Beyond Liberalism and Its Critics: An Essay in Constitutional Theory

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Introduction

Contemporary legal culture spends a great deal of energy in generating arguments about constitutional law. Typically, such arguments concern the determination of the content of constitutional clauses which define the meaning and extension of governmental powers, individual rights and civil liberties, the allocations of power among different departments of government, or among local and supra-local spheres of government, and so forth.

Needless to say, it is interesting and necessary to debate questions of constitutional law. However, it seems that those discussions can be enriched and enlarged with considerations coming from a different perspective: that of constitutional theory.

Constitutional law proper (i.e., constitutional law in the narrow sense of "the science of constitutional law") developed in the nineteenth century, and thus largely as a product of legal positivism. Before the emergence of constitutional law in this narrow sense, there was only constitutional (or political) theory, which has come down to us from Plato and Aristotle. Therefore, constitutional theory precedes constitutional law and is coeval with, and germane to, philosophy. By the same token, it has intricate attachments to religious motives. Thus, by its origin and development in close ties with the traditions of both philosophy (metaphysics) and theology, political or constitutional theory, which for many centuries existed in lieu of constitutional law, was, until Hegel at least, a style of argument rich in substantive content, which was supposed to correspond to the content of politics itself.

However, during the many centuries in which constitutional theory existed instead of constitutional law in the narrow sense, there was no

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such complex of institutional practices as that which became the typical political foundation of modern Western societies, under the name of "rule of law". In this new institutional environment, constitutional law gradually took the fore and became the staple of higher magistracies, including constitutional courts. As a consequence, judges have characteristically become accustomed to think that in interpreting the constitution they are dealing with abstract considerations distinct from the content of crude politics, and from the multiple and intractable substantive motivations which it incorporates.

It can be said, therefore, that the development of constitutional law in the narrow sense, together with the habits of thought and social and political practices which it helped to sustain, overshadowed the relevance and the richness of themes pertinent to constitutional theory, while weakening or suppressing the connections between the one and the other, as between law and politics. Under the rule of law, legal doctrine tends to become quite artificially separated from political and ideological debate, which is thrown to the feared rage of political parties. In this sense, it is ironical but also telling that only where constitutional review has long been understood and cultivated as an essentially political instrument does there seem to have developed some possibility that the discussions in the field of constitutional law be expanded so as to include political themes, though not necessarily for the benefit of theory.

This essay is an effort to explore the connections between constitutional law and constitutional theory. It is not an attempt to develop a theory. Rather, it is an endeavor to show that constitutional law can neither be meaningful nor useful without reference to notions understood and experienced as politics, that is, notions which can be viewed as the political foundations of constitutional doctrine in the context of an enlarged intellectual perspective. Such perspective is afforded by an understanding of pertinent themes in neighboring theoretical fields, which can be profitably explored for the present purposes.

Indeed, besides political theory, at least two other intellectual traditions have, since the eighteenth and nineteenth centuries, focused upon the political dimension of social experience. Each has in its own way attempted to throw new light on the essential foundations of modern social intercourse. They are the traditions of social theory and of political economy. It makes sense therefore to resort to discussions in those fields

4. It is thus concededly due to the Marshallian tradition of constitutional review in the United States that nominations to the American Supreme Court have tended to become hot political issues. See, e.g., the legal-political discussions contained in the pieces published in (1987) 9 Cardozo Law Review concerning the proposed nomination of Robert Bork to that court.
in order to articulate a broad view of the political foundations of contemporary constitutional doctrine.5

The argument presented below rests on certain basic assumptions, which can be summarized as follows. First, there is the idea that the political essence of society, understood as a body of unsteady substantive motivations — constitutive of politics, but often vicariously identified with "reason" and "nature" — underlies and sustains all collective impulses to defy, through moral and material progress, both historically established practices and natural constraints. Moreover, there is the claim that, since the liberal revolutions, and throughout the socialist critical responses to them, the political essence of society has been repeatedly though imperfectly removed from the horizon of theoretical debate. This will be called the "denial of political essence". The idea is that the denial of political essence was a process accomplished by liberalism, as well as by its critics from right and left.

Second, there is the notion that such persistent denial of political essence has caused contemporary social and political practices to curtail the possibility of sustaining continuous self-conscious defiance of history and nature. Since self-conscious defiance of history and nature begets emancipation of the self, the denial of political essence is equivalent to deception of the self by itself, which can be termed "self-deception."

Hence the third point: the need for the formulation of the challenge of contemporary constitutional theory. This challenge can be understood as that of devising institutions which venture beyond liberalism and its critics. Such institutions must be capable of reinstating the political essence of society, without favoring totalitarianism (as occurred under socialism) nor constraining possible chances of present or future transformation of the ground rules of social life.

This essay inquires about the denial of political essence, characterized in general terms as self-deception (Part I). Such denial is also sought in specific renderings, that is, in available doctrinal and practical developments, namely, in jurisprudential notions complemented chiefly by theoretical and policy achievements in the field of political economy. It is suggested that in some aspects of these developments, specifically in

5. An alternative strategy would be to resort to the tradition of classical political theory itself, as has been recently done by many authors, who have revived the theme of Aristotelian republicanism in order to discuss constitutional law. See, e.g., F. Michelman, "The Supreme Court 1985 Term — Foreword: Traces of Self-Government" (1986), 100 Harvard Law Review 1. However, the classical tradition arguably overlooks important developments, which can be conveniently dubbed into "the problem of modernity," which is inquired into in the more recent traditions of political economy and social theory. On the "problem of modernity", see R. Unger, Law in Modern Society, (New York: Free Press, 1976) at 37-40.
State-centered Marxist studies, in Weberian social science and in Keynesian economics, the seeds are already sown for the reinstatement of the political essence of society (Part II). It is furthermore argued that the constitutional tensions resulting from the growth of administration, insofar as the latter was made dependent on Keynesian economic policies, are indicative of a paradigm shift from liberal (or English-style) constitutionalism to what can be described as a "new constitutionalism" (Part III). Finally, an effort is made to derive from the exercise an understanding of the challenge of contemporary constitutional theory. It will be suggested that an acceptable response to such challenge must include the "legal derivation" of monetary policy under conditions of reinstatement of the political essence of society. (Part IV).

Part I

1. Political Essence, Political Form and Self-Deception

The rationality of the order of society has been an ideal continuously entertained in the Western tradition of political and social thought. A recurrent difficult point, however, has been that of telling reason from myth, that is to say, reason from unreason. Such difficulty occurs whenever a set of criteria for the justification of a particular social order is formulated and is attributed a rational and tendentially unchallengeable status. Starting clearly at least since Plato’s dialogues (which convey the debate of rationalism against both the sophists and traditional morality), the tensions which are expressed in the ambiguous relationship between reason and unreason become subsequently present throughout proposed categories of rational thought in general, and yield the aporias which accompany them.

In so far as they are regarded as differentiated from myth, modern rational ideas are related to all enacted rational practices and processes of innovation of society and culture. However, such ideas, and the practices to which they correspond, are still always (as they were in the time of Socrates and Plato) elaborated and acted out with their in-built conceptual tensions and practical conditions of conflictual confrontation. This imparts to such ideas and practices an ambiguous character as to their aspired ideal or practical rationality.


7. It suffices to think of the implicit or explicit coexistence within offered theoretical frameworks of such concepts and experiences which can be broadly designated by form and substance, truth and faith, universal and singular, reality and appearance, mind and body, being and nothingness, subject and object, theory and practice, self and other, etc.
There are some of such ambiguities and opportunities of conflict that have negligible impact upon the way in which the general economy functions, the way in which the society is politically organized, or the endurance of beliefs and understandings that inform the present structure of a given culture and the objective conduct of social actors. Such lower-impact ambiguities and opportunities of conflict are in due time resolved or forgotten and are discarded as error or unreasonable thought, and impossible or impermissible courses of action.

There are, however, higher-impact ambiguities and opportunities of conflictual confrontation, such as those which in ancient Greece characterized the debate between rationalism on the one hand and sophistry and (religious) tradition on the other, and which became the sparkle of what has been in many contexts characterized as “legitimation crisis”\(^8\). Such ambiguities and opportunities of conflict may be briskly diffused into the cultural and material conditions of existence, incorporate novel elements into current practices, and swiftly change the structure of imagination and conduct of social and political actors.

Higher-impact ambiguities and opportunities of conflict are today those controversial points debated and fought over by social actors and lawyers, philosophers and scientists, in the form of clashing hypotheses about truth, taste and rightful action or method. They can, however, seldom be precisely rendered into a stable conception, doctrine, theory, or set of methodological procedures, because their distinct practical implications, conceptual identity, and cultural significance can only be determined after their actual exploration, simultaneously linking and modifying thought and practical reality, has, for some reason (or unreasonable?), ceased.

Yet, although they cannot be precisely determined for a large expanse of time, many of such higher-impact ambiguities and opportunities of conflict have always been, for limited historical durations, selectively removed from the procedures of cultural production,\(^9\) and from the courses of action generally available to the members of the society. Such subtracted ambiguities and opportunities of conflict were previously the taboos and other irrational norms and practices. Today they are decisions stabilized as counterpoints to knowledge and technology produced under certain cultural, professional and scientific standards of acceptability said


\(^9\) As occurs, for example, under the paradigmatic structures of normal science. On the concept of changing paradigms of scientific knowledge, see T. Kuhn, *The Structure of Scientific Revolutions*, (Chicago: Chicago University Press, 1970).
to be rational. It is interesting to note also that a great number of such decisions are today first formulated as, or conditioned by, legal norms (which include legislative, administrative and judicial rules, complemented by scholarly writing, as the expression of standing policies, commands or rights), themselves characteristically aspiring to a recognized status of rationality. The subtraction, by whatever means, of higher-impact ambiguities and opportunities of conflict from the procedures of cultural production and societal interaction can be called normative differentiation.

It can thus be said that normative differentiation in modern and premodern politics turns on the determination or more or less stable and exclusive criteria of permissible action, and of imaginative construction of ideals, beliefs, concepts and all other cultural artifacts. Once they are appropriated as more or less exclusive and stable means of determination of permissible present and future imagination and conduct, such criteria become the acknowledged instruments of power—they become, in other words, the objective form of the political essence of society.

The legal institutions (or legal-constitutional frameworks) of modern Western societies are perhaps the most sophisticated and comprehensive examples of current devices through which higher-impact ambiguities and opportunities of conflict are selectively removed from the processes of cultural production and practical societal intercourse. Indeed, such legal systems, in both their theoretical (jurisprudential) and practical (professional and official-bureaucratic) dimensions, are perhaps what most tangibly and comprehensively incorporates today the objective form of the political essence of modern Western societies.

By means of the enactment and more or less continuous administration of such legal systems (the modern legal-constitutional frameworks and their attachments to bodies of international law), an unprecedented measure of moral and above all material progress has been attained in the contemporary world. However, this spectacular advancement of human capabilities came only at the cost of confining the chances and resources for the promotion of general historical innovation to very restricted avenues and directions of change; namely, those pursued by certain favored and legally defined economic and political actors (property owners, corporations, trade unions, governmental bureaucracies), who jointly exercise the mastery over the subtraction of ambiguities and opportunities of conflict from the procedures of cultural production and societal interaction, democratic legitimation notwithstanding.\textsuperscript{10} In other words, due to the operation of the legal system, the political essence of

\textsuperscript{10} See \textit{infra}, note 11.
society remains unavailable to self-conscious practical intervention by ordinary individuals engaged in ordinary social practices. They can not self-consciously influence, through their daily, ordinary activities, the broadening and/or redirection of the avenues of historical and material progress. This generates a situation of alienation of ordinary individuals from the political essence of society, which is translated into general moral and material oppression and decadence – the moral and material inability of the whole collectivity to even more thoroughly defy history and nature.

Such legally constructed alienation from the political essence of society, which translates into the confinement of collective chances and resources of social transformation, leads to what appears to be the central quandary of modern politics, which can be formulated as follows. On the one hand, the broadening or redirection of the avenues of historical and material change appears to require continuous emancipation from natural and moral oppression through extensive restoration, into the existing procedures of cultural production and societal interaction, of currently subtracted ambiguities and opportunities of conflict; episodic elections alone having proven insufficient to radically redefine the avenues and the direction of change. On the other hand, the restoration of such ambiguities and opportunities of conflict implies the proportional cancellation of normative differentiation, which exists only when certain ambiguities and opportunities of conflict are temporarily, but resolutely, subtracted from cultural production and societal intercourse occurring at present, in the shape of extant institutions.

This is why in modern society, where myth has been allegedly overcome for the sake of reason, unreason reappears not only as the nourishment of all forms of hope and despair, but also as the basis of all truly political imagination and calculi of the possibilities of innovation and material progress. If one form of unreason has become the modern mind’s neurotic bent, another has become simply the often politically disfavored – because creative and emancipatory – idea or practical initiative from which higher-impact ambiguities and opportunities of conflict might develop. “Reason” has therefore come to constitute the basis of self-deception, as unreason became the foil of emancipation from natural fate and moral oppression. Thus self-deception became (through reason) a characteristic of modern political rationality only because

emancipation has become (through unreason) a real, objective possibility. In short, unreason became the path to the suppressed political essence of society as well as to the expansion of the possibilities of emancipation from natural and historical constraints.

This theme can be developed in the account, offered below, of early liberal normative differentiation and institutions, and of the criticisms they have been subjected to by more recent theoretical developments and practical initiatives. Such account is relevant for the characterization of the challenge of contemporary constitutional theory.

**Part II**

1. *The Early Liberal Legacy as the Denial of Political Essence*

The modes of determination of norms have not been unchanged in the history of Western societies. In pre-modern societies normative differentiation was objectively (publicly and collectively) entangled with myth. As suggested above, the objective entanglement with myth yielded a normatively differentiated structure of institutions. Such structure expressed necessarily the objective form of the political experience of the community.\(^{14}\) The development and bureaucratic (translocal, centralized) organization of a religious tradition\(^{15}\) which combined monotheism, prophetic revelation, and eschatological and soteriological perspectives of human existence was a specific rendering of such entanglement of normative differentiation and myth. The definitive disentanglement of normative differentiation from myth occurs when rational politics based on emancipatory legal institutions becomes an ideal as well as a practical possibility and enacted action.

Indeed, modern historical events have set in motion cultural and practical initiatives which have displaced the dominance of medieval moral theology and associated political experiences as the forces and procedures controlling normative differentiation in the West. Such initiatives forming relatively diversified but historically interrelated aggregates of experiments in thought and action can be broadly termed “liberal revolutions”. In their extended meaning, liberal revolutions include not only the overthrow of ancient or sacred privilege, but also a change in the conception and mode of achievement of normative differentiation.


Prior to the liberal revolutions, normative differentiation always necessitated objective entanglement with unreason.\textsuperscript{16} To such objective entanglement corresponded the institutions of theocratic rule and of natural economy.\textsuperscript{17} Under conditions of theocratic rule and natural economy, objectivity of institutions took ordinarily the form of ritualized conduct, and normative differentiation was, at crucial junctures, sanctioned by a priesthood or other proclaimers and administrators of mystery and revealed dogma. An alternative mode of determination of political rationality was the subjective and passive appeal to a demythologized conception of nature. This alternative, however, led only to skeptical surrender to emergent historical circumstances, which were attributed to natural fate, as in the detached hostility of stoicists to engagement in political activism or resistance.\textsuperscript{18}

Since the liberal revolutions, however, objectivity of institutions became independent from publicly ritualized conduct. Indeed, the liberal mode of normative differentiation required that the subtractions of ambiguities and opportunities of conflict become, in essential aspects, affirmative subjective events.\textsuperscript{19} By shifting the processes of normative differentiation from publicly ritualized conduct or inward fateful resignation into innovative imagination and action flowing from private normative differentiation, the liberal revolutions spurred a multiplication of creative intellectual and practical initiatives (scientific, economic, military and political) which combined to destroy once and for all the old institutions and sustain the possibility of permanent cultural and material progress. Such historical breakthrough occurred, as is well known, originally in the West.\textsuperscript{20} Private normative differentiation, as a mode of articulation of the political essence of society, can therefore be said to constitute a requirement of modern political rationality.

\textsuperscript{16} Primarily through myth, and secondarily through the “non-scientific” and ancillary means of prudential dialectics (as opposed to the “geometrical” method of natural law jurists), which was the method of law from the Roman jurisconsults to the medieval Bartolists. Prudence is non-scientific, in the sense that \textit{phronesis} is opposed to \textit{episteme}. On this latter point, cf. J. Habermas, \textit{Theory and Practice}, (Boston: Beacon Press, 1973) at 42. On the role of scholastic dialectics in early continental legal science, see H. Berman, \textit{supra}, note 12, at 143-151.

\textsuperscript{17} The conception of “natural economy” and its relationship with modernization experiments, possibilities of “reversal” to natural economy, imperatives of self-transformation and “anti-reversion policies” are articulated in R. Unger, \textit{Plasticity into Power}, (Cambridge: Cambridge University Press, 1987) at 8-96.

\textsuperscript{18} Cf. the remarks on Montaigne offered by Q. Skinner, \textit{supra}, note 3, at 275-284.


\textsuperscript{20} It was what Unger termed “the European escape from the cycle of reversion”. See R. Unger \textit{supra}, note 17, at 25-42.
However, once modern creative intellectual and practical initiatives had accomplished the historical breakthrough which allowed modern Western societies to increasingly secure themselves against the possibilities of reversal to theocracy and natural economy, practical and intellectual strongholds were developed to fortify those recently created institutions and intellectual paradigms whose rejection over time could further promote continuing cultural and material progress and emancipation. Arguments in favor of private normative differentiation have therefore soon and repeatedly superimposed on that requirement of modern politics the postulate that private subtractions of ambiguity and opportunities of conflict, which are supposed to result in permissible outward thought and action, had already yielded a relatively stable, unchanging — indeed, tendentially universal and thus uncontroversial — structure of knowledge, taste and practical righteousness. In this, the need to resort to unsettling substantive motivations constitutive of higher-impact ambiguities and opportunities of conflict was dispensed with. Reality thus allegedly became independent not only from objective unreason, as that of past ritualized conduct, but also from subjective unreason — the acknowledged possibility of privately generated normative instability, which could be intentionally directed towards the reform of existing conceptions and institutions. It is this liberal denial of self-criticism (which amounts to liberal self-deception) that accounts for the denial of political essence in modern constitutional experience.

Indeed the exercises in self-deception began as soon as a first round of intellectual and practical innovations brought by the liberal revolutions came to be interpreted as offering sufficient safeguards against a reversal to theocracy and natural economy. The theories of classical political economists and the practices advocated by them, together with the theories and institutional practices of English constitutionalism, were among the most influential of such exercises in self-deception. Both traditions were able to rely on an imagined form of intercourse with nature which, so they successfully recommended, must be attained through creative, emancipatory private normative differentiation. This took, on the one hand, the form of the moral (or legal) pursuit of claims and actions associated with the rubric "natural right", and, on the other hand, the form of the economic pursuit of claims and activities associated with the classical economic theory of value. Such innovations thus involved the creation of the modern constitutional government based on "natural" rights, and of the market economy based on self-governed practices of economic exchange that were independent from moral-

21. See infra, discussion on "natural right" and "absolute value".
theocratic norms (such as the "just price" of scholastics) and from mercantilist regulations.

To be sure, both the labor-\textit{cum}-natural law theory of property\textsuperscript{22} that came in support of the English political settlement of 1688-89 – which gave to the English constitution the foundations by which it became an admired example of civil government – and the classical economic theory of value had much in common.\textsuperscript{23} If for nothing else, both ways of going about normative differentiation relied on notions and correlative practices whose contradictory character was never made explicit at the time they were formulated:

(a) the idea and practice of emancipatory thought and action occurring through labour as private normative differentiation; and

(b) the notion that the objective result of such normative differentiation corresponds to "natural" right, or to "absolute" real value.

Thus, to the Lockean argument that society must rest on private appropriation of economic resources – through one’s mixing of one’s labor with whatever is thereby "removed" out of the state of nature and turned into claims constitutive of private property – corresponds the classical economists’ tacit derivation of the objective conditions of societal intercourse (i.e., the "exchange value") from such conditions’ "labor cost", as measured according to some unchanging, natural or absolute criterium equated with "real value".\textsuperscript{24} These are versions of the very same central thought, namely that private normative differentiation necessarily yields an objective structure of knowledge or righteousness claims that is held to be inherently stable or acceptable and thus shielded


\textsuperscript{23} This argument draws on G. Myrdal, \textit{The Political Element in the Development of Economic Theory} (Cambridge: Harvard University Press, trans., 1965) at 56 \textit{et seq}. The notion of "fundamental law", prominently cultivated by English jurists, but which Myrdal does not address, must also be mentioned. In English legal tradition, up to the civil wars, emphasis had been placed on ancient custom or constitution, which was brought in the defence of feudal privilege against royal prerogative. But "the period following 1688 witnessed a transference of emphasis from ancient custom and precedent to unhistorical reason", John G. A. Pocock, \textit{The Ancient Constitution and the Feudal Law} (Cambridge: Cambridge University Press, 1987) at 229-251, 241. The notions of fundamental law and natural right therefore served the same general political purpose.

\textsuperscript{24} Classical political economy provided a very problematic account of the objective socio-economic order. As expressed by Myrdal, "[b]oth Smith and Ricardo define value in the first place as exchange value. In the course of the explanation they smuggle in the theory of real value without a thorough discussion of its nature", G. Myrdal, \textit{supra}, note 23, at 61. Thus, "classical writers ... presupposed an absolute real value in terms of which both magnitudes of the ratio are expressed. An invariable measure of value implies an absolute, intrinsic value. This entirely unempirical fiction underlies the whole classical system and pervades even its otherwise sound arguments": \textit{ibid.}, at 66.
from privately generated moral or political challenge. Consequently, this objective structure is also shielded from the possibility of explicit, self-conscious revision and purposive historical demise. This central conception of "natural" righteousness was also embraced in the European continent by the *philosophes*, and was celebrated as the foundation of post-revolutionary civil government and social order.

As an objective political experiment, the liberal mode of normative differentiation, with the characteristic ramparts of self-deception bolstered by the notions referred to above (natural right and absolute real value), successfully supported the attempt by political actors and thinkers to suppress or reduce to practical meaninglessness the activities of normative differentiation occurring in received objective institutions, above all in the Roman Church, and in the latter's independent, Reformation-bred princely surrogates. This was done chiefly by means of the elaboration and administration of modern legal-constitutional frameworks.

The development of such frameworks, together with the elaboration of the doctrines proposed by classical economic theory, supported the well-known liberal recipe for the conduct of what were conceived as the means of the rational organization of society. Thus the first round of intellectual and practical innovations brought by the liberal revolutions produced combinations of:

(a) constitutional governments, imagined as harmonious or equilibrated political systems under which the society of governed was to be quite naturally and quite flawlessly embodied in a few simple institutions – typically, a demythologized monarchy subdued by a complacent parliament committed to a self-reassuring credo of natural righteousness;

(b) *laissez-faire*, as a result of the enforcement of the liberal ("natural") constitutional rights;

(c) minimal taxation (with no progressive taxes), and modic public expenditure, including that for military purposes;

(d) free trade;

25. Although Locke refers both to revelation and natural reason it is to the latter that he turns in order to justify individual property ("God, who hath given the world to men in common, hath also given them reason to make use of it to the best of life and convenience"). Labour, the means to appropriate nature, is what is truly rational and capable of yielding utility in natural resources employed to the best of life and convenience.

(e) benevolent colonialism; and
(f) the gold standard. 27

These were the formal instruments which set the liberal societies in motion. Such instruments allowed social groups to break away from the theocratic-totalitarian yoke. Yet, as discussed above, by affirming through their core doctrines (natural right and absolute real value) the attainment of definitive truth in respect of the political foundations of the social order, those instruments were also the means through which was accomplished the denial of the political essence of society. Such denial of political essence became a source of constraint and oppression. 28

It goes without saying that such formal instruments resulted from experiments in thought and action which could not have been pursued in practice as the application of an accomplished and tightly knit theory or set of policies. In other words, these instruments were experimental, as much as any tentative enterprise of historical innovation. Therefore they necessarily varied in their concrete embodiments, pace of accomplishment, and in the extent of their failure or success, while promoting (or constraining through self-deception) further experimentation and creative initiatives in thought and action by the members of the societies that first sailed in the winds of the liberal revolutions. And it was probably because self-deceptive constraints impinged upon further experimentation that criticisms of the early liberal legacy soon emerged.

2. Criticism from the Right
If the above indications can be accepted as a fair account of the early liberal mode of normative differentiation and of its respective institutional results, then the criticism of them, as offered by late-liberal and postliberal intellectual traditions and practical initiatives, can be considered at this point. Such criticisms can be divided into three main bodies of theories and correlate sets of institutional practices.

First there are the theories which accept that normative differentiation is private. But under such theories the importance of private normative determinability is minimized by the argument that the unbiased, perfect translation of private normative differentiation into externalized, objec-

27. The characteristic early liberal practices regarding laissez-faire, taxation, public expenditure, international trade, colonial policies and the gold standard are stressed in J. Schumpeter, History of Economic Analysis, (New York: Oxford University Press, 1954) at 396-407. Schumpeter describes these practices as elements of the sociopolitical background of the period from 1790 to 1870, the period of economic liberalism.
28. The denial of political essence indeed often led to perverse obscurantism and to the defense of vested interests, as stressed by M. Horkheimer, supra note 19, at 24-25.
tive institutions is achieved if (and only if) positive scientific method exclusively is employed in ascertaining and in building the order of society.

These are claims upheld by positivist social science and jurisprudence, from Bentham to Comte, to von Stein and beyond, and by neo-classical economics. In this late-liberal, positivist line of criticism of the early liberal mode of normative differentiation and correlate institutions, the denial of the possibility of controversial grounds and results of the private subtractions of ambiguities and opportunities of conflict (being such denial, as discussed above, self-deception) is shifted to a ritualization, so to speak, of "scientifically" generated knowledges and technical innovations. At the same time, because they are seen to be associated with religious or metaphysical concerns, the institutional harbors of "non-scientific", "non-technical" normative determination characteristic of early liberalism tend to be suppressed. Thus, for example, Comte attributed the prestige of the institutions of liberal politics to what he regarded as a deplorable "constitutional metaphysics" which reduced "fundamental regeneration to a feeble universal imitation of the transitory constitution peculiar to England"; while Bentham described as utter "nonsense" the idea of natural right, celebrated in the 1791 French Declaration of the Rights of Man. The "ritualization" of scientific method by means of "positivism" was the way in which the denial of political essence was now achieved, but with altogether different objective outcomes.

Indeed, the institutional practices which are sanctioned by this first line of criticism are the "temporal dictatorships" the "panopticons", the allegedly non-political, uncontroversial practices of technocratic social engineering, as well as economic practices which constituted deviations from the policies associated with classical political economy, and which were provided "rational" explanations by theories of marginal utility proposed by neo-classical economics. In such deviations, which were meant as devices compensatory of perceived insufficiencies of existing institutions, were included:

29. On the emergence of positivist social science, see generally H. Marcuse, Reason and Revolution, (Atlantic Highlands: Humanities Press, 1983) 323 et seq. On neo-classical economics, see infra, note 32.
32. On the theoretical foundations of neo-classical economics, see the account of the "Jevonian Revolution" presented by Maurice Dobb in his Theories of Value and Distribution since Adam Smith, (Cambridge: Cambridge University Press, 1973) at 166-210. See also J. Schumpeter, supra, note 27 at 909 et seq., and G. Myrdal, supra, note 23, at 80-103.
(a) public regulation of hitherto privately conducted economic activity, from factory legislation and antitrust laws to imperialist foreign policies and protectionist tariffs;

(b) progressive or corrective taxation;

(c) public expenditure for social purposes; and

(d) the resort to central bank supervision in the control of money market.33

At the legal-constitutional level, these compensatory devices corresponded basically to an expansion of constitutional rights, so as to include (paradoxically alongside, and not in stead of, the "natural" rights devised earlier) claims that could not be pursued on the basis of exclusively private normative differentiation, as occurred in the phase of early liberalism. Rather, the fulfillment of the new rights depended on the practicability of the compensatory devices mentioned above.

Thus, from its formulation in Robespierre's famous draft of the Declaration of Rights of April 21, 1793, which filtered into the French constitution of June 24, 1793, down to the end of World War I, the idea became widely accepted and put into practice, that constitutions must provide not only for the classical individual rights, but also for collective or social rights.34 This implied, however, the objective availability, in some measure, of institutions of civil government which did not entirely rest on the early liberal credo of "natural" righteousness, but rather depended on positive scientific knowledge.

In deep contradiction to this reform of the system of rights, the parliamentary form of government—which, as conceived and functioning under the natural rights-based "political equilibrium" doctrines of English-style constitutionalism, was the very practical embodiment of self-deception—was generally maintained as a legal-constitutional model of the political system.35 The explanatory and technical tools of neo-

33. These were policies described by Schumpeter as part of the sociopolitical background of the period from 1870 to 1914. See J. Schumpeter, supra, note 27, at 766-771. The limits of the innovative thrust of the new policies can be grasped in Schumpeter's remark about the decline of the "serene confidence in laissez-faire", which had been characteristic of early liberalism. Now, by contrast, "[e]conomic liberalism ... became riddled with qualifications that sometimes implied the surrender of its principles", ibid., at 761.
35. According to Mirkine-Guetzévitch, the build-up of tensions between the Executive and Parliament (the renforcement de l'Exécutif), which was part of the characteristic tendency of constitutional revisions in the interwar period in Europe, was the exception to the general model of constitutional organization under parliamentarism. The doctrinal scheme remained that of the Executive subjected to control by Parliament. This is at the bottom of what Mirkine-Guetzévitch described as the "rationalization of power" (rationalization du pouvoir) which occurred in the propagation and adaptation of English-style constitutionalism in the European continent. Cf. Mirkine-Guetzévitch, supra note 34, at 166-183, 195-215.
classical economics provided convenient means for the late-liberal and allegedly non-political adaptation of certain objectively available bureaucratic capacities of the State to the management, for redirection, of some of the consequences of self-deception under the old legal-constitutional core of early liberal politics. An example of this can be found in the introduction, by the marginalist economist Boehm-Bawerk, of progressive income tax in Austria in the late nineteenth century.\(^\text{36}\)

Finally, it should be mentioned that a variant of the positivist line of criticism was developed which, while involving the ritualization, so to speak, of its supposedly "scientific" and uncontroversial method, constituted predominantly a form of apology of the early liberal mode of normative differentiation, since it did not focus or count upon the objective availability of institutions of civil government capable of implementing deviations from the early liberal recipe. This was the "sociological tradition",\(^\text{37}\) which in this respect paralleled the jurisprudential developments associated (a) with the conservative German corporatist tradition, (b) with neo-scholastic French institutionalists, and (c) in general with much of the doctrinal speculations of the school of droit social.\(^\text{38}\)

3. Criticism from the Left

There is a second major line of criticism of the early liberal mode of normative differentiation. This line of criticism holds that the subtraction of ambiguities and opportunities of conflict from the processes of cultural and material production is largely involuntary or unconscious, and independent from a conceived or experienced "natural" order. Private normative differentiation is, in this view, irrational and therefore incapable of generating any stable objective institutional means of sociopolitical cohesion in the long run. Instead, it is argued, private normative

\(^{36}\) See J. Schumpeter, \textit{supra} note 27, at 769. As noted by Schumpeter, "It is not only that leading academic authorities, such as Marshall, began to approve of what was considered high direct taxation — including inheritance taxes — but also that they began to espouse what was a mortal sin against the spirit of Gladstonian finance, namely, a policy that went beyond taxing for revenue only and aimed at taxing in order to change ("correct") income distribution", \textit{ibid.}, at 945.

\(^{37}\) See R. Nisbet, \textit{The Sociological Tradition} (New York: Basic Books, 1966). Nisbet's survey of nineteenth-century sociology serves to underscore the point that the authors of that tradition were unable, in their criticism of modern society, to appeal to, or conceive of, alternatives to tradition or conservative morality.

differentiation, because largely independent from consciousness and conscious action, is bound to cause deep objective contradictions, and is therefore historically self-destructive. This is the view championed by Marxism, and appears, although quite ambivalently, throughout Marx’s works.

The ambivalence of the Marxist criticism of liberal normative differentiation stems from the following characteristic of Marx’s thought. In Marx’s early works, emphasis is given to Hegelian themes of ideal subjectivity. To this thematic emphasis may be attributed Marx’s requirements of self-consciousness of human activities. But in Marx’s mature works, the emphasis is turned to themes of political economy, where self-consciousness, while still a requirement for Marx, is rather noted for its absence in economic terms. One instance of this materialistic criticism of the liberal mode of normative differentiation is formulated in Marx’s famous description of his critique of political economy:

In the social production of their life, men enter into definite relations that are indispensible and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. At a certain stage of their development, the material productive forces of society come in conflict with the existing relations of production. Then begins an epoch of revolution.

Another formulation of this same criticism is the theory of value Marx advanced in Capital. By restating central tenets of political economy and criticising them, Marx could offer a critical account of economic exchange, which, as a principle of modern social interaction, necessarily involved a ritualization, so to speak, of its own processes, expressed in Marx’s proposed “fetishism of commodity”. The concept of fetishism of commodity, as much else in Marx’s work, offers rich grounds for the development of self-criticism. In general, self-criticism has been pursued

40. The question of the relationship between the earlier and the later portions of Marx’s work, and therefore also of the interpretation of Marx’s thought as a whole by reference to a proposed theoretical division or continuity in Marx’s writings, has given rise, as is well known, to an extensive debate. See L. Kolakowski, 1 Main Currents of Marxism, (Oxford: Clarendon Press, 1987) at 262-263.
43. Ibid., at 163-177.
in the context of works that tend to converge with the third line of criticism of the liberal mode of normative differentiation, as will be discussed later.

What should be stressed at this point is that the Marxist line of criticism can involve (and indeed has often involved) the theoretical core conceptions and difficulties of historical materialism, for Marx's mature work may also be read as claiming, or aspiring to, the attainment of positive objectivity, as a cure for private normative differentiation occurring under liberal theories and institutions.

Indeed, the conception of Marxism as a positive, empirical science, capable of offering uncontroversial knowledge of history and society, has been often espoused by Marxist writers and politicians, from Engels and Kautsky to Lenin and Bukharin.44 The critique of the liberal mode of normative differentiation and liberal institutions based on such interpretation of Marx's works thus tends to follow much of the late-liberal, positivist line of criticism described above, often leading to comparable diagnoses of institutional wrongs and prospective alternatives: the substitution of party rule and tendentially uncontroversial technocratic central planning for what is perceived to be a superstructural masquerade of false ideas and deceiving practices concerning the material processes of societal interaction (the counterparts to Comte's "constitutional metaphysics" or to Bentham's similar dislikes for the old liberal legal and political philosophies and practices). In this, exclusive theoretical props of historical materialism are resorted to, which point in the direction of a ritualization, so to speak, of the objective inevitability of the materialist interpretation and predictions of history, which were, if nothing else, imposed as orthodoxy by party discipline. The resulting lack of self-criticism has been a Marxist form of self-deception, which is also conducive to the denial of the political essence of society.

There are, however, other ways of interpreting the works of Marx which neither stress themes of absolute ideal subjectivity nor rely on deterministic materialism. Specifically as a line of criticism of the liberal mode of normative differentiation, the theories which propose conceptions of the superstructure as being relatively autonomous from economically determined relations present interesting attempts to undermine the self-deception which breeds under the "deterministic" interpretations of Marx.45 Indeed, State-centered analyses such as those advanced by

Althusser, Poulantzas, Offe and Skocpol constitute some of the examples of attempts to avoid the trappings of self-deception characteristic of deterministic Marxism. For such alternative analyses tend to inquire into the existence of objective institutions which are not posited by economic presuppositions (self-defined as "scientific", uncriticizable truths). In other words, such alternative analyses are conceived not to be entirely determined by a scientifically ascertainable economic base, but they are also understood to have definite relationships with the subjective processes occurring in the society and existing in the immediate experience as objective political practices and social relations.

Indeed, the interesting aspect of these works is that they tend to require that themes which are usually tucked away from emancipatory criticism — and ensconced under the presuppositions of "naturalness" of liberal rights, "absoluteness" of classical economic value, and uncriticizable "scientificity" of positivist social and economic science, and deterministic historical materialism — be made available for scrutiny. But this begs the question: scrutiny in the name of which values or authorities? As pointed by Jessop, one of the features of such State-centered studies is their understanding that the conceptual significance of the State "cannot be determined a priori, but depend[s] ... on conjunctural analyses". In other words, the acceptability of the knowledges generated under the State-centered studies rests on certain generalizations of empirical facts which depart from received orthodoxies about the social functions explanatory of the State (and hence of politics) in conventional social science. But this would scarcely seem possible if such functions explanatory of the State and politics would correspond in fact to early and late liberal, self-deceptive propositions. The answer to the question raised seems to be then that State-centered studies only make sense because they are practically inscribed in the context of, and therefore as intellectual enterprises benefit from, the conditions of the "new constitutionalism", under which ambiguities and opportunities of conflict afforded by the legal constitutional framework do in the last instance prevail, including with respect to the elaboration of "scientific" knowledge, as will be described later.

47. For a survey of the State-centered analyses referred in the text, see B. Jessop, "Recent theories of the capitalist state", in (1977) 1 Cambridge Journal of Economics 353-373.
48. Ibid., at 356.
49. See infra, Parts III and IV.
The development of the claims of this strand of Marxist analysis tend to converge with the views proposed by a third line of criticism of the liberal mode of normative differentiation discussed below. But before turning to that discussion, a word must be said about the practical side of the Marxist line of criticism of the liberal mode of normative differentiation.

The historical experiments which in this century have been enacted as the "socialist" round of intellectual and material innovations have involved no major reformulations of institutions of civil government. Indeed, for the sake of revolution, there was no experimentation with the legacy of liberal constitutionalism. There was, instead, experimentation with the mixing of wanton party-based despotism with technocracy, most often in the name of a deferred post-revolutionary future. Thus the leading socialist historical experiments in economic centralization (socialist planning) and party rule have led to results which, as a whole, can hardly be considered preferable to those obtained in the industrialized societies of the West, since, as totalitarian practices, they have obviously foreclosed self-criticism and emancipation to a much greater extent than that which would seem possible or conceivable under the institutions grown in the tradition of liberalism.

This claim, however, would be at odds with the contentions of the third line of criticism of the liberal mode of normative differentiation. The third line of criticism understands that the first round of innovations brought by the liberal revolutions, together with the late-liberal deviations from the initially defined knowledges and prescribed institutions, have already by themselves originated a world of totalitarian oppression.

4. A Third Vantage Point? Toward a "New Constitutionalism"

Indeed, the third line of criticism of the liberal mode of normative differentiation postulates that the private subtraction of higher-impact ambiguities and opportunities of conflict from the processes of societal interaction is ordinarily foreclosed under modern institutions. Thus, according to the third line of criticism, the institutions that have emerged from the liberal revolutions and their modifications by subsequent positivist criticism are ordinarily completely objective. This is the postulate of comprehensive objectivity of institutions. But it is also argued that such institutions are capable of being directed toward the promotion of certain ends. These may include, and be limited to, the stabilization of the fundamental societal and statal processes that sustain the status quo. However, the ends may also be incompatible with the current order. The argument is, in other words, that the general ends of human action are rationally "unknown", being therefore in this sense "unreasoned" ends. Consequently, reliance on objective institutions is unavoidable and may either sustain or conflict with established social reality.
The third line of criticism may therefore be developed either in an apologetic, or in an actively innovative direction. In the latter case it may be said to follow, and in the former to let go unfulfilled, the requirement of emancipatory criticism. The third line of criticism of liberal normative differentiation is mainly associated with Weberian social science, including much of the work of Frankfurt School theorists, and with Keynesian economics. These contributions will be discussed in the following paragraphs.

Weber's analyses of modern society differ sharply from those advanced in both the first (positivist) and the second (Marxist) lines of criticism of the liberal mode of normative differentiation. The whole work of Weber can indeed be understood as the product of a continuous effort to distinguish his views from those of each of the lines of criticism mentioned above. Thus in his discussion on scientific method, for example, Weber distinguishes empirical judgements of fact from judgements of value, while also insisting that any scientific ascertainment of empirical knowledge necessarily involves value suppositions which neither stand on their own as absolutes nor are determined by empirical or economic factors. Therefore, without yielding to commitments to absolute ideals, Weber's views on method also reject the uncritical acceptance of scientifically generated knowledge, either in its manifestation as a positivist stance, such as that of the first line of criticism described above, or in its formulation as deterministic Marxism. But Weber's rejection of the materialist conception of history in his sociological writings is certainly more spectacular than that articulated through his discussions on methodology. In fact, Weber's insistence on the importance of ideas, especially religion, in the explanation of the emergence of modern society, stands as an impressive refutation of the materialist conception of history.

What appears to be Weber's central concern with regard to the characterization of political rationality in the modern world is the notion that comprehensive rational calculability, attained through modern legal-bureaucratic institutions, has become a deeply ironic condition. The sense of irony stems from the recognition that ultimate moral values cannot be rationally determined as absolutes: they remain always "unreasoned" ends. In other words, since for Weber modern rationality is purely of a formal kind, no superior value or all-embracing conception

of order can be relied upon as a view which offers indisputable moral reassurance, such as occurred previously under pre-modern institutions. The modern world of rational calculability, built out of religious asceticism, has tragically become, in Weber’s famous phrase, an “iron cage” from which humanity cannot escape.\(^5\)

Weber’s pessimism or sense of irony and his emphasis on formal calculability as the principle of modern rationality was incorporated in the work of the theorists of the Frankfurt School, who hoped to pursue a theoretical agenda that would have definite normative import with respect to concrete sociopolitical practice.\(^5\) While the early project of Horkheimer’s “critical theory”, in seeking such practice-bound normative closure, turned to the role of the proletariat as the class-struggle corollary of the materialist interpretation of history,\(^5\) the pessimistic, ironic criticism of modern rational calculability was greatly stressed in the general work of the group.\(^5\) Granted that the normative ambitions of the Frankfurt School project has remained throughout the intellectual career of the group, the fact that its thematic emphasis was made to include concerns identified with Weberianism may well be considered as indicative of what both perspectives (Marxism and Weberianism) share in common.

Indeed, while in Marx’s works there is a tension between the endeavour of criticizing Hegelian philosophy (ideal subjectivity) and that of criticizing classical political economy (the material objectivity associated with the classical conception of “exchange value”), in Weber a comparable tension is implicit in the conflicting claims that (a) the modern world is organized on the basis of purely formal calculability, and that (b) the institutions through which formal calculation is accomplished have become the fetters of humanity.\(^5\) If the Hegelian-Marxian ideal subjectivity of self-consciousness and its Weberian counterpart, the principle of required calculability, are bluntly rejected, then a relapse into pre-modern ritualized conduct may result (and it is here that Weberianism raises its ironic stance as a call for emancipation, and that Marxism claims

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52. Ibid., at 155-183, 181-82.
56. On the relationship between the thought of Weber and that of Marx, see the essay by K. Loewith, *Max Weber and Karl Marx*, (London: George Allen & Unwin, 1982). Loewith suggests that the vital impulse which animated the intellectual efforts of both Marx and Weber was “something akin to human emancipation”, *ibid.*, at 22 and *passim*. 
to offer an alternative direction of thought and action). On the other hand, if the Marxist criticism of political economy and its Weberian counterpart, the ironic, pessimistic appraisal of modern institutions, are set aside, then either (a) the naive acceptance, and hence repressive imposition, of the objectivity of empirical facts (status quo), and (b) themes related to absolute ideal self-consciousness may arise. It is important to stress that Weber does not yield to traditionalisms or moral-religious collectivisms, as do, for example Durkheim or Tocqueville. Thus the combination of the postulate of comprehensive objectivity of institutions and the pervasive sense of irony seems to indicate that for Weber calculability should be made to overlap with emancipation. Weber’s conception of engaged but “value-free” objectivity and his theory of charismatic leadership can be understood as attempts to deal with this problematic aspect of his thought.

It should furthermore be added that the third line of criticism of the liberal mode of normative differentiation has also received significant impetus from the rise of Nietzscheanism, or modern irrationalism. In a broad sense, Nietzscheanism is the enthronement of the unreason inherent in the rationally calculated world which results from private normative differentiation. It is the unyielding and incorrigible experiencing of such unreason as the primary source of self-understanding. Indeed, the Weberian sense of irony, which appears also in Weber’s thesis of the “disenchantment” of the world, is not completely disconnected from the Nietzschean drive to overcome subjectivity, as the reference to Nietzsche in Weber’s “Science as a Vocation” indicates. Nietzscheanism expresses the idea that the liberal revolutions quickly generated a world in which rational calculation encountered and recognized its limits. With Nietzscheanism, rationality can no longer be purely conceptual, as it had


58. Nietzscheanism, in the sense the word is employed here, is synonymous with “modern irrationalism”, and translates generally into the works of the so-called Lebensphilosophen, or “vitalist” philosophers. Cf. G. Lukacs, The Destruction of Reason, (Atlantic Highlands: Humanities Press, 1981), where a sweeping criticism of the “vitalist” philosophers (among whom Lukacs includes Weber and the pragmatists, represented by William James) is offered from a Marxist perspective.

59. “Since Nietzsche we realize that something can be beautiful, not only in spite of the aspect in which it is not good, but rather in that very aspect. You will find this expressed earlier in The fleurs du mal, as Baudelaire named his volume of poems. It is commonplace to observe that something can be true, although it is not holy or not good. Indeed it may be true on precisely those aspects. But all these are only the more elementary cases of the struggle that the gods of the various orders are engaged in”: M. Weber, “Science as a Vocation”, in Max Weber on Charisma and Institution Building, (Chicago: Chicago University Press, 1958) at 294-309, 308.
been until Hegel. This is translated in the Marxist slogans on the primacy of experience over philosophy,60 in the Erlebnis of phenomenology,61 in the Weberian sense of irony, and it was brought to a sort of culmination in Nietzsche.

On the practical side, the third line of criticism of the liberal mode of normative differentiation has corresponded eventually62 to the development of the full-fledged welfare state, including, in many societies, economic planning,63 based chiefly on a new constitutional tolerance with regard to expanded normative competence and autonomy of administration (as opposed to parliamentary legislation and dispensation of liberal justice) and on policies associated with Keynesian economics.64 From the juridical point of view, as will be seen later, the novel institutional practices may described as a “new constitutionalism”.

Under Keynesianism and the new constitutionalism, what were mere “compensatory devices”, accounted for by the theoretical instrumentalties of neo-classical economics, win the chance to become the practical stuff of centrally and formally controlled, but (as regards substance) politically ambiguous, policy innovation initiatives. This has involved mainly the abandonment of the three sacred canons of politicoeconomic practices, which still had not been displaced by the late-liberal criticism of the early liberal legacy. These canons were (a) the English-style constitutional government, (b) the balanced budget, and (c) the gold standard. English-style constitutionalism has been superseded by internally polarized governments and in-flux systems of rights, the balanced budget by deficit spending, and the gold standard by the Bretton Woods framework. The aspects of these developments relevant for the present discussion will be addressed in the paragraphs that follow.

Keynesian economics can be broadly viewed as the form of economic analysis and policy-making which understands that (a) the adopted forms

60. See, e.g., Karl Marx, “Theses on Feuerbach”, in The Marx-Engels Reader, supra note 40, at 143-145.
62. After the overcoming of the terrifying experiences under national socialism and fascism.
63. See Andrew Shonfield, Modern Capitalism, (London: Oxford University Press, 1965) at 71-236.
64. The terms “Keynesianism” and “Keynesian economics” are employed expansively in this article. They designate not only the ideas pulled together in John Maynard Keynes’ General Theory of Employment Interest and Money, (London: Macmillan, 1936), but also in general the attitudes and looser conceptions that informed policy-making for which the works of Keynes (or at least the practical directions of macroeconomic management to which they pointed) remained important formal references, inspite of the existence of other strands of economic thought (notably the German “social-market economy” doctrine). For relevant discussions of the influence of Keynes’ ideas, see works by various authors collected in Peter Hall, ed. The Political Power of Economic Ideas: Keynesianism Across Nations, (Princeton: Princeton University Press, 1989).
of socioeconomic interaction cannot be considered as the mere result of the private normative differentiation occurring in the society, which as such is conducive to inefficiencies and above all to "involuntary unemployment"; and that (b) objectively available institutions (namely, public bureaucratic capacities) may be relied upon or developed in order to promote desirable goals not fulfilled under current knowledges and practices.

Therefore, at a general level, Keynesian economics adheres both to the postulate of comprehensive objectivity of institutions and to the claim that objective institutions may or must be criticized and reformed. Keynes indeed expressed ideas along these lines in his famous essay against the liberal credo of laissez-faire:

It is not true that individuals possess a prescriptive 'natural liberty' in their economic activities. There is no 'compact' conferring perpetual rights on those who Have and on those who Acquire. The world is not so managed from above that private and social interest always coincide. It is not so managed here below that in practice they coincide. It is not a correct deduction from the Principles of Economics that enlightened self-interest always operates in the public interest. Nor is it true that self-interest generally is enlightened .... We cannot, therefore, settle on abstract grounds, but must handle on its merits in detail what Burke termed 'one of the finest problems of legislation, namely, to determine what the State ought to take upon itself to direct by public wisdom, and what it ought to leave, with as little interference as possible, to individual exertion.'

As is apparent in the above text, Keynesianism abandons all possibility of naive reliance on the liberal mode of normative differentiation and advocates the resort to objectively available institutions. But Keynesian reformism can be concerned predominantly with the attainment of long-lasting conditions of "equilibrium" growth or economic management, under which devised forms of societal and statal interaction (economic aggregates and their interrelationships) are conceived to be stabilized and relatively insulated against emancipatory criticism or radical practical change. This appears to be the case not only with the reduction of Keynesian economics to the consensus formed in the economics profession as to the policy implications of Keynes' works, but also with post-Keynesian debates about the explanation of stable economic growth in

66. See, e.g., Hansen's summary of the prescribed "many-sided" attack on inflation: "1. Judicious use of monetary policy. Moderate control of the use of credit. 2. Fiscal policy — maintenance of high taxes, scrutiny of expenditures and postponement of all capital outlays not justified on strong grounds of national policy ... 3. In addition to the judicious use of monetary
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macroeconomic terms. If it can be agreed that the particular positions within post-Keynesian economics vary with respect to how the problem of the uncertainty of future expectations (which had been stressed by Keynes) is dealt with, then it must follow that the theories which propose models of stable growth or equilibrium without major qualifications can be understood as attempts to downplay important discontinuities in the constitution of economic aggregates and their interrelationships. They can therefore yield knowledges which deceivingly depict society as a larger compound of self-sustaining, self-regulated systems of interrelated practices not subject to major conceptual or practical discontinuities rooted in the political essence of society.

The theories which propose such self-sustaining macroeconomic systems, although adhering to the postulate of comprehensive objectivity of institutions (as far as they rely on economic models which relate aggregates of forms of human interaction as objective totalities, e.g., "labor supply", "savings", "investment", "wage variations", "profit variations", and so forth), are in fact self-deceptive, since they tend to foreclose emancipatory criticism/reformism, which would presuppose a more resolute willingness to incorporate substantive political issues into the theorization of models and connected policy implications. Of course

policy and a firm use of fiscal policy, minimum direct controls ... Moderation and self-restraint are essential for the survival of free democratic government", A. Hansen, Monetary Theory and Fiscal Policy, (New York: McGraw Hill, 1949) at 166. Keynes himself did not provide a systematic and detailed presentation of the policy implications of his economic ideas. The "Concluding Notes on the Social Philosophy towards which the General Theory might lead" are sketchy, as the title of the chapter itself indicates. See J. M. Keynes. General Theory, supra, note 63, at 372-384. Keynes discussed his views on policy in more detail in his occasional writings, such as "Can Lloyd George Do It?", "The Economic Consequences of Mr. Churchill", and "The Means to Prosperity"; see J. M. Keynes, Essays in Persuasion, supra note 65, at 86-125, 207-230, 335-366.


68. This is, in the words of J. Robinson, the distinguishing mark of post-Keynesian economics: "When Keynes was writing The General Theory, his main difference from the school from which he was struggling to escape lay in the recognition of the problem of effective demand, which they ignored. It was for this reason that he put everyone from Ricardo to Pigou into one category ... After the book was published, he drew the line differently. He saw that the main distinction was that he recognized, and they ignored, the obvious fact that expectations of the future are necessarily uncertain. - It is from this point that post-Keynesian theory takes off. The recognition of uncertainty undermines the concept of equilibrium", J. Robinson, "Foreword" in A. Eichner, ed. A Guide to Post-Keynesian Economics, (New York: M.E. Sharpe, 1978) at xi-xxi, xi.

such incorporation of political issues must not, and probably cannot, take the form of loose ideological speculations. It can, however, be articulated as an enlarged ability to expose contradictions and discontinuities among proposed economic analyses and correlate policy prescriptions, in view of their disparate "political" (substantive) implications.

Another way of stressing the same point would be to say that, in such proposed self-sustaining economic systems, the ironic pessimism of Weberian sociology (or its Marxian counterpart) is missing, because it is replaced by coherent but uncritical theoretical solutions which do not reflect in a larger measure the conditions of the "new constitutionalism", which, as will be seen later, require that discontinuous concepts, rooted in an unstable pool of substantive motives comprising an "ideological slack", be articulated as temporarily stabilized knowledges and institutions.

In sharp contrast to the conservative, uncritical Keynesian quest for stable equilibrium or growth, stands the work of economists who adhere not only to the postulate of comprehensive objectivity of institutions but also to that of emancipatory criticism. The general thrust of this strand of Keynesian (and post-Keynesian) economics - which in this aspect would be comparable with the normative aspirations of the Marxist-Weberian sociology of the Frankfurt School theorists - is the tendency to generate knowledges and prescribed practices which can come to constitute potentially emancipatory objective relations. To attempt to indicate the extent to which post-Keynesian economics has succeeded in proposing emancipatory knowledges (or policy prescriptions), or to attempt to determine precisely which groups of post-Keynesian economists have advanced more clearly in critical directions is of course beyond the scope of the present discussion. It will suffice to consider that the break with past economic orthodoxy brought by economists such as Keynes, Kalecki and the members of the so-called "Stockholm school" have probably provided the first practical-theoretical impulse of emancipatory criticism of resilient ramparts of self-deception characteristic of the early-liberal and late-liberal experiences, without, however, falling prey to self-deception of the kind bred by deterministic Marxism. This impulse can either be further developed and diversified, or be opposed, by subsequent economic doctrines.

70. P. Davidson, supra note 67, provides a classification of the lines of post-Keynesian economic theory, and names well-known representatives of each.
Part III

1. The New Constitutionalism at Work

At the strictly legal-constitutional level, the innovations which are associated with the third line of criticism of the liberal mode of normative differentiation are, as indicated above, those of a "new constitutionalism". Such new constitutionalism is characterized by:

(a) the internal polarization of government (where administration and parliament are in constant actual or potential opposition) due to the increasing technical role acquired by the executive branch, which unfolds in burgeoning expert bureaucracies whose activities and relationships with private normative differentiation occurring in the society are far from being articulated in a comprehensive fashion by public or private law; and

(b) a constant and extensive undermining, by bureaucratic regulation, including the "guiding influence" of monetary and fiscal policies, of the system of liberal ("natural" plus "social") rights, which is consequently pushed into a state of flux.

Both the internal polarization of government and the constant legal-bureaucratic deformation of the system of rights (which thus becomes a system of rights-in-flux, in which moreover the distinction between individual and social rights becomes relativized) stem largely, it must be conceded, from Keynesian policies. Such policies have built into the novel constitutional practices a constant potential of subversion of the established order, a potential which did not previously exist as an instrumentally controllable condition, i.e., as a condition of objective institutional availability to formal calculation in the Weberian sense.

Such built-in potential of subversion of the legal system as the normative framework of society is expressed in the undertaking of governmental actions aimed at preventing or reversing drastic downturns or upswings in the economy, which links economic policy-making with

74. The expression is Keynes': "The State will have to exercise a guiding influence on the propensity to consume partly through its scheme of taxation, partly by fixing the rate of interest, and partly, perhaps, in other ways", J. M. Keynes, The General Theory, supra note 64, at 378.
75. Before Keynesianism, the result of economic policy, under liberal institutions, was mass unemployment, which has been a form of politicoeconomic retrenchment. Such retrenchment was the result of the impossibility of sustained internal polarization of government and flux of the system of rights beyond the point of materialization of the crise de confiance, the veto-power of financial capital. An excellent example of such impossibility was the spectacular failure of the so-called "Blum experiment", for an analysis of which, see reference infra note 97, O. Kirchheimer, "Changes in the Structure of Political Compromise"
ideological disputes that currently motivate social groups. These ideological disputes appear variously as discussions about the often conflicting aspirations existing in the society as "institutionalized" or "noninstitutionalized" interests. The former are those interests organized around stabilized aggregates of resources, including more or less exclusive channels of political negotiations with governmental bureaucracies. On the other hand, noninstitutionalized interests are those which fluctuate around inherently ephemeral but unsettling thematic campaigns, such as in environmentalist, feminist, or pacifist movements, and in populist appeals. In the process of dispute, concrete practices indirectly related to the inflation rate, the institutional structure of markets and of capital, to standards of professional conduct, and therefore in general also to the production of knowledge, and to the elaboration of standards of taste and righteousness are, on different occasions and in different degrees, brought into question.

This seems to be, in one way or another, what determines the decline of currently stabilized aggregates of resources which define materially crystalized interests (trade unions, corporations, governmental bureaucracies) constitutive of the status quo. The disputes and the political tensions which grow and die away, or result in emancipatory reform, are only possible because of the internal polarization of civil government combined with the undermining and relative flux of the system of rights.

The new constitutionalism therefore stimulates the expansion of practice-bound ideological speculation (which approximates, and tends to converge with, economic or business-type speculation) as part of the

76. For an assessment of the connections between the economy and the politics of contemporary industrial democracies, see D. Hibbs, Jr., The Political Economy of Industrial Democracies, (Cambridge: Harvard University Press, 1987).
77. See, e.g., A. Shonfield, supra note 63, at 128-129.
78. On the relevance of fluctuating, "noninstitutional" social movements in contemporary politics, see C. Offe, "Challenging the boundaries of institutional politics: social movements since the 1960s", in C. Maier, ed. Changing Boundaries of the Political, (Cambridge: Cambridge University Press, 1987) at 63-105. See also the discussion of the tensions between corporate and non corporate (i.e., institutionalized and noninstitutionalized) interests, see J. Goldthorpe, "The End of Convergence: Corporatist and Dualist Tendencies in Modern Western Societies", in J. Goldthorpe, ed. Order and Conflict in Contemporary Capitalism, (Oxford: Clarendon Press, 1984) at 315-343.
81. See, e.g., P. Starr & E. Immergut, "Health Care and the Boundaries of Politics" in Changing Boundaries, supra note 78, at 221-254.
"normal", i.e. ordinary, social experience afforded by the legal system operating under the "guiding influence" of economic policy. However, at the same time, it paradoxically frustrates the translation of such speculation into meaningful practice.

The latter point can be understood if one considers that while in pre-modern societies the possibility of innovation in thought and action remained subject to constraints posed by tradition and theocracy, and while after the liberal revolutions and the first two rounds of innovation (positivist and "socialist"), such possibility remained either harnessed to liberal law emanating from self-deceptive English-style constitutionalism or suppressed by totalitarian rule, in the "new constitutionalism", due in part to the operation of economic policy, such constraints have been significantly relaxed. As a result, a permanent ideological slack in the society has been created, and, although it was simultaneously neutralized by the so-called de-ideologization of postwar political parties82 (which has thwarted translation of radical deviant speculation into policy outputs) it did, precisely in this form, become the required counterpart of the internal polarization of government, which then has to be understood as a counterpart to de-radicalized mass participation.83 Thus, previously stabilized aggregates of resources, which define the interests and identities of institutionalized groups, are subjected to destabilizing pressures derived from the flux of rights, but are seldom sufficient to generate radical reforms.

However, in times of sustained politicoeconomic crisis, the ideological slack existing in the society and the internal polarization of government may become interrelated in practically and logically discontinuous variations. Such logically and practically discontinuous interrelationships, without being pegged to constraints related to ideas of "natural" righteousness and correlate practices, nor being able to be contained under positive law and regulations, generate the patterns of the political business cycle, while modifying overtime and structure of those patterns, as well as the content and political and social significance of important aspects of the constitution: the current structure of internal polarization of the institutions of civil government, and the current differentiation and interrelationships of rights. Such discontinuities may lead to moments of breakdown of economic policy brought by high inflation or high unemployment or both.

It is difficult to identify the exact points in time when the transition from English-style constitutionalism to the new constitutionalism occurred in the diverse Western industrial democracies. But Lord Hewart’s *New Despotism*, which in 1929 denounced the expansion of administrative discretion in England, and which later merged with wartime controls and with Keynesian prescriptions in the elaboration of the 1941 budget, Franklin Roosevelt’s 1944 “second Bill of Rights”, and de Gaulle’s program to build a polity in which “the executive power does not proceed from the legislature, not even by a devious path, which would inevitably be that of abuses and haggling” are unmistakable indications of it. The French constitution of 1958, which incorporated the constitutional ideas of General de Gaulle, has even been defined as “an unbalanced dyarchy, with indeterminate allocation of powers and responsibilities, bolstered by a technostructure in constant growth.” Similar language was used in the United States, where a group of scholars, the 1937 *President’s Committee on Administrative Management*, described independent federal administrative agencies as forming “a headless fourth branch of government, a haphazard deposit of irresponsible and uncoordinated powers”. Indeed, even the “constructive vote of no-confidence” of the German Basic Law can be considered a formal feature belonging to the new constitutionalism, since it allows for the exertion of power not legitimized by a parliamentary majority.

Yet it must be conceded that the new constitutionalism has developed more as a consequence of practices introduced from the economics profession than from doctrines elaborated by jurists. In other words, the

new constitutionalism has emerged without any explicitly revised jurisprudential basis radically discrepant from early- and late-liberal proposals. Thus the round of intellectual innovations corresponding to the third line of criticism of the liberal mode of normative differentiation and of liberal institutions has not been completed in the field of jurisprudential debate, if it may at all be considered to have progressed to an articulate stage of structured controversy. The most ambitious, though still insufficient, efforts of recent legal theory-building have resulted in two main theoretical tendencies, which can be described as follows.

On the one hand, there is the tendency to theorize about legal institutions as self-sustaining “equilibrium” systems. In this first tendency can be inscribed the Law & Economics approach, and the facile legal sociologisms - based on capacious functionalist generalizations of writers such as Daintith and Teubner. On the other hand, there is the tendency to criticize such equilibrium systems theorizations, a task usually pursued by critical legal scholars.

The result of the development of these theoretical tendencies seems to be very simple. On the one hand, under the new constitutionalism, conservative jurists side with conservative technocrats and exchange knowledges and expertise with them in the task of ensuring that only the narrowest range of variation from the old liberal institutional core is allowed to take place. This has no destabilizing effect on the mainstays of power which define the status quo. On the other hand, reformist jurists may be encouraged to search for emancipatory knowledges, practices and

tensions, to be introduced from politics (the on-going ideological debate) into the legal system, with destabilizing intention, but still no corresponding effectual force.

This limitation of legal criticism, namely, its lack of practical effectiveness, stems from a defect of the political institutions and jurisprudential notions which have come to us from the liberal legacy. Such defect is the inability of legal discourse and professional practice to come to grips with the political essence of society. This becomes clear in the characterization of the fate of rationality in the new constitutionalism, which is conducive to the formulation of the challenge of contemporary constitutional theory.

2. Political Rationality in the New Constitutionalism

In the new constitutionalism, technocratic bureaucracies, from central banks to transportation boards, by referring to the technical necessities and truths which are scientifically (formally, mathematically) calculated, are able to serve "the public interest" or to render "public services", and spare the center of the formal constitutional system the difficult task of justifying with purely formal concepts of constitutional law (or of justifying under governmental practices carried out in the name of purely formal concept of constitutional law) much of the public policies administered in response to the fluctuation of questioned meanings and normative claims. The rise of technocratic bureaucracies roughly since the mid-1800s has therefore arguably contributed to political and social instability, as reflected in the shifts of the confidence basis of the business cycle. Under the legal-constitutional framework of the liberal polity, this confidence basis and its drift coincided with the power and welfare of established groups embodying institutionalized interests. Such coincidence persisted until the interwar period, as was dramatically confirmed by the failed "Blum experiment". However, it was subsequently undermined since World War II, under the new constitutionalism as explained below.

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97. It was largely because the political components of the 1936 crisis were not the object of technical development, through jurisprudence or through political economy, that the Blum experiment failed spectacularly. For a brief analysis of the political-financial aspects of the crisis, see O. Kirchheimer, "Changes in the Structure of Political Compromise", in A. Arato & E. Eibhardt, eds., The Essential Frankfurt Reader, 49-70 (New York: Continuum, 1987). Ironically, Blum was himself a distinguished jurist, who severely criticized liberal constitutionalism, cf. L. Blum, La Réforme Gouvernementale, 3rd ed. (Paris: Éditions Bernard Grasset, 1936) at 150-151, 211-227. On Blum's reputation as a jurist, see J. Colton, Léon Blum, Humanist in Politics, (Durham: Duke University, 1987) at 12-13.
In addressing present socioeconomic conditions, governments no longer rely (at least no longer primarily nor exclusively) on the liberal jurists' self-evident and all-embracing claims of natural righteousness, nor on their notions of "fundamental (or higher) law" and of balance of forces under the constitution. Nor do governments rely on formal legal rules said to be devoid of any contingent substantive content, as was proposed by legal positivism. Instead, after the 1930s, governments have developed methods to measure national income, GNP and unemployment, and to calculate the impact of taxation and public expenditure on aggregate demand. These techniques of mathematical calculation are used instrumentally, and independently of jurisprudential notions, to articulate economic policies (supplemented by public policies based also on calculated knowledge in the diverse areas of scientific expertise) whose final practical outcomes, for unknown substantive reasons, do not necessarily coincide, or do not coincide fully, with the expectations of established groups. These policies therefore stimulate aggregate demand based on ulterior speculative drives, that is, on motives of action originally not comprehended in the social routines supported by the exertion of economic power as distributed under existing law.

Once mathematically calculated knowledge, considered in its instrumental technocratic use, under demand-stimulus economic policies and supplementary public policies, is recognized to be the result of incorporating the unknown into temporarily stabilized forms, then there arises an awareness of the integration of the speculative sociopolitical dimension of such knowledge into proposed normative standards. At a more general level, this condition of economic policy and of public policy in general is expressed in the idea that in mathematical procedure "the unknown becomes [simply] the unknown quantity of an equation". Such reduction of the unknown into known quantities acquired important significance because Keynesian monetary policy is based on an instrumental subversion of the "speculative motive" of money-hold-

99. In Kalecki's characterization: "Under a laissez-faire system, the level of employment depends to a great extent on the so-called state of confidence. If this deteriorates, private investment declines, which results in a fall of output and employment (both directly and through the secondary effect of the fall in incomes upon consumption and investment) ... But once the Government learns the trick of increasing employment by its own purchases, this powerful controlling device loses its effectiveness ... The social function of 'sound finance' is to make the level of employment dependent on the "state of confidence", M. Kalecki, "Political Aspects of Full Employment", in (1943) 14 Political Quarterly 322-331., at 325.
ers, and because Keynesian fiscal policy does not serve any reasoned end postulated as necessary. This couples with the inability of positive science (which is produced under conditions of countercyclical deficit spending, and which drives technocratic social engineering) to envisage the substantive political dimension of its own foundations. Such dimension could gain a legal-doctrinal expression. Safety standards, which inform public policy in the area of environmental protection are an example in point.

Policy makers today are ready to acknowledge that “[s]cience and the law are uneasy partners”.102 The uneasy partnership of science and the law stems from the fact that “[s]cience thrives on uncertainty ... [t]he best young scientists flock into fields where great questions have been asked but nothing is known”.103 When it serves as the basis of public policy, therefore, scientific or mathematical calculation integrates non-formal considerations (or eschewed opportunities of broad speculation) into formal normative standards of socioeconomic interaction:

In assessing a suspected carcinogen, for example, there are uncertainties at every point where an assumption must be made: in calculating exposure; in extrapolating from high doses where we have seen an effect to the low doses typical of environmental pollution; in what we may expect when humans are subjected to much lower doses of a substance that, when given in high doses, caused tumors in laboratory animals; and finally in the very mechanisms by which we suppose the disease to work. — One thing we clearly need to do is to ensure that our laws reflect these scientific realities”.104

In assessing the risk inherent in the production or social use of a hazardous substance, therefore, uncertainties and speculative opportunities abound. And those uncertainties and speculative opportunities are not eliminated by scientific or mathematical calculation: they are simply patched up by formal equations yielding formal and temporarily sustainable knowledge. The public policies articulated on the basis of such knowledge therefore carry a suppressed or masked speculative component that has “unknown” but definite political significance. That component corresponds to the “political gap” in the knowledge generated by positive science. No matter what apparatus of formal calculation is employed, whether stochastic models in monetary policy or probabilistic risk assessment in the regulation of nuclear safety, the problem of the persistence of the unknown arises in the guise of questions such as that

103. Ibid.
104. Ibid., at 1027.
of knowing which is "the effect of uncertainty as to the values of the parameters of the model"; or that of knowing whether "no [possible] scenario has been left out" and so forth. There is also the distinct problem, experienced by every specialist in any given field, that experts "may [and do] disagree among themselves".

One can imagine that in the aggregate the "political gap" existing in the knowledge generated by positive science tends to acquire special political significance once it is understood that

(a) research and development, and science policy generally, which in the new constitutionalism are necessarily sustained in a situation of countercyclical tides of deficit spending, result in part from a fiscal policy that does not serve any reasoned set of substantive ends, yielding therefore "politically defective" knowledge;

(b) such politically defective knowledge becomes the basis of the rationality of welfare agencies and other regulatory activities; and

(c) the accumulation of positive scientific knowledge and expertise in certain "paradigmatic" directions and its absorption into the regulatory process sustains the formation of the preconditions of the current patterns of production and investment.

In these three elements combined lies the political significance of all calculated knowledge. Such elements lead to the conclusion that self-governance, or self-regulation, as a condition desired for socioeconomic interaction, cannot, even if guided by extensive and elaborate formal calculus, be sustained indefinitely, without episodes of self-contradiction and irrational, self-destructive tendencies or crises. These correspond to events of collapse of formal norms (and/or systems of quantitative grounds of action, namely, prices) and vacuum of legitimate substantive motivations at the level of the institutional foundations of established practices. The argument that a capital market crash occurs due in part to

107. Ibid., at 238. On this point, see also infra, note 109.
108. In fact, the lack of substantive ends is a general characteristic of both monetary and fiscal policy, and it underlies the whole Keynesian conception of political economy. This is perceivable in Keynes' half-humorous and famous suggestion that the Treasury "fill old bottles with bank-notes, bury them at suitable depths in disused coal-mines which are then filled up with town rubbish, and leave it to private enterprise on well tried principles of laissez-faire to dig the notes up again", J. M. Keynes, The General Theory, supra note 64, at 129.
the lack of exogenous (governmental) regulation of the institutional rules by which such markets exist as self-organized practices serves to illustrate this condition.

Part IV

1. The Challenge of Contemporary Constitutional Theory

What should be retained from the above discussion is that mathematical procedures of calculation integrate uncertainties, as masked or suppressed speculative components, in the formal body of understandings offered as stable knowledge and rules of action.

The unknown, most of all the arcana imperii, which remained the foundation of policy under pre-modern institutions, were said to have ceased to exist in liberal or English-style constitutionalism. Indeed, the rule of law presupposes private normative differentiation and universal intelligibility and acceptance of norms (typically, "natural" rights), in light of which the prince loses all extraordinary or superior powers. On the other hand, universal intelligibility and acceptance of the grounds of action was also a characteristic of the first two rounds of criticism (postivist and socialist) of early liberalism. However, with the rise of Keynesianism and, in general, of public policy based on scientific calculation materially sustained by countercyclical tides of deficit spending and by instrumental subversion of the speculative motive of money-holders, the unknown reappears, but this time as the masked or suppressed speculative dimension of the formal apparatus of government, which is ultimately the formal constitution itself. It was this reappearance of political mystery that has opened the possibility that, in the new constitutionalism, under the guidance of Keynesian economic policies, the political essence of society be reinstated, and public affairs be conducted, on the basis of calculi whose substantive implications may not coincide with the views and interests of institutionalized groups.

But this condition may fail to win recognition by public authorities, and self-conscious reinstatement of the political essence may be hampered, if either the old liberal rights remain as a necessary normative reference with untouchable validity (for example, in the cases of privatization of normative power in the name of liberal rights), or if positive science is allowed to stand apart from explicit political considerations,

112. See supra , notes 78 and 99 and accompanying text.
i.e., apart from speculations concerning the desired directions of collective material and moral change. Such speculations are normally practiced by any citizen moved by political (secular or religious) convictions. Moreover, all such speculations are capable of generating coherent systems of beliefs or speculative knowledge, such as in religion, in metaphysics or even in political parties' programmes. But only those speculations which are capable of generating the occurrence of events of collapse of form and vacuum of substance at a recognized constitutional level, followed by temporarily stabilized formal, public rules (statutes, judicial decisions, administrative rulings) do attain any emancipatory practical significance.

The problem of the liberal constitution was that the substantive dimension of the exercise of economic power, which is necessarily based on conflicting speculative motivations constitutive of economic competition, remained beyond the reach of formal legal rationality. Thus politically relevant collapses of formal norms occurred most often as coups d'état (e.g., eighteenth of Brumaire), revolutions (e.g., 1848 in France), or as the result of war (e.g., the American "Civil War amendments"; the French Third Republic). In such abrupt transitions, there was no instrumental effort (apart from plebiscitarian leadership) orchestrated in order to build institutional forms that embodied the self-contradictory political essence of society.

Similarly, in the current industrial democracies, where the "new constitutionalism" prevails, collapses of formal norms occur in a great proportion as elusive policy shifts, at the periphery of the central government, in the bureaucracies which administer their formal models of how the world works. Moreover, much of the policy shifts occurring in the technocratic bureaucracies of industrial democracies remain subject to instrumentally effected but merely quantitative variations of macroeconomic policy. Thus the constitutional relevance of the occurrence of events of collapse of form and vacuum of substance in the new constitutionalism is diffuse, and the intelligence of their substantive political significance is most often lost. Most of all, these policy shifts and the modification of social routines which they entail are very imperfectly linked, if at all, to political practices and to ideological debate, in which the definitions of avenues and directions of historical change are collectively fought over.

The challenge of contemporary constitutional theory is therefore twofold. First, this challenge corresponds to the need to devise institutions capable of transmitting to the center of the formal political system (the formal constitution) the occurrence of events of collapse of form and vacuum of substance of adopted norms and policies. This transmission
must be such that the events of collapse of form and vacuum of substance are made to gain expression in substantive doctrinal contradictions (as opposed to mere quantitative notation in mathematical equations and formal scientific models) which convey the chief political dilemmas and conflicts in the society. Second, the challenge of contemporary constitutional theory is that of turning such doctrinally articulated political dilemmas and conflicts into effective preconditions of economic competition and exchange relations. This twofold challenge could be met by:

(a) the articulation of constitutional doctrine (in the narrow sense of constitutional law) with political parties' programmatic and ideological concerns; and

(b) the "legal" derivation of monetary policy.

In other words, what is accomplished today merely by means of quantitative variations of macroeconomic policies must be instrumentally connected with substantive contents juristically and explicitly formulated as the self-conscious and self-contradictory political essence of society, which then must be established as the effective ground of economic action.

However, as seen above, the political essence of society was shunned under the liberal constitution as well as under the positivist and "socialist" experiments and directions of thought.

Thus the challenge of contemporary constitutional theory will be met only where the doctrinal articulation of the formal constitution ventures beyond liberalism and its critics. In other words, such challenge will be met only where law and politics are economically and instrumentally articulated in the service of goals definitely discrepant from any conceivable natural right and from any existing body of positive law. This means to say that, beyond liberalism and its critics, constitutional adjudication must be capable of being conducted in instrumental articulation with the ideological speculations channelled through radicalized political parties, which must then be juristically translated into general grounds of economic action irreducible to "natural" rights, to "compensatory devices" of the kind proposed by the positivist criticism discussed earlier, or to administrative regulations of the kind prevalent in socialist planning.

Indeed, adjudication must replace the conventional "law-finding" activity (finding the "right answer", saying what the law is, etc.) by an emancipatory "economic reform-finding" activity. This would culminate, not with the adjudicatory declaration of pre-existing natural rights nor of pre-existing positive law (nor yet with the corroboration or supplementation of administrative rule-setting), but with the granting of economic entitlements which respond to political parties' mobilization practices and programmatic commitments. Such economic entitlements
would definitely have to be thought of as "illegal" in light of liberal jurisprudence. In other words, they would have to be understood as economic entitlements against established law, which law is always that of institutionalized groups. At bottom, therefore, they would constitute means of support of "noninstitutionalized" experiments of political engagement with an economic import constitutive of potential alternative directions of investment, i.e., constitutive of emancipatory drives of qualitative diversification of the marginal efficiency of capital. This would imply the redistribution, not of wealth alone, but of economic power itself. Such redistribution would have to rely on the "legal derivation" of monetary policy, which could be accomplished as follows.

The economic entitlements against established law could be attached to open market operations in which special government papers are bought and sold. Such special government papers could be given long-run and differentiated substantive political meanings corresponding to the programmatic proposals debated by political parties. They could be called "public policy bonds", and be divided into different classes, possibly with different yields, according to the different policy areas, such as "housing", "education", "urban planning", "environmental protection", "research and development", "public health", "race relations", and so forth. Thus the legal derivation of monetary policy would involve the prudential attribution of positive constitutional value to certain political parties' programmatic proposals, and adjudication whereby quantities of bonds would be assigned to "politically" aggrieved persons. Such public policy bonds would constitute the economic basis of the economic entitlements "against the established law". The entitlements would, in turn be anchored in legally derived monetary policy.

Thus, for example, a tenant that under the formal laws must be evicted, but that according to ideological priorities established by political parties should not be evicted, may in fact be legally evicted and at the same time be granted an economic entitlement "against the established law", corresponding to a certain amount of "housing policy bonds", sufficient to provide for his or her housing needs, in the context of mobilization practices related to, say, movements in support of urban renewal in a given city district. This would have a corresponding effect in the interest rate. Similarly, economic competition practices considered to be fair under the law may be deemed unacceptable under ideological criteria whose constitutional significance is juristically recognized and by virtue of which a politically aggrieved party (a business or class of business in

113. The opponents of social transformation, as suggested by Machiavelli, always "have the law on their side". See N. Machiavelli, supra note 13, at 30.
a certain geographical area) may be granted an amount of "domestic trade policy bonds", in the context of cooperative movements supported by political parties, and again with an influence on the interest rate. The examples could be multiplied.

The conventional procedures and criteria for the establishment of monetary and fiscal policies would have to be revised, since both interest rates and the means of financing the public deficit would affect the constitutional role of the public policy bonds. However, the general result of the new practices and institutions would be a much greater diversity of possible patterns of legally endorsed collective action, obtained through incomparably better means than the mere inflationary stimulation of economic growth, or the mere quantitative "equalization" of the interest rate with the marginal efficiency of capital.