

**Hauser Globalization Colloquium Fall 2008:  
Global Governance and Legal Theory**

NYU Law School

Professors Benedict Kingsbury and Richard Stewart  
Furman Hall 324, 245 Sullivan St. (unless otherwise noted)  
Wednesdays 2.15pm-4.05pm

*Provisional Semester Program - Attached Paper is shown in Bold*

- August 27- Teaching Session: Introductory Class (course instructors)  
September 3- No class (legislative Monday)  
September 10- Speaker: David Dyzenhaus, University of Toronto, NYU Global Law Professor  
Topic: The Concept of (Global) Administrative Law  
September 17- Panel Discussion on the September 2008 ECJ Decision in Kadi.  
Professors Stewart, Kingsbury, and members of the international law faculty.  
September 24- Speakers: Eyal Benvenisti (Tel Aviv/NYU) and George Downs (NYU)  
Topic: Toward Global Checks and Balances  
October 1- Speakers: Nico Krisch (LSE); and Euan MacDonald and  
Eran Shamir-Borer (NYU)  
Topic: Global Constitutionalism and Global Administrative Law (two papers)

***Friday October 3 - SPECIAL SESSION Furman Hall 310, 3pm-5pm***

**Speaker: Neil Walker, Edinburgh**

**Topic: Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders**

*Background reading: Constitutionalism Beyond the State*

- October 8- Speaker: Meg Satterthwaite (NYU)  
Topic: Human Rights Indicators in Global Governance  
October 15- Speaker: Janet Levit, Dean, University of Tulsa College of Law  
Topic: Bottom-Up Law-Making Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit  
October 22- Speaker: Jack Goldsmith, Harvard Law School. *Pollack Room, Furman Hall 900.*  
Topic: Law for States: International Law, Constitutional Law, Public Law (paper co-authored with Daryl Levinson)  
Guest Commentator: Prof Georges Abi-Saab, Geneva, former Chair of WTO Appellate Body  
October 29- [The IILJ will convene jointly with JILP a conference on International Tribunals, on Wed Oct 29, 9am-6pm, at the Law School. Global governance issues will feature. Students should attend this conference during the regular Colloquium time slot, and are welcome to attend other parts of the conference also. See the IILJ Website for details.]  
November 5- Speaker: Robert Keohane, Princeton and Kal Raustiala (UCLA)  
Topic: Toward a Post-Kyoto Climate Change Architecture: A Political Analysis  
November 12- Speaker: Jeremy Waldron (NYU)  
Topic: International Rule of Law  
November 19- Speaker: Benedict Kingsbury (NYU)  
Topic: Global Administrative Law: Conceptual and Theoretical Problems  
November 26- Student paper presentations [may be rescheduled, due to Thanksgiving break]  
December 3- Student paper presentations and wrap up.

Program and papers available at: <http://iilj.org/courses/2008HauserColloquium.asp>

SYMPOSIUM

# Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders

Neil Walker\*

*The recent proliferation of transnational forms of legal regulation and recognition has transformed the way we understand the global legal configuration, both in quantitative and in qualitative terms. Quantitatively, so dense are the connections and so significant the overlaps between legal orders that they can no longer easily be compartmentalized—still less marginalized—as mere boundary disputes. Qualitatively, the underlying basic grid, or “order of orders,” through which we make sense of such connections and overlaps, is no longer well understood in traditional Westphalian terms—as the accommodation of mutually exclusive state sovereignties within a largely facilitative framework of international law. Rather, there is an emerging “disorder of orders,” with traditional state sovereigntist, unipolar, global-hierarchy, regional, legal-field discursive (including global versions of both “constitutional” and “administrative” law), coherentist, and pluralist grids of understanding of the relationship between normative orders vying with one another, but with none gaining ascendancy. The future of the global legal configuration is likely to involve more of the same. It is likely we will not witness the reestablishment of a new dominant order of orders but, instead, will depend on the terms of accommodation reached among these competing models and among the actors—popular, judicial, and symbolic—who are influential in developing them.*

## Introduction

Today, it is a commonplace assumption that the frontiers of justice have shifted considerably over the last sixty postwar years. The “Keynesian-Westphalian frame,”<sup>1</sup> which supposed that questions of the just ordering of social relations—matters of fair representation, fair distribution, fair recognition, and fair treatment—were properly asked and answered only within and, to a lesser extent, between sovereign states with mutually exclusive territories, populations, and governing arrangements, is far less dominant than once it was.<sup>2</sup>

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<sup>1</sup> Nancy Fraser, *Reframing Justice in a Globalizing World*, 36 NEW LEFT REV. 69 (2005).

<sup>2</sup> See, e.g., Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION 3–32 (Neil Walker ed., Hart 2003).

Similarly, in the corresponding legal register, the idea that these key questions of justice arise only within the conventional, and conventionally separate, structures of constitutional law (considered as the law *of* the Keynesian-Westphalian state) and international law (considered as the law *between* Keynesian-Westphalian states) is far less dominant than once it was. What is more, this decline in the influence of the Keynesian-Westphalian frame is evident even, and perhaps especially, among the countries of the West that were the original designers and exporters of that frame.<sup>3</sup>

Certainly, it remains controversial just why this seismic shift has taken place. It is a complex and open question which of the circuits of transformation, widely recognized under the portmanteau term “globalization,”<sup>4</sup> has been most important in the recent transformation and in what combination. Such transformative forces would include increased capital mobility and transnational trade; the growth of global, regional, and other transnational political institutions; the increased scope and fluidity of societal networks through new transport and information technologies; and the greater proximity, accessibility, and assimilation of other cultures. Even more controversial is the question of how advanced the process of global transformation is and how resistant to countertrends.<sup>5</sup> Nonetheless, the premise that, in principle, the dominant Keynesian-Westphalian frame is under challenge from the current wave of globalization not only increasingly informs political understandings and worldviews but is shared across many of the social sciences, and, in each case, this sea change has helped to shape significant new research agendas and problem-solving paradigms.

The concern of the following inquiry is with core aspects of the “juristic agenda” currently emerging in the domain of legal science in response to the present intense phase of globalization. The broad phrase “juristic agenda” is used advisedly to embrace all aspects and every level of a discipline of inquiry and research program that, considered as whole, remains closely informed by law’s privileged role as a method of practical intervention in the social world.<sup>6</sup>

<sup>3</sup> See, e.g., James Tully, *The Imperialism of Modern Constitutional Democracy*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 315–338 (Martin Loughlin & Neil Walker eds., Oxford Univ. Press 2007).

<sup>4</sup> See, e.g., DAVID HELD, *THE GLOBAL COVENANT* (Oxford Univ. Press 2004).

<sup>5</sup> See, e.g., PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION* (2d ed., Polity 2000).

<sup>6</sup> More specifically, by the term “juristic” I embrace the whole continuum of systematically law-centered, reflective thought, from the most concrete and applied to the most abstract and detached—from the exposition and critique of legal doctrine through the classification of the forms of law and the explanation of the place of law in the social and political order to prescriptive analyses of optimal or ideal law. The classification under a common umbrella of these diverse forms of thought acknowledges the close and durable thread connecting the contemplative study of law to the applied pursuit of law as a specially authoritative form of practical reasoning (but see *infra* note 9), and, in so doing, it alerts us to the possibility that at least some of the reasons for the prevalence of the theme of boundary disputation and relations between particular legal orders in the study of law-under-globalization has to do with their centrality to the *practice* of law.

The juristic agenda, understandably, focuses on the two key, related challenges to law's practical capacity arising from globalization and from the gradual displacement of the state-centered Keynesian-Westphalian frame, and it is these two challenges that will provide the focal point of our overall discussion. In pursuing this discussion, however, we are attentive not only to what is "on" the agenda—so to speak—but also to both the limits and the possibilities inherent in the agenda-setting process. On the one hand, one palpable, recurrent feature of the juristic agenda is its tendency to understand the challenges occasioned by the displacement of the Keynesian-Westphalian frame through a perspective that remains in the shadow of that frame and, as such, may fail to register in full its declining significance. As we shall see in due course, this tendency to view and interpret the new configuration of global law through an old lens may actually reinforce the problems posed by the new configuration. On the other hand, if we take a longer view, the displacement of the old frame also allows new possibilities for reimagining global law in circumstances of considerable political flux and epistemic uncertainty. As we shall again see in due course, this state of affairs provides an opportunity for exercising influence over the assembly of a new frame that juristic agenda-setters, on account of their very position in the division of labor, have already begun to discern and are well-placed to pursue.

What do the two key challenges to law's practical capacity posed by globalization consist of, and in what sense is the contemporary juristic agenda incomplete or deficient in its understanding of them? While one challenge is found at the surface of the new globalized law, the other penetrates its depths. The surface challenge concerns the exponential increase in the density of trans-boundary relations and in the incidence of boundary disputes in the new post-Keynesian-Westphalian arenas of global law. To the (considerable) extent that the juristic agenda concentrates its attention on the question of the disputed borders between legal jurisdictions—a question easily grasped insofar as it differs only in intensity and not in kind from that already familiar within the Keynesian-Westphalian frame—it necessarily remains a partial and restrictive agenda. This is so because controversies between overlapping legal orders in the changing global configuration can alert us only to the immediate symptoms of the difficulties posed by that new configuration, not to their underlying causes.

These underlying causes point us back to the structural shift mentioned in the opening paragraph, and so to the second and deeper challenge posed to law by globalization, and to a second difficulty with how the juristic agenda conceives of and responds to that challenge. If, as already noted, we understand the inside/outside, mutually exclusive pairing of constitutional and international law as providing the juridical expression of the long-dominant Keynes-Westphalian frame—which we may paraphrase as "state sovereigntist"<sup>7</sup>—and, in doing so, as supplying the basic grid prescribing global relations among legal-normative

<sup>7</sup> See Table One in the text, *infra*.

orders, then clearly that state-sovereigntist “order of orders,” or metaprinciple of authority, has been threatened in its position of preeminence. Crucially, however, the very challenge to the basic grid provokes a paradoxical response. To the extent that the restoration of a settled framework of authority, in the face of new uncertainty, is both perceived as an unprecedented opportunity and acted upon as an urgent necessity in order to restate the basis of global legal order in terms consistent with the familiar logic of a single overarching metaprinciple, this impulse militates *against* either the reestablishment of the traditional state-sovereigntist grid or its replacement by an equally dominant alternative. Here the juristic agenda is implicated both as the messenger—as the reporter of broad geolegal tendencies toward fragmentation—and as a source of further fragmentation. For, as we shall see, contemporary legal thought is apt both to recognize and, indeed, in some cases to sponsor a variety of different and inconsistent—and thus potentially competing—candidate metaprinciples of authority, each vying to reinstate or supplant the state-sovereigntist understanding, and to do so in a way that seems to demand yet cannot supply some decisive basis for adjudicating between them. In other words, what is recognized—and what tends to be reinforced by that very recognition and, in particular, by the versatility of attempts to resolve the problem so recognized—is the disappearance of any settled, singular grid for defining the relations between legal orders. What we are left with, in consequence, is a *disorder* of normative orders.

In the following two sections, a fuller explanation of the two basic preoccupations of the new agenda of global legal inquiry—the surface problem of boundaries and the deep problem of the basic grid of authority—will be set out, and a more detailed account provided of the emergent disorder of orders, which both informs and tends to be reinforced by that new agenda. In conclusion, we will focus on the other side of the coin; namely, on how a new method of thinking about the conditions of global law and a new set of opportunities for pursuing this new approach may emerge nonetheless from the problems and paradoxes of the old.

## 1. The centrality of the margins

The fact that so much contemporary juristic thinking on a global scale becomes concentrated on boundary questions and disputes between legal orders is only indirectly and remotely attributable to the long-standing bias within legal research toward dispute-centered and, more specifically, court-centered matters<sup>8</sup> and, thus, to a corresponding predisposition to seek out the comfortably familiar. While an important factor, such a bias is less prevalent—and much less uniformly so—than once was the case.<sup>9</sup> However, circumstantial factors are of

<sup>8</sup> See *supra* note 6.

<sup>9</sup> On the particularly advanced process of mutual estrangement between the academy and legal practice in the United States, see William Twining et al, *The Role of Academics in the Legal System*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 920–949 (Peter Cane & Mark Tushnet eds., Oxford Univ. Press 2003).

more immediate significance and provide a more solid justification for that contemporary focus. For with the loss of the earlier model's neat, territorially coded mutual exclusivity of jurisdiction, and with the proliferation of new legal orders at subnational, supranational, international, and private levels, there are simply many more points of intersection than previously. What is more, these are often of high-profile and palpable significance and typically are centered on the courts as the authoritative interpreters of the legal orders in question.

In this regard, the contrast with the Keynesian-Westphalian frame is marked. Under that frame and its state-sovereigntist understanding of constitutional and international order, relations between courts are typically construed either as presumptively vertical (if internal to a domestic constitutional order) or as presumptively horizontal (if between domestic constitutional orders).<sup>10</sup> Within a constitutional order, there is typically a hierarchy both of courts and of sources of law, albeit often incomplete, or with parallel chains reflecting and tracing the distinctions between private and public law, civil and criminal law, constitutional and administrative law, and so forth.<sup>11</sup> Between different domestic legal orders and the courts of these different domestic legal orders—provided they do not stand in a legally recognized imperial relation—the default relationship is, by contrast, one of mutual independence and so is better understood as horizontal. Here, there is no presumption of hierarchy but, simply, the contextually appropriate choice of law rules (in international private law) or, more generally, the relevant interpretative assumptions as to the more or less persuasive authority of foreign law operating at the margins of each legal order. Moreover, such rules and the interpretative aids of transnational law do not “stand above” the domestic systems in which they are applied. Rather, they are formulated or interpreted each in the context of their own system—in deference to and under the self-validating terms prescribed by each domestic legal order's sovereign authority.

Under this same stylized state-sovereigntist model, the case of relations between a domestic constitutional order and the international legal order,

<sup>10</sup> The literature on legal pluralism would emphasize how much was invariably neglected and left out of the dominant understanding supplied by such a stylized frame. See, e.g., JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (Cambridge Univ. Press 1995); Brian Tamanaha, *Understanding Legal Pluralism, Past to Present, Local to Global*, (St. John's Legal Studies Research Paper No. 07-0080, 2007). The effective selectivity of the dominant understanding, however, is testament to (rather than a qualification of) its dominant status.

<sup>11</sup> Indeed, an incomplete hierarchy of courts is often associated with an incomplete hierarchy of normative authority, with the relevant causal relations running in either direction. Where the constitution does not definitively situate all laws within a single Kelsenian *Stufenbau*, different courts may be authorized to recognize different chains of legal authority, or, more actively, may develop different conceptions of the appropriate hierarchy of justiciable sources of law in ways that have further implications for the relationship of these courts *inter se*. On the French case, see, for example, Alec Stone Sweet, *The Juridical Coup d'Etat and the Problem of Authority*, 8 GERMAN L.J. 915 (2007). On analogies between the French and the EU cases, see Jacques Ziller, *National Constitutional Concepts in the New Constitution for Europe*, 1 EUR. CONST. REV. 452 (2005).



more generally conceived, may be viewed as a rather special one, though one that still does not fundamentally disturb the state-centered orthodoxy. Until the middle of the last century, the presumed resolution of this matter was deemed to differ depending upon whether the national system in question was monist, thus acknowledging the immediate authority of international norms, or dualist, and therefore requiring domestic transposition of these norms before they could be considered operative.<sup>12</sup> But even this did not create a deep problem at the level of the state-sovereigntist order of orders. In either case, it was national courts acting under the auspices of national constitutions that retained the final word within their jurisdictional boundaries, including the final word on the very background decision of whether to conceive of themselves as monist or dualist. These courts retained, as well, the capacity to enforce that final word. As a consequence, the monist-dualist distinction did not announce two quite distinct and separate metaprinciples of legal authority governed by two different concepts of the order of orders. Rather, the distinction remained a much more modest one involving two different conceptions of the metaprinciple of state sovereignty under a single Keynesian-Westphalian concept of the order of orders. Furthermore, it has been observed that, while the monist-dualist distinction—always more categorical than was merited by the actual pattern of relations between domestic orders and the international order—gradually gave way in the post-Second World War years to a closer attention to specific conflict rules based on the relative ranking of domestic and international sources, this evolution did not disturb the status quo in an essential sense. For, once again, these rankings and the conflict rules they generated, derived from the constitutional fundamentals of the various host national legal orders, whose sovereignty thereby remained sacrosanct.<sup>13</sup>

Yet this way of looking at matters is no longer adequate to a world in which the overlap and interconnection between legal orders looks much denser—so much so, in fact, that many new transnational legal forms have emerged in these “in-between” places. In this new phase, the negotiation of the contested margins of the old legal orders and of the various new legal forms themselves has ceased to be a marginal concern. It is hard to grasp the richness of this development with any simple taxonomy,<sup>14</sup> although we may indicate, schematically, the following mutually supportive dimensions of the new post-Keynesian-Westphalian relations of interconnection and interaction. They are, in sequence, relations of

<sup>12</sup> ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 210–217 (Oxford Univ. Press 1994).

<sup>13</sup> Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 256–293 (Sujit Choudhry ed., Cambridge Univ. Press 2006).

<sup>14</sup> But see, for example, in the context of EU law, the insightful preliminary scheme suggested by European Court of Justice judge Allan Rosas; *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 EUR. J. LEGAL STUD. (Dec. 2007), available at <http://www.ejls.eu/>.

*institutional incorporation, system recognition, normative coordination, environmental overlap, and sympathetic consideration.* These may be viewed in a descending order of connective intimacy and of influence on the “host” by the “foreign” system. One consequence is that each of the more intimate forms of connection necessarily embraces the less intimate, but not vice versa. So, for instance, institutional incorporation necessarily implies system recognition, normative linkage, environmental overlap, and sympathetic consideration, while each of the lesser forms of intimacy need not presuppose the higher forms.

Let us examine, briefly, each of these in turn.

### 1.1. Institutional incorporation

Under this arrangement, the host normative order makes general provision for the normative decisions of an external agency to be incorporated and, to that extent, to be treated as authoritative within the host normative order. In its developed form, such a close institutional embrace remains rare. Indeed, the only mature example lies in the relationship between the European Union (EU) and its member states. The fifty-year-old EU, with an open-ended jurisdiction now much extended beyond its original aim to provide a single West European market in goods, services, and capital, is clearly unique among nonstate legal entities regarding the extent to which—and the range of matters over which—it overlaps the territorial and functional jurisdiction of states.<sup>15</sup> How is this reflected in the quality of its legal accommodation by the member states? While it remains controversial to what extent the institutional incorporation of the supranational EU system by the national systems is explicit or implicit in the founding treaty framework, and how much has been subsequently “read in” by an activist European Court of Justice (ECJ),<sup>16</sup> it is undoubtedly the case that the treaty framework itself anticipates a high level of institutional interpenetration. This is true both at the legislative level, through provision for the direct domestic applicability of certain types of European supranational law,<sup>17</sup> and at the judicial level, through the preliminary reference mechanism, whereby the rulings of the ECJ on matters of interpretation or the validity of European Community (EC) law must be treated as authoritative in the domestic legal order of any of the member states by the relevant domestic referring court.<sup>18</sup>

### 1.2. System recognition

This also occurs in the context of highly iterative relations among legal orders. Unlike institutional incorporation, in this form of relation no general institutional

<sup>15</sup> See, e.g., JOSEPH WEILER, *THE CONSTITUTION OF EUROPE*, chs. 1, 2 (Cambridge Univ. Press 1999).

<sup>16</sup> See, e.g., Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 34 INT’L J. LEGAL INFO. 223–245 (2006).

<sup>17</sup> Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C340) 3 [hereinafter EC Treaty], art. 249.

<sup>18</sup> EC Treaty, arts. 234, 220.



mechanism requires that recognition take place in the host system on the terms dictated by the other system. Nevertheless, the relationship of unilateral or mutual recognition is formalized by the host on a systemic level and, as such, is understood as in some way intrinsic to the self-definition of the host system.

Perhaps the most obvious as well as the most general example of this process is how domestic legal orders increasingly define themselves in a way that involves recognition of some of the values and rules of the general international legal order as automatically binding. Developments in domestic understandings of *jus cogens* and of norms possessing an *erga omnes* character have signaled a general, if vague and uneven, movement away from a situation in which international law was regarded largely as matter of *jus dispositivum*—something for sovereign states to contract in or out of at will by treaty or other agreement. Particularly in the burgeoning areas of transnational human rights law, transnational trade law, and transnational criminal law, states increasingly understand their subjection, and that of other states, to certain key international system norms—and, increasingly, the capacity of their own citizens to rely directly on these norms—to be part and parcel of their self-professed general status (*qua* states) as members of the “international community”<sup>19</sup> and, thus, independent of norm-specific consent. Indeed, as we shall see, the encouragement of the recognition by states of such a compulsory hierarchy of international norms is a key impetus behind recent efforts to relabel much international law as “constitutional” in quality.<sup>20</sup>

However, we can also see many examples of intersystem recognition among new nonstate legal entities. Indeed, this is unsurprising insofar as such entities, unlike states, did not originate as independent and exclusive legal orders. Rather, as the offspring of agreements between such independent orders, these entities have been genetically programmed from the outset to overlap other orders (state and otherwise) in an increasingly crowded jurisdictional space. To return to the case of the EU, we can see many examples of this. Intersystem recognition may be specified and entrenched textually, as in the EU’s basic treaty obligation to respect fundamental rights as guaranteed in the European Convention on Human Rights<sup>21</sup>—the product of another nonstate legal entity, the Council of Europe. Alternatively, intersystem recognition may flow from a general duty to comply with other treaty obligations entered into with closely overlapping regimes, as in the EU’s relationship with the World Trade Organization (WTO)<sup>22</sup>

<sup>19</sup> On the “international community school” in international law, see, for example, Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century* 281 REUEIL DES COURS 9 (1999).

<sup>20</sup> See section 2, *infra*.

<sup>21</sup> EC Treaty art. 6(2); and, more emphatically, in the EU’s new obligation—amending EC Treaty art. 6(2) in the (unratified) Treaty of Lisbon—to accede to the European Convention on Human Rights; 2007/C 306/01.

<sup>22</sup> See Case C-149/96, *Portugal v Council*, 1999 E.C.R. 8395.

and the various other transnational regimes with which it is contractually linked. Or recognition may even proceed without any clear textual or contractual basis and develop as a feature of judicial practice and precedent, as in the EU's controversial and as-yet-unresolved acceptance—on the basis of the several obligations of its member states<sup>23</sup>—of the “higher” authority of UN Security Council resolutions. In all such, cases, we see an inherently “relational”<sup>24</sup> element in the self-understanding and self-definition of the nonstate entity—a sense that its normative purpose and its effectiveness alike are dependent on the cultivation of a network of relations with other entities.

### 1.3. Normative coordination

By this we mean all other cases of coordination between normatively empowered actors falling short of compulsory institutional incorporation or full system recognition that, nevertheless, go beyond a “thin” bilateral or multilateral connection between national legal orders by way of traditional international legislation of the type familiar under the Keynesian-Westphalian frame. This involves the development, often as a result of initiatives at the margins between existing legal orders, of a whole range of intermediate legal forms that are less structurally robust and normatively wide-ranging than the EU or other of the more developed poststate polities, such as the WTO or the Council of Europe. These forms, nonetheless, obtain a degree of autonomous institutionalization beyond the bilateral or multilateral legislated will of states. By definition, this is a vague category; however, it covers a large part of what is novel in the new global legal order. Indeed, the various transnational regulatory regimes collected under the rubric of the Global Administrative Law project<sup>25</sup>—all of which are concerned with the way in which tasks we associate with the administration of general public goods or other collectively pursued “club goods” increasingly take place across transnational spaces—capture well the diverse range of this new kind of normative coordination and institutionalization. These include the globally extended administrative and regulatory activities of UN bodies such as the World Health Organization or the Financial Action Task

<sup>23</sup> This has come to recent prominence in a case concerning the freezing of terrorist assets in accordance with a UN Security Council resolution. For the original Court of First Instance litigation, in which a deferential approach to the Security Council found favor, see Case T-315/01, *Kadi v Council & Commission* 2005 E.C.R. II-3649. For the less deferential reaction of the advocate general in the subsequent appeal to the ECJ, see Case C-402/05, pending, Opinion of Advocate General Poiares Maduro, Jan. 16, 2008. See, more generally, Robert Schutze, *On Middle Ground: The European Community and Public International Law* (EUI Law Department, Working Paper 2007/13, 2007).

<sup>24</sup> See also Neil Walker, *EU Constitutionalism in the State Constitutional Tradition*, 59 *CURRENT LEGAL PROBS.* 51 (2006).

<sup>25</sup> For an early manifesto, anticipating what is by now a vast literature, see Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15 (2004–2005).

Force; informal transnational networks such as the Basel Committee consisting of the heads of central banks; bottom-up “distributed administration”<sup>26</sup> between national regulators with common and complementary objectives in matters such as biodiversity conservation or nuclear safety; hybrid private/public transnational administrative forms such as the industry-sponsored but, significantly, now government-populated Internet Corporation for Assigned Names and Numbers (ICANN); and, finally, purely private bodies such as the International Standardization Organization, concerned with matters of product harmonization, or the World Anti-Doping Agency, devoted to sports ethics.

#### 1.4. Environmental overlap

The development we focus on here is different in kind from the first three, but, in significant part, is parasitical upon them. It is concerned not with the interlocking norms of different legal orders, or with the new and complex legal forms created out of this interlocking, but with overlap in the social and economic environments impacted by these different legal orders or by the various new forms of regime they generate.<sup>27</sup> The multiplication of circumstances in which various laws emanating from different legal regimes can have an actual or potential bearing on the same practical context and on the same actors implicated in the same practical context inevitably accompanies the proliferation of transnational public, private, and hybrid forms of normative coordination, each of which possesses jurisdiction that is neither exhaustive, on the one hand, nor neatly and narrowly demarcated, on the other. The social and political significance of this new matrix has been analyzed in a number of different ways: as increased functional specialization between epistemic communities, the refined division of the prerogatives of mobile elites, the networked extension of a new methodology and culture of “governance,” or a self-reinforcing acceleration of societal differentiation and fragmentation.<sup>28</sup> However, what cannot be denied is the uncoordinated jurisdictional logic of the regimes in question. Each functional regime tends to have its special constellation of stakeholders and a conception of relevant protected interests, situational goods, and legal *vires* that reflects the particularity and partiality of the constellation; the meeting of these self-referential systems can lead to novel conflicts, uncertainties, and complexities.

A number of recent celebrated examples show this process at work. Take, for instance, the long-running, transatlantically polarized dispute regarding genetically modified organisms, which involves both the EU and WTO—where

<sup>26</sup> *Id.* at 21.

<sup>27</sup> See, e.g., Miguel Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEG. STUD. (Dec. 2007), available at <http://www.ejls.eu/>.

<sup>28</sup> For a recent useful overview of a huge and diverse literature, see Martti Koskenniemi, *The Fate of International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007).

the WTO's Sanitary and Phytosanitary Measures Agreement (SPS)<sup>29</sup> is heavily influenced by the less state-centered and more public health-dominated Codex Alimentarius standards—as well as the Biosafety Protocol to the UN biodiversity convention.<sup>30</sup> Or consider the controversy over the possible environmental effects of the operation of the MOX Plant nuclear facility at Sellafield in the U.K., which involved litigation under the auspices of the EU, the United Nations Convention on the Law of the Sea (UNCLOS), and the Convention on the Protection of the Marine Environment of the North East Atlantic (OSPAR convention).<sup>31</sup> What we see in each of these cases, as in countless others, is a multilayered overlap so dense, complex, and sensitive to differently situated, nuanced conceptions of the public good that it makes no sense to try to identify the proper law through resort to some two-dimensional notion of mutually exclusive or unilaterally dominant jurisdictions. What is more, not only is environmental overlap the product of the new density of normative connections but it can often produce its own secondary normative consequences, as discrete normative systems with actual or potential overlapping practical environments adjust to the implications of overlap.<sup>32</sup>

### 1.5. Sympathetic consideration

Here we are concerned with the “migration”<sup>33</sup> of constitutional and other legal ideas between legal orders—state or otherwise—in contexts in which the legal orders in question are neither in an internal normative relation (as in categories one, two, and three, above) or in a relation of practical interlocking (as in category four, above). Rather, we address, here, relations between discrete legal orders of a type that would readily have been understood as presumptively horizontal under the two-dimensional Keynesian-Westphalian, state-sovereigntist frame, and which for that reason are not often mentioned in the same breath with the various, new “three-dimensional” relations considered

<sup>29</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493 (1994).

<sup>30</sup> Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027 (setting forth “advance informed agreement” procedures to be used before importing or exporting “living modified organisms” resulting from biotechnology).

<sup>31</sup> For illuminating discussion of these and other cases, see Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006).

<sup>32</sup> For example, as in the case of “regulatory competition” between legal orders, where regulators deliberately set out to provide a regulatory framework preferable to available alternatives in order to encourage potential users for whatever reasons (for example, promotion of economic interests in a particular territorial or functional sphere; promotion of a particular set of values over another) to operate within that framework rather than the available alternatives. On the theoretical foundations of the theory of regulatory competition, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>33</sup> See THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 13.

above. It is, nevertheless, appropriate to consider such relations as belonging to the same pattern of interconnection as the other four categories, and this for both interpretative and causal reasons.

In interpretative terms, it is important to note that, in many cases, the practice of consulting system-external sources in the courtroom, or indeed in the legislative chamber,<sup>34</sup> does not necessarily depend upon the presence of a structural interconnection of the type set out in the four categories already described. This takes us to the heart of what is intended by “sympathetic consideration.” To give sympathetic consideration is to consult a system-external source on the premise that there exists some ground of common understanding or affinity for taking that external source seriously. Such common understanding or affinity can cover a wide range. It can operate on relatively modest cognitive grounds—a search for close analogies in other systems on the pragmatic assumption that like problems and predicaments will produce like considerations for their solution.<sup>35</sup> Or it can take as its point of departure a much more ambitious sense of different contemporary orders gradually coming to share the same general, or even universal, moral grounding in human rights or other constitutional values, and thus always providing persuasive authority *inter se*.<sup>36</sup>

What is more, turning to causal factors, we may observe that the more intimate forms of structural interconnectedness (to which the general process of globalization speaks and to which the other four categories of legal or practical interconnectedness bear witness) are often cited or, at least, tacitly understood as important background reasons for the broader movement in favor of a more sympathetic consideration of external sources. In a world of increasingly common predicaments, interdependence, and interlocking fates—so it is often argued—we both urgently require and are better able to cultivate a more cosmopolitan sensibility, one in which the ethical boundaries between particular communities follow the lead of their practical boundaries in becoming more porous and less distinct.<sup>37</sup>

As is well known, this whole approach is also received skeptically in many circles. Nowhere is this skepticism more prominent than among some members

<sup>34</sup> See, e.g., JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (Cambridge Univ. Press 1999).

<sup>35</sup> As, for example, in the “experimentalist” writing of Charles Sabel and his collaborators; see, e.g., Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

<sup>36</sup> There are countless examples of this, from the so-called dominant “postwar constitutional paradigm” based upon an integrated set of national and international safeguards of human rights, democracy, and equal citizenship; see Lorraine Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 13, at 84; to more limited “normative families,” such as those collected under the labels of “common law constitutionalism”; see, e.g., Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD J. LEG. STUDS. 435 (2003).

<sup>37</sup> See, e.g., HELD, *supra* note 4.

of the U.S. Supreme Court. Those who adhere to a state-sovereigntist understanding of the Constitution, backed up with originalist or textualist principles of interpretation, maintain that apart from cases where, on the facts, there is, indeed, a clear structural reason in domestic law for taking account of a non-system rule, no special sympathetic consideration should be taken of foreign and international judgments.<sup>38</sup> Yet the very vehemence of this refusal, together with the fact that it is an issue that palpably divides the Supreme Court,<sup>39</sup> is simply further testimony to a growing awareness of how much is at stake—and how much is controversial—in a post-Keynesian-Westphalian understanding of the relationship between legal sources.<sup>40</sup>

## 2. The new disorder of orders

Against this rapidly shifting backdrop, it becomes apparent why both the descriptive accuracy and the prescriptive authority of the Keynesian-Westphalian frame have come under sustained attack. States are now joined by a plethora of other autonomous or semiautonomous units of legal order within the global configuration, and each of these units must negotiate their boundary relations *inter se* as well as with the states themselves. What is more, the terms on which states are joined by these units are increasingly competitive. In response to and reinforcing the decline in the traditional coincidence of government, peoplehood, and political and economic capability that undergirded the state-centered Keynesian-Westphalian frame, these other units are more and more apt to emulate or even to outstrip the state in terms of one or more of the generally recognized indices of effective sociopolitical capacity—whether this be democratic representativeness,<sup>41</sup> scope and depth of jurisdiction, protection of individual rights or minority interests, functional expertise, administrative capacity, responsiveness to diverse opinion, or the ability to ensure compliance of affected parties.<sup>42</sup> It is this double development—the shift away from the centrality of the state in both legal and sociopolitical registers—

<sup>38</sup> In particular, Justice Antonin Scalia. See his exchange with Justice Stephen Breyer in *A Conversation between US Supreme Court Justices*, 3 INT'L. J. CONST. L. (I•CON) 519 (2005).

<sup>39</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003), and *A Conversation between US Supreme Court Justices*, *supra* note 38.

<sup>40</sup> See, e.g., Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2006).

<sup>41</sup> This is the least likely claim to be made and is, for many, seen as the most fundamental weakness of postnational legal forms; see, e.g., Dieter Grimm, *The Constitution in the Process of Denationalization*, 12 CONSTELLATIONS 447 (2005). See also Esty, *infra* note 42; and de Burca, *infra* note 42.

<sup>42</sup> For recent overviews of the comparative legitimacy of state and poststate sites of governance, see, e.g., Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006); and Grainne de Burca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. (2008).



that, in turn, produces a double challenge at the level of boundary negotiation and intersystemic relations more generally. Not only, as noted, are there just more areas of overlap and marginal contestation on the surface of legal relations, but there is no single deep metaprinciple of authority—such as state sovereignty, with its structurally simple matrix of horizontal and vertical authority relations—to provide a dominant overall grid for the conduct of these marginal relations.

Instead, as we see in Table One below, there are various contending global metaprinciples of legal authority, or “orders of order.” There remains a residual state-sovereigntist position; now, however, it competes for ascendancy with hierarchical, unipolar, regional, integrity-based, legal-field, and pluralist approaches. Closer examination reveals yet further complexity and so, apparently, even greater scope for irresolution. For with each of the candidate metaprinciples we find distinct subvariations, with strong and exclusive models, on the one hand, and, on the other, more moderate designs. Yet, tellingly—as we shall see—we may be able to draw a quite different message from this trend. The further *diffusion* of the range of metaprinciples of authority may also imply the *defusion* of the grounds of their mutual difference, since the more moderate

**Table One. Global Metaprinciples of Legal Authority**

<b>Metaprinciple of legal authority, i.e., order of orders</b>	<i>Strong and exclusive application</i>	<i>Moderate and contributory application</i>
<b>1. State sovereigntist</b>	Realism—old-fashioned “anarchy” <sup>43</sup> of the international system	liberal internationalism
<b>2. Global hierarchical</b>	World government	Pyramid structure with some cosmopolitan norms/institutions
<b>3. Unipolar</b>	Pax Americana	Global liberal hegemon
<b>4. Regional</b>	Divided world order	New balance between different regional conceptions of constitutional/international order
<b>5. Integrity</b>	Universalizability of norms across orders	Coherence of conflict norms between orders (e.g., proportionality and balancing)
<b>6. Legal-field discursive</b> (e.g., international constitutional law, global administrative law, new “ius gentium”)	Particular legal field as master discourse of law	Extension and application of discourse of conceptualization and imagination associated with a particular legal field to the global level
<b>7. Pluralist</b>	New anarchy of legal forms and relations	“Bottom up” countervailing power model

<sup>43</sup> HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (Columbia Univ. Press 1977).

versions do not seek or, at least, do not require exclusive status but may, instead, accommodate the moderate versions of at least some of the other metaprinciples. Before we can pursue this hypothesis, however, we must first examine each of the candidate metaprinciples in turn.

The residual state-sovereigntist metaprinciple divides along familiar lines. On the one hand, there is an old-fashioned realist position. Precisely because it denies any intrinsic, noninstrumental value to law, realism is a position more securely domiciled within the cognate discipline of international relations than with legal science itself.<sup>44</sup> For the realist, the law reflects—and given the incorrigibility of the international state of nature—cannot but reflect a precarious balance of power between states.

On the other hand, there is a more liberal position in which states remain ontologically prior in the global order yet are capable, through law, of achieving stable cooperation, albeit a cooperation based on a common interest in peace and reliable commitments and on mutual respect for overlapping visions of the public good,<sup>45</sup> rather than on some sense of a thick normative consensus. Granted, the legacy of support for both of these positions remains strong and international circumstances may periodically conspire to reaugment their empirical significance; moreover, the liberal position, unlike the realist position, is not wedded to the kind of geosocial naturalism that cannot countenance the sustained relevance of actors other than states at the global level.<sup>46</sup> Nonetheless, neither version of the state-sovereigntist position can fully respond to the post-Westphalian challenge other than through a Sisyphean reassertion of an unquestioned authority to which that very challenge poses a standing rebuke.

The next three metaprinciples, in their various ways, privilege a vertically supported framework of authority. Each of the global-hierarchical,<sup>47</sup> unipolar,<sup>48</sup> and regional models<sup>49</sup> is cited in its strong version in the ideological struggle to fill the space evacuated by the Keynesian-Westphalian model; however, more often this is done in a negative rather than positive spirit—less as a utopia to be pursued than as a dystopia to be avoided. But behind these familiar surfaces of rhetorical

<sup>44</sup> On how much of contemporary international law theory is defined *against* realism, see Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 1 (1995).

<sup>45</sup> See, e.g., JOHN RAWLS, *LAW OF PEOPLES* (Harvard Univ. Press 1999).

<sup>46</sup> See, e.g., ANDREW MORAVCSIK, *CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* (Cornell Univ. Press 1998).

<sup>47</sup> For an instructive history of schemes of world government from Kant to contemporary cosmopolitanism, see Catherine Lu, *World Government*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Winter 2006, <http://plato.stanford.edu/entries/world-government>.

<sup>48</sup> See, e.g., Thomas Donnelly, *Brave New World: An Enduring Pax America*, American Enterprise Institute Online (Mar. 25, 2003), at [http://www.aei.org/publications/pubID.16710/pub\\_detail.asp](http://www.aei.org/publications/pubID.16710/pub_detail.asp).

<sup>49</sup> See, e.g., ROBERT KAGAN, *PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (Albert A. Knopf 2003); ROBERT COOPER, *THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE 21ST CENTURY* (Atlantic 2004).

opposition, each metaprinciple resonates more strongly and is more likely to attract reasoned affirmation in a moderate version. A modestly tiered, cosmopolitan program constructed at the global level around security and human rights protection, with further layers of regional and state-level jurisdiction organized in accordance with the appropriate scale of the collective-action problems in question, is a position favored across a range that embraces pragmatic UN reformists, on the one hand, and moderate cosmopolitans such as Jürgen Habermas, on the other.<sup>50</sup> For its part, the liberal-hegemon position, in which post–Cold War U.S. military dominance is treated not just as a brute datum but as a way of guaranteeing the simulation—in an “empire-lite”<sup>51</sup> form—of the conditions of liberal internationalism, is a position that has remained attractive to a brand of North American opinion opposed to the more nakedly self-interested models of Pax Americana, which had gained a foothold in the Bush administration in the period after 9/11. Finally, the rise of American power, in concert with the consolidation of a more self-consciously outward-looking regional power in the EU—a somewhat neglected motivation behind the latter’s recent, and recently aborted, constitutional project<sup>52</sup>—and, more embryonically, in other geographical trading blocks, has also encouraged an approach within which the coexistence of different regional sensibilities within global law is countenanced.<sup>53</sup>

The next two metaprinciples set out in Table One—the integrity and the legal-field discursive approaches—tend, by contrast, to privilege a horizontally supported framework of authority. The integrity approach ranges from a utopian normative universalism, which would replace or complement the world government of the strong version of the hierarchy approach with a world community of value,<sup>54</sup> to a more modest coherentism. This more reticent approach readily recognizes the existence and defensibility of different levels and orders in the global mosaic, each with distinct sources, priorities, and value preferences. Yet it seeks a shared set of general principles—one increasingly influential version centers on the expansive epistemic claim of the principle of proportionality and the method of balancing<sup>55</sup>—that, nevertheless, would

<sup>50</sup> See, in particular, JÜRGEN HABERMAS, *THE DIVIDED WEST* (Polity 2006). For a critical overview, see Michel Rosenfeld, *Habermas’ Call for Cosmopolitan Constitutional Patriotism in an Age of Global Terror: A Pluralist Appraisal*, 14 *CONSTELLATIONS* 159 (2007).

<sup>51</sup> See, e.g., MICHAEL IGNATIEFF, *EMPIRE LITE* (Vintage 2003).

<sup>52</sup> On this neglected external dimension, see Grainne De Burca, *The Drafting of a Constitution for the European Union: Europe’s Madisonian Moment or a Moment of Madness?*, 61 *WASH. & LEE L. REV.* 555 (2004).

<sup>53</sup> See, e.g., Jeb Rubinfeld, *The Two World Orders*, *THE WILSON QUARTERLY*, Autumn 2003, at 22.

<sup>54</sup> See Lu, *supra* note 47; and the references at *supra* note 36.

<sup>55</sup> The *locus classicus* of this approach is ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., Oxford Univ. Press 2002); on the reasons why proportionality and balancing have proved particularly suited to adjudicating large competing claims at the transnational boundaries of legal systems, see Alec Stone Sweet, *Proportionality, Balancing and Global Constitutionalism* (unpublished manuscript 2007).

provide a coherent framework for deciding on the optimal relationship between levels and orders in any particular dispute setting.<sup>56</sup>

For their part, legal-field discursive approaches tend to draw upon a particular domain of law, familiar under an earlier authoritative grid, and to treat this field perspective as the basis for the creation of a new “discourse of conceptualization and imagination”<sup>57</sup> at the metalevel of the new order. This we see, for example, in current attempts to adapt and extend the first-order Keynesian-Westphalian concepts of constitutional law and administrative law, or to revive the more venerable second-order metaprinciple of *ius gentium*.<sup>58</sup> Just because these fields are affected by the conditions of their formation under the older frame and, indeed, may remain more familiar in that earlier guise, such approaches risk being dismissed as incongruous, marginal, or redundant contributions to the new frame. Yet we should not underestimate the suggestive power of “naming”<sup>59</sup> and of the new “narrative perspectives”<sup>60</sup> invited by such naming—that is, the potential for transforming our collective sense of the meaning and normative significance of new juridical objects by recoding them in old terms. The recent mobilization and pursuit of the idea of international constitutional law,<sup>61</sup> for example, seeks to persuade its audience of the lexical,<sup>62</sup> institutional,<sup>63</sup> or ideal-normative<sup>64</sup> priority of particular features of the international or transnational level of law over the national level.

In like manner, the wide range of novel regulatory forms captured under the umbrella of the Global Administrative Law project<sup>65</sup> conveys a sense of the

<sup>56</sup> See, e.g., Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004), in which it is claimed that a minimum, and minimally legitimate, coherence of the global order depends upon the interplay of four key principles—formal international legality, subsidiarity, adequate participation and accountability, and reasonable and rights-respecting outcomes.

<sup>57</sup> WEILER, *supra* note 15, at 223 (with specific reference to the development of a constitutional discourse in the EU).

<sup>58</sup> See Waldron, *supra* note 40; see also Jeremy Waldron, *Partly Laws Common to all Mankind*, Yale Law School Storrs Lectures (Sept. 10–12, 2007).

<sup>59</sup> Susan Marks, *Naming Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 995 (2006).

<sup>60</sup> See Koskeniemi, *supra* note 28, at 369.

<sup>61</sup> See, e.g., Armin Von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223 (2006).

<sup>62</sup> See, e.g., Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006).

<sup>63</sup> With reference to the central role of the United Nations, see, for example, Bardo Fassbender, *We The People of the United Nations: Constituent Power and Constitutional Form in International Law*, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 3, at 269.

<sup>64</sup> See, e.g., Weinrib, *supra* note 36; Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, 36 C.M.L.R. 703 (1999).

<sup>65</sup> See Kingsbury, Krisch & Stewart, *supra* note 25.

legitimate translation from the national level of certain key legal principles of good public administration—such as reason giving and *audi alterem partem*—and their application within and between different transnational regimes. Similarly, the renewed interest in a precursor of modern international law such as the *ius gentium*—understood as a kind of universal law for noncitizens that is recognized by each polity to complement its particular law for citizens—speaks to a similar attempt to find in the broader and deeper legacy of nonstate law the principle and resources of field organization necessary to imagine and construct a new set of global legal relations.<sup>66</sup> Moreover, while these field approaches can sometimes be presented in a manner that appears to claim hegemonic status, their deeper message tends to be more inclusive. Because they are essentially ways of reordering and reconstructing the existing materials of law rather than discarding and supplanting them, in the final analysis they are inclined to be accommodating of other perspectives in the universe of authority rather than exclusive in their meta-authoritative ambition.

Finally, there is a range of pluralist approaches, again with an important distinction to be drawn between strong and moderate versions. The strong approach displays striking parallels with the naturalist realism of the strong version of the state-sovereigntist approach. Under this perspective, the new state of nature is no longer an anarchy of formally identical states but an anarchy of highly differentiated units or nodes of legal authority. This line of analysis has been criticized for being too easily seduced by the exotically diverse character of the landscape it contemplates and, thus, for a consequent tendency—whether fatalistic or complacent—to “cease to make demands on the world”<sup>67</sup> and, instead, simply to describe and accept it.

Yet alongside this naturalistic approach there are more prescriptive approaches whose aims are not to celebrate pluralism for its own sake but to try to draw out some positive normative dividend or lesson from its incidence. This kind of pluralism we find prevalent in studies of the post-Keynesian-Westphalian openness of particular intersystemic relations, notably as regards the perennially unresolved authority relations between the EU and its member states.<sup>68</sup> However, we also find it increasingly applied, in a generic fashion, across the wider canvas of new global legal relations.<sup>69</sup> In this broader prescriptive mode, pluralism tends to emphasize the advantage of a “bottom up” evolutionary landscape of diverse legal orders over a “top down” programmed arrangement. This advantage may be seen in a variety of ways: in terms of the greater capacity of each order to check and counter the legitimacy deficits and

<sup>66</sup> See Waldron, *supra* note 40, and Waldron, Storrs Lectures, *supra* note 58.

<sup>67</sup> See Koskenniemi, *supra* note 28, at 23.

<sup>68</sup> See, e.g., Walker, *supra* note 2; Maduro, *supra* note 27.

<sup>69</sup> See in particular Krisch, *supra* note 31; Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183 (2008); Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

to moderate the excesses of the others; in terms of pluralism's encouragement of tie-breaking compromise or dialogue; in terms of its propensity toward equal recognition of different and diverse constituencies and their corresponding legal regimes; and in terms of a general willingness to recognize and embrace the emergence of new such constituencies and regimes.

### 3 Conclusion: Coming to terms with disorder

What does the simultaneous promotion of so many candidate global metaprinciples of legal authority, in place of the dominant Keynesian-Westphalian metaframe, suggest about the stability and direction of the newly emerging global legal configuration, and about the role of the juristic agenda within this? And how, if at all, might we envisage further refinements of the juristic agenda in response? Three linked conclusions address these questions.

In the first place, regardless of the persuasiveness, or otherwise, of the claims made on behalf of the various candidate metaprinciples, none of them is likely to achieve the kind of hegemonic ascendancy once held by the Keynesian-Westphalian frame. This is true—if less obviously so—even of the pluralist position and even though its logic of assertion is quite different from any of the others. Rather than proposing an alternative order of orders, pluralism proposes a kind of “nonorder” of orders, in which no general steering mechanism is available to frame the relations between orders; instead, any such relational complex (with the attendant virtues of countervailing power) emerges serendipitously out of the undirected interaction of the parts. Yet, importantly, such a distinctive logic of assertion does not relax or otherwise alter the criteria of success. For the pluralist nonorder to prevail, in any comprehensive sense, this will depend—as does the comprehensive success of any of the other metaprinciples—not just on the failure of any other candidate metaprinciple to achieve a position of predominance but on the failure of any other candidate metaprinciple to achieve even a modicum of structuring influence. To the extent that traces of the state-sovereigntist, pyramidal, liberal hegemonic, regionalist, coherentist, and legal-field discursive models can be seen in the ordering of global legal relations, there can be no *tabula rasa* on which a pure form of bottom-up pluralism may develop. This, indeed, indicates the deep sense in which it is important to conceptualize and understand the emerging configuration as a (candidate-neutral) *disorder* of orders rather than a (pluralism-favoring) nonorder.

In the second place, however, to return to a theme briefly intimated earlier, it is remarkable that—once we dismiss the strong headline versions of the competing metaprinciples, which are primarily concerned with the rhetoric rather than the practice of geopolitics and geolaw—the more moderate versions stand in a different kind of relationship to one another. Not only need they not be mutually incompatible but we can actually see in the dynamics of their respective development some kind of active recognition of this; either a degree of modesty of ambition and an awareness that they cannot provide a comprehensive



metaprinciple or a degree of developmental openness to the other metaprinciples. For example, some versions of residual state-sovereigntist or pluralist models can be read as self-consciously partial and selective metaprinciples, as can some versions of the three modestly framed vertical metaprinciples—pyramidal, unipolar, and regionalist. So, too, coherentist models and, more expressly and expansively, legal-field discursive models can be seen as open to and reconstructive rather than dismissive of the claims apparent, implicitly or explicitly, in other candidate metaprinciples. On this view, the disorder of orders need not be viewed as a cacophony of infinitely discordant voices, as an unrestrained and unrelenting process of metalevel agonism. Rather—in theory, at least—it may contain within it space for some kind of reconciliation among differing framing possibilities.

But how, if at all, might practice come to vindicate theory? In order to explore whether and how any such reconciliation between the more modest variants of the metaprinciples could take place, it is required of us—in the third place—to return, one last time, to the paradox of contested authority at the center of the post–Keynesian–Westphalian predicament. The emphasis in this concluding discussion, however, is no longer on how that predicament is brought about, but on how it might be overcome.

On the face of it, this presents a formidable challenge. First, we must accept that the disorder of orders, considered as an accomplished and ongoing state of affairs, concerns the absence of transunit agreement in the presence of multiple competing candidate metaprinciples about how we should best resolve the relations between the different units of legal, political, and moral ordering in the world. Second, any such resolution, in turn, would have implications for which version (and whose version) of just ordering should prevail in any particular case or category of cases. That being so, we have no option but to attempt to renegotiate any such metalevel agreement within precisely the same geopolitical framework and culture of contested authority we are seeking to resolve. In other words, as we seek to stabilize the ground beneath our feet, we cannot stand upon anything other than that same unstable ground.<sup>70</sup>

The paradoxical quality of the reflexive treatment of contested authority manifests itself in two problems. In the first place, there is a legitimacy problem. Who *should* get to decide how we specify the optimal global relation between decision-making units? In the second place, there is a capability or initiative problem. Who is in a position to wield influence effectively—who *can* decide how we specify the optimal global relation between decision-making units?

<sup>70</sup> A similar paradox of contested authority may be noted at lower levels within the global order, particularly in the EU, where the recent preoccupation and failed experiment with documentary constitutionalism speaks to the same lack of sufficient common investment in a single metatechnique (in this case a constitutional process) for resolving authority conflicts (both among states and between states and the center). Again, the failure of the solution method is itself a symptom of the problem. See, e.g., Walker, *supra* note 24.

The legitimacy and the capability problems are but two sides of the same coin. On the one hand, the fact that a particular institution or agency happens to hold a position to influence the renegotiation of the basis for meta-authority in the contested global meta-authority system—say, the U.S. government, the UN Security Council, or the EU Commission—is itself a question-begging function and a product of that contested meta-authority system. On the other hand, so deeply contested is the meta-authority system that it is difficult to see a basis on which any group of even putatively legitimate stakeholders might act, with sufficient trans-systemic support, to make a decisive difference in favor of any one particular metaprinciple.

But while the paradox of contested authority, with its dual problem of legitimacy and capability, evidently rules out the restoration of a single, dominant metaprinciple of authority, does it also rule out the practice of reconciliation among multiple metaprinciples, each more modestly conceived, which we have suggested as a less dogmatic basis for the post-Keynesian-Westphalian configuration? To answer that question requires us to identify those categories of actors and those sites of activity that—while they cannot be privileged absent any settled, single meta-authoritative principle—nevertheless carry sufficient legitimacy and enjoy sufficient capability, within the present shifting constellation, to be involved in any defensible and plausible ongoing meta-authoritative process. We must then ask what kind of contribution these categories can make, separately and together, to a constructive practice of reframing with reference to diverse candidate metaprinciples. Three such categories of actors and sites of activity stand out—popular, judicial, and epistemic.

First and foremost, there are the popular sites. To return to the beginning, the decline of the Keynesian-Westphalian frame, while it has profound legal repercussions, remains, at root, the erosion of a *political* settlement. This was a settlement in which the idea of democratic representation operated in a two-link chain through the internal medium of the state and the external medium of the interstate system. To the extent—which is considerable—that political power is no longer exclusive to these two media so democratic representation requires realignment to the new points at which power is articulated. Yet to the (equally considerable) extent that the terms of this rearticulation and redistribution of political power are themselves in flux and contested, the higher democratic priority lies within the “politics of framing”<sup>71</sup> itself. Here, of course we encounter a paradox of representation to mirror our broader paradox of authority. The ever-intensifying debates regarding global and regional civil society and how they should bear upon and figure within global and regional institutions and constitutions are revealing.<sup>72</sup> What these disputes demonstrate is that claims for a representative basis sufficient to justify influence over

<sup>71</sup> Fraser, *supra* note 1, at 75.

<sup>72</sup> See, e.g., JOHN KEANE, *GLOBAL CIVIL SOCIETY* (Cambridge Univ. Press 2003).

or involvement in new forms of representation tend to be made in contexts where the available forms of representation themselves may be obsolete, unformed, or underdeveloped, making their legitimacy contestable.

This state of affairs, of course, does not rule out bootstrapping forms of democratic renewal—or “democratic iteration.”<sup>73</sup> But it does underline the point that neither the democratic principle itself nor the preferences of those agents who claim to be empowered by the democratic principle can supply the whole answer to the question of the appropriate forms and conditions in terms of which democracy is constituted, distributed, and interconnected.<sup>74</sup> A key point of the present essay has been precisely to demonstrate that other and deeper metaprinciples of authority are required, and that other key constituencies operating at other sites, which pass the relevant legitimacy and capability threshold, have to be involved in the negotiation of these factors.

The judiciary comprises one such key constituency. Boundary disputation, as we have seen, may be the symptom rather than the deep cause of the post-Keynesian-Westphalian authority predicament. But the very frequency with which this symptom is brought to the notice of judges, as the guardians of the jurisdictional borders of legal orders and as the last-instance umpires of inter-system disputation, means that they emerge as recurrent and indispensable players in the meta-authoritative process. Here, legitimacy—the idea of some kind of trans-system authority of judicial reasoning and capability—their default role in intrasystem maintenance, combine significantly to empower higher judges.

Of course, this empowerment provides no guarantee that such judges, in fact, will do anything other than simply deal with the symptoms, without consideration of the deeper problem of meta-authority. However, as some senior judges become increasingly habituated to these new circumstances of endemic interjurisdictional disputation, there is evidence that they do become more open to exploring deep causes. As one judicial figure operating in the EU context has remarked in an extracurricular context, judges accustomed to working at the margins of legal orders must—and do—increasingly engage in “meta-teleological”<sup>75</sup> reasoning. That is to say, they must—and do—look not simply to the wider telos and justification of the relevant rules at issue but also to the wider telos and justification of the very legal order responsible for these

<sup>73</sup> SEYLA BENHABIB, *ANOTHER COSMOPOLITANISM*, ch. 1 (Oxford Univ. Press 2006).

<sup>74</sup> This is quite separate from and logically prior to the criticism that, at some poststate sites and for some poststate jurisdictions, democratic arrangements are simply not socially viable, logistically possible, or technically appropriate as a mode of decision making. See Esty, *supra* note 42; and de Burca, *supra* note 42.

<sup>75</sup> Maduro, *supra* note 27, at 5.

rules, and to how this wider telos is informed by the host legal order's relationship with adjacent legal orders.

This brings us to our third and last key constituency—back to the legal academics and professional commentators centrally implicated in the setting and pursuit of the juristic agenda. When we assess the credentials for the involvement of this group in the meta-authoritative process, the question of legitimacy collapses entirely into the question of capability. The juristic agenda setters have no title and no standing other than what accrues to them given their capacity to throw light on the predicament of meta-authority and, perhaps, to suggest ways of addressing that predicament. As we have sought to argue, in some respects the juristic agenda setters have remained too much in thrall to an older regulatory culture—and, in particular, to the aspiration of a single metaprinciple of authority—to be particularly effective in the task of either diagnosis or treatment. Yet, for all that they often remain in the reactive shadows of events, the very looseness and permissiveness of the deep structure of these events also allow juristic agenda setters independence and room to maneuver. Precisely because the global legal configuration, unlike the particular legal orders within that configuration, has no central institutional hierarchy of a political, administrative, or even judicial form—and did not possess one even in the relatively settled Keynesian-Westphalian phase—those theorists and commentators who set and follow the agenda of inquiry into that global configuration become, of necessity, its key and unusually privileged “symbolic analysts.”<sup>76</sup> On the one hand, no one is authorized by the whole to speak for the whole. On the other, no one *else* is as well equipped to find the critical distance necessary to imagine or reimagine the unauthorized whole.

It is this convergence of circumstances that opens up such a suggestive link between the *conceptual* framing of global authority relations of the juristic agenda setters and the framing of global authority relations understood as a legitimate and effective social and political accomplishment. As already noted, this is something perhaps most clearly glimpsed and most productively exploited by the sponsors of the various versions of the coherentist approaches and, even more so, the legal-field discursive approaches. Yet this kind of agenda-setting initiative cannot hope to treat the predicament of meta-authority effectively if it is intended and received in an ideological fashion. That is to say, it cannot simply be an exercise in relabeling, one designed to put a more acceptable veneer on but not otherwise add value to the justification of a controversial and contestable posture in legal authority relations—whether it be a new “constitutional” hierarchy of some international law

<sup>76</sup> ROBERT REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM* (Alfred A Knopf 1991).

sources over national law<sup>77</sup> or an extension of a “subpolitical” sphere of “administration” and administrative law to the nonstate sector. Rather, and this is crucial, such an agenda-setting initiative must be pursued with a view to persuading the other constituencies—judicial and political, with their indispensable roles to play in the meta-authoritative process—to consider, accept, and act on the new conceptualizations in ways that transform their meaning and broaden their legitimacy. Indeed, only if an initiative is pursued in this more explicitly communicative, jurisgenerative spirit can the agenda of global legal science ever hope to do more than simply reflect the progress and note the gathering symptoms of the predicament of state-decentered legal authority.

<sup>77</sup> For criticism of the tendency of some exercises in “international constitutional law” to do little more than invoke the vocabulary of constitutionalism in order to dignify existing arrangements, see Neil Walker, *Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law*, in *MULTICULTURALISM AND LAW: A CRITICAL DEBATE* 219–234 (Omid Shabani ed., Univ. Wales Press 2007).