Chapter 5
The Role of Constitutionalism in Regulatory Governance

Pablo Larrañaga

> *A good government implies two things; first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained.*
>
> James Madison, *Federalist Papers*, No. 62.

For a long time, constitutionalists have been concerned with the problematic relationship between constitutionalism and regulatory governance.[1] For example, in a recent collection of essays: *Regulatory State: Constitutional Implications*,[2] Colin Scott summarizes those concerns in two kinds of critiques to regulatory governance. On the one hand, he brings up a strict or internal critique, which focuses on the constitutional problems of legislative

Previous versions of this work were discussed in diverse contexts: the Thomas Hobbes Seminar organized by ITAM and UNAM in Mexico City; the "Legisprudence" workshop at the XXV IVR World Congress in Frankfurt; the Vaquerías Seminar in Cordoba, Argentina; the Seminar of the Department of Political Theory at the University Pompeu Fabra, in Barcelona; the Seminar of the Department of Legal Philosophy of the University of Alicante and the 1st US – Latin-American Law Colloquium organized by the Law School of the University of Texas and the Department of Law of ITAM. I deeply appreciate the insights I received in every of such occasions, and naturally remain responsible of any failure remaining in the text.

[1] See, e.g., Black (2007), Majone (1997, 1999), Baldwin (1997) and Sunstein (1990).

[2] Oliver et al. (2010).

P. Larrañaga (✉)
Departamento de Derecho, ITAM, 1, Río Hondo,
1080 Tizapán-Progreso, México DF, Mexico
e-mail: larranaga@itam.mx

L.J. Wintgens and A.D. Oliver-Lalana (eds.), *The Rationality and Justification of Legislation*, Legisprudence Library 1, DOI 10.1007/978-3-319-00062-6_5,

delegation to regulatory agencies, and the obstacles to control by legal means the supposedly technical nature of such "constitutional" powers. On the other hand, he takes up a broad or external critique, which points to the legitimacy deficit of such governmental arrangements in a context of diffusion and fragmentation of sovereignty in the global regulatory arena.[3]

If Scott's picture is accurate, the problematic relationship between constitutionalism and regulatory governance has two roots. On the one hand, public law scholars—particularly, constitutionalists—consider that some of the institutional features of the regulatory state modes of government (i.e., independent and autonomous regulatory agencies located in the Executive Branch of government, with a supposedly delegate legislative-regulatory power; the use of regulatory techniques other than "command and control", e.g., information, self-regulation, state-largess, without rulemaking constraint as limit to policy discretion; the circumvent of administrative process by a managerial conception of government prerogatives, etc.), do not meet the standards (Rule of Law) intrinsic to any constitutional government.[4] On the other hand, many political theorists and government scholars sustain that the acceleration and the greater depth of globalization implies a substantial shift of public policy from a national domain to a supranational arena. In their view, globalization carries with it a substantial harmonization of governmental patterns and institutional models—e.g., trade, financial markets, industrial property, copyrights, environmental standards—that overrides the national states capacities to issue autonomous regulation, with the consequence of granting non democratic organizations (international economic organizations, e.g. IMF, OECD, WTO, etc.), transnational industries, firms and forums (e.g., NYSE, Standard & Poor's, Moody's,

[3] Scott (2010). Although "governance" is a current concept in political theory and public administration scholarship, legal scholars do not use this concept frequently—I am afraid, in contemporary constitutionalism even government is far form being a central concern. Therefore, perhaps a definition could be of some utility:

> Governance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government of effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them (The World Bank 2010: 1).

To be sure, this chapter looks particularly at the second aspect of this definition: the capacity of the government to effectively formulate and implement a sound regulatory policy.

[4] See, e.g., Strauss (2010), Freeman (1999), Richardson (1999) and Mashaw (1997).

The World Economic Forum, etc.) and NGOs (Greenpeace, Amnesty International, etc.) a substantial say on national governmental outcomes.[5]

Apart from anything else, from a more day-to-day practical perspective—which, at the end of the day, may turn out to be more relevant for the argument of this chapter—a puzzling fact reveals another facet of the problematic relationship between constitutionalism and regulatory governance: in spite of the democratic wave of the 1980s, and of the neoliberal policies of the 1990s, many developing countries that implemented those "structural" reforms still show both relatively low complaint with the constitutional government standards and a relatively weak economic and social regulatory governance.[6]

So, in spite of the canonical approach to constitutional government, it seems wise to approach the governance in contemporary society from a perspective that not only highlights the incompatibilities between constitutional

[5]In fact, as we will see, both sources of the problem are normatively intertwined. As Martin Loughlin has sustained, the central concern of public law is the government *through* the institutions of law; being constitutions a central feature of modern legal orders (Loughlin 2010, part IV). Consequently, if regulatory governance is found utterly incompatible with a constitutional framework, this would compromise no only the legal status of regulation but, more importantly, this would dissipate any possibility for its legitimacy as government technique.

Needless to say, this framing of the problem is not unproblematic. As it is well known, both "constitutionalism" and "governance" are contested categories, and their relationships with contemporary legal phenomena are, at least, controversial. See, e.g., Pollombella and Walker (2008) and Jordana and Levy-Faur (2004a, b). It is not my purpose in this chapter to participate in that theoretical conversation, but rather focus on its implications from the perspective of constitutional government.

[6]There are wide national divergences in this matter that call for alternative and, naturally, more sophisticated explanations. Nevertheless, I consider Mexico—and maybe, Argentina; a country I know definitively less—as a paradigmatic example of this phenomenon. Mexico went through a process of "structural" reforms of the 1980s and 1990s directed, on the one hand, to the reinforcement of constitutional government—consider, e.g., the impulse of constitutional justice as a relevant factor with respect to government control—and, on the other, to the deployment of a regulatory state—consider, e.g., the emergence of most of the regulatory agencies in a period of less than 5 years. Nevertheless, although Mexican economy is regularly ranked among the 15 larger economies in the world (14th, in July 2012), it is still the 98th (of 178) in the light of corruption meters of evaluation, and the 56th (of 169) on human development standards.

Statistical sources: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results, and http://hdr.undp.org/es/estadisticas/idn

This is not the context for a detailed argument on the causal relationships among institutional environments, governance standards, and social development. Nevertheless, for an introductory approach to the Mexican case, see, e.g., Moreno-Brid and Ros (2009) and OECD (2012).

standards and regulatory governance instruments, but that also recognizes the positive, mutually reinforcing, synergy between these institutional models. This synergetic approach, I contend, is more consistent with the fact that the governance patterns in developed countries show both a higher degree of compliance with the constitutional standards and a systematic deployment of regulatory strategies.[7] Notwithstanding the dramatic failure of the financial markets regulation that caused the current capitalist crisis, there is an overwhelming consensus among economic and social historians on the mutually reinforcing dynamic between the constitutional arrangements and the governance of the economy. Both are pivotal factors to explain a sustained historic economic growth and an extended social welfare system in developed societies after World War II.[8] This evidence should meet up with the normative-constitutional approach to institutional transformation in a way that explains the interdependence between constitutionalism and governance.

The central tenet of this chapter is, thus, that there is a mutually reinforcing relationship between the constitutional standards and regulatory governance arrangements, and that the functional effects of that particular nexus have to be properly understood in order to assign to constitutionalism a proper role in the understanding of contemporary governance.

These rather bold statements have three more complex, intertwined, implications. First, a synergetic approach to constitutionalism and regulatory governance is a more accurate account of liberal democracy and market society than the canonical political-moral approach to constitutionalism.[9]

Secondly, in this approach, constitutionalism and regulatory governance are functionally linked to two different forms of governmental power, *potestas* and *potentia*, which have a reciprocal enhancing dynamic in a working constitution. This implies that the higher the performance of a government in the light of the standards of one institutional model (e.g. constitutional government), the higher its possibility of a better performance

[7] Again, institutional variation is wide, and the tendency to make an ideological reading of facts is extremely large. Nevertheless, as we will see, serious efforts to explain and understand the variation on national performance arrive to the conclusion that state power is, in fact, a *sine qua non* factor to sustained economic and social development. See, e.g., Mann (1986–2013).

[8] There is a vast literature on this topic, but one of the most vigorous examples of it is North et al. (2009).

[9] I label as "canonical" the different conceptions covered by the neo-constitutionalist wave: Robert Alexy, Luigi Ferrajoli, Gustavo Zalgrebelski, etc. But I think that maybe Dworkin's approach to the role and contents of a constitution could be a more concrete reference of what I have in mind.

with regard to the standards the other model is (e.g., regulatory governance). In this approach constitutionalism and regulatory governance are functionally interdependent elements of a working constitution.

Thirdly, in this account of constitutional government, there is a justificatory balance between the standards that we use to evaluate the performance of governmental powers in the form of *potestas* and *potentia*. Therefore, there cannot be an independent satisfaction of the standards of any such models without meeting at the same time the standards of the other. In this approach constitutionalism and regulatory governance are normatively (instrumental-pragmatic) interdependent conditions for collective power.

In this chapter I will support the previous statements by a three-level argument.[10] First, I will argue that, in contrast with the prevalent view of constitutionalism that limits its rationale to the function of controlling political power within a system of moral standards—i.e., fundamental human rights—an account of the constitutional dimension of regulatory governance requires giving its due to a frequently neglected central goal of constitutionalism: the organization of social action through the institutionalization of power, with the central purpose of generating and preserving collective power.[11] This shift in the constitutional outlook, I will contend, brings up the need of a sociological conception of constitutionalism that can reconcile, under one and the same rationale, two different basic functions of a constitution: creating and controlling governmental power. This sociological "turn"

[10]I rather talk of a "thee-level argument" instead of three arguments because, in my view, they are just elements of a unitary instrumental and "welfarist" conception of public law. As will be transparent, these levels do not clear cut usual divides like descriptive and normative discourses; function and justification, and efficacy and justice. My strategy is to formulate a persuasive argument by the coherence among the particular statements of each level, instead of formulating independent, although convergent, conclusions.

[11]This is the power to do collectively the sort of things that no one, either an individual or a private corporation, regardless its quantum of distributive power, can do by himself. I borrow the concepts collective and distributive power form Parsons (Parsons 1960: 199–225). Michael Mann sums up this notions in the following terms: "*Distributive power* is the power of an actor A over an actor B. For B to acquire more distributive power, A must lose some. But *collective power* is the joint power of actors A and B cooperating to exploit the nature or other actor, C" (Mann 1986–2013: 2). As it is well know, canonical constitutionalism deals almost exclusively with distributive power problems, being actors A and B, e.g., government and citizens; different branches of government, or different agencies of the Executive Branch. In this approach I propose to shift our attention to problems of collective power as constitutional matter, being constitutional arrangements social instruments to generate coordination for collective action between A and B, either oriented to transform nature, or to increment their (common) capabilities to control effectively actor C—i.e., a social agent (private or public) with potential ability to resist or distort collective action.

implies three things. First, the rationale for constitutionalism (as much as that of the other two institutional pillars of modernity: democracy and of capitalism) can be best depicted as a mutual advantage strategy, based on the procurement of interests of the individuals. Secondly, the notion of coordination—rather than those of contract or consensus—is the key linkage for social order, and, in consequence, the bedrock for any plausible account of the role of a constitution in governance. Thirdly, once we get rid of unnecessary deontological engagements, it is plain that the main drive of constitutionalism is the generation of the collective power necessary to procure individual welfare; all constitutional arrangements have an instrumental value with regard to this basic social goal.

The second level of the argument focuses on the specific tasks of a constitution related to the design of governmental powers. In this part I will argue that, in contrast with the current constitutional doctrine, which limits the role of constitutionalism to provide control mechanism to government despotism—division of power, checks and balance, judicial review, etc.—, a constitution that is properly designed to organize government in order to increase social collective power—i.e., a working constitution—also has to take into account the mechanisms to enable the government to control social agents (the governed), who very often have strong incentives and substantial power to resist collective-constitutional action.

The third level of the argument gets into the specific relationship between constitutionalism and regulatory governance, *in the context* of a working constitution for contemporary society—i.e., one that is properly designed to generate a regulatory regimen adequate to formulate and implement sound public policy in contemporary society.[12] Specifically, I will try to show that constitutionalism and regulatory governance are part and parcel of the regulatory regime of open access social orders, and, in this way, make evident the pivotal role that constitutionalism plays in regulatory governance.

5.1 The Strategy of Constitutionalism, Briefly Revisited

To have a constitution is the product of a social determination or, more precisely, of a series of social resolutions or decisions, such as: (a) to subordinate public power to the legal order; (b) to assign constitutional rights the role of a final standard of public argument among competing social interests and values; (c) to follow to certain procedures for making of legal rules and

[12] See Oliver et al. (2010).

for the access to public offices, etc. These are, in short, the rules of the game of constitutionalism.[13] As is well known, there are diverse and, somehow, competing rationales for the social resolutions of both "making a constitution" and "playing by a constitution", such as: moral reasons grounded in its instrumental value to protect human dignity and autonomy, and prudential reasons grounded in the instrumental value of a constitution to promote social welfare or manage social conflict. Whatever the position on this matter, what I want to underline is that those rationales are not warranted by any constitution, but reasons for constitutionalism as a mean to procure certain values or social goals.[14] That is, those are reasons for the constitutionalist strategy.

If the strategy of constitutionalism is to be considered really and truly a "strategy"—i.e., a rational ordering of means to an end—, then, this strategy is to be explained and justified from a pragmatic perspective—i.e., within a framework of the rational social action in question. First, we have to recognize the sort of impulses that motivate to undertake that sort of action—i.e., the ends or goals in question. Second, we have to show its functional mechanism by identifying which kind of social interaction it is—i.e., the means or instruments in question. And, third, we have to make explicit a sound idea "rationality" of social action—i.e., why those means fit the purported end, with a reasonable degree of efficiency.[15] In my view, the most cogent

[13]Naturally, those decisions can be described in much more detail, and their institutional consequences are far for simple and unproblematic. Actually, as it is well know, the implications of "playing by a Constitution" are both theoretically and practically significant, and have been "the" central matter for Public Law at least for the last two centuries.

[14]I am, of course, aware that there is controversy on the nature of those social goals, and that there lies the philosophical (political, social, moral, etc.) dimension of constitutionalism. This is not a conversation in which I want to participate now. What I want to highlight is a much less controversial feature of constitutionalism: its instrumental nature.

[15]Otherwise, a constitutional theory that could not formulate a convincing grounding for both the "making" the Constitution and for the social-institutional practice of "playing" by the Constitution, would be metaphysical dream.

This "strategy" is, actually, an instance of the two-step justification presented by Rawls is his seminal article "Two Concepts of Rules" (Rawls 1955), and later developed in his *A Theory of Justice* (Rawls 1971). This constructivist approach to the foundation of our institutions and, more importantly here, to the standards of justice belong to a long tradition in liberal thinking that reaches back, at least, to pre-liberals such as Hobbes. Nevertheless, letting aside its liberal *pedigree*, I think that most of its relevance in contemporary constitutionalism springs from the unequivocal artificial character of the argument, which contrasts with the implicit naturalism that pervades contemporary neo-constitutionalism.

approach to the strategy of constitutionalism is the one formulated by Hobbes, and later complemented by Hume.[16]

As is well known, according to Hobbes' account of constitutionalism,[17] self-interest is the motivation of social order; and, thus, constitutionalism can be seen as a mutual advantage strategy, in the sense that it can be considered "a causal generalization of self-interest" (Hardin 1999: 2). That is, constitutionalism is "the best way to secure our personal interest in survival and economic prosperity is to secure the general mutual interest in these things through establishing and maintaining general order" (Hardin 1999: 2). In this Hobbesian account, the "sociological law" of what work in our interest is prior to positive law (the constitution). This is so because, as Hardin underlines, the workability of a constitution through the coordination of substantial part of the population with respect to some institutional order "make[s] it in the interest of virtually all to go along with it" (Hardin 1999: 3).[18] Underlying this requisite of workability of the constitutional order, there is a welfarist (utilitarian) purpose for the maintenance of that order: "government has no value in its own right; it is merely a means to the end of human welfare" (Hardin 1999: 47). This implies that, for Hobbes (and, arguably, for any utilitarian account of legal order), "social construction of welfare obviously trumps what individuals can accomplish" (Hardin 1999: 47 ff.).

The purpose of this sketch of Hobbes's account of constitutionalism as a mutual advantage strategy is to highlight three elements of the constitutionalist strategy. These elements make evident, in my view, the congeniality of the tasks of constitutionalism and those of regulatory governance. First, since welfare is the central impulse to constitutionalism and, more particularly, of constitutional government, in contrast with a widely shared

[16]Of course, I do not claim originality in this claim. On the contrary, in the next paragraph I closely follow Russell Hardin (Hardin 1999), although for the sake of parsimony I will not elaborate on his suggestive, and complex, approach to constitutionalism, democracy and markets as mutual advantage strategies. On the role of coordination in Hume's political theory as an "improvement" of Hobbes contractualist argument, see, Hardin (2007).

Apart from that, Hardin argument is not completely original; on the contrary, it is deeply rooted in the liberal tradition within which modern constitutionalism emerged. See, e.g., Holmes (1995).

[17]For the sake of simplicity, in what follows I will assimilate the ideas of constitutionalism, order, state and government.

[18]That is, "sociologically, a mutual advantage theory is therefore *de facto* a coordination theory. The government that coordinates interests in more likely to sustain support that the government that evokes moral commitments" (Hardin 1999: 3–4).

convention in contemporary constitutional doctrine, the content of constitutions neither need to be conceived as political program nor as a moral agreement: it is, fundamentally, a device to make government possible. Constitutions are collective instruments to attain government as a collective goal.[19] Second, since coordination, rather than contract or consensus, is the key linkage for social and constitutional order, one and the same kind of reasons for collective action—i.e., self-interest—are both the causal explanation of the establishment of a constitution and of the workability of that same constitution. That is, the conditions for undertaking the strategy of constitutionalism are the same as those for the stability of a constitution.[20] Third, since constitutions are fundamentally collective action devices, the most basic purpose that any constitution must achieve is the organization of government under the technical-instrumental standard of producing, increasing, and stabilizing coordination as a source of public power. It is, thus, under the light the foregoing ideas that the strategy of constitutionalism can be

[19] Although, in my mind, it is a platitude, it may be worth recalling in the current *zeitgeist* that the question of government legitimacy is conceptually and functionally dependent of the question of government possibility. Therefore, a theory of the first that does not give a satisfactory account of the second is, at least, superfluous.

[20] See Hardin (1999: 103 ff.). On other grounds, this effectiveness principle has been formulated also in the legal theory. For example, Neil MacCormick has approached this prerequisite of constitutional effectiveness in the following terms:

> Given a constitutional order that is by-and-large efficacious, it makes sense to treat the constitution as that which ought to be respected. That is, it makes sense to act on the footing that state coercion ought to be exercised only in accordance with provisions laid down by constitutional founders, and that all other forms of coercion ought to be repressed as legally wrongful […] Two points need to be made. First, this presupposes that we know what a constitution is. This knowledge in necessarily based on […] the functions of allocating powers and establishing checks and balances among them. That is, from the appreciation of the functioning of a territorial legal order with a judiciary, executive and legislature in some kind of working interrelationship that can explain what goes into a constitution. Secondly, the existence of a constitution is not primarily a matter of the adoption, by whatever procedure, of a formal document that purports to distribute powers of government […]. It is, again, an issue of functionality, to do with the response of political actors over time to the norms formulated in the text of a constitution. These are or are not taken seriously as governing norms of conduct. To some variable degree, but at least in the great majority of relevant situations, conduct must be oriented toward these norms by actors, and understood by reference to the same norms by those acted upon. Only those that are in this sense taken seriously do really exist as working constitution, (MacCormick 2007: 45 f.).

considered as part and parcel of contemporary governance, rather than exclusively as either a straitjacket or a benchmark of legitimate public action.

Surely, many misunderstandings can be avoided by making clear the distinction between reasons *for* constitutionalism and reasons *of* a constitution. Reasons *for* constitutionalism are fully instrumental in nature, and consequently their justification or validity depends on whether the resolution to "play by a constitution" is, in fact, an adequate mean to attain certain a desired social order. In contrast, reasons *of* a constitution are authoritative in nature, and thus their justification or validity depends on whether they are compatible with the forms and content of "the" constitution. Nevertheless, for the constitution to be "rightly", "correctly" or "properly" designed, authoritative reasons *should* be functionally instrumental to the goals of constitutionalism.

I admit that this distinction between reasons *for* constitutionalism and reasons *of* a constitution is rather obvious and simplistic. Nevertheless, as I will show in the next section, it becomes more meaningful once we consider the functional nexus between these instrumental reasons in the constitutional design of governmental powers.

5.2 Constitutional Workability and Governmental Powers

In the light of the instrumental perspective sketched in the previous section, for a constitution to be part of the strategy of constitutionalism—and, thus, for the reasons *of* the constitution to "become" reasons *for* constitutionalism-, there has to be a functional relationship between the authoritative products of the constitution—i.e., the institutionalized governmental powers, and the instrumental reasons for the constitutionalist strategy. This functional relationship depends on two conditions of the "workability" of a constitution that are somehow implicit in what I have said, but that were unequivocally expressed by Madison in his famous *Federalist*:[51]

> […] if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. *In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself* (Emphasis added).

That is, a "working" constitution must meet two standards: first, it must be effective in generating governmental power and, second, it has to be

effective in controlling such power.[21] These constitutional tasks are closely related to the technically specialized legal-administrative "forms" that frame modern public law.

5.2.1 Constitutional Forms of Governmental Power

In *Foundations of Public Law* Martin Loughlin traces back his analysis of the constitutional forms to create and control governmental power to two categorically distinct modes of relationship between players of a game—here, the strategy of constitutionalism, originally identified by Michael Oakeshott:

> One is an actual and limited relationship between real contestants, in which they seek a substantive outcome, namely to win. The other is an ideal relationship that may be invoked in a particular context, but exists independently to it; it is the mode of association understood expressly and exclusively in terms of recognition of rules. Only by focusing on the latter are we able to glimpse the idea of Rule of Law (Loughlin 2010: 326).[22]

These two modes of association are parallel to two forms of authority incorporated in the modern state, in spite of their mutual tension: *societas*—i.e., the authority generated by allegiance to an order of rules—, and *universitas*—i.e., the authority generated by allegiance to a set of common purposes.[23] Then, whereas a *societas* is the result of agreement on the authority of a set of arrangements and norms,[24] a *universitas* is a corporative association for

[21] This does not entail, of course, neither that all sources of governmental power are legal-administrative, nor that all mechanism of control of such power are constitutional. In his impressive study of the organization of social power, Michael Mann identifies four sources and organizations of power that interact in multiple overlapping and intersecting socio-spatial networks: ideological, economic, military and political (Mann 1986–2013). Although constitutional conversation has traditionally focused in the problem of controlling political power, governmental power is linked to all these sources and organizations of power, that require, I contend, a more comprehensive theory of constitutionalism. See, e.g., Larrañaga (2011).

[22] See, also, Oakeshott (1983: 119 ff.).

[23] See, Loughlin (2003: 16 ff.) and Oakeshott (1975: 185 ff.).

[24] "*Societas* is simply the product of a pact to acknowledge the authority of certain arrangements: it is a 'formal association in terms of rules, not a substantive relationship in terms of common action'" (Loughlin 2003: 16) with respect to Oakeshott (1975: 201).

the sake of common purposes.[25] While in the former, the task of governing consists, basically, in warranting the terms of the "partnership",[26] in the latter, the task of governing can be seen as a "managerial undertaking, with the ruler being related to this enterprise in some such manner as that of its custodian, guardian, director, or manager".[27]

When complemented with two different concepts of power in the public sphere, the foregoing distinctions enhance, in my view, the power of the Madison's quotation that heads this chapter. That is, the purposes of *societas* and of *universitas* have to be considered under the light of two different forms of governmental power, namely, "*potestas*, the rightful power to rule, and *potentia*, a source of power drawn from government's actual ability to control the disposition of things" (Loughlin 2010: 407). I will first consider briefly the concept of *potestas*, centered in the task of controlling the government and more congenial with canonical constitutionalism, and later, at more length, the concept of *potentia*, which is centered in the task of controlling the people and is intimately related, I argue, to the specific role of constitutionalism in contemporary regulatory governance.[28]

5.2.2 Potestas *and* Societas*: Governing as "Ruling Within the Constitution"*

One of the most puzzling problems in constitutional theory—and arguably, in legal theory—[29] is the relationship between form and substance, more precisely, the role of form in controlling power. Public lawyers have devoted

[25] "The state conceived not as a partnership but as a corporate association […] Corporate bodies of this type united 'persons associated in respect of such identified common purpose, in the pursuit if some acknowledged substantive end, or the promotion of some specified enduring interest" (Loughlin 2003: 17), and with respect to Oakeshott (1983: 203).

[26] "[T]he ruler of a state when it is understood as *societas* is the custodian of the loyalties of the association and the guardian and administration of its conditions which constitute the relationship of *socii* […] Its government (whatever its constitution) is a nomocracy whose laws are understood as conditions of conduct, not devices instrumental to the satisfaction of preferred wants", Oakeshott (1983: 218).

[27] Loughlin (2003: 17) and Oakeshott (1983: 218).

[28] Obviously, the combination of the two modes of association and the two conceptions of authority adds up to four analytical "models". Nevertheless, for the sake of parsimony I will consider only the most contrasting among them: *potestas*/*societas* and *potentia*/*universitas*. Much of what follows in this section is inspired by Loughlin (2010: ch. 6, 11 and 14).

[29] See, e.g., Summers (2010).

a good deal of time examining the functions of legal form in controlling governmental discretion. It is from this perspective that, for example, legal rights can be considered formal devices or instruments to control societal/governmental outcomes, although perhaps the most unequivocal instance of the mark of form in governmental power is the doctrine of due process.

Anything else aside, the idea of legally controlled governmental power is the bedrock of the constitutional government ideal. This ideal is contained in the very concept of constitutional *potestas* as a basic standard for the legitimate exercise of governmental power, which plays a pivotal role in the contractualist argument for allegiance in the context of a *societas.*[30] Nevertheless, the relationship between *potestas* and governmental power is not limited to the obvious function of preventing despotic or arbitrary government. *Potestas* plays a fundamental role in generating the kind of collective power that, even though it has not been the focus of canonical constitutionalism, is central to the idea of a working constitution. *Potestas* organizes public domain and, by this means, enhances state power. The foundation of this "positive constitutionalism" lies, to put it bluntly, in the functional division of institutional labor and is linked with the workings of the checks & balance mechanisms, to reach in farther into the very nature of modern state.[31]

There are, of course, several alternative approaches to the nature of the modern state. However, when considering it in the light of the design of a working constitution, it seems reasonable to adopt a "working" theory of the state. Harold Laski claimed that this theory, "must, in fact, be conceived in administrative terms" (Laski 1931: 53). That is, the state's power or will, "is the decision arrived at by a small number of men to whom is confided the legal power of making decisions" (Ibid).[32]

Taking into account this organizational shift, the element of *potestas* opens up two ways of communication between the modern state as *societas* and the idea of regulatory governance. One way runs through the process of the "juridification" of the public sphere and, the other, through the quest for

[30] As it is well known, this is particularly true in the Lockean version that influenced, over any other intellectual source, the liberal aspiration to abolish arbitrary power as an inherent moral value of the law, See, e.g., Fuller (1969: ch. 2). For a liberal, but less emphatically moralist view of the "virtue" of the Rule of Law, see, e.g. Raz (1977).

[31] Although John Stuart Mill's "positive constitutionalism" focuses in the democratic dimension of liberal institutions, I think that most of Mill's insights in this matter can be extended to the diffusion of knowledge of in constitutional governance. See Holmes (1995: 178 ff.).

[32] For a very suggesting approach to these organizational functions of law that deserves more attention by public law scholars than that received up today, see Llewellyn (1940).

the state monopolization of violence. These nexus cannot be explored here at length, but deserve a short description.

On the one hand, the institutionalization of *a* constitutional state carries with it the "juridification" of a social conversation in terms of universal legalistic dualisms: right/wrong; competence/incompetence; rights/duties, etc.[33] This process of "juridification" is particularly relevant with respect to the legitimacy of claims among individuals and, of course, between citizens and the government.[34] In a constitutional state conceived as *societas*, government is fundamentally a legal construct (an organization of legal forms or institutions), and it is through legal *potestas* that governmental action (legislation, administration, jurisdiction) must keep or guard the equilibrium between the political and civil *societies*. On the other hand, as is well known, in Weber's sociology the legitimacy of social organization through the formal rationality of state law is derived from the claim of states to the monopoly of the legitimate use of violence in society. In the sociological reading of constitutionalism sketched in the previous section, the pragmatic force of that claim to legitimacy is linked to the state power to act as an effective "last resort" in social coordination. Consequently, although the organization of state power is, as Laski notes, rather a matter of form than a question of substance, the chances of legitimacy of the outcomes of any such organization derive from factual considerations: that is, the "trustworthiness" of the state's claim to the *monopoly* of legitimate use of force. As we have seen, the source of this trust is far from being a mystery or a gratuitous concession; rather, it is a consequence of considering, first, that constitutionalism is a mutual advantage strategy and, second, that the organization of power—i.e., its organization through *potestas*—in a particular constitution *is* prompted to produce the kind of advantages that make such *trust* rational[35]: i.e., that public domain is organized in a way that enhances collective power.

[33] Social theory has been interested in this process of the "juridification" of social life for a long time. See, e.g., Habermas (1998) and Unger (1976). Nevertheless, this problem has regained actuality precisely as a consequence of the sociological analysis of the conditions of an effective regulatory state. See, e.g., Teubner (1987).

[34] Actually, the depth of the process of "juridification" of the public sphere sets the public/private divide in crisis. See, e.g., Oliver (1999).

[35] An additional quotation of Laski seems timely:

> *How that power is organised is rather a matter of form that of substance. It may, of course, be organised in such a way that it cannot, as in the Czarist Russia, attain the end which theory postulates for it*. Power, that is to say, is always a trust, and is always held upon conditions. The will of the State is subject to the scrutiny of all who come with the ambit of its decisions. Because it moulds the substance of their lives, they have the right to pass judgement upon the quality of its effort.

In brief, there are two ways in which the *potestas* of a working constitution is linked to the idea of regulatory governance; the first way runs from constitutional law to governance, and the second in the opposite direction. The "juridification" of the public sphere implies that, regardless the instruments or strategies of governance, those instruments and strategies must be susceptible of a "juristic" expression, interpretation and scrutiny. Besides, the "trust factor" required by *potestas* implies that any organization of public domain must be functional to make constitutional arrangements operative for the societal goal of generating collective power for an effective government—i.e., a government that is capable of carrying out the sort of task that we expect to be done, in order to have reasons *for* constitutionalism.

5.2.3 Potentia *and* Universitas*: Governing as "Constitutional Management"*

When we approach modern state as a *universitas,* it becomes clear that, in addition to the roles of *potestas* in the constitutional state as *societas*, there is a dimension of public power in the form of *potentia*: i.e., the government's actual ability to control the disposition of things. As already noted, a central tenet of this chapter is that the decision to "play" by the constitutionalist strategy is meant to enhance collective power through governmental organization, and, therefore, that any constitutional design of governmental powers *must* meet the demands of state *potentia* to pursue our goals as *universitas*.

The nature of *potentia* as a form of public power can be seized in the contrast between "despotic power" and "infrastructural power" that Michael Mann makes in his socio-historical analysis of the sources of power in modern state[36]:

> *Despotic power* refers to the distributive power of state elites *over* society […] *Infrastructural power* is the institutional capacity of central state, despotic or not, to penetrate its territories and logistically implement decisions. This is collective power, '*power through*' *society* coordinating social life through state infrastructures (Mann 1986–2013: 59).

> They have, indeed, the duty to pass judgement; for it is the plain lesson of historic record that the wants of men will only secure recognition to the point that they are forcibly articulate. *The State is not ourselves save where we identify ourselves with what it does. It becomes ourselves as it seeks to give expression to our wants and desires. It exerts power over us that it may establish uniformities of behaviour which make possible the enrichment of our personality. It is the body of men whose acts are directed to that end*. Broadly, that is to say, when we know the sources from which governmental acts derive we know the sources of State's will (Laski 1931: 53 f. Emphasis added).

[36] See Oliver et al. (2010).

The contrast between the state power *over* and *through* society give rise to a number of problems related to the relationship between state and society. Many of those topics are clearly relevant for an analysis of the role of constitutionalism in regulatory governance. Nevertheless, I will only deal succinctly with two interdependent aspects of the infrastructural governmental power, which I think are closely linked to the concern about the constitutional legitimacy of regulatory governance.[37]

The first aspect that I want to highlight is the nexus between *potentia* and the historical process of increasing penetration of the state in social and individual life. As Philip Gorski has shown, this process was triggered by a "disciplinary revolution" that took place at the dawn of modern state,[38] and the outcome of that revolution was the expansion and the institutionalization of "discipline" in society in general, and in bureaucratic elites in particular:

> Like the industrial revolution, the disciplinary revolution transformed the material and technological bases of production; it created new mechanisms for the production of social and political order [… This revolution] was driven by a key technology: the technology of observation –self-observation, mutual observation, hierarchical observation […] What steam did for the modern economy, discipline did for modern polity: by creating more obedient and industrious subjects with less coercion and violence, discipline dramatically increases not only the regulatory power of the state, but its extractive and coercive capacities as well (Gorski 2003: xvi).

The button-up direction of this disciplinary revolution reveals a key feature of the infrastructural power of modern state: its endogenous character. That is, in contrast with exogenous sources of state power (territory, climate, population size, etc.), infrastructural power is an endogenous power that derives from the own state *as* institution; being the routine of compliance to norms, standards, procedures, protocols, etc. the key factor for such institutionalization of government.[39] That is, whereas with regard to exogenous sources of state power, in principle, a state will be more powerful when controlling, for example, an extensive and populated territory, with regard to the endogenous *potentia*, a state will be more powerful by counting with professional,

[37] As it is well know, constitutionalist ideology is embedded in a sound liberal skepticism regarding the proper use of governmental power; particularly, with respect to the tendencies of the state to "colonize" society and of government to "capture" public interest. These are risks concomitant to any arrangement of and for authority. Nevertheless, as I will try to show in the next section, there is nothing to gain form circumventing this problem by means of ideological commitment, and a lot to improve in our institutional designs by the acknowledgement of a necessary balance between the social goal of a powerful state and the risk of misuse of that power.

[38] See Gorski (2003).

[39] Cf. above n. 18.

reliable, technically capable, etc. bureaucratic elites, and with a population prone to institutionalized behavior.[40] Briefly,

> […] discipline increases state power in so far as it creates overall levels of administrative efficiency and social order because a more orderly society is cheaper to govern and a more efficient administration in cheaper to run (Gorski 2003: 36).

A second, closely related, aspect of the increasing *potentia* of modern state is the nexus between information/knowledge and Foucault's idea of "rationality of government", manifested in the use of certain "techniques of power" or "power/knowledge" designed to "observe, monitor, shape and control the behaviour of individuals situated within a range of social and economic institutions" (Gordon 1991: 3 f.). These techniques power are the center pieces of the practical knowledge of how to govern; that is, "the immanent conditions and constraints of [governmental] practices" (Gordon 1991: 7). In Foulcault's approach to the history of governmental power, the exercise of power in contemporary states can be understood as the product of a continuum in the replacement of a "society of sovereignty" by a "disciplinary society", and this, by a "society of government". He encapsulates this process in the history of "governmentality", by which he means three associated things:

1. The ensemble formed by institutions, procedures, analyses and reflections, the calculation and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal knowledge political economy, and as its essential means apparatuses of security.
2. The tendency which, over a long period and throughout the West, has steadily led towards the pre-eminence over all other forms (sovereignty, discipline, etc.) of this type of power which may be termed government, resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of *saviors*.
3. The process, or rather the result of the process, throughout which the state of justice of the Middle Age, transformed into the administrative state during the fifteenth and sixteenth centuries, gradually becomes "governmentalized" (Foucault 1991: 102 f.).

[40] Of course, the quality of elites is a function of social capital, and this is, again, in a mayor part a product of state *potentia*, as it is effectively implemented in public policy: education, health, infrastructure, etc. The obviousness of the virtuous circle between social development and governance does not make easy to find out the springs to start its movement.

Of course, as it could be easily recognized much of what is been said here and in the next section in close to Weber's contrast between patrimonial and bureaucratic systems. See Weber (1978: 220 ff.).

Of course, Foucault's idea of governmentality requires a series of nuances in order to make it fully applicable to the contemporary idea of regulatory governance. Nevertheless, although Foucault had clearly in mind the activity of controlling population, as we will see at more length in the next section, that idea is pertinent to understand the enhancing of the state *potentia* in promoting general welfare—i.e., the goal of *universitas* as association—, in so far as it points to the central role of technical knowledge and bureaucratic expertise as conditions (and constraints) of the performance of tasks of contemporary states.

In sum, both *potestas* and *potentia* are two fundamental components of governmental power in contemporary states. These two forms of power are related to a working constitution in different and complex ways. On the one hand, in order to attain our goals as *societas*, working constitutions are effective to the extent that they can channelize social discourse and, eventually, social conflict through constitutional institutional arrangements—i.e., through *potestas*. On the other hand, in order to attain our goals as *universitas*, working constitutions are effective in so far as they channelize social choice towards those instances that are in the best informational (rational) position to make those collective decisions. Traditionally, the idea of constitutional government has been associated only with the first sort of "controlled" governmental power, but as we will see in the next section, under the conditions and constraints of contemporary social organization, when limited to the *societas*/*potestas* couple, a constitution is not well equipped to play its role in regulatory governance.

5.3 Constitutional Government as a Regulatory Regime for Open Access Societies

The authors of *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (North et al. 2009) frame the scope of their ambitious book as follows:

> The task of the social sciences *is to explain the performance characteristics of societies through time, including the radical gap in human well-being between rich countries and poor as well as the contrasting forms of political organization, beliefs, and social structure that produce these variations in performance* […] Two social revolutions resulted in profound changes in the way societies were organized. The central task of this book is to articulate the underlying logic to the two new patterns of organization, what we call *social orders*, and to explain how societies make the transition from one to the other.
>
> In order to understand why emergent features of modern developed societies, such as economic development and democracy, are so closely linked in the second revolution, we are interested in the basic forces underlying patterns of the social order. *Social orders are characterized by the way societies craft institutions that support the existence of specific forms of human organization, the way societies*

> *limit or open access to those organizations, and through the incentives created by the pattern of organization* […]
>
> All human history has had but three social orders. The first was *foraging orders*: small social groups characteristic of hunter-gather societies. Our primary concern is with the two social orders that arose over the last ten millenia. The *limited social orders* or *natural state* emerged in the first social revolution. Personal relationships, who one is and who one knows, form the basis of social organization and constitute the arena for individual interaction, particularly personal relationships among powerful individuals. Natural states limit the ability of individuals to form organizations. In the *open access orders* that emerged in the second social revolution, personal relations still matter, but *impersonal categories of individuals, often called citizens, interact over wide areas of social behavior with no need to be cognizant of the individual identity of their partners. Identity, which in natural states is inherently personal, becomes defined as a set of impersonal characteristics in open access orders*. The ability to form organizations that the larger society supports is open to everyone who meets a set of minimal and impersonal criteria. Both social orders have public and private organizations, but natural states limit access to those organizations whereas open access do not.
>
> The transition from the natural state to an open access order is the second social revolution, the rise of modernity (North et al. 2009: 1 f. Emphasis added).

The justification of such a long quotation lies in the difficulties of the announced purpose of this section: show that, as element of the regulatory regime of open access societies, constitutionalism displays its proper role in regulatory governance. In the light of the very schematic approach to governmental powers outlined in the previous section, this quotation discloses some hints about the hypothesis of a positive relationship between constitutionalism and regulatory governance: the organizational dimension of state. And, what is more important, this socio-historical approach to the question gives a relatively general response to the question of why some countries, like Mexico, that supposedly undertook the structural reforms towards constitutional government *and* market oriented economies, still show relatively low levels of effective constitutional and regulatory governance, with the consequence of meager economic performance and lower social development than that which would be expected in the light of the available social resources (quality of the territory, size of the population, integration in global networks, etc.). The thesis I will argue for in this last section is that Mexico has failed to integrate those reforms under a working constitution, and therefore has failed to take effective social, political, and economic measures which are necessary to become an open access society.[41]

[41] Of course, I do not want to suggest that the "workability" of the constitution is the only factor—not even the main factor—to explain the resilience of those societies as natural states. My argument only goes as far as saying that a common factor among societies that exhibit high degree of constitutional governance is that they are, in fact, open access orders. This can be a *sine qua non*, but definitively not a *per quam* relation.

5.3.1 Open Access Societies

An important assumption of North et al. is that they approach the question of the social order as a matter of the social organization of complex and sophisticated forms of contracting, into the state and beyond the state. These institutional forms make possible for the members of such organizations to reach agreements on fundamental commitments, which need not be necessarily consistent, always and at every time, with the particular incentives of every participant.[42] Open access organizations, they claim, are organizations that pursue their goals through institutional arrangements, particularly through formal rules. In such context, a critical condition to open access social orders is that the formal institutions and rules can control violence "only in the presence of an organization capable of enforcing the rules impersonally" (North et al. 2009: 16).[43]

[42]This approach makes a distinction between adherent organizations and contractual organizations. Whereas, in the first case, organization does not depend on the a third party to back agreements, and cooperation among the members of the organization *must* always be compatible with the individual incentives, the second, in contrast, requires the backing of a third party to support organization, and to make possible agreements that, in some cases, are not aligned with the incentives of participants. Perhaps someone might find this approach to social order as contractual organization incompatible with my presentation, in the first section of the paper, of constitutionalism as mutual advantage strategy. Nevertheless, this supposed incompatibility fades by making the distinction between reasons *for* constitutionalism and reasons *of* the constitution. I have stressed the point that, as mutual advantage strategies, social and constitutional orders depend on the fact of serving the interest of the relevant individuals in a society; and that the existence of a working constitution—i.e., one which produces coordination under the constitution—is a condition for reasons *of* the constitution to become reasons *for* constitutionalism. I think that this is not at all incompatible with sustaining, following Hobbes, that constitutions work by authoritative means: i.e., by establishing obligations that are independent to other incentives of those regulated by the constitution. Commitments are essential features of any constitution, and their binding character depends, precisely, on the existence of the constitution in question (see, above, n. 18). This is why, mutual advantage arguments provides both an answer to the question of why constitutions are made, in first place—in my opinion, the only persuasive answer—, and a justification of why, ones established, constitutions are binding along the time: the pragmatic obligation to obey to what is in my interest—i.e., maintaining a working constitution.

[43]Although they focus on the conditions for the control of social violence, I suggest, nevertheless, that their framework is useful to give an account of the collective power required to procure any other form of social welfare besides and beyond peace. In this sense, in the light of an strategic approach to constitutionalism sketched in the first section, I consider—with Hobbes and with liberals, in general (Holmes 1995: ch. 2)—,

The larger a society is, the stronger is the demand for the organization of institutionalized violence. Social science has advanced two competing explanations of how this institutionalization takes place. On the one hand, in a Weberian fashion, the state can be considered as an individual actor, an organization of organizations that claims the legitimate monopoly of the use of violence in society. On the other hand, other social scientists (manly, economists) have modeled the state as a revenue-maximizing monarch, as a stationary bandit, or as a representative agent. These explanations allow us to give a relatively simple explanation of social order, taking for granted that it is a function of the interaction between two entities, a society and *the* state, molded by the incentives and restrictions of a single actor: the authority. Nevertheless, North et al. claim that both approaches fail because they overlook

> […] the reality that all states are organizations [and, therefore they miss] how the internal dynamics of relationships among elites within the dominant coalition affect how states interact with the larger society (North et al. 2009: 17).

Alternatively, they propose their own explanation to social order:

> Rather than abstracting from the problem of bringing together powerful individuals to manage violence through some organized effort, we begin with the problem of structuring the internal relationships among individuals who make up the organization of (potential) enforcers. The first problem in limiting violence is to answer the question: How do powerful individuals credibly commit to stop fighting? […] *The control of violence depends on the structure and maintenance of relationships among powerful individuals*" (North et al. 2009: 16 f. Emphasis added).

---

that the same cluster of passions is the source for our demand of order (peace) and of welfare in general:

> The Passions that encline men to Peace, are Feare to Death; Desire of such things as are necessary to commodious living; and a Hope by their industry to obtain them. And Reason suggesteth convenient Articles of Peace, upon which men may be drawn to agreement (Hobbes [1651] 1996: 90).

Constitutionalism is, thus, one of those "Articles"—for peace, and welfare— upon which we may be drawn to agreement. Much has been said about the role of fear in Hobbes theory of human conduct, although very little has been commented by legal and political scholars about the desire of welfare and the hope for a productive life. These are "cold" and "positive"—at least, non destructive— passions, more familiar to the economic branch of liberalism, and have been considered by some as quintessentially *bourgeoises*. I claim, nevertheless, that this call to welfare is a fundamental influence of the more contemporary idea of regulatory state. See, e.g., Hirschman (1994); I have further developed this welfarist approach to constitutionalism in Larrañaga (2009: ch. 5) and Larrañaga (2011).

That is, in contrast with limited access social orders—"natural states", in their terms—,[44] which pursue their goals through the formation of a dominant coalition whose members possess special privileges, open access social orders show a positive relationship—"a virtuous linking"—between the capacity of government institutions to perform their tasks and the open character of those institutions. By integrating, then, the individual social action and the institutional context into the organization of the state, open access social orders work through a complex equilibrium or balance that reinforces their own system—in terms of this chapter, that enhances "collective power".[45] The resemblance of this equilibrium with the intertwinement between constitutionalism and regulatory governance is striking and making it crystal clear justifies, again, a long quotation:

> First, citizens in open access order share belief systems that emphasize equality, sharing, and universal inclusion. To sustain those beliefs, *all open access orders have institutions and policies that share the gains of and reduce the individual risk from market participation, including universal education, a range of social insurance programs, and widespread infrastructure and public goods* […]
>
> Second, political parties vie for control in competitive elections. *The success of party competition in policing those in power depends on open access that fosters a competitive economy the civil society*, both providing a dense set of organizations that represents a range of interests and mobilize widely dispersed constituencies in the event that and incumbent regime attempts to solidify its position through rent-creation, limiting access, or coercion.
>
> Third, *a range of institutions and incentive systems impose costs on an incumbent party that seeks to cement its position through systematic rent creation and limiting access*: imposition of systematic rent-creation yields a shrinking economy and falling tax revenue […].
>
> An important property of open access orders is the seeming independence of economic and political systems. *Economic organizations in open access orders do not need to participate in politics to maintain their rights, to enforce contracts, or to ensure their survival from expropriation; their right to exist and compete does not depend in maintaining privileges* […]
>
> An integral feature of open access order is the growth of government […] *The widespread sharing in open access […] entails large governments. Public goods spending on education and infrastructure involves expensive programs, as do the various programs that provide social insurance, including unemployment insurance, old age insurance, disability, and health insurance. Governments in open access orders are therefore larger than those in natural states, and their actions and policies are more complementary to markets* (North et al. 2009: 111 ff.).

[44] In a nutshell, the basic contrast between open access societies and natural states is that, whereas the first "regulate economic and political competition in a way that uses the entry and competition to order social relations", the second "uses political power to regulate competition and create rents; the rents order social relations, control violence and establish social cooperation" (North et al. 2009: xii).

[45] See, above, n. 9.

So, regardless specific historical and cultural variances, the open access societies that have emerged in the last two centuries share a number of commonalities:

1. A set of beliefs held among the population, and supported by the organization of the state, which includes various forms of inclusion, equality and shared growth.
2. Civil society encompasses a wide range of organizations independent of the state.
3. All open access social orders are, largely, impersonal.
4. Because of the antecedent characteristics, open access social orders cannot easily manipulate the interests of individuals and/or organizations.[46]

Probably, most Latin Americans—and, for sure, most Mexicans and, I think, a large number of Argentineans—would readily agree that those are not features of the social order they live in. Sadly, there is overwhelming evidence in the opposite direction: we live in fundamentally elitist societies, that have been unable to generate sustained growth and general access to welfare, and in which states can easily manipulate individual and group interest through invested privileges in the political system.

But, why is it so? Mexican society, for instance, has been in a long "transitional journey" to a constitutional, democratic, and market regime for more than 30 years, and still for large part of the population—the majority, in fact—live in a fundamentally despotic regime: what they experience is a social order with weak protection of rights, low levels of political representation, and despairing economic expectations. As I announced in the introduction, the general failure of those "structural reforms" is a main concern of this chapter, although I cannot give a full-fledged account of it here.[47] Nevertheless, I think that it is possible to discern some central aspects of the problem by approaching it as a failure to integrate the regulatory-constitutional regime of an open access society. That is, a society that enhances collective power in order to attain our goals to become more egalitarian, democratic, and prosperous.

5.3.2 Some Elements of the Regulatory-Constitutional Regime of Open Access Societies

There is a large literature on regulatory regimes and governance[48] and, of course, it is not my purpose to get in depth into it. On the contrary, I only want to use the idea of a "regulatory regime" as a heuristic tool to show how open

[46] See North et al. (2009: 112 ff.).

[47] See, e.g., Culebro and Larrañaga (2012).

[48] See, e.g., Braithwaite (2008) and Jordana and Levi-Faur (2004a, b).

access social orders integrate constitutionalism and regulatory governance. For this very limited expositive purpose, the idea of a regulatory regime can be reduced to two dimensions.[49] In the first dimension, a regulatory regime is considered a "control system" integrated by three basic elements: (a) ways of gathering information; (b) ways of setting standards, goals, or targets; and (c) ways of changing behavior to meet the standards or targets. The second dimension comprises the instrumental and institutional elements of a regulatory regime, covering the basic distinction between the regime "context" and the regime "content". Whereas regime context is the background (legal, economic, social, etc.) in which regulation takes place, the regime content is the policy setting and the configuration of the state and other governmental organizations involved in regulation (Hood et al. 2001: 20 ff). Of course, a detailed analysis of the elements of the regulatory regime of open access societies opens up an extremely large number of complex variables. I will, nevertheless, simplify my account by showing some instance of the deployment, in such regimens, of the kinds of governmental power enunciated in the previous section, *potestas* and *potentia*, that we associate respectively with the constitutional dimension and the governance dimension of these constitutional regimes. For the sake of parsimony, in the light of my argument in Sect. 5.2, I will only exemplify the dimension of control system, and leave for another time both the consideration of context and content.

[49] Although formulated in another context, I think that the idea of regulatory regimes as control systems developed by Hood, Rothstein and Baldwin in the book *The Government of Risk. Understanding Risk Regulation Regimes* (Hood et al. 2001) is fitted for my expositive purposes, and consequently in what follows I will be very close to their approach.

> We use the term 'regime' to denote t*he complex of institutional geography, rules, practices, and animated ideas* that are associated with the regulation of a particular risk or hazard. *Institutional geography can vary in features such as scale, from international to national to local jurisdiction; integration, from a single agency handling all features of regulation to high fragmented administration and complex overlapping systems controlling related aspects* of risk; and specialization, from risk-specific and hazard-specific expertise to general-purpose administration […] Three basic features of the regime approach deserve to be noted briefly here.
>
> First, we see risk regulation regimes as *systems*. *We view them as sets of interacting or at least related parts rather than as 'single-cell' phenomena.* So we are interested just as much in what 'street bureaucrats' and front-line people do on the ground as in the activity of standard-setters and policy-makers, and in the relationship, if any, between the two.
>
> Second, *we see regulation regimes as entities that have some degree of continuity over time*. Of course, regulatory systems seldom are, if ever, completely static. Risk regulation regimes have their sudden climacterics as well as their incremental adjustments and steady trends […]
>
> Third, *as with any system-based approach to organization, regimes are conceived as relatively bounded systems that can be specified at different levels of breath*. (Hood et al. 2001: 9 ff. Emphasis added).

5.3.2.1 Ways of Gathering Information

The regulatory constitutional regime of open access societies allows for an efficient information management, which increases *potentia* without getting rid of *potestas*. This virtuous result is a consequence of balancing the requirements of constitutionalism and of governance in this realm. *Potestas* requires, on the one hand, that government should have restricted access to the information distributed in civil society and, on the other, that society must have, in principle, unlimited access to whatever the government does. In contrast, *potentia* requires, on the one hand, that government have accurate information about what is going on in a society, and that, on the other hand, under certain conditions, a large part of society ignores, at least for some time, what is that the government is doing. The institutional mechanism of such balance includes, among others, deference, *ex post* controls, political accountability, etc. that hardly fit into a strict constitutionalist paradigm, but that nevertheless can be indirectly democratically checked. A very concrete example of this balancing is the way in which some countries—e.g., Spain and Italy and, in general, UE countries—have dealt with financial and other sensitive personal information—e.g., political and religious affiliation—in managing organized crime and antitrust policy. In principle, although the Executive branch leads this policy, creates and uses databases—in most of the cases, in coordination with transnational agencies—, the use of the information contained in those records and archives is controlled, *ex post*, by specialized administrative or legislative bodies and/or the judiciary. This networking includes, governmental access all income information as well as property registration systems, at both national and transnational levels. These policies of information management are also, in general, controlled *ex ante* by Parliaments, issuing directives to implement national policies (risk management, public security, antitrust, networks regulation, etc.) and the content of international agreements in such policy matters. Here, again, although the technical and managerial responsibilities fall in the Executive domain—in many cases, in autonomous technical agencies—, while the warranties of constitutional and democratic governance are provided by other branches of government.

In contrast, in natural states information is fragmented and, very often, its social management is patrimonial in that they benefit of privileged coalitions, including state bureaucracies. Consequently, in natural states government, there is an extensive use of codified information and a general reluctance to organize information in transparent, efficient, public records and archives. Paradoxically, this tendency is reinforced by bureaucratic specialization and decentralization. These processes create diverse degrees of opacity and different codes to access specific information, that create

complex and specialized systems. An example of this is the "over-technicality" of government language and rules in the public domain, particularly those areas related with economic competition, e.g., antitrust policy, network regulation, etc. A very concrete example of this can be found in the information provided by the Mexican government in processes of public contracting and with respect to the rulings of regulatory agencies (antitrust, telecommunication, etc.), where very often relevant information—mainly, decisional criteria—is absent or hidden among irrelevant, unspecific, and equivocal data.[50]

5.3.2.2 Ways of Setting Standards, Goals and Targets

The regulatory constitutional regimes of open access societies promote long-term commitments to public policy objectives, by the use of general standards to evaluate the effect of governmental action in specific targets of those policies. This way of setting standards, goals, and targets has obvious advantages with respect to the use of public scarce resources, but also allows for a greater participation of a wide set of organizations in the formulation and execution of those policies (NGOs, industries, academia, etc.).

[50]Mexico suffers of a particularly inefficient information management that, in my opinion, has not been significantly improved by the "transparency policy" in recent years. To be sure, there is an enormous quantity government of information available, but there is much to be done with respect to the relevance criteria of a large part of such information. Sadly, as any contractor with any government level (Federal. Local or Municipal) and any participant in market competition in Mexico has experienced, very often the official available information does not give any clue on what makes the difference at the end of the day. For example, the Federal Government policy of "publish it all" in the websites of the Secretariats and Agencies and the Supreme Court's policy of broadcasting their "deliberations" are, I am afraid, so bluntly inadequate measures for its manifested purpose that, probably, deserve to be considered mere simulations or shams. The CFC (the antitrust federal agency) has not made public the Board's criteria for ruling in different aspects of competition policy for more than 15 years, and as any patient follower of the Supreme Court debates knows, it is really very difficult to recognize clear nexus between what is "said" by the Justices in Court and the content of the Court's final "rulings". Of course, members of the dominant coalition know that information hides *the* information, and any effective measure in this respect—e.g., improving decisional processes of the CFC or the Supreme Court through reorganization, without necessarily expand their already generous budgets to despair of many—would reduce the "revenue" of privileged access to that information, enhance competition and, therefore, contribute to a more open access society. No wonder there is so much indulgence for the "argumentative" character of our Supreme Court doctrine and the "technical" content of our Agencies resolutions. See, e.g., Larrañaga (2008) for a general approach to transparency policy in Mexico, and for an evaluation of the decisional processes in regulatory agencies in Mexico, see, e.g., Centro de Estudios Espinosa-Yglesias (2009).

Making public policy "Public" in a robust way is a critical factor to make public policy both an effect and a cause of collective power, in the sense of a rational action into a incentive system that control that the assigned resources are used for the purported goals. And this is, clearly, a pivotal factor in the control of corruption.[51]

In contrast, natural states regimes are prone to formulate public policy goals in comparatively shorter temporal spans ("by the end of my mandate") and/or in general and imprecise terms ("we will do justice"). This way of formulating standards, goals, and targets not only reflects an evident lack of realism, but a deeper culture of unaccountability that cohabits comfortably with an irrational use of public resources. A consequence of this lack of an agenda of public policy is the reinforcement of an adaptive use of rule-making as a rent-seeking strategy. Dominant coalitions have a considerable leeway in deciding the allocation of social resources, not to mention the redistribution of those resources in ways that reinforce their privileges. A concrete example of this vicious circle can be found in the Mexican public education policy since the early 1970s and in the telecommunications policy since the early 1990s—with the exception of television, where the private-monopolistic public policy dates longer.[52]

5.3.2.3 Ways of Changing Behavior

Efficient information management and sound policy-making are conditions for effective regulation. Consequently, open access societies are also relatively more effective in their regulatory policies, because they use a large array of governmental tools (state largesse, communication, taxation, command

[51] See, e.g., Dahl and Lindblom (2000: ch. 2).

[52] The quality of infrastructure (transportation, utilities, telecommunications, etc.) is, probably, the most accurate standard to evaluate the "openness" of a society. It is so not only because of its very well known effect in social productivity, but mainly because it reflects the both the commitment *and* the capacity of a society to produce public goods—i.e., to open universal access to these goods. Mexico suffers of a dramatic deficit in infrastructure every domain—form gas pipes to sewers. There are three causes of this deficit, closely linked to the ways in which standards, goals and targets are settled: (1) the lack of planning for longer periods that one administration—in the Municipal level, 3 years—; (2) the strong linkage of infrastructure planning with political representation, and (3) the extremely high levels of corruption in this sector. Very little has improved by the privatization policy of the last decades. Since infrastructure projects require of considerable financial support, as a consequence of extraordinarily expensive financing, only few actors can compete in this sector—actors that, of course, can externalize their financial opportunity costs through their monopolistic rents.

and control, etc.) that rely, partially, on the state capacity to control social resources (money, knowledge, legitimacy, etc.),[53] and, partially, on the technical capacities of professionalized bureaucracies to use those resources.[54] Perhaps, the most significant example of this governmental infrastructure of the states *potentia* to effectively control social behavior is the state capacity to extract resources from society, either by taxation or by reducing the costs of governing. Contrary to the libertarian-conservative dogma, governments in open access societies control a relatively large proportion of social resources, which make possible the provision of public goods—with its intrinsic universalistic turn. This is, of course, not a consequence of a more virtuous society or more public oriented individuals, but manly the product of well-organized governments, highly effective in the everlasting fight of the state against alternative organizations over the control of scarce resources in society—actually, for the control of the social organization itself.

In contrast, natural states have a relatively lower degree of technical *potentia* due, in part, to the real lack of governmental skills of bureaucracies, and, in part, to the lack of incentives of those bureaucracies to serve the government goals, as privileged members of the rent-seeking coalition. As a consequence of this relatively low regulatory skill, relatively less wealthy societies are doomed to the extensive use of command and control regulatory techniques, which are supported by a formalist legal culture, that is, precisely, one of the weakest links in the governance chain. Contrary to a candid reading of *potestas*, natural states are seldom anomic; these are societies with a highly legalistic culture, reinforced with sophisticated formalistic legal cultures. Since large part of social order depends on the stability of the dominant coalition, effective ways of controlling the effect of conflicts among the members of the coalition are critical to such despotic social orders. In Mexico, arguably the best example of this "risk management" mechanism is the "juicio de amparo", which permits high degrees of political and administrative discretion while controlling, at the same time, the risks of "damaging" the network of privileges granted by the political and legal systems.

5.4 Conclusion

A sociological approach makes it possible to incorporate constitutionalism and governance into a common strategy, namely, the mutual advantage of enhancing collective power for the purpose of general welfare. This common

[53] See, e.g., Mann (1986–2013: ch. 11 ff.) and Migdal (1988).

[54] See, e.g., Daintith (1997).

ground gives an accurate account of contemporary forms of government, without getting rid of the normative core of constitutionalism. This normative backbone of constitutional government is expressed in the notion of a "working constitution", within which legitimate ruling (*potestas*) and the actual capacity of making things happen (*potentia*) have a mutually reinforcing relationship. In the contemporary context, constitutionalism and governance integrate a regulatory constitutional regime that embodies a system of control that makes possible the emergence of open access societies. It is in the light of the functional elements of such "control system" that the merit of structural reforms towards constitutional government *and* market economy must be evaluated.

References

Baldwin, Robert. 1997. *Rules and government*. Oxford: Oxford University Press.

Black, Julia. 2007. Tensions in the regulatory state. *Public Law* Spring: 58–73.

Braithwaite, John. 2008. *Regulatory capitalism. How it works, ideas for making it better*. Cheltenham: Edward Elgar.

Centro de Estudios Espinosa-Yglesias. 2009. *Evaluación del Desempeño de los Órganos Reguladores en México*. México.

Dahl, Robert, and Charles Lindblom. 2000. *Economics, politics, and welfare*. New Brunswick: Transaction Books.

Daintith, Terence. 1997. Regulation. In *International encyclopedia of comparative law*, vol. XVII, 10. Dordrecht: Martinus Nijhoff Publishers.

Foucault, Michel. 1991. Governmentality. In *The Foucault effect. Studies in governmentality*, ed. Graham Burchell. Chicago: The Chicago University Press.

Freeman, Jody. 1999. The real democracy problem in administrative law. In *Recrafting the rule of law: The limits of legal order*, ed. David Dyzenhaus, 330–369. Oxford: Hart Publishing.

Fuller, Lon L. 1969. *The morality of law*. New Haven: Yale University Press.

Gordon, Colin. 1991. Governmental rationality: An introduction. In *The Foucault effect. Studies in governmentality*, ed. Graham Burchell et al., 1–52. Chicago: The Chicago University Press.

Gorski, Philip. 2003. *The disciplinary revolution: Calvinism and the rise of the state in early modern Europe*. Chicago: The Chicago University Press.

Habermas, Jürgen. 1998. *Between facts and norms. Contributions to a discourse theory of law and democracy*. Cambdridge, MA: The MIT Press.

Hardin, Russell. 1999. *Liberalism, constitutionalism, and democracy*. Oxford: Oxford University Press.

Hardin, Russell. 2007. *David Hume: Moral & political theorist*. Oxford: Oxford University Press.

Hirschman, Albert. 1994. *The passions and the interest. Political arguments for capitalism before its triumph*. Princeton: Princeton University Press.

Hobbes, Thomas. 1996. In *Leviathan: Or the matter, form and power of a commonwealth ecclesiastical and civil*, ed. R. Tuck. Cambridge: Cambridge University Press.

Holmes, Stephen. 1995. *Passions and constraint: On the theory of liberal democracy*. Chicago: The Chicago University Press.

Hood, Christopher, et al. 2001. *The government of risk: Understanding risk regulation regimes*. Oxford: Oxford University Press.

Jordana, Jacint, and David Levi-Faur. 2004a. The politics of regulation in the age of governance. In *The politics of regulation: Institutions and regulatory reform for the age of governance*, ed. Jacint Jordana and David Levi-Faur, 1–28. Cheltenham: Edward Elgar.

Jordana, Jacint, and David Levi-Faur (eds.). 2004b. *The politics of regulation. Institutions and regulatory reform for the age of governance*. Cheltenham: Edward Elgar.

Larrañaga, Pablo. 2008. *La constitucionalización del derecho a la información: contexto, consecuencias y retos*. México: Senado de la República-ITAM.

Larrañaga, Pablo. 2009. *Regulación. Técnica jurídica y razonamiento económico*. México: Porrúa.

Larrañaga, Pablo. 2011. Un mapa teórico para el constitucionalismo económico. In *Normas, razones y derechos*, ed. Rodolfo Vázquez, 281–302. Madrid: Trotta.

Larrañaga, Pablo, and Jorge Culebro. 2012. The development of regulatory state in Mexico. From economic policy reform to institutional failure. In *Fourth biennial conference on new perspectives on regulation, governance and learning, The standing group on regulatory governance of the European consortium for political research*, Exeter

Laski, Harold. 1931. *A grammar of politics*. New Haven: Yale University Press.

Llewellyn, Karl. 1940. The normative, the legal, and the law jobs: The problem of juristic method. *The Yale Law Journal* 49: 1355–1400.

Loughlin, Martin. 2003. *The idea of public law*. Oxford: Oxford University Press.

Loughlin, Martin. 2010. *Foundations of public law*. Oxford: Oxford University Press.

MacCormick, Neil. 2007. *Institutions of law: An essay in legal theory*. Oxford: Oxford University Press.

Majone, Giandomenico. 1997. From the positive to the regulatory state: Causes and consequences of changes in the mode of governance. *Journal of Public Policy* 17: 139–167.

Majone, Giandomenico. 1999. The regulatory state and its legitimacy problems. *West European Politics* 22: 1–24.

Mann, Michael. 1986–2013. *The sources of social power.* 4 vols. Cambridge: Cambridge University Press.

Mashaw, Jerry. 1997. *Greed, chaos and governance. Using public choice to improve public law*. New Haven: Yale University Press.

Migdal, Joel. 1988. *Strong societies and weak states. State-society relations and state capabilities in the third world*. Princeton: Princeton University Press.

Moreno-Brid, Juan Carlos, and Jaime Ros. 2009. *Development and growth in the Mexican economy. A historical perspective*. Oxford: Oxford University Press.

North, Douglass, et al. 2009. *Violence and social orders. A conceptual framework for interpreting recorded human history*. Cambridge: Cambridge University Press.

Oakeshott, Michael. 1975. *On human conduct*. Oxford: Clarendon.

Oakeshott, Michael. 1983. Rule of law. In *On history and other essays*. Oxford: Blackwell.

OECD. 2012. *Towards more effective and dynamic public management in Mexico*. Paris: OECD.

Oliver, Dawn. 1999. *Common values and the public-private divide*. London: Butterworks.

Oliver, D., et al. (eds.). 2010. *The regulatory state. Constitutional implications*. Oxford: Oxford University Press.
Parsons, Talcott. 1960. *Structure and process in modern societies*. New York: Free Press.
Polombella, Gianluigi, and Neil Walker. 2008. *Relocating the rule of law*. Oxford: Hart Publishing.
Rawls, John. 1955. Two concepts of rules. *Philosophical Review* 64: 3–32.
Rawls, John. 1971. *A theory of justice*. Cambridge, MA: Harvard University Press.
Raz, Joseph. 1977. The rule of law and its virtue. *Law Quarterly Review* 93: 195.
Richardson, Henry. 1999. Administrative policy-making: Rule of law or bureaucracy? In *Recrafting the rule of law: The limits of legal order*, ed. David Dyzenhaus. Oxford: Hart Publishing.
Scott, Colin. 2010. Regulatory governance and the challenge of constitutionalism. In *The regulatory state. Constitutional implications*, ed. D. Oliver. Oxford: Oxford University Press.
Strauss, Peter. 2010. Rule making and the American constitution. In *The regulatory state. Constitutional implications*, ed. D. Oliver. Oxford: Oxford University Press.
Summers, Robert. 2010. *Form and function in a legal system. A general study*. Cambridge: Cambridge University Press.
Sunstein, Cass. 1990. *After rights revolution. Reconceiving the regulatory state*. Cambridge, MA: Harvard University Press.
Teubner, Gunter (ed.). 1987. *Juridification of social spheres: A comparative analysis in areas of labor, antitrust and welfare law*. Berlin: Walter de Gruyter.
The World Bank. 2010. *The World Wide Governance Indicators Project*. Washington.
Unger, Mangabeira. 1976. *Law in modern society*. New York: The Free Press.
Weber, Max. 1978. *Economy and society*. Berkeley: The University of California Press.