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Article Title: Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering

Year of publication: 2010

Link to published article:

<http://dx.doi.org/10.1111/j.1467-9337.2010.00460.x>

Publisher statement: The definitive version is available at wileyonlinelibrary.com

Draft not for citation. The final version of this article appears in *Ratio Juris*, Vol. 23, pp. 390-410 (2010)

Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering

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Drawing upon Hannah Arendt's and Carl Schmitt's theories on the relationship between nomos and boundary, this paper revisits how constitutionalism and political power are reconciled as a constitutional ordering. It first analyzes constitutionalism in the light of political modernity. Indicating that political power grounded by a constitution is omnipotent, complementing and completing constitutionalism, this paper contends that an omnipotent constitutional ordering is anything but an unleashed Leviathan. It is argued that constitutional omnipotence is framed and thus constrained by a constitutional nomos, the matrix of which is a dual delimitation of boundaries, generational and jurisdictional.

TABLE OF CONTENTS

I. Introduction	2
II. From a Limiting Constitution to Constitutional Omnipotence:	

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Revisiting Constitutionalism in the Light of Political Modernity.....	3
III. The Nomos of Constitutional Ordering: A Dual Delimitation of Boundaries.....	7
A. <i>Generational: The Constituent/Constituted Distinction</i>	8
B. <i>Jurisdictional: The Internal/External Distinction</i>	15
IV. Conclusion	21

I. Introduction

With the collapse of the Berlin Wall as a symbol of political and ideological boundary in 1989, talks of the constitutionalization of international law spread through academic circles (e.g., Cass 2001; MacDonald & Johnston eds. 2005; Walter 2001). A global version of constitutional ordering transcending nation-states is being jubilantly envisioned (e.g., Rosenfeld 2008; Slaughter 2004, 261). Echoing these institutional aspirations for constitutional ordering on a global scale, the normative ideals of constitutionalism such as the protection of human rights and the rule of law are projected onto the world (Kahn 2000; Von Bogdandy 2006). Global constitutionalism is viewed to characterize the nascent global arrangement of constitutional ordering.

However, as the debate on the contents under the rubric of global constitutionalism shows (Walker 2008), the future of constitutionalism in the global era is not as certain as aspiring globalists envision it would be. Moreover, how to implement constitutionalism as a set of normative ideals in the transnational context not only sharpens the enduring question of the enforceability of international law but also brings the relationship between constitutionalism and political power to the fore (Kumm 2004; Peters 2006). While the idea of limited government stands at the center of constitutionalism (Friedrich 1974), to achieve the ends of constitutionalism requires political power. Thus, reconciling constitutionalism with political power underlies political ordering in the constitutional form. How to account for the relationship between these two seemingly contradictory components of constitutional ordering -- a political ordering grounded by a constitution (Breslin

2009, 13-20) -- stands at the core of constitutional theories.

Drawing upon Hannah Arendt's and Carl Schmitt's theories on the relationship between nomos and boundary (Arendt 1998, 63-64, 198; Schmitt 2003, 67-79), this paper revisits this issue, aiming to argue that constitutionalism and political power are reconciled under a constitutional nomos of a dual delimitation of boundaries. The argument made herein proceeds as follows. Section II first offers a framework of analysis within which it is shown that constitutionalism means more than the idea of limited government. Constitutionalism in its full sense should be understood in the light of the conception of political power in the project of modernity. Seen in this light, political power grounded by a constitution is omnipotent, complementing and completing constitutionalism. Yet, an omnipotent constitutional ordering is anything but an unleashed Leviathan. Rather, it is argued in Section III, the core of this paper, that constitutional omnipotence is framed by a constitutional nomos, the matrix of which is a dual delimitation of boundaries, generational and jurisdictional. The relationship between this structure of boundary and constitutional ordering is the key to making sense of how political Leviathans can be tamed into a constitutional form of political ordering, embodying strong constitutionalism. Section IV sums up the arguments and notes the contemporary challenges facing the constitutional nomos in the global era.

II. From a Limiting Constitution to Constitutional Omnipotence: Revisiting Constitutionalism in the Light of Political Modernity

Constitutionalism indicates "a state of mind" in which the relationship between the citizenry and the political community is (re)constructed by a constitution that is centered on the protection and enhancement of fundamental rights (Elster 1991, 465). In terms of the relationship between a constitution and the state as the archetype of the political community, however, limiting government power by the constitution does not tell the whole story. Alongside its limiting function, the constitution creates and legitimizes state power by grounding the exercise of political power in a constitutionally ordained government. Due to its endurance and prominence among other political symbols, the constitution also plays an integrative

role in society.¹ Taken together, limiting government power is only one aspect of a full-fledge concept of constitutionalism in which the constitution relates to political power in a more complex way (Breslin 2009, 20-22). A framework of analysis beyond the idea of limited government is necessary to account fully for the relationship between constitutionalism and political power.

Based on Aristotle's schema of "four causes," Paul Kahn (2004, 265-79) identifies the constitution and the state as the "formal cause" and the "final cause" of the political project of modernity, respectively, suggesting an alternative view of the relationship between constitutionalism and political power.² Under this modernist political project, characteristic of the constitution as the "formal cause" is the idea that the state power ordained by the constitution is conceived of as part of "a project of theory, as well as of practice (Ibid., 270)." Specifically, the state cannot be disassociated from the idea of justice but is rather considered the means to complete the pursuit of justice. Seen in this light, the constitution that underlies the state is read and interpreted through theories of justice (Ibid., 258, 268-72). While the constitution does not create a government whose power is unlimited, the constitution is facilitating, not limiting, with respect to the government role in the fulfillment of fundamental rights (Fiss 1982, 742). On the other hand, the state as the "final cause" of political modernity suggests the idea of "constitutionalism without end (Kahn 2004, 276)." It not only points to the projection of a constitutional order into an infinite future but also suggests the state as the locus where the meaning of citizenship is fulfilled (Ibid., 278-79).

The case of state intervention in the private sphere illustrates the relationship between the "formal cause" and the "final cause" of political modernity and thus illuminates the relationship between constitutionalism and political power. Paralleling the extension of the concept of justice to the private sphere, through the lens of the constitution as the "formal cause" of the modernist political project, on

¹ Ulrich Preuss identifies and discusses four functions of modern constitutions: limiting, creating, legitimizing, and symbolic (Preuss 1995, 5-6; see also Grimm 2005a, 195).

² In addition, Kahn notes, the "revolution" and "the citizen's body" stand as the "efficient cause" and "material cause" of this project (Kahn 2004, 265-79).

the one hand, constitutional rights are interpreted as applying to the horizontal relations among individuals as well (Kumm 2004). On the other hand, the constitution is read as containing a protective function, enabling, if not mandating, the government to take measures protecting citizens from harm caused by third parties (Michelman 2005, 150-51).

In terms of this normative expansion of constitutional purview, the constitution appears to become “total (Kumm 2004).” Nevertheless, what lies beneath the notion of total constitution is more complex than it denotes. As comparative constitutional studies indicate, the horizontal effect of fundamental rights does not necessarily suggest that the constitution plays an equally normative role in horizontal and vertical relations (Gardbaum 2003; Sajó & Uitz eds. 2005). Rather, as Mark Tushnet (2005) points out, the pursuit of justice in the private sphere in the light of the constitution materializes mainly through the state’s statutory and regulatory interventions. Against the backdrop of the activist state, he argues that the court-centered doctrine of horizontal effect of fundamental rights is “residual” as to implementing the idea of justice inherent in the constitution in horizontal relations (Ibid., 169-70). Similarly, the protective function of fundamental rights in some constitutional jurisdictions such as the United States may be invoked in judicial decision only through the “back door” where the justification for state intervention is found in its constitution-derived protective role and thus characterized as--at best--underenforced constitutional rights (Michelman 2005, 147).

Taken together, a full implementation of constitutionalism is undertaken with the aid of an enforcing power exercised by the state in the light of the constitution. As a set of norms, the purview of the constitution may not be as expansive as the notion of total constitution suggests (Kuo 2009b). Yet, guided by the “final cause” of the modernist political project, the state under the constitutional scheme embodies “constitutionalism without end (Kahn 2004, 276).” In other words, when the end of the constitution is the pursuit of justice and the constitution is interpreted through theories of justice, citizens are inclined to hold the government accountable for bringing about the promise of justice that is attributed to the constitution. Thus, corresponding to the endless pursuit of justice emanating from the constitution, the

capacity of the constitutional state is expansive, even omnipotent (Ibid., 135-36). Seen in this light, the constitutional state turns out to be constitutional omnipotence, considered constitutionally capable of intervening to remedy private injustices with an eye to delivering the promise of citizenship, even if the necessity of state intervention is not expressly stipulated in the constitution (Tushnet 2008, 176-77).

A full-fledged concept of constitutionalism underlain by a corresponding notion of political power as indicated above rests on *constitutional authorship* (Michelman 1998). Put differently, centering on the omnipotent agency of We the People, constitutional authorship lies at the foundation of the modernist political project (Kuo 2009a; see also Preuss 1995, 6-7). While the state in the form of constitutional democracy is the creation by We the People, the meanings the omnipotent We the People gives to the constitutional ordering of power are revealed through the matrix of “nomos and narratives” as Robert Cover (1983) illuminated. The normative code of constitutional rights does not exhaust the popular drive of turning to the state in the name of the constitution as the last resort to fulfill the ultimate meaning of citizenship. Instead, the meaning of constitutional norms can only be fully made sense of alongside its background narratives, while the abundant narratives surrounding how the idea of citizenship is substantiated tend to drive the expansion of constitutional normative universe in the unfailing pursuit of justice (Ibid., 6). With respect to the contemporary expansion of constitutionalism, citizens’ inclination to turn to the guardian of the constitution, the (constitutional) courts, to hold the government to account for implementing constitutionalism in its fullness drives the constitutionalization of politics, contributing to the rise of “juristocracy (Hirschl 2004).” In this way, government policies are reconstructed in constitutional terms, although they may not be fully judicially enforceable (Graber 2004).

In sum, the *telos* of the constitution is set to embrace the omnipotent constitutional author, who acts as the self-governing agent of a political community (Kuo 2009a). We the People as the constitutional author not only speaks the polity into being through constitution-making but also empowers the constitution as the reference point of the constitutional ordering of political power (Ackerman 2007, 1756). Constitutionalism cannot be reduced to a limiting constitution. Rather,

constitutionalism in its full sense assumes an omnipotent, albeit constitutional, state of political modernity.

III. The Nomos of Constitutional Ordering: A Dual Delimitation of Boundaries

The power-augmenting implications of the “omnipotence” of the modern constitutional state notwithstanding, political ordering under a constitutional scheme is anything but an unleashed Leviathan. As Max Weber’s famous definition of the modern state suggests, the state’s claim to monopoly on legitimate power, i.e., political legitimacy, is confined within its “territory (Weber 1946, 78).” The ties of political legitimacy to boundary, a territorial one in Weber’s conception of the state, points to what is termed herein constitutional nomos, under which constitutionalism and political power are reconciled and integrated as constitutional ordering.

Expanding on the meaning of nomos in its Greek origin, Hannah Arendt and Carl Schmitt respectively argued that a bounded space is constitutive for political community, while the boundary-setting acts of initial land appropriation and subsequent distribution as well as exploitation define where political life begins and frame how it plays out (Arendt 1998, 63-64, 198; Schmitt 2003, 67-79; see also Lindahl 2006, 892-94). Thus noted Arendt, the law of the polis “was quite literally a wall, without which there may have been an agglomeration of houses, a town..., but not a city, a political community (Arendt 1998, 63-64).” Pursuing this line of thinking, this section aims to reveal that the omnipotence of political power is framed and thus constrained along a structure of dual boundaries, generational and territorial, which constitutes the nomos of constitutional ordering. In the first place is teased out what is herein called the generational boundary: the distinction between the constituent and constituted (or postconstituent) generation. Next, this section shows how the exercise of political power is grounded by a jurisdictional boundary. As a result of the jurisdictional boundary, an internal/external distinction constitutionally frames the exercise of political power emanating from We the People.

A. Generational: The Constituent/Constituted Distinction

During the ratifying conventions of the United States Constitution, James Wilson remarked,

There necessarily exists, in every government, a power from which there is no appeal, and which, for that reason, may be termed supreme, absolute, and uncontrollable....The truth is, that in our governments, the supreme, absolute, uncontrollable power remains in the people....The consequence is, the people may change constitutions whenever they please. This is a right of which no positive institutions can ever deprive them. (Elliot 1989, 2: 432)

On the other hand, as indicated above, that We the People stands as the ultimate source of authority in constitutional democracy does not mean that it acts as a formless force. Thus, the central issue to We the People as the author of the rule of law is how the ultimate, supreme, absolute, uncontrollable lawgiving power, i.e., the constituent power, is conceptualized under the rule of law.

The distinction between constituent and constituted power becomes “formal” in the hands of analytical jurisprudence. The former revolves around the power to proclaim a new constitution; the latter refers to all the powers that derive from that constitution (Green 2005). Worse yet, given the frequency of replacing constitutions in third world countries, this distinction becomes meaningless in that constituent power is claimed to have been activated whenever a new constitution is proclaimed (Mahmud 1994). Constituent power is thus abstracted, while We the People as the constitutional author appears to be sheer fictional (Negri 1999, 5-6).

In contrast, radical political theorists regard constituent power as the embodiment of absolute freedom. Paralleling Arendt’s characterization of political freedom in action as the essence of the idea of revolution (Arendt 1990), Antonio Negri (1999, 11) defines constituent power as “a force that bursts apart, breaks, interrupts, unhinges any preexisting equilibrium and any possible continuity” in order to “establish a new [constitutional] arrangement, to regulate juridical relationships within a new community (Ibid., 2).” To Negri, “insurgencies” are when constituent power is (re)activated (Ibid., 23-24). He contends that an

audacious exercise of constituent power, which Arendt termed “revolution,” is nothing less than rebellion (Ibid.).³ Also echoing Arendt’s distrust of the role of the law in the political world (Arendt 1990, 235-38, 253-59; see also Kahn 1997, 54-59), Negri (1999, 322) considers the representative form of modern politics to be the opposite of political freedom. In other words, Negri together with Arendt radicalizes the innovative and revolutionary character of constituent power with an eye to rescuing it from the tendency of abstraction and fictionalization in the hands of legal formalists such as Hans Kelsen.⁴ In this line of thought, the concept of constituent power is fully energized. In the mean time, however, it becomes “inimical to any form of self-limitation and self-binding,” falling into “a state of legal nihilism (Kalyvas 2005, 242 n.50; see also Barshack 2006, 218-22).”

Apparently, some resemblance exists between revolution and rebellion. For example, as Bruce Ackerman (1998, 44) discusses the role of the Shays’ Rebellion in the lead-up to the making of the United States Constitution, “Shays and other rebels of rural New England were not only closing down courts and refusing to pay debts. They were engaging in more *constructive forms of politics*—meeting in illegal conventions and making *extraordinary demands for fundamental change*.” Both revolution and rebellion were engaged in constructive but illegal forms of politics, making extraordinary demands for fundamental change.

This resemblance, however, does not mean that the constituent act of revolution is conceptually identical to rebellion. For one thing, in the eyes of its contemporary opponents, the Shays’ Rebellion stands apart from the Revolution:

[T]he situation had changed radically in 1780, when the people of Massachusetts solemnly approved a constitution. Since that time, no group of men could properly meet in convention and ‘dare, with impunity, to lay the foundations of a CIVIL WAR in the state, or to molest that Government in the execution of its Constitutional

³ Rebellion is not the only way that constituent power takes place. Other than armed rebellions, constituent power may take the form of peaceful mass demonstrations (Kalyvas 2005, 230).

⁴ Negri (1999, 30-35, 251-328) differs from Arendt in terms of his Marxist-materialist characterization of constituent power.

powers.’ (Ibid., 45)

To be sure, this does not mean that their view is more authoritative than that of those participating in that rebellion. Rather, the resemblance between revolution and rebellion only suggests that they need to be examined beyond comparing the claimed goals and identifiable behaviors of their participants.

From the “external” point of view such as Negri’s materialist position,⁵ rebellion is not dissimilar to revolution indeed. In terms of their destructive effect of potentially voiding an existing legal order, Negri, in line with Arendt, claims that both rebellion and revolution embody political freedom, which can lead to the ex nihilo creation of a politico-juridical order. A norms-voiding act figures as the archetype of political freedom; a world of legal norms is evocative of repression, falling short of freedom (Negri 1999, 23-24; see also Kahn 1997, 66, 73). Yet, it poses a fundamental challenge to Negri as well as Arendt to transit from what they regard as an act of absolute freedom by revolutionary negation to the making of a new political order that concludes the revolutionary/rebellious action.

In contrast, from the “internal” point of view, the rule of law is the preservation of meaning revealed in the constituent act of revolution, providing the framework of reference within which political freedom is to be understood. The constitutional order is the child of the constituent act, while the chief mission of the constitutional order is to maintain the meaning of the constituent act that gives birth to the constitution (Kahn 1997, 65-66, 71-72). Moreover, in the eyes of a politico-juridical order, an unbridgeable gap exists between rebellion and the constituent act of revolution. The term “rebellion” suggests a potential existential threat of civil war that could call the political survival of the politico-juridical order into question (Ackerman 2006, 20-21, 170-74), while the constituent act is that which gives legitimacy to a constitutional order. Taken together, even if it may not be distinct from a revolution in terms of the extent of concomitant violence and the political positions of its participants and thus looks retrospectively like an unsuccessful

⁵ Negri (1999, 327) indicates his materialist position by locating constituent power in what he calls “living labor.”

revolution, a rebellion is an existential threat to the survival of a constitutional order and thus needs to be suppressed, if necessary, by extraordinary forceful measures (Ibid., 39-74).

To be sure, the attitude of a given constitutional order toward a nascent rebellious movement may unpredictably turn around and an ongoing rebellion can thus be rethought as a revolution (cf. Mayer 2000, 4-5). Yet, this possibility cannot be foreseen from within the existing politico-juridical order but instead will materialize only by pushing aside the past revolution together with its constitutional child and thus opening up the space for a new constitutional order. In other words, from the “internal” perspective of the politico-juridical order, political freedom can only take the form of the exercise of constitutional rights and powers. This concept of constitutional freedom contrasts with the radical assertion of absolute freedom and unrestrained right in revolutionary moments (Harris 1993, 74-78). Understood in this way, the existing constitutional order is the transfiguration of the last revolution, which is viewed to embody justice and the ultimate truth, and thus must be preserved (Kahn 1997, 64-68).

Granted, the constitution itself leaves the possibility of self-reformation open by providing for the procedure of constitutional amendment. Yet, due to the concern about the identity of the constitution, which is set out by the constituent act of revolution, amendment power is considered constituted and thus limited (Schmitt 2008, 140-46). From this point of view, a given constitutional order is categorically disabled from determining whether there is an ongoing alternative constituent act to take the place of the most recent revolution. Rather, it is destined to commit itself to the maintenance of the underlying meaning of its legitimacy-bestowing constituent act (Rubinfeld 2001). For this reason, any rival claim for truth and justice even carried out in the form of constitutional amendment sounds like nothing less than heresy to the constitutional order in force.⁶ Put differently, a constitutional amendment that successfully claims to change the identity of an existing

⁶ This question concerns the status of the amendment process in the constitution and its limitation (compare Harris (1993, 169-91) with Rubinfeld (2001, 174-76); see also Barshack (2006, 198-204); Kahn (1997, 63-64)).

constitutional order amounts to revolution, bringing about a new constitutional order, even if all the requirements of the amendment process are followed (Jacobsohn 2006; cf. Schmitt 2008, 147-66).

To the constitutional order, a seemingly revolutionary act is nothing but a signal of rebellion. This does not mean that revolution is unknown to the constitutional order (Kahn 1997, 49-74). Rather, revolution can only be regarded as the source of the legitimacy of the existing constitutional order but not as an actually ongoing act to be recognized. In other words, a constituent act of political freedom that gave birth to the existing constitutional order can only be embodied, not judged, by this juridical system itself.

This relationship of *embodiment* as opposed to *judgment* reflects a categorical distinction between the constituent act and the constituted-constitutional order in a temporal sense. As Chief Justice John Marshall (1803, 176) in *Marbury v. Madison* noted, “The exercise of this original right” by the American people to “establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness” is “*a very great exertion; nor can, nor ought it to be frequently repeated.*” The [constitutional] principles, therefore, are deemed fundamental.” In other words, the “very great exertion” of the constituent act, which is “supreme” but “can seldom act (Ibid.),” belongs to the past and stands in relation to the existing politico-juridical order “always at a temporal distance (Kahn 1997, 94; see also Barshack 2006, 195-96).” Correspondingly, the constituted-constitutional order constitutes, so to speak, an extended present in which the politico-juridical order concludes the past revolution and simultaneously carries out its meaning (Kahn 1997, 94).⁷ That which constitutes this conceptual distinction between the constituent past and the constituted present is what is termed herein the “generational boundary” in the legal imagination.⁸

To illustrate the generational sense of the constituent/constituted distinction,

⁷ “[The constitutional principles] are designed to be permanent (Marbury, 5 U.S. (1 Cranch) at 176).”

⁸ “Generational” is inspired by Jed Rubenfeld’s discussion on Thomas Jefferson’s presentist view of constitutional democracy (Rubenfeld 2001, 19-21; cf. Ackerman 1997, 1519).

take Ackerman's attempted constitutionalization of constituent power as an example (cf. Arato 2000). At the core of Ackerman's constitutional moment theory is a metaconstitutional order centered on the idea of "unconventionality," which provides for a (quasi)institutional pattern regarding the exercise of constituent and constituted power, or rather, in his term, *constitutional politics* and *normal politics* (Ackerman & Katyal 1995). In essence, the idea of unconventionality is a prudential stratagem for political actors to push through fundamental constitutional changes by playing with or circumventing, if necessary, the procedures stipulated in the existing constitution (Ibid., 558-59). Constitutional changes resulting from unconventionality are revolutionary in substance but are formally centered on the existing constitutional order.⁹

Still, the dualism in his metaconstitutional order evokes the "generational boundary" of the politico-juridical order. Although Ackerman insists on the "intergenerational," "synthetic" interpretation of constitutional meanings mandated in different periods of "higher lawmaking," he also emphasizes the "preservationist" role of the generation subsequent to a constitutional moment (Ackerman 1990, 81-162). When the constitutional moment passes, judicial review is instituted to safeguard the meanings spelled out in the generation of higher lawmaking against its inevitable corruption in ordinary politics (Ackerman 1997). If we take Ackerman's constitutional moment theory as the exemplary ultimate attempt to *juridify* political order by constitutionalizing constituent power (Barshack 2006, 218), the distinction he makes between constitutional politics and normal politics together with the preservationist role assigned to judicial review attest to the inevitability of a particular concept of time—generational distinction—in framing the legal imagination of the politico-juridical order (Ackerman 1997, 1519-20; see also Michelman 1998, 77).

Ackerman's theory of dualist democracy is taken here only to show how the generational boundary plays a role in legal thinking as his ambitious attempt to

⁹ For this reason, Ackerman's attempt to constitutionalize constituent power may create "normative confusion" surrounding the concepts of reform and revolution (Kahn 2006, 269 n.23; see also Barshack 2006, 216-18).

revolutionize constitutional thinking indicates. Noticeably, this temporal distinction is a conceptual construct in the legal imagination (French 2001). The constituent past and the constituted present are indispensable to each other and constitute a linear relationship (Kahn 1999, 46-48). Revolution is conceptually located in the past and is out of reach of the present constitutional order in the sense that the meaning of the revolution can be revealed and understood through interpretation and construction but cannot be remade (Barshack 2006, 195-204). In other words, the idea of constituent power, which grounds the existing constitutional order and its development, is necessary to lay the foundations of the present legal system (cf. Möllers 2005, 184).

Apart from Ackerman's dualist view of American constitutional change, this sense of the generational boundary between the constituent past and the constituted present is even exemplified by the myth of the "ancient constitution" in the British monist constitutional tradition (Ackerman 1990, 8). In brief, the myth of the ancient constitution goes, "[Britain's] history [of parliamentary sovereignty] may be understood as a struggle to rid the English of Norman yoke and return to the fair simplicity of the Anglo-Saxon constitution (Loughlin 2000, 139 & n.67)." Accordingly, the ancient, pre-Norman Anglo-Saxon constitution, which is imagined to have originated in the past generation, "time immemorial," is conceptualized as the constituent bedrock of the British constitutionalism of monist democracy.

In sum, the distinction between constituent power and constituted power in the legal imagination makes it conceivable that We the People as the omnipotent constitutional author holding the "supreme, absolute uncontrollable power" can bring about the constitution of political rule without plunging the political power that underlies the constituted order into permanent revolutions. It should be noted that this conceptual distinction does not eliminate the struggles between political action and constitutional order. Also, saving a constitutional order from a permanent revolution has more to do with real politics than with any conceptual distinction. This distinction, however, serves as a conceptual apparatus that helps to illuminate constitutional ordering, i.e., how the meaning of political freedom is understood under the rule of law. In other words, as a component of the conceptual apparatus of the rule of law that makes up the constitutional nomos, the generational

boundary between constituent and constituted power not only sets the constitutional order apart from persistent political tumults but also symbolizes the existing order as the progeny of a constituent action of political freedom.

B. Jurisdictional: The Internal/External Distinction

The constitutional state with omnipotent political power is a political space delimited by territorial borders.¹⁰ Borders may run along distinctive natural terrain such as the Pyrenees between Spain and France; they may exist as purely artificial landmarks on an expanse of inconspicuous desert or plain such as the 49th Parallel demarcating the Canada-U.S. boundary (Guéhenno 1995, 38-39). Nevertheless, whether borders are constituted by artificial signs or natural terrains makes no difference in terms of their legal implications and political meaning. Rather, the legal implications and political meaning different kinds of borders have in common are concerned with the other component of the constitutional nomos, the jurisdictional boundary (Ford 1999, 853).

To members of a political community, borders mean both liberty and security (Dudziak & Volpp 2005, 595-96). On the one hand, borders institutionalize their right to travel abroad and guides how foreign people and goods would flow into their political community (Ibid., 595). In this way, borders facilitate citizens' liberty of social interactions and economic choices. On the other hand, borders stand as the guard posts or defensive bulwarks against the perceived threats from the outside, securing their political community as a space of political freedom (Frug 1980, 1083-95; Walzer 1984, 35-39). To aliens, however, the borders of the destination country are quite the opposite. They are zones of discretion instead of rights. Whether an alien can pass the borders with legal travel documents is not guaranteed but instead remains at the discretion of the border control authorities of the destination country (The Immigration and Nationality Act, 8 U.S.C. §1225(b)(2)(A) (2005)). Thus, to aliens, borders of the destination country are

¹⁰ Territorial waters as well as territorial airspace is the conceptual extension of physical territorial borders (Brilmayer and Klein 2001, 705-30).

neither a zone of liberty nor one of security. Rather, they are the places where discretion and uncertainty prevail (Walzer 1984, 39).

It does not, however, mean that borders are all negative to aliens. For example, once crossing the United States borders, aliens are “legally present” in the United States and thus entitled to legal protection. To deport or expel them, the authorities must follow the due process of law by acquiring an order from an immigration judge (Aleinikoff 1989, 867). Similar situation exists for those so-called “third-country nationals” who seek asylum in the countries within the European Union (EU). Upon entering the EU, they are entitled to the protection of the asylum-seeking procedures of the first EU country in which they arrive. In contrast, before they set foot in the EU territory, they do not have due process protection concerning their asylum-seeking claims (Fry 2005, 103). These two examples show that within the borders of the destination polity, an alien is not entirely excluded from legal protection but instead stands as a subject of legal rights. In terms of a legal space, borders suggest where discretionary power and legal rights intersect (Dudziak & Volpp 2005, 595).

Noticeably, from the legal perspective, the scope of political power does not correspond to state borders and the discretionary exercise of political power beyond the borders does not necessarily implicate lawlessness. The images of the global deployment of American military forces attest to the state’s projection of powers beyond the borders. The fact of the global projection of American power, which is not necessarily unlawful but rather always based on bilateral agreements, sheds no light on its legality. It merely indicates that borders do not constitute the barriers for legal imagination of political power beyond them but instead distinguish between different images of political power in the eyes of the law (Ibid., 604). Moreover, whether it is constrained by rights or materializes as discretion illustrates the different legal meanings emerging from the borders. Thus, to understand the legal implications of borders, it is necessary to go beyond the issue of legality and to explore what lies beneath the distinction between rights and discretion.

Borders are more of conceptual construction by the law than of physical space demarcated by territorial boundary. To see the discrepancy between legal construction and physical space concerning borders, the case of legally present

aliens in American law is a case in point again. As noted above, for an alien who does not have valid travel documents but managed to bypass the Customs and Border Protection (CBP) check point without going through the required security clearance procedures, she has *entered* the United States in the eyes of the laws. Due to her “presence” in the United States, she is entitled to the protection of the due process of law in regard to her expulsion. Yet, when a foreigner is physically on American soil but still waiting for the CBP clearance at the check point, she falls into the legal category of “arriving aliens.” In that situation, she is not considered legally present in the United States, whether she has the required documents or not, because she has not yet crossed the borders. Thus, she, as an arriving alien, is subject to discretionary legal procedures such as exclusion without court orders.¹¹ The distinct treatments of exclusion and expulsion that an “arriving alien” and a foreigner who is “legally present” in the United States would receive, respectively, under American law, indicate that border is more of legal construction than of natural existence (Kahn 2008, 142-43). What matters concerning the demarcation of borders is the resulting distinct legal categories of power and right constructed along borders, not the territoriality implicated in state borders (Ford 1999, 898).

As noted above, the projection of political power is not restricted within legal borders. Still, legal borders constitute the boundary along which distinct constructions of political power are made by the law. On the one side of the boundary is the space of legal rights in which the political power the state exerts on its subjects, citizens as well as noncitizens, is not discretionary but rather subject to challenges from constitutional rights (Raustiala 2005, 2521-22). On the other side, political power imposed upon its subjects is not only authorized by the law but also discretionary (Ibid., 2555-56).¹² This is not a lawless space but one of legally

¹¹ This is the so-called distinction between exclusion (or inadmission) and expulsion or deportation in the U.S. immigration law (Aleinikoff 1989, 867).

¹² Notably, this general characterization of the discretionary nature of the extraterritorial exercise of government power needs to be modified when the subject of the government power is a citizen (e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)).

authorized discretionary power (Fallon 2004, 173-74).¹³ While the exercise of discretionary political power can be seen through constitutional lens and even gets its day in court, its subjects are unable to level constitutional challenges by appealing to their rights enshrined in the constitution (Lobel 1995, 1391-92). Thus, what runs along the conceptual boundary constructed by legal borders, which is termed herein “jurisdictional boundary,” points to different imaginations of the relationship between the political community and its subjects (Ford 1999, 922).

To clarify, what is argued about above is not that the distinction between legal/constitutional right and political discretion meshes perfectly with the internal/external distinction resulting from the jurisdictional boundary. The point is rather limited: The jurisdictional boundary demarcates two different relationships of political rule. Inside the jurisdictional boundary, the relationship between political power and its subjects is built on legitimacy, which is legally institutionalized through the protection of constitutional rights (cf. Grimm 2005b, 456). As Richard Ford (1999, 853-54) indicates, a jurisdiction is “abstractly and homogeneously conceived” in the laws so that social relations within a jurisdiction is “obscure[d]” and re-presented as “impersonal,” “reduc[ing] space to an empty vessel for governmental power.” Jurisdiction is “real” or rather “made real” because “a bundle of social practices” such as levying taxes and checking passports take shape along the jurisdictional boundary (Ibid., 856). Moreover, jurisdictions create “a predictable and easily manageable social order” in which “particular types of political and interpersonal subjectivity” are to develop (Ibid., 922). Thus, the jurisdictional boundary is integral to the “shaping [of] our social and political world and our social and political selves (Ibid.).” The identity of We the People is substantiated within the bounded jurisdiction of a political community, leading to “the member/stranger distinction (Walzer 1984, 34).” In stark contrast, outside the jurisdictional boundary is a relationship of political rule that is only instrumental to maintaining the legitimacy in the internal dimension. The relationship between the

¹³ In *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889), the U.S. Supreme Court indicates both diplomatic measures and military actions as part of the final resorts of a sovereign state in regards to external affairs (130 U.S. at 606).

external projection of political power and its subjects does not reside in the sphere of legitimacy but instead constitutes a relationship of expediency as well as occupation in which constitutional rights play no effective role (Lawson 1990).

As the relationship between citizens abroad and the extraterritorial exercise of government power shows, this jurisdictional boundary is legally constructed and thus open to redrawing by the law (Dudziak & Volpp 2005, 595, 604). Still, the internal/external distinction that points to disparate relationships between the exercise of political power and its subjects is crucial to the legal imagination of a constitutional Leviathan with omnipotent political power. By virtue of the internal/external distinction, the modern state as an omnipotent form of political power simultaneously maintains the dual needs of constitutional self-government and political self-maintenance of a political community (Føssel 2006, 308).

On the one hand, as a modern form of political power, the constitutional state is imagined to retain the capability of fully launching the political power to secure its own survival (Kahn 2004, 276-79). On the other hand, constructed in the form of constitutional democracy, the modern state needs to maintain a space of political freedom as opposed to political discretion concerning the exercise of its power vis-à-vis its subjects (Ibid., 268-72). Specifically, while the constitutional state achieves internal political unity vis-à-vis other political organizations, the exercise of state power within the jurisdictional boundary must be in accordance with the constitution, the ultimate authority of which is derived from We the People (Ibid., 100-03). In contrast, outside the jurisdictional boundary, a separate conception of power relations—foreign affairs—is conceived, at the center of which is to secure the survival of the state and to protect its citizens from external threats by resorting to military forces, if necessary, or other forms of political power (Schmitt 2003, 128-29). In the external sphere of state power, a state does not hold sway against other states concerning politico-juridical authority. Rather, once beyond the jurisdictional boundary, a state either competes or cooperates with other states to secure its interest and achieve its objects, on which the constitution sheds little light apart from the

telos of securing the political self-maintenance of We the People.¹⁴ In sum, the jurisdictional boundary together with the concomitant internal/external distinction provides the conceptual juridical tool for what Carl Schmitt called a “borderline concept” of sovereignty rooted in political modernity: The decision concerning the transition from constitutional normalcy of rights and law to the discretionary state of exception at the core of “the political” is centered on the delineation of a conceptual borderline, i.e., the jurisdictional boundary (Schmitt 1985, 6).

Moreover, the jurisdictional boundary and the internal/external distinction serve as the conceptual apparatus by which political modernity takes the form of constitutional democracy in the Westphalian world. While “borders clearly demarcate[s] ‘outside’ from ‘inside’ and establishe[s] the ‘ultimate’ authority of the state within its domain (Rudolph 2005, 4),” it is through the jurisdictional boundary that the state is conceived as a bounded political space, allowing two distinct types of governance to develop within and without its domain, respectively (Schmitt 2003, 128-29). Thus, the boundary that demarcates constitutional democracies as distinct bounded political spaces needs to be precisely delineated to avoid the conflicts over areas of political legitimacy and juridical supremacy (Ruggie 1993). In contrast to the premodern age when areas adjoining jurisdictions were conceptualized as “frontiers (Giddens 1987, 50),” the jurisdictional relationship between modern states is defined as precise “boundary (Ford 1999, 866-72).” Unlike the frontier as a “no man’s land” where hostile politico-juridical powers fought each other (Guéhenno 1995, 39), the boundary between states, aided by the development of cartography (Ford 1999, 866-72), is precisely demarcated so that no rival political order can contest the ultimate politico-juridical authority of the state. As a “jurisdiction,” there is only “a particular political authority [that] holds sway” in the state (Miller & Hashmi 2001, 4). Thus, in terms of international relations, the delineation of the boundary constitutes a meta-constitution for the politico-juridical order of political

¹⁴ This underlies Justice Jackson’s now often-quoted remark to the effect that the constitution is not “a suicide pact (*Terminiello v. City of Chicago*, 337 U.S. 1, 37 (Jackson, J. dissenting)).” One corresponding conceptual tool in the U.S. constitutional law is the doctrine of “plenary power (Kahn 2008 130, 142).”

units in the Westphalian world (Schmitt 2003, 42-49, 80-83).

In sum, the distinction between political legitimacy in the internal dimension and expediency in the external one in the legal imagination reflects the dual needs of constitutional democracy as a transfigured manifestation of political modernity: the legitimacy of the constitutional state and the political self-maintenance of We the People. It should be noted that territorial borders bear greatly on but fail to account fully for the internal/external distinction. Rather, from the legal perspective, territorial borders are only one of the embodiments of the conceptual jurisdictional boundary from which the internal/external distinction results.¹⁵ Although the jurisdictional boundary as a legal construct can be redrawn by the law, it also needs to be precisely and clearly delineated at a fixed point of time to avoid the clashing claims over supreme politico-juridical authority in a particular political space (cf. Kramer 1991, 207-08). To the extent that the jurisdictional boundary provides a conceptual apparatus for constitutional democracies in demarcating two relationships of political rule, it is constitutive of the constitutional nomos by which the omnipotence of political power is preserved without degenerating into formless violence.

IV. Conclusion

Striking balance between constitutionalism as a set of normative ideals and political power as a necessary condition for the implementation of constitutionalism in a constitutional ordering is not an easy task. Leaving out its normative component, constitutional ordering is no less than a disguised political beast, a predator instead of a guarantor of constitutionalism. Simplifying constitutionalism as normative ideals without addressing its implementation, constitutional ordering is not the political means to achieve the common ethical ends of a self-governing community but rather a desired utopia. To embody strong constitutionalism to the effect that the normative ideals associated with constitutionalism can be fully implemented,

¹⁵ The distinction between citizen and alien is another example (Bosniak 1994).

constitutional ordering requires omnipotent but constrained political power.

To address this oxymoronic nature of constitutional ordering, this paper has dug into the constraints embedded in constitutional omnipotence itself by revisiting the project of political modernity under which omnipotent political power is conceived in a constitutional form. In the light of political modernity, this paper has found that what underlies the contemporary inclination towards constitutional ordering is a desire for strong constitutionalism. Thus, constitutionalism stands for more than limited government. Paralleling its limiting function, the constitution in which strong constitutionalism is conceived indicates constitutional omnipotence. Based on Arendt's and Schmitt's discussions on the relationship between norm and boundary rooted in the Greek concept of *nomos*, this paper has argued that omnipotent political power and constitutionalism coexist, albeit with tension, under a constitutional *nomos*, the matrix of which is a dual delimitation of boundaries, generational and jurisdictional. Through this conceptual structure of boundary, constitutionalism and political power are reconciled.

What has been argued hitherto is the conceptual framework within which constitutionalism and political power have been conceived and related to each other in the project of modernity. However, the current endurance of this underlying constitutional *nomos* does not mean that it can withstand contemporary challenges, continuing into the next constitutional age. In the face of globalization, conceptions of time and space are undergoing great transformation. Jurisdictional boundaries are blurred; time is compressed (Harvey 1989, 201-326). As a result, the dual delimitation of boundaries at the core of the constitutional *nomos* is getting blurred (Ruggie 1993; Scheuerman 2004). How constitutionalism and political power would be reconciled in the post-constitutional *nomos* age constitutes the central issue for constitutional scholars in conceiving of the future of global constitutionalism.

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