Chapter Two [very preliminary draft]

Why a *Fourth* Branch:

The Structural Logic from Montesquieu through Madison to Kelsen and Schmitt

Constitutional theory dating to Montesquieu identified three branches of government, each with a specific function: The legislature enacted general rules, the executive enforced the rules, and the judiciary resolved disputes about the rules' meaning and application. Every government had to have these branches in some form; that is, the branches were *necessary* elements in a governance structure. In addition, the branches were *exhaustive*: that is, taken together they did everything a government could do.[1]

One desirable feature of a governance structure is that it be reasonably stable. In ordinary times the structure must grind out policies, execute them, and deal with ensuing problems in a routine way. Modest shocks – a small-ish war or some moderate economic disruptions – might lead to departures from the ordinary course, but after the shock dissipates the structure should return to something like

[1] John Locke identified an additional branch, which he called the federative. It is associated with international affairs and it has not figured substantially in modern constitutional theory.

its prior state, perhaps modified a bit because people have learned that some adaptations should be built into the structure to be available as needed.[2]

What, though, ensures reasonable stability? Or, put another way, what can we do to ensure as best we can that a governance structure can sustain itself over time? Classical constitutional theory identified two possibilities. Call them "civic virtue" and "structures."

The republican tradition emphasized the role of civic virtue in promoting a governance structure's reproduction: Citizens devoted to the regime would be alert to threats from within – "corruption," in republicans' terms – and would act against those who would undermine the system either by throwing the rascals out of office or, in the extreme, by armed resistance. Jürgen Habermas's ideas about constitutional patriotism are a modern version of this tradition, as are – perhaps unfortunately – some versions of ethnonationalist populism.

The difficulty with civic virtue as a guarantor of regime stability is obvious enough: Constitutional and political theorists have not been able to come up with institutions (mechanisms) that have any substantial chance of reliably reproducing civic virtue in the citizenry. Sometimes they gesture in the direction of the family or the education system, but in doing so they rely mostly on exhortations and hopes

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[2] Carl Schmitt's idea of the commissarial dictatorship has some resonances with this thought, though Schmitt's perception that governance structures had to be able to survive *extreme* shocks led to his well-known views about the impossibility of defining the contours of states of exception by binding law.

rather than mechanisms. More promising are accounts according to which civic virtue is the natural precipitate of widespread participation in the world of commerce.[3] Repeated interactions among commercial traders, for example, might generate an understanding of the importance of trust in sustaining the market – and that can generalize to an understanding of how trust is essential to stabilize governance structures. Yet, the modern capitalist system does not provide these or other kinds of opportunities to cultivate civic virtue in commercial settings. Lacking institutions or mechanisms to support it, civic virtue has been difficult to work into contemporary constitutional theory.[4]

The idea that structures of governance could do a decent job of ensuring their own reproduction goes back almost as far as the civic republican tradition. For present purposes we can associate it with James Madison. Madison saw threats to constitutional stability from two directions. Members of each branch would seek to aggrandize themselves at the expense of the others, and the government as a whole might infringe upon individual rights.

As to the first: Legislators would seek to enforce the law themselves, for example by imposing sanctions on identified individuals. Executives would seek to legislate by decree and use their resources to force individuals to comply. And

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[3] Cite to Elkins.

[4] I make some attempts to describe "civic virtue" oriented institutions in the Conclusion.

courts, though the weakest branch, might aggressively expand their jurisdiction and "interpret" laws in ways that effectively transformed them.

Constitution-designers could write provisions purporting to prohibit these attempted incursions, either specifically – as in a constitutional ban on bills of attainder – or generally, as in the famous formulation in the Massachusetts 1640 frame of government.[5] But, Madison feared, these provisions would be mere "parchment barriers."[6] He argued that competition among the branches was a better mechanism for guaranteeing that each branch did only what it was designed to do. As Madison put it, "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[7] Executive officials would have the resources (mostly military) to resist legislative attempts to enforce the law, and legislators would have the resources (mostly financial) to resist executive efforts to legislate. And, because the interests of the occupants of government position were connected to the rights of the position, executive officials and legislators would have incentives to use those resources.

As to rights violations: Madison offered a skeletal version of modern interest-group pluralism in arguing that the government as a whole would be unable to systematically violate rights. He contrasted small republics, in which rights-

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[5] Quotation.

[6] Federalist 48.

[7] Federalist 51.

violations could indeed occur, with the extended republic that would be the United states. Small republics were, he argued, rather homogeneous. Members of the majority could find it in their interests to enact laws that violated individual rights, and the victims lacked sufficient voting power to defeat these proposals. An extended republic, in contrast, would have so many diverse groups spread throughout the nation that those who might be victimized by a local majority could call upon allies from around the country to aid their resistance.

More formally, the extended republic would have the constitutional *power* to displace local rights-threatening legislation. A local minority can locate allies elsewhere and offer to support their general political agenda – dealing with matters other than the rights-threatening legislation – in exchange for enacting a statute overturning locally oppressive statutes. For Madison, pluralism made this a generally available remedy. Further, on the national level in an extended republic every interest group would be able to trade its votes to block proposals that threatened the group's rights.[8]

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[8] A note on the scope of the theory outlined in this Chapter: It applies to nations after what Hannah Arendt called the political revolution, the transformation of subjects into citizens. But not to all such nation, because not all (perhaps none) have undergone what she called the social revolution, after which, having gained adequate material resources, all citizens would be able to participate in roughly equal ways in the nation's political life. See Hannah Arendt, On Revolution (195-).

The mechanisms Madison identified to ensure regime stability were quite ingenious, and perhaps could work in principle. Reality defeated them, though. Consider first pluralism as the mechanism for rights protection. Some nations might be so small that homogeneity overcomes pluralism.[9] Perhaps more important, the pluralist mechanism requires that the threatened group be able to organize itself to act as a unified bargainer in political negotiations. Some groups might lack the resources to do so, and some might be divided internally over the priority to give defeat of rights-threatening laws as against other matters on the political agenda. Such groups might be unable to engage in the kind of hard bargaining required by the pluralist mechanism.

The argument about competition among the branches was defeated by the rise of political parties organized on a national scale. As a prominent article puts it, the United States now has a system of separation of parties, not separation of powers.[10] And this is true more or less everywhere, though the nature of party systems varies among nations, with different systems having different implications for the separation of powers.

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[9] As we will see, Carl Schmitt can be read to hold that real social homogeneity lies as the foundation of every constitutional order. His student Ernst-Wolfgang Böckenförde argued that only "relative" homogeneity was required, implying that at least in some circumstances pluralism would be sufficient to resist rights-incursions by a "merely" relatively homogeneous majority.

[10] citation.

We can see the difficulty most easily in parliamentary systems. Where the party system is reasonably well-organized – with a handful of parties contesting each election with an eye to forming either a majority or a coalition government – the executive and legislature will collaborate rather than compete. The majority party or the governing coalition will decide whether acting through legislation or by executive decree best advances the government's program, without regard to Montesquiean formalities. So-called separation-of-powers systems, in which separate elections are conducted for the chief executive and the legislature, *can* use the Madisonian mechanism in a world of political parties, but only when government is divided, that is, when the chief executive is from one party and the legislature is controlled by other parties.

What if the party-system is chaotic rather than well-organized? Then another principle comes into play – Alexander Hamilton's insistence on energy in the executive.[11] Executives will be elected on a party basis, but their parties might be personalistic. Even if they emerge from long-standing parties, executives will act on the incentives they have to aggrandize power. And, in a chaotic party system, the legislature will find it difficult to organize resistance – because "chaos" means precisely that the parties are unable to coordinate action among themselves on any single agenda.

Writing against the background of German parliamentary development, Hans Kelsen saw that the Madisonian mechanism of competition among the

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[11] Federalist 70.

branches could not ensure regime stability. He argued that guaranteeing stability was a fourth function of governance structures. Its existence had perhaps been obscured by the Madisonian argument, which took the function to be performed as a by-product of the creation of branches whose primary purposes were the Montesquiean ones.[12] The "new" institution was to be the "guardian of the constitution."[13]

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[12] I should note here that my exposition from this point on is not an effort at the exegesis of the specific writings of Kelsen and Carl Schmitt. It is instead my effort to construct an account of the fourth branch that is roughly consistent with their ideas but might be inconsistent with some of their specific points. Put another way, it is my effort to construct a constitutional theory, inspired by but not bound to what Kelsen and Schmitt wrote.

[13] If Kelsen was correct in identifying a "new" function that would ensure regime stability, then that function should exist in *any* governance order that claims to settle things (for more than a short period). So, for example, we should be able to identify a "guardian of the theocratic constitution" or a "guardian of the one-party constitution" in nations with such constitution. And indeed we do: The Guardian Council in Iran, the Central Committee of the Communist Party in the People's Republic of China. In the remainder of this Chapter (and book), I consider only fourth branch institutions in regimes roughly qualifying as constitutional democracies, though with a rather expansive definition of that category.

As is well known, Kelsen thought that an institutional he called the constitutional court could serve as that guardian. Its function was to preserve the constitution in conditions of party government, and that function dictated many of its characteristics. First, it was to be removed from the party system. Kelsen believed that only something like a court could possibly satisfy that requirement. Second, the guardian's task was to determine whether the Montesquiean branches (primarily the legislature and the executive) reflected the constitution's allocation of authority among them. That allocation was done through law, the constitution itself. And so, the guardian of the constitution would be interpreting and applying law.

Third, the law the constitutional court interpreted inevitably had substantial political content, not in the sense that it embodied party-political positions but in the sense that it reflected (or expressed or identified) deep judgments about what allocations of authority best promoted fundamental goals of the political order. What those goals are was contentious. Some would take the order's goals to be promoting the interests of the nation's people, others advancing their values, others ensuring that their preferences be reflected in law, yet others taking the common good as the goal.

This implied that the constitutional court's members could not be "mere" lawyers or ordinary judges. Working in civil law jurisdictions, Kelsen saw ordinary judges a skilled legal technicians who advanced through their careers deploying what he understood to be a relatively "pure" form of law that almost never

implicated deep judgments about the political order's fundamentals. Such judges, in Kelsen's view, would not have the training, the experience, or the capacity to execute the constitutional court's functions well.

How could the guardians of the constitution be appointed? Clearly not through the ordinary bureaucratic methods of appointing ordinary judges in civilian systems. Every other appointment mechanism, though, threatened to recreate in the constitutional court the party-political problems that made a constitutional court necessary.

The contours of a solution emerged as constitution designers worked with Kelsen's scheme. First, there should be either formal or informal constraints on eligibility for the court. Roughly, at least some of the court's members should have some familiarity with the party-political system so they would know something about how the constitution allocated power according to its fundamental goals. To avoid injecting immediate party-political goals into the court's decisions, though, its members should not have held important positions within political parties.[14]

Second, at least in part to provide some support in the party-political system for the constitutional court's on-going role, the Montesquiean branches should have

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[14] Notably, former presidents of France are guaranteed seats on the French Constitutional Council. A norm against the presidents' active participation existed for several years but apparently has been abandoned. We can see in this provision something like an attempt to blend Kelsen's understanding of who the guardian of the constitution should be, with Schmitt's, discussed below.

role in the selection process. Constitution designers appear to have concluded that judicial nominations commissions are an important feature of good design. Details vary, of course, but such commissions typically include members of the legislature, including both members of the majority party or coalition and members of the opposition, some judges either of the ordinary courts or of the constitutional court, and some representatives of civil society. And again typically, none of these components has a majority on the commission. The commission identifies a relatively small number of potential appointees to the constitutional court, and the executive must choose from the commission's list.[15]

Much more could be said about the design of the Kelsenian constitutional court, but I move on because this book's goal is to analyze fourth-branch institutions generally, not only constitutional courts.

The conservative (and later Nazi) German legal theorist Carl Schmitt was Kelsen's great interlocutor. Like Kelsen, Schmitt understood the need for a guardian of the constitution. But, Schmitt argued, Kelsen's focus on problems created by the party-political system led him to design the guardian badly. Schmitt levelled two arguments against Kelsen. The first went to the foundation of the guardian's function, the second to the inability of a court – and indeed law – to serve as the guardian.

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[15] Again, I elide many details and variations here. A particularly important detail involves the path to be taken if the executive refuses to choose an appointee from the list.

Schmitt's position rested on his understanding of the constitution the guardian was to protect. For him the constitution was not merely (or even) the words allocating power and defining rights in some foundational document. Rather, the constitution was a nation's self-identity, sometimes inferred from constitutional provisions but sometimes residing in other sources. The constitution's guardian would speak for the nation's people as a whole against efforts by party politicians to undermine or transform the people's identity. For Schmitt only someone above politics could do that; in this he agreed with Kelsen. But a constitutional court could not speak for the nation; only someone chosen by the people – but outside of party politics – could.[16] Schmitt believed that the German President under the Weimar Constitution was precisely such a person.

Schmitt's position required that the President, or equivalent figure, stand above party politics. That was almost certainly not true in Weimar Germany and is true almost nowhere today.[17] The best cases for a Schmittian president as guardian

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[16] Theorists have sometimes suggested that a monarch who ordinarily abstains from intervention in party-political disputes might speak for the nation under extraordinary circumstances.

[17] Governors General in countries in the British Commonwealth might be good candidates, but in both Australia and Canada Governors General have used their powers in highly charged partisan circumstances with the effect of favoring one party over another. In 1975 the Australian Governor General dismissed the Labour Party prime minister Gough Whitlam rather than acceding to Whitlam's request

of the constitution come from nations where the President is a figurehead trotted out for civic ceremonies and, occasionally, for moralistic discourses about the nation's well-being. Yet, forceful interventions by figurehead presidents to preserve the constitution – by anything more than finger-wagging – would cause a constitutional crisis larger than the one that provide the intervention. And, presidents with real power almost always *lead* one of the nation's major political parties: They can cause constitutional crises by ignoring the constitution, but they cannot resolve them by standing above politics.

Schmitt's second concern about the constitutional court as guardian flowed from his formalistic ideas about law. For Schmitt, law was *definitionally* a-political, a self-contained body of doctrine and reasoning that constituted a formal system closed to input from policy concerns associated with party-political positions.[18] So, for example, courts interpreting contracts could rely only on doctrines shaped by a concern to develop an internally coherent whole; they could not consider assertions that one rule for interpreting employment contracts would systematically favor employers, another employees. Schmitt did not reject the proposition that law could

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that he call an election for the Senate that promised to break a budget deadlock. In 2008 the Canadian Governor General agreed to prorogue Parliament so that the Conservative prime minister Stephen Harper could avoid an immediate vote of no confidence. Harper used to opportunity to rebuild his political fences and when Parliament reconvened the threat of the no confidence vote had disappeared.

[18] Note resemblance to Luhmann.

incorporate attention to policy considerations, a proposition rattling around in German legal theory when Schmitt wrote (and a proposition that, independent of its role in the intellectual history of law, is now widely accepted). But, on Schmitt's account, the only policies that law could incorporate were those with nearly universal support (and therefore policies set apart from party-political controversy).[19]

For Schmitt it followed that whatever Kelsen's constitutional court would be doing, it would not be doing *law*. The separation-of-powers disputes on which Kelsen focused were always party-political; indeed that was precisely why the Madisonian account of a self-guaranteeing constitution failed. The constitutional court would be infusing "law" – the scare-quotes are important – with party-political content however it resolved disputes because the only grounds available for such a resolution were party-political.

Kelsen responded by rejecting Schmitt's general account of law. For Kelsen ordinary law was infused with policy content, and it was foolish to deny that across wide ranges of ordinary law that policy content corresponded to (or was correlated with) party-political positions. Again the law of employment contracts provides a good example: Whether employment contracts with no provisions dealing with the length of the contract term were to be interpreted to create employment-at-will or a guarantee of employment unless the employer had cause to discharge the worker

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[19] For present purposes I put to one side the possibility – in my view, the reality – that there are no such policies.

could be answered only by considering issues such as labor mobility, employer flexibility, and the like – all of which were associated with party-political positions.

So, for Kelsen, constitutional courts were indistinguishable along the dimension of *law* from ordinary courts. Schmitt had a response. Again focusing on constitutional law's party-political content, Schmitt argued that party-political choices were legally unconstrained even if they could be incorporated into law once they were made. For Schmitt, though, the proper institutional location for unconstrained choices was pure politics. This is the (modest) implication of his famous formulation, "Sovereign is he who declares the exception." The power to make (and make effective) unconstrained choices is the hallmark of sovereignty. So, on Schmitt's account, Kelsen's view about *ordinary* law raised the prospect that we would have to regard as sovereigns the judges who made that law by incorporating unconstrained party-political policies into it.

That prospect was not realized with respect to ordinary law, though, because it was revisable by ordinary party-political processes – by legislation, in short. It *was* realized in constitutional law, though. The judges on Kelsen's constitutional courts would be sovereigns making unconstrained choices that were at their foundation party-political no matter how hard they tried to disguise their decisions in the language of a law above party-politics.[20]

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[20] This is consistent with Schmitt's "decisionist" account of constitutional fundamentals, according to which the most basic choices in structing a constitution are "mere" decisions, completely discretionary choices. Schmitt himself associated

So what? Kelsen's guardian of the constitution was designed to address the problem of ensuring constitutional stability in a party-political state. The constitutional-court-as-sovereign is a fully political body once we understand the foundations of constitutional law properly. A political body, yes, but perhaps it could still be a body above party politics. At this point questions of institutional design arise. Is it possible to design mechanisms for selecting and removing judges on constitutional courts that insulate them from the threats to the constitutional order created by party politics?

The short answer is, No. The longer answer is this: We can design such mechanisms that will indeed insulate the constitutional court from those threats, but the mechanisms will do so effectively only under conditions that make it unnecessary to have a constitutional court as a guardian of the constitution. Here is the underlying argument. Consider a selection system that involves some participation by legislatures and executives. The Madisonian system of competition among parties can produce constitutional court judges who are in the aggregate above politics.[21] But (of course) where the Madisonian system works with respect to selection of constitutional court judges, it is likely to work as well (or nearly as well)

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decisionism with the choices made by the nation's leader, but in theory – and on this account of a Schmittian understanding of the constitutional court – decisionism can be associated with such a court.

[21] The clearest cases involve constitutional court judges with limited terms, allowing for regularly timed replacements, and chosen by legislative supermajorities.

with respect to legislative and executive protection of the constitution. And, where the Madisonian system does not work well with respect to the constitution itself – in a world of divided party government or chaotic legislatures, for example – it is unlikely to work well with respect to selecting judges for the constitutional court.[22]

Where does this leave us? The problems associated with a party-political legislative and executive system are not precisely the same as those associated with a party-political constitutional court. Perhaps such a court can do something – not as much as Kelsen appears to have thought, but something – to protect the constitution. Similarly, perhaps a party-political legislature can do something – not much, but something – in addition.

Another possibility animates the remainder of this book. Kelsen may have been right in seeing party politics as a threat to the constitution, and in seeing the need to create something to serve as a guardian of the constitution. He may have been wrong, though, in thinking that a single such institution, the constitutional court, would be sufficient. Perhaps we should take seriously the plural in the title of the South African Constitution's Chapter Nine: "Institution*s* Supporting Constitutional Democracy." In doing so we might move the Madisonian argument to a higher level: Not competition among institutions above party politics, but competition among institutions implicated in party politics but each in a slightly different way. A constitutional court might fail to protect the constitution against a specific threat, but perhaps the nation's ombudsperson do so – or the nation's

[22] The argument about mechanisms for judicial removal takes the same form.

auditor general, or its public prosecutor. A nation with enough institutions supporting constitutional democracy might be able to protect against specific threats as they arise. Not in any systematic way, though: It is not that the constitutional court is systematically going to a better job of protecting rights than an ombuds office, or a public prosecutor a better job at attacking corruption than a court, or …. Rather, the hope is that with respect to any specific threat to the constitution, at least one of the many institutions available to support the constitution will manage to do a good job, perhaps (often) for quite idiosyncratic and unreproducible reasons. That at least is the proposition that this book examines.