand the identity of the new polity as both *being* coherent and, at once, in the process of *becoming*. The logic of becoming is tied to the dialectic movement of coherence and fragmentation. While this appears simple it also introduces a significant degree of complexity into the process. Because of course fragmentation *is* that *given* a projection of unity, and unity depends on an act of gathering fragmentation into renewed coherence. This fragile balancing of opening out and closing back, of a mutually constitutive patterning of closure and openness, has received its most profound articulation in the work of Niklas Luhmann, though we do perhaps not need to probe those depths here to make a series of more modest claims: (i) unity allows us to think of coherence and fragmentation *in tandem*; (ii) the identification of a polity as a unity involves a renewed *gathering* of fragmentation in *re-instating* a unity and with it an *immunisation* of sorts against fragmentations that might spell paralysis or entropy; and (iii) such immunisation accommodates a *certain degree* only of multi-dimensionality and pluralism in that polity’s *law*. There is a threshold as to the degree to which givens (structures) can meaningfully be varied. At this threshold, certain things resonate and can be perceived as opportunity for renewal, and other things remain irrelevant, excluded, immunised against. There is no point exaggerating this inclusiveness, elasticity or openness to the plural, because the limitations have little to do with our good will to accommodate plural ‘others’. In the end multiple perspectives exist only if a pivotal joint is given. The ‘gathering’ of fragmentation requires holding fast to certain givens and not contesting *them* at least. Otherwise convergence runs the risk of entropy, and the polity of losing its bearings, if in the name of multidimensionality the polity becomes bounded neither spatially (since multi-dimensionality puts borders to question: ‘what is it about Europe that draws its boundaries at any specific point?’) nor in terms of any particular ‘essence’ (since that too would deny multi-dimensionality as such).

In what follows I will tie that conceptual argument to a political one. I have given this text the title ‘improbability of self-determination’ because I want to think constitutionalism in political terms. If self-determination appears improbable it is because of two things: it is invoked and invited in *legal* terms and it is over-

whelmingly tailored to *economic* imperatives. And yet, against both these templates, self-determination can only mean this: that the constitution gives a people – as *their* Constitution – the possibility to *act* and, where they find themselves other-determined, to *act back*. What makes political self-determination improbable then, I will argue, is that its opportunity is thwarted by the very language in which it is summoned.

It is in this way, most directly, that Tuori's invitation to think the Constitution as a relational concept becomes relevant to the caveats, set of objections and test cases that I will put forward. For Tuori, the relational character of the constitution's 'vindicates its significance in a multi-dimensional and multidisciplinary research project' such as the one undertaken here. I have already put forward some reservations about the possibilities of multi-dimensionality. If now I proceed to argue the improbability of constitutional self-determination it is because I also want to take seriously Kaarlo Tuori's other point, where he stresses thinking through 'the interdependence of law, politics and the economy'.

Let me attempt to tease out aspects of 'improbability' in the dimensions of constitutionalism where self-determination is usually seen to reside. In the following, I will examine the concepts that organize the field: *constituent power* (*pouvoir constituant*) which involves the power to lay down political will; '*constitutional moments*', the times *par excellence* of constitution making; '*constitutional conversation*', the modality of constitution-making; and the '*animating principles*' of constitutionalism, which allow a political community to define and – crucially through new interpretations of existing principles – to re-define its constitutive commitments. I will argue that in each case they fall short of providing leverage for self-determination due to their alignment, in the last instance, with the structures and the order of capital.

## 1. Constituent power

Pitched at the most abstract level, the improbability of self-determination finds its 'expression', so to speak, in the familiar tension between majority will and rights, or in its more theoretically interesting formulation, the tension between 'constituent' and 'constituted' power. The latter is sometimes identified as the 'paradox' of constitutionalism, which is, in a nutshell, that Constitution-*making* comes within a pre-given context of 'recognition' that alone establishes its objective meaning as 'constitution', and is thus only ever *of the order of 'making'* in a crucially limited sense.

(Christodoulidis 2007 and, more generally, Loughlin & Walker 2007.) Constitutional discourse cannot but fold back the constituent into the representational space of the constituted. Constituent power is always already implicated with constitutional form, the instituting already coupled with the instituted. Political power *must* present itself as conditioned, and with it the highest power of a political community is, so to speak, sovereign only under conditions that it is *not*. Because to be validly exercised, constituent power must be imputed to the constitution that establishes the conditions under which the popular will can be expressed *as* sovereign. Law and democracy are reconciled only via the suppression of a paradox that impacts on constitution-making as never, inevitably, fully democratic. This deadlock is ‘constitutive’ of constitutional opportunity, and as such carries its limitations into constitutional self-determination.

If this is important not just to acting but also crucially to acting back (see above) it is because the ‘constituent’ is conceptually linked with what may establish itself *otherwise*. What is established *according* to institutive rules, what conforms to pattern and is contained within form, is most obviously not of the order of the constituent. And yet, one is reminded again and again, the recognition of the event of the exercise of constituent power, the very registering of something as constituent, must necessarily occur within such a framework of recognition where the exercise can be ‘individuated’ as an event and ascribed to an actor. Outside such a framework the constituent is meaningless as lacking the coordinates of its recognition. And although paradox is a much-abused term, it is perhaps this time truly in paradox that the co-originality of law and politics finds its problematic ‘accommodation’. This for the most part elicits a speedy return to the comfort-zone of constitutional-politics-as-usual where the constituent is either ignored or rendered harmless. Either way, constituent power is subjugated to constitutional form in the only ‘realistic’ understanding of constitutionalism, which is the one that guarantees an order that questions neither its affiliation to state structures nor its affinity to capitalist structures. To repeat, the constituent yields to the constituted as a condition of recognition, which reinstates the rigidity of contextual conditions. Hence the subsumption of political choice to the constitutional givens that set the contours of what might be challengeable, what achievable under the particular configuration of the public sphere.

Against such channeling one might still want to rescue the following question and place it at the base of a discussion of self-determination: *how are we to think democracy democratically*, as a forever renewable exercise of constituent power? And if this ‘democratic’ scrutiny of ‘democracy’ jars as a prescription for political practice,

a confusing merger of level and meta-level, the question that this ‘merger’ raises is whether there can be a political-philosophical reading of democracy that calls it forth from the settings to which the institutional conditions of its exercise confine it.

## 2. Constitutional moments

The notion of ‘constitutional moment’ was introduced by Bruce Ackerman in his 1984 Storrs lectures (Ackerman 1984) and elaborated in much of his subsequent work. Against a liberal ‘levelling’ understanding of democracy Ackerman pits his own republican understanding of an elevated constitutionalism. The liberal ‘leveller’ fails to distinguish two quite distinct levels of political conduct, says Ackerman. The leveller’s ‘impoverished constitutional vocabulary’ does not give form to those ‘constitutional moments’ in a people’s history when ‘the people sacrifice their private interests to pursue the common good in transient and informal political association.’ (Ackerman 1984, 1020.) It is during such moments that the true voice of The People is heard. It is in such moments that citizens act in their capacity as sovereign populace. What is a constitutional moment? According to Ackerman’s definition, it is an occasion upon which The People exercise deliberative, ‘considered judgements’ regarding ‘the rights of citizens and the permanent interests of the community’ (Ackerman 1991, 240, 272–4). The appeal to the common good ‘ratified by a mobilized mass of [...] citizens expressing their assent through extraordinary institutional forms’ (Ackerman 1984, 1042) defines Ackerman’s republican vision. He is prepared to concede that these moments of exceptional politics occur rarely and ‘should become pre-eminent only under well-defined historical situations’. During these moments of profound rupture, citizens re-claim their delegated sovereignty through direct popular action. Because the constitutional provisions do not license these moments of creativity, the amendment that the constitutional moment carries is not, legally speaking, democratically licensed. Yet they are democratic in a more fundamental sense as exercises of political sovereignty. These moments are moments of ‘constitutional creativity’ (Ackerman 1991, 314ff) and ‘democracy reborn’ (295–6), in the sense that the populace as sovereign periodically instigates transformations of such depth that they can be credibly claimed to have re-situated the meaning of freedom, democracy and, for our purposes, self-determination. Ackerman puts it very well,

and note here that he puts it in terms of the idea of a constitutional conversation, to which we will return:

While established Constitutional Law did not always resolve America's deepest crises, *it has always provided us with the language and the process within which our political identities could be confronted, debated and defined* – both during the periods of normal politics and on those occasion when Americans found themselves called, once again, to undertake a serious effort to redefine and reaffirm their sense of national purpose. (Ackerman 1984, 1072.)

These insights have generated a spectacular constitutional optimism and Ackerman's term has traveled across time and jurisdictions to furnish 'discoveries' of 'constitutional moments'. As such one finds described the creation of the EU, the various extensions of its powers, referenda, the establishment of universal jurisdiction for certain crimes, even international organisations' declaration of principles (for example the ILO's declaration of its four 'core' principles in 1998). The concept is problematic not merely because it is nearly impossible to find instances that fulfill the conditions that Ackerman stipulated for them. It is problematic because it attempts to deal with the constituent moment's threat to the constituted by turning it on its head. Because isn't every analysis of 'constitutional moments' an attempt to domesticate the dangerous political? And does it not struggle helplessly to contain the impossible tension between, on the one hand, a certain democratic/political surplus that might qualify something as a *moment* in the first place by carving it out of the homogeneous flow of business-as-usual constitutional history, and on the other hand to keep it constitutional, that is, in line with what the Constitution itself *determines* as opportunity for renewal?

Our theorists appear to have hit a theoretical impasse here – the notion of a structure-defying event that somehow implausibly registers as 'constitutional' despite the constitutional conditions of its individuation – and have assumed it to be an insight. Plainly I cannot see how these moments that break the mould of constitutional renewal qualify as constitutional rather than illegal, or, if they merely stretch the institutional imagination within the parameters of permissible variation, why they are exceptional, *transgressive*, 'moments'. Even the moments that Ackerman has in mind, by his own admission, appear problematic in certain respects, perhaps a great deal more than he is prepared to concede. The first moment, the moment of foundation (Philadelphia) is an act of insurrection that qualifies as a *constitutional* moment only *ex post facto*, through what Derrida calls the 'fabulous retroactivity' that bestowed it validity. Speaking of Ackerman's other 'moments' such as the New

Deal and the Civil Rights movement in America, historically it was overwhelmingly the case that they were initiated and pursued by active minorities of the population who have come up against and managed to curb the 'normal-political' attitude of large indifferent majorities. The case of the extension of equal rights to all Americans, identified by Ackerman as the moment of confluence of popular mobilization (civil rights movement) and judicial decision-making (*Brown v Board of Education*) was not really a moment at all, since confluence implies simultaneity, and *Brown* significantly predated the eruption of the civil rights movement. Perhaps in its most alarming subterfuge this 'moment' emigrates to Constitutional Courts, 'Herculean' or merely 'civic republican' (see Dworkin 1986 and Michelman 1988). In any case it does not take a leap of the imagination to point out that, exaltation aside, there is little that is theoretically interesting about all this in terms of thinking through the *institutional*, which is what I take is the crucial task we set ourselves.

### 3. The constitutional 'conversation'

In the category of constitutional conversation I would include the many ways in which the discursive paradigm, and the aspiration of ideal consensus, have entered constitutional thinking. There is much sophisticated theory arguing that despite stated exclusions and limitations, despite the often 'thick' conditions that law introduces to frame political discussion and decision-making, the dynamic of the constitutional conversation is one of gradual inclusion of even the suppressed and marginalised voices. This dynamic is increasingly multi-perspectival, reaching full-blown reflexivity. The constitutional dimension of the conversation is significantly not confined to the exceptional 'constitutional moments' of popular mobilization that we saw above. Instead it spreads over continuous time, in the citizenry's public engagement, or even, its virtual participation in constitutional cases; Dworkin's *Law's Empire* (1986) and Michelman's *Law's Republic* (1988) are paradigmatic in this respect. They argue that discussion in the public sphere achieves a certain continuity between the unofficial *fora* of 'lifeworld' sites and the more formal sites where decisions are taken. With this continuity and with the many co-originalities between political rights and democracy, public and private autonomy, the paradigm of the constitutional conversation aspires to diffuse the many tensions that we saw characterising the relationship of constituent to constituted, of will to reason, of democracy to rights.

It should be added here that the introduction of the discursive paradigm into constitutional thinking informs and dovetails with a further substitution: procedural law substitutes substantive law. The shift from '*substance*' to '*procedure*', and following that the mutation of the latter into the varieties of *social dialogue*, that has in the last few decades received paradigmatic status, also draws its justification from the idea of democratic self-legitimation. In all cases, *dialogue*, preferably unconstrained and geared to achieving 'well-grounded' if not ideal consensus, is the legally sanctioned communicative medium that positions us as addressees of the law that we have given ourselves. This fabulous commutability between addressors and addressees of law makes redundant any difficult, external, justifications for 'substantive' protections. The democratic imperative is realised in and as dialogue (imperfectly perhaps but then the dialogic model has an inbuilt self-correcting dynamic) and carries the full weight of justification and inclusion. Citizens in the public sphere, prosecutors and prosecuted in the criminal trial, litigants in civil cases, employers managers and workers, all meet as 'partners' in communicative exchange, both making and receiving the law.

Let us briefly here visit an example from industrial relations and one amongst numerous cases where European law promotes 'social dialogue'. Under the EC Treaty the Commission is obliged to consult management and labour on issues in the sphere of social policy. Moreover, the treaty gives either side the opportunity to initiate 'social dialogue' to resolve disagreement. In effect it allows either side to remove the issue from the Commission for a period of nine months during which consensus is sought on the content of the proposal. This modest proposal for a 'stalling device' has triggered nothing short of Habermasian fervour in some quarters. Most importantly it has been hailed as an instance of *constitutionalising* labour relations from below (see Christodoulidis & Dukes 2008). And yet, even a cursory look will reveal that this is a 'social dialogue' fraught with problems. It stumbles first and foremost on the issue of 'representativity'. There is no effective representation of workers at the European level, no guarantee that affected parties will have a say in the dialogue. The question of the representativity itself is not subject to the processes of dialogue and thus not determined reflexively in them. 'Social dialogue' as envisaged is to be conducted in the absence of any procedural guarantees, and there are no bargaining structures that might regulate bargaining outcomes. And perhaps most significantly: Without the possibility of backing a claim with the threat of industrial action, the negotiating positions of the vulnerable partners are obviously undercut. The cumulative effect of the multiple forms of disempowerment, the absence of any guarantees of effective bargaining power or

representativity, leaves the speaking position of labour weakened or withdrawn in the process. One might be excused therefore for pointing out the naivety of assuming that a constructive, undistorted or communicative (as opposed to strategic) dialogue is feasible under these conditions. 'Social dialogue' imposes the format of communicative action upon a substrate of the antagonistic relations of classes. The substitution of a strategic (antagonistic) model for a communicative one (partnership) allows a triple displacement: Not only are workers prevented from backing their claims with the possibility of acting on them, but they are also assumed to be partners in a dialogue whose natural end is consensus, and where failure to reach it is attributed either to bad faith or to incidental rather than structural constraints. The naivety of the model of social dialogue looks rather more cynical in this light, an ideological technique of anticipation and substitution, and of symbolic simulation.

Might one not then draw some modest general insights from this kind of impasse to argue that constitutional conversation is a heavily hedged-in conversation whose organizing principles set the conditions of what can be discussed, challenged and negotiated meaningfully? As lawyers we are well aware of these conditions and limits on what is constitutionally negotiable, who and what is included in the constitutional conversation. The more obvious forms that these limits take are the 'rigidity' of Constitutions, the formality of constitutional amendment procedures, the exclusion from amendment by *any* majority of, typically, basic rights and safeguards of property.

In a hugely influential piece, though not in legal circles, Gayatri Spivak borrowed the term 'subaltern' from Gramsci to ask the immensely important question: 'can the subaltern speak?' (Spivak 1988). Her interest was in what one might call the *speaking position* of those whose possibilities of identification, action and resistance ran the danger of folding back into the hegemonic symbolic order of the colonisers. In this context she put some faith in what she wonderfully called the 'unguarded practice of conversation' against the symbolic processes by which the (colonial) rulers ruled by structuring the field of the possible responses of the ruled. There is something hugely important in all this for the way we, as lawyers, understand our own practice of constitutional conversation. And its limits. Because however interesting and aspirational our various exaltations, they are perhaps crucially inadequate for those people – and I use one out of hundreds of examples here – who find their life chances diminished by the stated absolute exclusion from constitutional conversation of the issue of land redistribution in *post-apartheid* South Africa. Or for those who find that in the complex constitutional distributions

of jurisdiction and standing, and law's complex attributions of harm and responsibility, they are left without speaking position or claim, dealing, like the victims of Bhopal with a catastrophe that remains singularly, in every sense, *their own*.

#### 4. The 'animating principles' of constitutionalism

There exists a shared assumption in much of the critical theory today that is adequately cognisant of critiques leveled against human rights (essentialist, ethnocentric, phallogocentric, individualistic, etc) which boils down to roughly this claim: a right cannot be contained or exhausted in any one determinate content, a definitive interpretation or conclusive *determinatio*. In particular, in the post-structuralist varieties of critical theory the claim assumes the form that what the law has silenced or systematically excluded will return in the modalities of responsiveness and questionability. In each case a right renews itself as responsive to our humanity. Note the double movement here. Law creates determinate effects (it is after all as Luhmann put it a 'reduction achievement' in relation to an under-determined social complexity) but those determinations forever leave a remainder, which *as* excess invokes further responses from the law. In other words: even where human rights are harnessed to the market or hollowed out completely in the name of security, a residue remains even in the most successful co-option of human rights, there remains an impetus in the aspiration – to protect dignity, personality, speech, whatever – that disturbs every filiation and thus, intriguingly, leaving the right standing above (beyond) and against its institutionalisation. There is a logic of dislocation planted at the very core of liberalism that turns it paradoxical: a gap opens just below liberalism's normative mainstays and explanatory schemas. And where this gap opens up in its gathering orders, the normative language of human rights – dignity, personality, equality – inaugurate conditions that exceed containment in those very orders.

In less theoretically ambitious formulations, a similar kind of logic informs the distinction between *hard and soft law*, where *soft* also intimates a malleability of sorts, an openness to re-interpretation.

My suspicion is that there may be something of a more sinister obfuscation at play in the distinctions made between a right and any of its actual instantiations, or between soft and hard law. As the literature on 'soft' law proliferates, one wonders whether it has not in fact been increasingly used to navigate the paradoxical effects

and externalities of the operation of a law driven by economic imperatives. And the problem surfaces is this: if any reasonable account of the unity of our law requires us to hold our practices up to scrutiny in terms of the principles these practices are meant to be instantiations for, the contradiction that emerges when the instantiations clash with the principles is diffused through the operation of a distinction that allocates the aspirations into the separate realm of soft law. This realm of 'soft' comes to encompass everything from constitutional preambles, constitutional commitments to social rights, and general principles on the one hand, and recommendations, opinions, green papers, white papers guidelines, etc, etc, on the other. What comes to hold these typologies together and allows their gathering under the generic 'soft' is the lack of direct applicability. But in the first instance general standards lack direct applicability because they require determinations before they can be applied in concrete situations, in the second instance guidelines lack direct determinations because they are not norms. However if these are placed together under the common categorisation 'soft', this crucial difference is missed. The operation of the distinction hard/soft law conflates an argument about generality with one about *jus cogens*. In regard to the latter, norms of 'hard' law that contradict guidelines are not invalid for that reason alone. But in regard to the former, hard laws that are supposed instantiations of general principles and yet give the lie to those principles are deficient laws, to be righted as unconstitutional. Because in this case the rationality of law that depends on holding together principles and their instantiations, a certain dialectic is broken and with it any possibility of making sense of the law as a rational enterprise disappears. No disjunction can be rationally upheld here between 'hard' and 'soft'. What becomes visible instead is merely the brute political expediency of collapsing into soft law the fundamental commitments to solidarity and social justice and of subordinating social policy objectives to the economic priority of the integration of capital.

## 5. Conclusion

We set out by proposing that coherence always presupposes fragmentation. We have now come a full circle to see how the deployment of *certain* distinctions facilitates a *certain logic of rule*. With the deployment of the distinction that we looked at between soft and hard law, European Law establishes itself as spanning that distinction. But in the way that we saw principle (soft law) undercut by regulation (hard law), what appeared as enabling the coherence at once also crucially undercut it. But of course

the distinction between hard and soft law is only one amongst many of the instances in which the deployment of distinctions organises and undergirds the logic of rule. We are all familiar with how the constitutive distinction between supra-national and municipal, a distinction that sets in motion the logic of subsidiarity, both defines European law and at once facilitates a race to the bottom. We also know how the fragmentation – the splitting down the middle – of the category citizen-producer, allows a conceptualisation of the economy that hollows it out from any sense of democratic empowerment or accountability.

Above all, the logic of distinction-drawing alerts us to this: consensus is organised at the expense of raising any meta-level objection over the terms of setting the context. Context-setting is performed through the drawing of distinctions that differentiate internally, and thus allow the deployment of further distinctions while at the same time immunizing the operation of context-setting from possible challenges. A certain structural inertia sets in at this point. What remains installed as context and unchallengeable as such through acts of internal differentiation is a particular form of democracy, cut off from democratic challenge through a successful act of substitution. And it is precisely this logic of the construction of the public sphere that, to take one amongst many instances here, but vital nevertheless, makes nonsense of the conjunction of democracy to the economy. The pressing need to re-think *need* politically finds no pathway in the realm of the ‘constituted’. There is no doubt that such claims are absent from political theorizing today, and Arendt’s disastrous contribution in ruling out ‘need’ from the political vocabulary – on the grounds that only the realm of contingency rather than that of necessity is properly political – cannot be over-emphasized. Whatever its theoretical underpinnings, it is indicative that the constitutive feature of the democratic principle underpinning the public sphere in this particular form of the organization of consensus, is that the very constitution of a democratic politics is in one and the same move *a denial of economic democracy*. Through this denial, democratic politics becomes coincident with democratic capitalism. The ‘co-originality’ of rights and democracy secure the domestication of democracy in its state form. The co-originality of public and private autonomy delineates the realms where self-determination can be meaningfully pursued. Through these institutive reductions democracy is summoned as the category of a certain politics, a principle of organization of consensus in a sphere where the capacity of society to use moral or democratic categories in the conceptualisation of the economy is undercut.

Michel Foucault wrote about governmentality that it involves the structuring of the field of action of others (Foucault 1982). We have looked at some of the ways in

which our Constitutions perform this work of structuring. The ‘consensus’ that is achieved is over-determined by these structures, which, in highly selective ways, configure and re-configure the relationships of law to politics, of policy to welfare, of law to the economy, etc. The work that they do is structural in the sense that they first enable a certain form of constitutional conversation. To the extent that the language of self-determination draws from those resources it remains bound to concepts instrumental to the logic of rule. Self-determination, as properly political, as a category of philosophical politics, thus must address itself to the points of foreclosure on which the constitutional management of consensus depends.

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