

**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>

Taking Constitutionalism Beyond the State

Abstract

In recent years, the idea that constitutional modes of government are exclusive to states has become the subject both of sustained challenge and of strong defence. This is due to the development at new regional and global sites of decision-making capacities of a scale and intensity often associated with the demand for constitutional governance at state level, to the supply at these same new sites of certain regulatory institutions and practices of a type capable of being viewed as meeting the demand for constitutional governance, as well as to a growing debate over whether and in what ways these developments in decision-making capacity and regulatory control *should* be coded and *can* be constructively engaged with in explicitly constitutional terms. The aim of the article is threefold. It asks why taking the idea and associated ethos and methods of constitutionalism ‘beyond the state’ might be viewed as a significant and controversial innovation, and so as in need of explanation and justification - a question that requires us to engage with the definition of constitutionalism and with the contestation surrounding that definition. Secondly, taking account of the various arguments that lie behind these definitional concerns, it attempts to develop a scheme for understanding certain key features of constitutionalism and of its post-state development that is able to command broad agreement. Thirdly, and joining the concerns of the first two sections, it seeks to identify the key current tensions – or antinomies – surrounding the growth of post-state constitutionalism with a view to indicating what is at stake in the future career of that concept.

Introduction

In recent years, the modernist idea that constitutional modes of government are for states, and for states alone, has been the subject both of sustained challenge and of strong defence. Anticipating our definitional discussion, we can comprehend the challenge to a state-centred constitutionalism, and the response to that challenge, as having both material and ideational dimensions. It refers, first, to the development beyond the states of certain levels of decision-making capacity that are normally associated with the demand for constitutional governance, as well as to certain types of transnational regulatory institutions and practices – from the emergence of charters of rights and strong regimes of judicial review to the elaboration of inter-institutional checks and balances and developed systems of political accountability - that are normally associated with the supply of constitutional governance. These developments in both demand and supply may be found (i) in *regional* organisations such as the European Union (EU) and the North Atlantic Free Trade Association (NAFTA), (ii) in *functional* organisations as diverse in their remit and in their pedigree (public or private) as the World Trade Organisation (WTO) and the Internet Corporation of Assigned Names and Numbers (ICANN), as well as (iii) under the general *global* umbrella of the UN Charter and institutions or the international legal framework more generally (Walker, 2002; Fassbender, 2007).¹ The challenge to a state-centred constitutionalism refers, secondly, to the increasing tendency for such existing post-state policy capacities and related regulatory institutions and practices to be conceptualized in explicitly constitutional terms, as well as to the growth in ‘constitutional’ imagination or sponsorship of alternative post-state regulatory institutions and practices.

The present article has three aims. It asks, first, why taking the idea and associated ethos and methods of constitutionalism ‘beyond the state’ might be viewed as a significant and controversial innovation, and so in need of explanation and justification. This requires us to engage in some detail with the definition of constitutionalism as well as with the contestation surrounding that definition. Secondly, taking account of the various arguments that lie behind these definitional differences, the article attempts to develop a scheme for understanding certain key features of constitutionalism in general and of its post-state development in particular that is sufficiently inclusive to command broad agreement. Thirdly, and bringing the concerns of the first two sections together, it seeks to identify the key current tensions – or antinomies – surrounding the growth of post-state constitutionalism with a view to indicating what is at stake in the future career of this concept.

The Statist Legacy and the Problem of Definition

Given the considerable *prima facie* evidence that the demand for and supply of constitutional governance is increasingly moving beyond the state, why does such an extension of the proper domain of constitutionalism meet with strong resistance? We can identify four kinds of objection which, sometimes cumulatively, are levelled against taking constitutionalism beyond the state, each referring to a different way in which constitutionalism is implicated or invoked in contemporary social and political relations. Constitutionalism beyond the state may be rejected or challenged as inappropriate, as inconceivable, as improbable or as illegitimate. Let us briefly examine these four ‘i’s in turn.

The argument from inappropriateness refers to the way in which constitutional techniques and values are invoked as a form of *normative resource* in law-mediated

endeavours to articulate values and objectives relevant to ‘good government’ and to supply institutional technologies for achieving these values and objectives. From this perspective, it may be argued that as the solutions provided within the normative arsenal of modern constitutionalism are historically tailored to the problems of states, then notwithstanding the superficial familiarity of the regulatory techniques that have developed in the post-state domain, such solutions may remain appropriate and relevant only or mainly to the problems of states (e.g. Majone, 2002). For instance, the historical preoccupation of modern constitutions with the separation of powers, with the independence of the judiciary, with institutional checks and balances more generally, with the federal dispersal of power and with government-constraining Bills of Rights, may be viewed not as universal precepts and techniques of good government, but as directed to the dangers of tyranny or arbitrariness associated with the concentration of political power in the particular case of the modern state with its claim to the monopoly of legitimate authority over discrete territorial populations (Madison, Hamilton and Jay, 1987)). Conversely, that same unique concentration of power in the state also points to the scale and depth of its positive responsibility as the primary point of political initiative. In so doing, it focuses attention on the importance of ensuring against decision-making gridlock (through aspects of intra or inter-institutional balance and co-operation, such as majoritarian voting rules or co-decision devices) or against decision-taking inflexibility and unresponsiveness (through various methods of executive empowerment, such as expansive prerogative powers in the British example or the development of the ‘political questions’ doctrine in the example of the United States and other documentary constitutional traditions). In either case, the particular - and sometimes conflicting - imperatives of constraint and empowerment, and the mechanisms appropriate to their pursuit and reconciliation, are

arguably peculiar to the modern state and to its highly privileged place as an exclusive or dominant repository of legal authority and political power in the global configuration. As such, these mechanisms are not directly relevant to any other type of entity with a less comprehensive depth and range of capability and responsibility.

The argument from inconceivability takes the case from inappropriateness a stage further. It holds not only that the tool-box of state constitutionalism is ill-suited or less appropriate to any other endeavour, but that the very idea of taking constitutionalism beyond the state - considered as anything more than a loose analogy to convey a continuing general commitment to 'good government'- is a kind of 'category error' (Moravcsik, 2005, p.25). The invocation of the ideas and practices of constitutionalism involves a distinctive way of thinking about the world - an *epistemic horizon* and political imaginary that presupposes and refers to the particular form of the state. Various features of the modern state and its constitutional representation characterize and reflect this very particular political imaginary. These include not only the idea of a 'sovereign' and so autonomous, self-contained and internally-integrated legal and political order, but also the notion that for each sovereign political order there is a distinct 'society' or 'demos', as well as a dedicated collective agency - whether 'nation,' 'people' or even the 'state' itself - who are or should be imputed to be the ultimate authors of that order. On such a view, if these background ideas of sovereign or autonomous system, distinct society and dedicated collective agency are not in place, as arguably they are not unless in the presence of the modern state, then we cannot meaningfully characterise any candidate normative and institutional design as constitutional.

The argument from improbability refers to the way in which constitutionalism is implicated in existing relations of authority. Any constitutional order is not just the

articulation of a way of thinking about the world, but also a framework for the organisation and application of political power. And since actually existing constitutional orders tend to be centred on the state, the 'state system' (Falk, 1975)) has long served as a mechanism of *authoritative pre-emption* frustrating the pursuit of non-state constitutional initiatives, or at least ensuring that such initiatives remain within the delegated authority of states. In this way the established Westphalian configuration of mutually exclusive states with mutually exclusive domains of constitutional authority, joined by an essentially state-parasitic framework of international law conceived of as a set of agreements *between* sovereigns, serves continuously to reproduce itself and to repress or marginalise any challenge to its domination.

The argument from illegitimacy, finally, concerns the manner in which constitutionalism is frequently invoked as an *ideological claim*, as a way of adding or detracting symbolic value from an actual or projected state of affairs on the basis of its supposedly 'constitutional' or 'unconstitutional' qualities. The case here is a straightforwardly consequential one. If constitutionalism, on one or more of the three grounds considered above, can only properly be conceived of as a matter of and for the state, then any attempt to assume the mantle of constitutionalism beyond the state is by necessary inference illegitimate. If a claim of constitutional status is made on behalf of an entity or a set of regulatory practices in circumstances where the tools are inappropriate to the problem, or where the requisite underlying belief system is not in place, or where the necessary 'de facto' authority is absent, then that claim becomes an empty or misleading one (Klabbers, 2004; Grimm 2005b, Weiler, 2003).

If we ask how the defenders of constitutionalism beyond the state respond to these sceptical perspectives, we can begin to appreciate that the key differences and

points of disputation are conceptual rather than empirical. There is no compelling ‘fact of the matter’ or even a persuasive body of evidence available to settle the argument between the sceptics and defenders of constitutionalism beyond the state. Rather, definitional issues and the underlying differences of perspective they expose are pivotal. We can demonstrate this by re-examining each sceptical perspective in turn.

The argument from inappropriateness claims that the tools of constitutionalism are the wrong type for non-state polity problems, in so doing treating constitutionalism as an instrument of regulatory design. The critique of that position would begin by re-iterating that the very similarity of many non-state regulatory instruments to the state model suggests that at least some of the techniques of prudential reasoning and design associated with constitutional statecraft are relevant to other types of political arrangement with more limited concentrations of political power. But this immediately raises the question of whether the definition of constitutionalism can properly admit of degrees, particularly in the light of the sceptics’ epistemic claim, with its all-or-nothing threshold qualification.

According to that epistemic claim, the constitutional way of addressing the world is inconceivable other than in the context of the state, so treating constitutionalism as a limited and limiting situation and perspective from which to imagine the world. The critique of that position would begin by questioning whether those supposedly limited and limiting presuppositions of the constitutional imaginary – the ideas of autonomous system, distinct society and dedicated collective agency – must indeed be tied to the state, or whether they may possess a broader significance. Again, this is finally an open conceptual question rather than one of incontrovertible empirical fact or of essential definition. Although the relevant

rhetoric of sceptical argumentation often suggests otherwise, the core ideas of system, society and dedicated collective agency possess neither the rigidity of meaning, nor do states possess the uniform distinctiveness of empirical characteristics relative to any such rigid meanings, that would be necessary to close down debate.² What is more, even if the relevant conceptual and empirical arguments do stack up against an expansive understanding of the non-state range of application of some or all of these core ideas, then this simply returns us to the prior definitional question considered above – whether we are simply stuck with the unimaginability of post-state constitutionalism under a pure, all-or-nothing conception, or whether we may still contemplate its moderate incidence under a more-or-less conception.

The argument from improbability claims that there is no state-independent source of power that is able to assume the mantle of constitutionalism, and in so doing it treats constitutional authority as a brute question of social and political power. The critique of this position would begin by reiterating that, despite the historical dominance of state-based constitutionalism, there is increasing evidence of constitutional development at non-state sites. But this again immediately begs the definitional question. What counts as constitutional development? Does it include ‘subjective’ claims, as in the ideological register, or must it refer only to actual or projected states of affairs - to ‘objective’ measures and conditions - under the normative and epistemic registers?

If, finally, we revisit the argument from illegitimacy, the contention that the discursive claim of constitutional character and status is not justified in any post-state context treats constitutionalism as a ‘speech act’ or rhetorical claim, and in this case as a quite unsubstantiated one. Yet the critique of this position would again begin by asserting that there is by now enough emergent evidence of constitutionalisation under

the other three registers to rebut the charge that such a rhetorical claim is empty. And to the extent that the ‘objective’ evidence of the appropriateness of the so-called constitutional measures and the conceivability of the so-called constitutional pre-conditions does not convince, a broader critique of the argument from illegitimacy would ask whether and why the imaginative prospect and projection of constitutionalism should in any case be entirely in thrall to constitutionalism’s achievements in modern history rather being considered as a self-standing and open-textured feature of the constitutional enterprise.

This encounter with constitutionalism’s ‘politics of definition’ (Anderson, 2005, ch.6) helps clarify what is at stake in the endorsement or otherwise of each or any of the four critical perspectives, and indicates how we might set about developing a more inclusive scheme to steer our substantive discussion of post-state constitutionalism. To begin with, patently the definition of constitutionalism and the question whether and to what extent constitutionalism might extend to the post-state context is both controversial and complex. Such controversy and complexity indicates the need, as a basic orienting premise, to contemplate the potential range of constitutionalism in open-ended terms so as to avoid the premature exclusion of the possibility of post-state constitutionalism by definitional fiat.

Secondly, and in the spirit of that open-ended brief, we should be careful not to settle *a priori* the question whether constitutionalism beyond the state may be understood in more-or-less, incremental terms, or whether it requires to be judged in all-or-nothing, holistic terms. To that end, it is helpful to think of how we might approach constitutionalism as something that can be parsed or disaggregated into its component parts or dimensions in such a way that, on the one hand, we at least possess the tools to comprehend it as a matter of degree and partial realisation,

without, on the other hand, denying the possible significance of the pattern of combination of these dimensions and so the potential force of the holistic argument.

But, how, thirdly, should such a parsing exercise proceed? What key dimensions of constitutionalism can serve as a broadly endorsed checklist for its post-state variant, and how should we think of the relationship between these dimensions? To answer that question we must appreciate that what underlies the significance of constitutionalism *for sceptics and promoters of post-state constitutionalism alike* in each of the four arenas of contestation is its character as a special form of practical reasoning pitched at a general or ‘meta’ level of social and political organisation. That is to say, if practical reasoning in general is about deciding how to act in a context of practical choice, the special type of practical reason associated with constitutionalism is concerned with the deepest and most collectively implicated questions of ‘how to decide how to decide’ how to act. Whether understood as a set of normative resources, an epistemic horizon, a locus-specific authoritative force, or an ideological claim, constitutionalism is concerned, in the broadest possible sense, with the question: *how can we and how should we approach the practical puzzle of developing, refining and interpreting the appropriate terms of governance of collective action?*

Accordingly, constitutionalism conceived of as this special form of practical reasoning must always strike a balance between the ‘can’ and the ‘ought’. On the one hand it is not a purely idealistic discourse, concerned to name and pursue certain ends regardless of whether these ends are ones that are broadly endorsed or (relatedly) feasible to achieve. This caution pushes us towards the conventional and the historical as indicators of and controls upon what constitutes a plausible political enterprise, and so to the identification of certain dimensions of constitutionalism in objective terms as socially realised, and, it follows, in the modern age primarily state-situated or at least

state-rooted forms of organisation and practice. Yet we cannot on the other hand defer entirely to modern history and convention and to their ‘externally’ verifiable record. The ‘ought’ dimension of practical reasoning always also suggests either an endorsement of or a critical rejection of existing practice, and, if the latter, the possibility of the revision of the ethical core of constitutionalism in light of past experience and the novelty of the practical context – most notably for present purposes the transnational context. This brings back in the subjective and evaluative dimension - the importance of the ‘internal’ construal of ‘external’ developments in constitutional terms - and the idea of constitutionalism as an ethical discourse under a constant process of reimagining and reconstruction. And indeed, in the final analysis the proposition that the constitutional imagination can escape the extensive legacy of modern history and the modern state is not simply a matter of theoretical faith. The fact (to be developed below) that constitutionalism also has a *pre*-modern history – a phase that pre-dated the development of the modern state as the exclusive vehicle of the constitutional ambition to provide an active and comprehensive design or blueprint for the proper government of a clearly demarcated society – suggests that if there was nothing inevitable or essential about the relationship between constitutionalism and statehood in the past, (McIlwain, 1947; Sartori, 1962; Maddox, 1982)³ so there cannot be in the future either.

In a nutshell, in our parsing of constitutionalism as a multi-dimensional form of practical reasoning, precisely because it *is* a form of practical reasoning constitutionalism in general and post-state constitutionalism in particular must tread a line between two precipices. It must avoid the twin dangers of the solipsism of excessive idealism (on the subjective side) and the apologetics or fatalism of

excessive conventionalism (on the objective side), in so doing employing each dimension to modify the other.

The Frames of Transnational Constitutionalism

A scheme that addresses the two large methodological tensions identified above – the more-or less versus all-or-nothing question and the balance between objective and subjective factors – while respecting both the resilient floor of shared understanding of our master concept and its semantic roots, is suggested by thinking about the different dimensions of constitutionalism as a series of reinforcing frames. The idea of constitutionalism as a framing mechanism resonates closely with a minimum shared sense of constitutionalism as a special species of meta-level practical reasoning – as something concerned with the very framework within which and in accordance with which we engage in collective forms of practical reasoning. The idea of constitutionalism as a framing mechanism, furthermore, is already present in the etymological roots of the constitutional idea. It is visible in the early shift from the literal reference to the composition and health of the human organism to the metaphor of the ‘body politic’ - first in the tradition of ancient constitutionalism conceived of as a descriptor of the already ‘constituted’ polity and only gradually augmented by a sense of active prescription and projection of its ‘good working order’ (Grimm, 2005b). In the modern state tradition in which this shift found its mature expression five forms of constitutional and indeed ‘constitutive’ framing of the polity have tended, albeit with highly uneven application and variable success, to take hold and to converge. These are juridical, political-institutional, self-authorizing, social and discursive frames (Walker, 2007a).

What typically counts, as constitutional in terms of the juridical frame is the idea of a mature rule-based or legal order – one that reaches or aspires to a certain standard both of independent efficacy and of virtue that we associate with legal ‘orderliness’.

What typically counts as constitutional in political-institutional terms is the presence of a set of organs of government that provide an effective instrument of rule across a broad jurisdictional scope for a distinctive polity as well as seeking a fair form of internal balance between interests and functions.

What typically counts as constitutional in self-authorizing terms is that the legal and political-institutional complex may plausibly be attributed to some *pouvoir constituant* that is both original to and distinctive of that polity and qualified to claim a legitimate pedigree or authorial title.

What typically counts as constitutional in social terms is a community sufficiently integrated to be the subject of legal regulation and institutional action that is both plausibly effective in terms of collective implementation and compliance and capable of locating and tracking some meaningful sense of that community’s common good.

And finally, what typically counts as constitutional in discursive terms is both the balance of the existing ideological power struggle and the ongoing normative ‘battle of ideas’ entailed in the labeling of certain phenomena or prospects under the binary logic of constitutional/unconstitutional, with all that that implies in terms of the ‘constitutional’ status and worthiness of the phenomena so framed.

How does this approach allow us to handle without prejudice the two large methodological question of post-state constitutionalism we have identified? In the first place, as regards the more-or-less versus all-or-nothing question, the basic criterion of internal distinction permits access to both readings. The possibility of an incremental reading is retained through the basic idea of the separability of the frames, a notion vindicated by the fact that in the state tradition the layering of the frames has

tended to follow a historical trajectory of reinforcement. This has involved the overall structure being reinforced by the later addition of the self-authorizing and social frames to the original juridical and political-institutional frames, with the increasing resonance of the discursive frame reflecting and reinforcing this gradual thickening (Walker, 2007a). Equally, the possibility of a holistic reading is kept open by the very structure of the framing idea. If we recall the epistemic basis of the holistic critique of post-state constitutionalism, it is found in the ideas of autonomous system, dedicated collective agency and distinct society. In each case there is an explicit fit with one or more of our defining constitutional frames – autonomous system to the juridical and the political-institutional, dedicated collective agency to the self-authorizing and distinct society to the social. Indeed, each of the three epistemic preconditions presupposes the very idea of integrity and boundedness implicit in the very notion of a frame. If, then, the framing notion captures the shared affinity of the various epistemic preconditions with the roots of the constitutional idea and the basis on which they complement one another, then it poses a difficult challenge to those who would seek to disaggregate that constitutional form into its component parts and treat no part or combination as indispensable.

In the second place, as regards the tension between objective and subjective, fact and value, apology and utopia, here the substantive content of the categories supplied by the framing criterion seeks to reflect and maintain the appropriate balance. Most obviously, the idea of a separate discursive register – a domain of ‘constitution talk’ – provides an explicitly subjective frame to correct for the objectivity of the other four frames. In addition, even the objective frames must be understood as a mix of fact and value, the idea of the ‘good working order’ of the legal, political-

institutional, self-authorizing and social frames of the constitution suggesting in each cases a critically evaluative benchmark to accompany the empirical accomplishment.

The Five Frames Considered

Let us now look at these five framing dimensions in turn. To begin with *legal order*, this refers to the circumstances under which we may conceive of a certain domain of law *qua* legal order - as something systemic and self-contained (Raz, 1980). The fine details may be viewed differently across jurisprudential schools, but the very idea of legal order is commonly understood as a necessary incident, or at least precondition, of any constitutional system. Legal order involves a cluster of interconnected factors; in particular self-ordering, self-interpretation self-extension, self-amendment, self-enforcement and self-discipline. The quality of self-ordering refers to the capacity of a legal system to reach and regulate all matters within its domain or jurisdiction, typically through its successful embedding of certain law-making 'secondary' norms as a means to generate and validate a comprehensive body of 'primary' norms (Hart, 1994, ch.5). The quality of self-interpretation refers to the capacity of some organ or organs internal to the legal order, typically the adjudicative organ, to have the final word as regards the meaning and purpose of its own norms. The quality of self-extension refers to the capacity of a legal system to decide the extent of its own jurisdiction - often known as *kompetenz-kompetenz* (Weiler, 1999: ch.9). The quality of self-amendment refers to the existence of a mechanism for changing the normative content of the legal order which is provided for in terms of that order and which empowers organs internal to that order as the agents of the process of amendment. The quality of self-enforcement refers to the capacity of the legal order, through the development of a body of procedural law and associated sanctions, to provide for the application and implementation of its own norms. The quality of self-discipline refers

to the positively evaluative and aspirational dimension of 'legal order,' for which the first five dimensions provide a necessary, if insufficient platform. Once the legal order reaches a certain threshold of certainty and reliability in its production and of comprehensiveness in its coverage of its primary norms (self-ordering), once it has reached a certain threshold of effectiveness in its rules of standing, justiciability and liability (self-enforcement), once it has obtained the capacity to adjust or 'correct' its own normative structure and provided it can guarantee sufficient autonomy from external influences in these systemic endeavours (self-amendment, self-interpretation and self-extension), it is then in a position to achieve two related aspects of self-discipline. In the first place, it can offer a certain level of generality and predictability in the treatment of those who are subject to its norms, and in so doing help cultivate a system-constraining cultural presumption against arbitrary rule. Secondly, and more specifically, the consolidation of a legal order with mature claims to autonomy, comprehensiveness and effectiveness provides the opportunity and helps generate the expectation that even the institutional or governmental actors internal to the legal order need and should not escape the discipline of legal restraint in accordance with that mature order. Indeed, these two core ideas - of the 'rule of law, not man' and of a 'government limited by law', (Tamanaha, 2004, ch.9) - provide a key element of all Western legal traditions, whether couched in the language of 'rule of law', or *état de droit* or *Rechtstaat*, and so supply a cornerstone of constitutionalism understood as a value-based discourse.

Whereas this first building block of modern constitutionalism can be traced back to the Roman roots of civilian law, albeit its 'rule of law' characteristics developed later, the second feature was one of the distinctively novel features of the modern state as it emerged as a new form of political domination in continental Europe in response

to the confessional civil wars of the sixteenth and seventeenth centuries. What we are here concerned with is the establishment and maintenance of a comprehensive political-institutional framework understood as a system of *specialized political rule*. This is a development that achieved an early stylistic maturity in the form of the French and American documentary Constitutions of the late 18th century. For such a system neither its title to rule nor its ongoing purpose flows from prior and fixed economic or status attributes or concerns (of the type that in the constitutional thought of classical and mediaeval polities tend to exclude some actors from the polity or grade and degrade them within it) or from some notion of traditional or divine order external to the system itself (as in pre-modern constellations of political power generally). Instead, authority rests upon a putative idea of the individual as the basic unit of society and as the (presumptively equal) source of moral agency, with the very idea of a political domain built upon and dedicated to that secular premise - one that develops its own authoritative yardsticks for conflict-resolution and its own mechanisms for collective decision making (Loader and Walker, 2007, ch.2; Loughlin, 2003, ch.3).

This development speaks to a new stage in the differentiation of social forms, one in which there is for the first time a separate sphere of the public and political that in its operative logic is distinctive both from the society over which it rules and from some notion of transcendental order. Such a specialized system has the dual attributes of immanence and self-limitation. On the one hand, it purports to be self-legitimizing. The justification of the continuing claim to authority of the autonomous political domain and the higher order rules through which that authority is inscribed rests not upon the external force and discipline of a metaphysical or a reified-through-tradition 'order of things', but upon the operation of the political domain itself and the secular

interests it serves. On the other hand, as the flip-side of this, there emerges a general sphere of purely private action and freedom that lies beyond either the autonomous domain of politics or the now redundant special mixed regimes of public and private right and obligation based upon prior forms of privilege or natural order (Grimm, 2005b, pp. 452-3; Habermas, 2001). The regulatory structures of the new specialist political order echo its distinctive attributes. Positively, and reflecting the quality of immanence, they take the form of third order institutional rules and capacities for making (legislature), administering (executive) and adjudicating (judiciary) the second-order 'legal system' norms through which the co-ordination of first-order action and the resolution of first-order disagreement within a population is secured. Negatively, and reflecting the quality of self-limitation, they take the form of checks and balances and monitoring mechanisms – of constitutionalism as 'limited government' - aimed at protecting a separate sphere of private individual or group freedom, one safe from incursions at the third order level of public authority or infraction at the second order level of the substantive norms of the legal system.

The idea of a specialized system of political rule also carries with it certain assumptions about the kind and intensity of normative concern properly considered constitutional. There are again two aspects to this, mirroring those affecting the institutional dimension. On the one hand, there is the idea of the normative system providing a 'comprehensive blueprint for social life' (Tomuschat, 2001) – of recognising no externally imposed substantive limits to its capacity to regulate each and all areas of social policy with which it may be concerned, and to do so in a 'joined-up' manner. On the other hand there is the recognition of an *internally* imposed constraint – the protection of the very sphere of private autonomy which underpins the idea of a secular political order in the first place. In turn this entails

formal or informal catalogues of individual rights - constitutionalism as fundamental rights protection - to add substance to the institutional or structural checks referred to above.

The institutionalisation of a separate and specialist sphere of political contestation and decision and a correspondingly broad and deep political jurisdiction stands in a close relationship to the legal order dimension already considered. Indeed, it is this basic relationship that Luhmann (1993) had in mind when he talked about the constitution as operating within both legal and political systems and providing a mechanism for their linking, or 'structural coupling', with the institutions of the political system both dependent upon – 'instituted' under - a legal pedigree and implicated as key agents in the processes of self-ordering, self-interpretation, self-extension, self-amendment, self-enforcement and self-discipline through which the legal order is sustained and developed. Yet the idea of a specialized political system, still less that of an autonomous legal order, does not necessarily imply, within the third framing register of constitutionalism, a type of authorization that claims either a democratic founding or a continuing democratic warrant. Rather, the operational autonomy, specialist nature and expansive normative scope of the political sphere may be consistent with a set of arrangements in which the original authorisation comes from beyond the system, as in many of the subaltern constitutions of imperial systems ((Wheare,1960; Oliver 2005); or in which the original authorisation is located within the system but is presented as a 'top-down' monarchical or aristocratic grant or bequest rather than a 'bottom-up' popular claim.⁴

So the autonomy and capaciousness of the political sphere need not imply that all those affected by the operation of the system participate or be represented in its institution or even its subsequent homologation. It need imply merely that, within the

third framing register, an understanding of political title should prevail, whether this be presented in terms of *raison d'état* or *salus populi* or some other version of the collective good, that is adequate to the constitutional polity's claim and character, within the second framing register, as a special and encompassing sphere of political action - one where there is no transcendental or otherwise overriding external justification as well as freedom from special social or economic interests. Yet the specialized system of political rule, just because it introduces the idea of a sphere of authority that must construct itself and provide for its own secular justification, cannot indefinitely avoid the very question, 'how to decide how to decide', nor its even more starkly indeterminate derivative - 'who decides who decides' (Maduro, 2003) - that it bring into sharp relief for the first time. Therefore, at least in the developing state tradition, constitutionalism tends to be a precarious achievement unless and until joined by a claim of collective *self-authorization*.

Within constitutional thought in that state tradition, then, this third authorizing frame gradually comes to be conceived in terms of the idea of constituent power, or the ultimate sovereignty of the people (Kalyvas, 2005). Again, the documentary form that centres modern state constitutionalism directly engages this dimension, with such texts typically claiming to be not only *for* the people but also *of* the people, and their drafting procedures - typically through the involvement of constituent assemblies and popular conventions - dramatising a commitment to substantiate that claim of popular authorship (Arato, 2000). So prevalent, indeed, is the ethic of democratic pedigree in modern state constitutionalism - of democracy as a meta-value in terms of which other governance values are understood and articulated (Dunn, 2005) - that debate tends to centre not on the question of its appropriateness but only on the adequacy of its instantiation. This may manifest itself in the critique of those constitutional

settlements that lack a founding documentary episode, or at least a plausible narrative of subsequent popular homologation (Tomkins, 2005), or in the claim that the constitution has betrayed its popular foundations, or in the criticism that for all its derivative concern with democracy in the everyday framework of government, the constitution is not autochthonous, but instead remains dependent upon the 'constituted' power of another polity or polities.

Modern (state) constitutionalism is not only about the generation through an act and continuing promise of democratic self-authorisation of the wherewithal for the operation of a self-sufficient legal order underpinned by its own institutional complex and normatively expansive framework of secular political rule. Alongside these normative or juridical forms, given the increased emphasis upon the prescriptive over the descriptive work of the constitution that the idea of an autonomous and self-authorizing political sphere inevitably brings, the modern state constitution also either presupposes or promises (and typically both), as a fourth framing achievement, a degree of *societal integration* on the part of the constituency in whose name it is promulgated and to whom it is directed (Grimm, 2005a). Unless there is already in place some sense of common cause to endorse those interests or ideals that the constitutional text has identified as being well served by being put in common and to affirm and so vindicate the capability of the institutional means that the constitution deems instrumental to the pursuit of these common interests or ideals, then the constitution conceived of as a project of political community is in danger of remaining a dead letter. What this prior propensity to put things in common or basic sense of political community amounts to is an issue of much controversy, and in any event is something better conceived of as a matter of degree. As a basic minimum, however, it refers to a sense of common attachment or common predicament within the putative

demos sufficient to manifest itself in three interrelated forms. It should be sufficient to ensure that most members demonstrates the minimum level of sustained mutual respect and concern required to reach and adhere to collective outcomes that may work against their immediate interests in terms of the distribution of common resources and risks. Reciprocally, it should be sufficient to ensure that each is prepared to trust the others to participate in the common business of dispute-resolution, decision-making and rule-following on these same other-respecting terms. Finally, this web of mutual respect and trust should be strong enough to sustain a political culture that, just because of the accomplishment of its core common commitment, can acknowledge and accept difference beyond this core commitment (Canovan, 1996; Miller, 1995).

. Yet just because it cannot supply the necessary social supports of respect and concern, trust and mutual toleration merely through normative enunciation does not mean that the constitution is incapable of influencing the measure of social integration necessary to its effective application and must passively presuppose the prior existence of the requisite measure of social integration. To begin with, its normative framework of political rule seeks to provide a settled template for living together in circumstances free from despotism or intractable conflict, and to that extent offers an incentive to all who are attracted by such a template to secure the floor of common commitment necessary for its effective implementation. Secondly, the act of making the constitution may have a mobilisation dividend that goes beyond agreement on the particular text in question. The value of the process is not exhausted by its textual product (Sadurski, 2001), but may extend to the generation or bolstering of just these forms of political identity necessary to the successful implementation of the text. Thirdly, as constitutions in the modern age are typically viewed as the expression

and vindication of the constituent power of a 'people', the successful making of a constitution has come to assume a special symbolic significance as a totem of peoplehood. So powerful, indeed, is the chain of signification developed under the modern banner of popular, nation state constitutionalism, that regardless of how it came into existence, the very fact that a constitution exists is typically understood and widely portrayed as testimony to the achievement, the sustenance, or – as in the case of the new Central and Eastern European States after 1989 – the restoration of political community. Fourthly, insofar as the constitution crystallises such general common ends or values as are the subject of agreement in the constitution-making moment and as may also be already present in the pre-constitutional ethical life of the relevant social constituency, it may have a 'double institutionalization' effect (Bohannon, 1967, p.45). The addition of the constitutional imprimatur may amplify the importance of and the extent of common subscription to these common values and ends, and in so framing and reinforcing a common political vernacular, strengthen the societally-integrative relationship between that common political vernacular and mutual respect, concern, trust and tolerance which is indispensable to political community. Fifthly and lastly, we may look beyond the founding moment of the constitution to see how it can become an ongoing source of intensification of the social foundations necessary to its effective implementation. This operates in at least two ways. On the one hand, the constitution may function as a reminder of community. Insofar as common political identity often develops alongside and feeds off the collective memorialisation of claimed common events, achievements and experiences, constitutional history provides one such stream of sanctified tradition. The constitution may thus write itself into collective history (Margalit, 2002, p.12). On the other hand the constitution may provide a resilient but flexible structure for

political-ethical debate, an anchor for a continuing conversation about the meaning of political community that operates in a Janus-faced manner to strengthen that political community. Looking back, it supplies a token not only of the supposed depth and extension of common experience, but also of the weight of accumulated practical knowledge. Looking forward, the constitution may be sufficiently open-ended and sufficiently understood as a work of trans-generational authorship for its structures and values to be capable of being inflected in ways which retain the symbolic gravitas of accumulated wisdom yet are adaptable to contemporary forms of political vernacular and understandings of trust, solidarity and tolerance. In other words, the constitution may provide a repository, and so a standing corroboration of the viable ethical threshold of political community, as well as a vehicle for its continuous adaptation (Habermas, 2003).

Let us finally turn to ‘constitution talk’ – and so to the discursive frame. Some aspects of this we have already considered under the ‘symbolic’ aspect of the social dimension. Constitutional discourse is not unique in its reference to legal order, specialized political system, extensive normative capacity, constituent power or political community, but it provides a unique imaginary frame in its potential to join these elements together in a singular discourse *about a polity*. That is to say, it is capable of providing an encompassing and self-reflexive vocabulary for imagining the polity in political-ethical terms. Of course, ‘constitution talk’ can also be used ideologically and strategically. As we have seen in our discussion of its societal dimension, such a socially resonant discourse is constantly invoked as a way of reinforcing particular claims and judgements, whether positive or negative – constitutional or unconstitutional – about particular political acts or practices or categories of political acts or practices. Indeed, its ethical centrality and its

susceptibility to ideological exploitation and strategic manoeuvre are two sides of the same coin – accounting for the status of constitutionalism as a ‘condensing symbol’ (Turner, 1974) to whose terms a whole series of debates about how we do and should live together are continuously reduced.

The Five Frames in Transnational Context

We can observe the growth of all five constitutional frames in the post-state context. Undoubtedly the most developed, and best-known example of transnational constitutionalism is found in the European Union, a process which appeared to many to have reached its apotheosis with the Convention on the Future of Europe in 2002-3 and the signing of the EU Constitutional Treaty (CT) of 2004 (Ziller, 2005). However, the prospect of a final constitutional settlement was subsequently thwarted by the ‘no’ votes in the referendums in France and the Netherlands in 2005, which in turn led to the European Council’s decision to abandon the constitutional project and replace it with a traditional international convention in the form of the Treaty of Lisbon 2007. Despite these recent tribulations, the EU experiment as it has unfolded before and after the 2004 watershed has succeeded in registering across all five constitutional dimensions (Walker, 2007a, 2007b), although in no one register do its claims go unchallenged.

The EU’s most venerable and still its most intense constitutional claim is in the juridical sphere. It is based upon a legal order with many of the attributes of autonomy. The so-called *acquis communautaire* - the accumulation of 50 years law under the Treaty framework – provides the ample fruit of the doctrines of supremacy and direct effect, with their strong self-ordering, self-interpreting, self-extending and self-disciplining elements. At the same time, the overlap between the territorial and

jurisdictional claims of the EU and its member states means that none of these accomplishments go entirely uncontested by the states themselves. Furthermore, in the case of the attributes of self-amendment – given that the member states remain the ‘Masters of the Treaties’ and finally responsible for their reform, and of self-enforcement – given the high reliance upon domestic legal systems for the implementation and application of EU law, the EU legal order remains in significant respects a dependent one.

The EU also boasts its own specialized and increasingly well-established political system - Council, Commission, European Parliament, European Court of Justice etc. Today that system embraces a very broad normative scope – much wider than its original market-making remit under the foundational Treaty of Rome in 1957, and since 2000 incorporating a Charter of Rights. Yet as with the legal system, the political system remains locked in a dual relationship of interdependence and competition with national systems. In many respects, moreover – in particular as regards popular support or recognition and as regards decision-making capacity and the effective management of veto powers, these European institutions remain less potent than the national institutions with which they interlock (Scharpf, 1999).

Largely in response to perceived deficiencies in the political-institutional system and (to a lesser extent) the legal system, the forming of a diversely representative Convention to provide the initial draft of the 2004 Constitutional Treaty signalled a concerted attempt on the part of integrationist interests to provide for the authority of the EU to be persuasively founded not just on the states but also directly on the ‘peoples’ and ‘people’ of Europe. The sponsors of the constitution sought, in other words, to assert a constituent power which is not simply derivative and aggregative of the constituent powers of its member states. The Convention process and the

promulgation of the Constitutional Treaty with its emphasis on common values, common citizenship, flags, anthems and other symbols of common attachment, was also clearly concerned with the mobilisation and amplification of the idea of a European-wide society to complement national political societies. And, finally, the same documentary constitutional process certainly stimulated the migration of transnational 'constitution talk' from the arcane world of European judges, Brussels elites and specialist university departments to much broader contexts of political deliberation. By the same token, however, although the seriousness of the documentary constitutional attempt is a telling measure of the momentum that had developed around the idea of a 'thicker' constitutional frame for the EU, its ultimate failure and the alacrity and eagerness with which European elites returned to the 'not the constitutional' (Walker, 2008b) alternative of an old-fashioned (and as yet unratified) Reform Treaty at Lisbon, demonstrates a continuing skewing towards the 'thinner' legal and political-institutional frames.

Elsewhere, we see the same constitutionalizing trend, if as yet much less fully developed, and with little attempt to move beyond a combination of the thin legal and political-institutional frames and the discursive frame.. Still on the regional front, the continental human rights organisations, most prominently in the case of the Council of Europe's European Convention on Human Rights, have begun to attract 'constitutionalizing' claims, in particular for the normative ambition and trumping (over domestic norms) qualities of their substantive human rights provision and their emergent sense of a continental 'public order' and common societal standard (Greer, 2003). If we look at the functional organisations, the World Trade Organisation, to take the best-known example, has recently become the subject of an intense debate over its 'constitutionalization' in both academic, and increasingly in political circles

(Dunoff, 2006; Howse and Nicoladis, 2001; Trachtman, 2006; Petersmann 2000). Over the last 15 years, its legal order has become more robust, particularly through the strengthening of its judicial branch or Appellate Body and the widening of its normative remit from the confines of the predecessor GATT jurisdiction. More generally, its political architecture has become somewhat more independent of its member states, and its defence of certain individual rights – with a particular emphasis on trading rights – against state and regional protectionist interests has become more robust and effective. Similar debates are taking place in a lower key elsewhere, not least with regard to the ‘civil constitutions’ associated with traditionally non-state and non-public sectors such as the internet and the organisation of sports (Teubner and Fischer-Lescano, 2004).

At the global level, the constitutional debate is less new, but its recently growth has arguably been more exponential than in any sector other than the EU. Since the Second World War and the birth of the UN Charter, there has been an intensified interest in the idea of the international legal and institutional order as a constitutional system, one never entirely extinguished by the *realpolitik* of the Cold War. Today, the combination, positively, of the post-war resilience of the UN and its institutions (as opposed to its inter-war League of Nations predecessor) and, negatively, of the new threats to *any* notion of a multilateral global order posed by American exceptionalism and neo-imperialism on the one hand and the rise of fundamentalist challenges to the pluralist premises of contemporary cosmopolitanism on the other, has created the conditions for a renewed interest in the discourse of constitutionalism. Jürgen Habermas is perhaps the most prominent thinker (e.g. Habermas, 2006) to have argued for a new overarching global authority at least in certain narrow but vital areas of the global public good – war, security and human rights – organised around

the reform of the UN in general and its Security Council in particular. In so doing, he has built upon a significant tradition of (strongly German influenced) thinking on an idea of global constitutionalism pivoting upon the common interest of the ‘international community’ (e.g. Fassbender, 1998, 2007; Simma, 1994; Tomuschat, 2001; Von Bogdandy, 2006) and underwritten by those *ius cogens* norms and *erga omnes* obligations that emphasises universal values over multilateral or bilateral negotiations (De Wet, 2006). What is perhaps most strikingly distinctive about this global strain of constitutionalism is the extent to which the discursive frame is to the fore. Whereas at every other post-state site including the EU (Weiler, 1999: ch.1), the constitutional idea - at least in the early phase of its articulation - tends to follow from and react to events – to objective changes in the other constitutional frames, this priority has tended to be reversed at the global level. Here, from the outset, constitutional discourse seems to have been more focused, on the one hand, upon a general reconceptualization of an established legal and institutional domain (regardless of – or with less emphasis upon changes in that domain), and on the other on the provision of a legitimating rhetoric for an explicit agenda of reform.

The Antinomies of Transnational Constitutionalism

In this final section we pull together the strands of the conflicted career of constitutionalism beyond the state by examining three sets of interrelated oppositional forces, or antinomies, in the current moment of development. The first is between *consolidation* and *contestation*. The second is between *diffusion* and *defusion*. The third is between *intensification* and *incoherence*. In what sense are these properly conceived of as oppositional tensions? Are these tensions inescapable, and, if so, need they be unproductive? These are difficult questions, and matters of projection as

much as current and historical analysis. All we can do is sketch the contours of each tension and draw some indicative conclusions.

The most profound irony of transnational constitutionalism is that just at the moment of its consolidation in the legal (and to a lesser extent) political vernacular – when it has reached a point of discursive ‘no return’, it has also plumbed unprecedented depths of contestation. Again the EU provides a key case in point. The political elites of the member states may have been eager to re-embrace the familiar form of an international treaty after the documentary Constitution of 2004 became irretrievably bogged down in ratification difficulties, but it is hard to see the constitutional debate being quietly laid to rest in the longer-term. There is sufficient dissatisfaction with the classically indirect state-centred discourse of EU constitutionalism – one that continues to rely on the traditional tropes of national sovereignty, internationalism and state delegation as the standard structuring devices of regional political community notwithstanding the qualitative shift of political and economic power and of associated regulatory forms away from the state – to ensure that even if there is no consensus on the optimal ‘constitutional’ form of a new order, a powerful critique of the anachronism of a purely state-centred ‘misframing’ (Fraser, 2005) will remain within the political culture.

But this discursive strengthening of constitutionalism remains problematic in at least two senses. First, while it may be potent enough to destabilise the state-centred view and challenge its presumptive authority, the failure of the Constitutional Treaty suggests that it does not carry sufficient momentum to resolve in an affirmative manner the second order debate about whether the EU should indeed have constitutional status. Rather, the view that ‘thick’ documentary constitutions should remain an affair exclusively or primarily of states continues to hold significant sway.

Secondly, there are those who believe, from the other flank, that the discourse of EU constitutionalism, far from being too heterodox a departure, may constitute an insufficiently radical break with the epistemic and normative properties of the Westphalian frame (Tully 2007a, Watkins, 2005); that in borrowing from the state tradition it also endorses a set of assumptions about the autonomous, top-down, centralised, law-fetishizing, self-contained, exclusionary and presumptively imperializing polity that has blighted that state tradition.

And if the second-order debate – constitutional framing or not – remains unresolved – the danger is that we are left in a state of constitutional limbo. The inability to find a constitutional settlement is eloquent testimony to the problem of legitimising the postnational or supranational order, but the similar lack of consensus on the continuing adequacy of a non-constitutional settlement show that there is no longer an uncontested second-order statist default position, whatever the fate of particular constitutional initiatives (Walker, 2006). And although the debate is not so well advanced anywhere else, arguably we are approaching deep second-order contestation in other contexts too – whether the WTO, the regional human rights organisations or, increasingly, the UN and the global order – with some criticizing constitutionalism as an illegitimate grab for power that properly should remain with the states (Schneiderman, 2006), others treating constitutionalism as the key to breaking the Westphalian frame, and others still sharing the constitutionalists' dissatisfaction with the *status quo* but inclined to view constitutionalism itself as the continuation of a familiar structure of power by other means.

In turn, the exploration of the second-order debate reveals a more detailed level of contestation over the first-order meaning of constitutionalism in terms of the significance or otherwise of the dimensions set out earlier. In so doing, it

demonstrates the resilience of the division between incremental and holistic understandings of constitutionalism. For some, the thick state-derivative frame, with all five dimensions in place, remains the non-negotiable *sine qua non* of constitutional status. Unless a polity boasts an autonomous legal order, a distinctive institutional architecture of legislative, executive and judicial powers and a wide normative ambit, a democratic founding and a resilient democratic pedigree, a political community of common attachment and commitment and a lively discourse of constitutional critique and self-interrogation, then it is at best a form of 'constitutionalism-lite' (Klabbers, 2004; Grimm 2005b; Weiler 2003) and at worst a fraud. For others, a more selective approach to constitutional status should not be viewed pejoratively as constitutional defusion, but should instead be seen as the potentially healthy diffusion of the constitutional idea. So it may be argued that it is neither feasible nor necessary for many transnational organisations to have the democratic foundations or the level of societal integration or the broad normative scope of national constitutions. Some exponents of WTO constitutionalism, for example, concentrate largely on its capacity to offer secure forms of protection of the private sphere of economic rights (Petersmann, 2000). Some exponents of the global constitutionalism of the UN concentrate on the universal and so polity- and society-unspecific claim of the UN legal order and political system (Fassbender, 2007). Some exponents of a relatively thin constitutionalism for the EU also concentrate on the virtue of its insulation from the policy inefficiencies and potential rights-abuses of a democratically volatile policy process (Majone, 2002; Moravcsik, 2005), or on the compensating virtues of an 'output legitimacy' (Scharpf, 1999) garnered through the aggregate benefits of policy outcomes rather than the responsiveness of such policies to a full range of popular input.

To complicate matters further, there are those both on the sceptical side and on the pro-constitutional side, who would draw a clear distinction between the constitutional requirements and potential of the ‘in-between’ EU, with its more state-like capacity and regulatory structure, and those of other less mature post-national sites. On this view, the level of development of the EU uniquely allows of no half-measures, but simply demands a thicker form of constitutional legitimation than other post-state sites. The prospect of this thicker form of legitimation is then either dismissed (by the sceptics) as simply implausible given the resilient location of political and social identity at the state level, so throwing into doubt the general legitimacy of the EU in its current expansive form, or urged (by the enthusiasts) as a possibility born of necessity (Walker, 2007a).

Regardless of differences both over the basis of claims to the virtue of partial constitutionalism and over whether these partial claims should apply generally or only to the less mature post-national sites, the argument typically runs that not only is it not plausible to look for full-pedigree constitutionalism at the postnational level, but that we would not even like it if we found it; that the virtues of political community are not always reducible to democratic will and popular implementation, but can lie in certain matters of the right or the good being insulated from politics, in policy being developed by experts, or in rules being better implemented in interested and knowledgeable communities of practice (Majone, 2002; Joerges, 2005; Mair, 2005; Pettit, 2004). In this vein we can see quite graphically how constitutionalism serves as a ‘subjective’ and dynamically evolving register of debate about the optimal political resolution of collective action problems, rather than as an ‘objectively’ decisive and unchanging resource in its resolution.

This brings us to the final antinomy – between intensification and incoherence. The simultaneous development of various postnational constitutional initiatives both reflects and reinforces a very uneven and untidy global scenario of transnational legal relations. It announces or portends a multi-dimensional configuration of overlapping and variously and partially constitutionalized polities. This is quite different from the post-Westphalian world system of modernity – a one-dimensional system of mutually exclusive and uniformly and comprehensively constitutionalized polities. Of course, this was always a stylisation, a template that operated within the imperial world centred on Western Europe rather than across imperial-subaltern relations (Anderson, 2005; Tully 2007b). There was, nevertheless, a coherent imaginary of legal authority at work – a singular ‘order of orders; (Walker, 2008a) that divided the world into the domestic constitutional law of sovereigns (and, ideally, of democratically endorsed sovereigns) and international law (however unstable) between sovereigns. Every place on the Westphalian map, at least in terms of its official legend, was the subject of a singular and determinate set of juridical relations. Legal pluralism was a purely external pressure – the occasional incursions of alternative regulatory logics, of local or trans-local customary law and the like. Under the new order, pluralism is internal - written into the emergent frame itself. We see this, for example, in the relations between state orders and the EU, or between the EU and the WTO, or, between state or regional bodies and various UN Charter organs and global treaty regimes (Koskenniemi, 2007).

The problem of incoherence, of there being opposite or unclear messages at work within the global juridical framework with its proliferation of authority sources, moreover, is not just one of the relational margins – of the occasional boundary dispute. For just as there is no agreement on the meaning of constitutionalism –

diffuse or defused – or even on the justification in-principle of its migration beyond the political agency of the state, so there is no meta-agreement on how the various more or less agreed parts of the post-Westphalian jigsaw should fit together. Rather, there are an increasing range of meta-agreements vying for ascendancy – a new “disorder of orders” (Walker, 2008a). Can we imagine, as one such meta-agreement, a polyarchy of regions and strong states? Or can we imagine, with Habermas (2006, ch.8), a narrow and modest global peak, underpinned by new regional sites of ‘global domestic policy’ and with the base continuing to be made up of states? Or must we fear the *ersatz* liberal internationalism of a world under the constitutional as well as the military shadow of American unipolarity? Or can we envisage a horizontal rather than a vertical principle of coherence, one based upon values other than hierarchy, as in some forms of ‘multi-level constitutionalism’ (Pernice, 1999) and indeed of many new forms of cosmopolitanism. (Held, 2004) And, if so, where is the guarantee of the genuine rather than hegemonic universality of the values (Koskenniemi, 2007)? And if not, are we not simply left with a fragmented postnational legal order, where the attempt to track fugitive political power in postnational legal arrangements, leads, to embellish Michael Walzer’s famous phrase (1983, p.39), to countless ‘petty juridical fortresses,’ with no principle of mutual coherence? Or does such a radical pluralism of overlapping polity forms have the potential to provide its own power-levelling virtues (Krisch, 2006)? Constitutionalism, including the relationship between state and transnational constitutionalism, clearly plays quite differently in the construction of these rival candidate meta-agreements. As we have seen most starkly in the case of the EU on the one hand and global constitutionalism on the other, constitutional discourse in such conditions of deep uncertainty and incoherence becomes much more emphatically a question of imaginative and more or less persuasive *projection* – a

gambit in the symbolic futures market rather than a confident investment in established stock.

Transnational constitutional discourse, in conclusion, appears to capture both the open-ended possibilities and the deracinated quality of the new political imaginary. Its authoritative, ideological, normative and epistemic power – its capacity to compel, to persuade, to intervene effectively and even to ‘make sense’ - is rooted in its statist origins. Yet transnational constitutionalism is increasingly attenuated from these roots, and is increasingly implicated in attempts to re-order an ever less settled map of transnational legal relations. At the same time, state-centred constitutionalism, while no longer hegemonic, provides a powerful continuing counterpoint to transnational constitutionalism at the authoritative and ideological level, one with the accumulation of practice and tradition very much on its side, as well as a distorting influence at the epistemic and even the normative level. If constitutionalism offers a route to a new state-decentred framework of legal authority, it must perforce continue to contend with heavy traffic from the direction of the state.

References

- Anderson, G. (2005) *Constitutional Rights after Globalization*. Oxford: Hart.
- Arato, A. (2000) *Civil Society, Constitution ad Legitimacy*. Lanham: Rowman and Littlefield, ch.7.
- Bohannon, P. (1967) 'The Differing Realms of the Law', in P. Bohannon (ed), *Law and Warfare: Studies in the Anthropology of Conflict*. New York: Natural History Press pp. 43–56.
- Canovan, M. (1996) *Nationhood and Political Theory*. Cheltenham, Edward Elgar.
- De Wet, E. (2006) 'The International Constitutional Order', *International and Comparative Law Quarterly*. 55, 51-76.
- Dunoff, J. L. (2006) Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law'. 17, 647-670.
- Dunn, J. *Setting the People Free: The story of democracy*. London: Atlantic.
- Falk, R. (1975) *The Study of Future Worlds*. New York: Free Press.
- Fassbender, B. (1998) 'The United Nations Charter as the Constitution of the International Community', *Columbia Journal of International Law* 36, 529.
- Fassbender, B. (2007) 'We The Peoples of the United Nations': Constituent Power and Constitutional form in International Law', in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press, 269-290.
- Fraser, N. (2005) "Reframing Justice in a Globalizing World" *New Left Review*, 36, pp.69-88.
- Greer, S. (2003) 'Constitutionalizing Adjudication under the European Convention on Human Rights' *Oxford Journal of Legal Studies* 23, 405-433.
- Grimm, D. (2005a) 'Integration by Constitution', *International Journal of Constitutional Law* 3, 191-210.
- Grimm, D (2005b) 'The Constitution in the Process of Denationalization', *Constellations* 12, 447-463.
- Habermas, J. (2001) 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles', *Political Theory* 28, 766-781.
- Habermas, J. (2003) 'On Law and Disagreement: Some Comments on "Interpretative Pluralism"', *Ratio Juris* 16, 187-199.
- Habermas, J. (2006) *The Divided West* Cambridge: Polity.

- Hart, H.L.A. (1994) *The Concept of Law* second edition. Oxford: Clarendon.
- Held, D. (2004) *Global Covenant: The Social Democratic Alternative to the Washington Consensus*. Cambridge: Polity.
- Howse, R. and Nicolaidis, K. (2001) 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far', in R. B. Porter, P. Sauve and A. Subramian (eds), *Efficiency, Equity, Legitimacy and Governance: The Multilateral Trading System at the Millenium*. Washington: Brookings Institute
- Joerges, C. (2005) 'What is left of the European Economic Constitution? A melancholic eulogy', *European Law Review*, 30, 461-489
- Kalyvas, A. (2005) 'Popular Sovereignty, Democracy and the Constituent Power', *Constellations*, 12, 223-244.
- Kingsbury B., Krisch, N., and Stewart, R. B. (2005) 'The Emergence of Global Administrative Law', *Law & Contemporary Problems*, 68(3), 15-61
- Klabbers, J. (2004) 'Constitutionalism lite', *International Organizations Law Review*, 1, 31.
- Koskenniemi, M. (2007) 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review* 70, 1-30.
- Krisch, N., (2006) 'The Pluralism of Global Administrative Law' *European Journal of International Law*, 17, 247-278
- Loader, I. and Walker, N. (2007) *Civilizing Security*. Cambridge: Cambridge University Press.
- Loughlin, M., (2003) *The Idea of Public Law*. Oxford: Oxford University Press.
- Luhmann, N. (1993) *Das Recht Der Gesellschaft*. Frankfurt am Main: Suhrkamp
- McIlwain C. H. (1947) *Constitutionalism Ancient and Modern* Ithaca: Cornell University Press.
- Maddox, G. (1982) 'A Note on the Meaning of 'Constitution'' *The American Political Science Review* 76, 805-809.
- Madison, J., Hamilton, A. and Jay, J. (1987) *The Federalist Papers*. London: Penguin.
- Maduro, M. (2003) 'Europe and the Constitution: what if this is as good as it gets?' J.Weiler and M.Wind (eds) *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press.

- Mair, P. (2005) *Democracy Beyond Parties (Paper 05-06)*. Center for the Study of Democracy, University of California, Irvine. Available at: <http://repositories.cdlib.org/csd/05-06>.
- Majone, G. (2002) 'Delegation of Regulatory Powers in a Mixed Polity', *European Law Journal* 8, 319-345.
- Margalit, A. (2002) *The Ethics of Memory*. Cambridge Mass.: Harvard University Press.
- Miller, D. (1995) *On Nationality*. Oxford: Oxford University Press.
- Moravcsik, A. (2005) 'A Category Error' *Prospect*, July, 22-26.
- Oliver, P. (2005) *The Constitution of Independence* Oxford: Oxford University Press.
- Petersmann, E.-U. (2000) 'The WTO Constitution and Human Rights', *Journal of International Economic Law* 3, 19-25.
- Pernice, I. (1999) 'Multi-Level Constitutionalism and the Treaty of Amsterdam: Constitution-making revisited?' *Common Market Law Review* 36, 703.
- Pettit, P. (2004) 'Depoliticizing Democracy', *Ratio Juris* 17(I), 52-65.
- Raz, J. (1980) *The Concept of a Legal System*. second edition, Oxford: Oxford University Press.
- Sadurski, W. (2001) 'Conclusions: On the Relevance of Institutions and the Centrality of Constitutions in Post-Communist Transitions' in J. Zielonka (ed) *Democratic Consolidation in Eastern Europe, Vol 1 – Institutional Engineering*. Oxford: Oxford University Press, pp.455-72.
- Sartori, G. (1962) 'Constitutionalism: a preliminary discussion' *American Political Science Review* 56, 853-64.
- Scharpf, F. (1999) *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press
- Schneiderman, W. (2006) "Constitution or Model Treaty? Struggling over the interpretive authority of NAFTA" in S. Choudhry (ed) *The Migration of Constitutional Ideas* Cambridge: Cambridge University Press 294-315.
- Simma, B. (1994) 'From Bilateralism to Community Interest in International law', *Recueil des Cours de l'Académie de droit international* 250, 6.
- Tamanaha, B. (2004) *On The Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press.
- Teubner, G. and Fischer-Lescano, A. (2004), 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, 25(4), 999.

Tierney, S. (2004) *Constitutional Law and National Pluralism*. Oxford: Oxford University Press.

Tomkins, A. (2005) *Our Republican Constitution*. Oxford: Hart.

Tomuschat, C. (2001) 'International Law: Ensuring the Survival of Mankind on the Eve of A New Century, General Course on Public International Law', *Recueil des Cours de l'Académie de droit international* 281, 63.

Trachtman, J. (2006) 'The Constitutions of the WTO', *European Journal of International Law*, 17,623-646.

Tully, J. (2007a) 'A New Kind of Europe? Democratic Integration in the European Union' *Critical Review of International Social and Political Philosophy*, 10.

Tully, J. (2007b) "The Imperialism of Modern Constitutional Democracy" in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press. pp.315-338.

Turner, V. (1974) *Dramas, Fields and Metaphors: Symbolic Action in Human Society*. Ithaca: Cornell University Press.

Von Bogdandy, A. (2006) 'Constitutionalism in International Law: Comment on a Proposal from Germany', *Harvard International Law Journal* 47, 223.

Walker, N. (2002) 'The Idea of Constitutional Pluralism' (2002) *Modern Law Review* 65, 317-359.

Walker, N. (2006) 'A Constitutional Reckoning' *Constellations* 13, 140-150.

Walker, N. (2007a) 'European Constitutionalism in the State Constitutional Tradition' in J. Holder, C.O' Cinneide and C. Campbell-Holt (eds) *Current Legal Problems 2006* 59, 51-89.

Walker, N. (2007b) "Post-Constituent Constitutionalism "The Case of the European Union in M. Loughlin and N. Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press pp. 247-268.

Walker, N. (2008a) "Beyond Boundary Disputes and Basic Grids: mapping the Global Disorder of Normative Orders" *International Journal of Constitutional Law* (forthcoming).

Walker, N. (2008b) "Not the European Constitution" *Maastricht Journal of European and Comparative Law* 15 (forthcoming)

Walzer, M. (1983) *Spheres of Justice: A defence of pluralism and equality*. Oxford: Blackwell.

- Watkins, S. (2005) 'Constitutional Tremors' *New Left Review* 33, (May-June) 5-21
- Weiler, J.H.H. (1999) *The Constitution of Europe* Cambridge: Cambridge University Press
- Weiler, J.H.H. (2003) 'In Defence of the Status Quo: Europe's Constitutional Sonderweg' in J.H.H. Weiler and M.Wind (eds.), *European Constitutionalism Beyond The State*, Cambridge: Cambridge University Press, 9-26.
- Wheare, K.C. (1960) *The Constitutional Structure of the Commonwealth*. Oxford: Oxford University Press.
- Ziller, J. (2005) *The European Constitution*. Amsterdam: Lower.

¹ For reasons of space, the present article does not consider the related trend towards *sub-state* constitutionalism. See e.g. Tierney (2004)

² On the temptations and frequent tendencies towards state-centred essentialism in the academic and political debate over the constitutional status of the EU, see Weiler (199; ch.10)

³ In an influential article, while not seeking to deny that the idea of constitution has a distinctive pre-modern history going back at least to the Latin *constitutio*, Sartori (1962) dismisses its relevance to modern debate. He argues that the modern sense of constitutionalism is about the *control* of power (*jurisdictio*) in the modern state whereas the ancient sense was concerned simply with power's efficient *exercise* (*gubernaculum*) in the emerging political forms of the classical age – a quite different and in some respect opposing idea. However, as Maddox persuasively responds (1982), such a stipulative definition suggests the kind of critic-centred rather than use-centred approach that Sartori himself is at pains to deny, and ignores the fact that modern constitutionalism is an evolution from ancient constitutionalism rather than a radical departure. In particular, neither ancient nor modern constitutionalism, for all their different emphases, focus on either *gubernaculum* or *jurisdictio* in isolation. Rather, in their common basic emphasis upon the reduction of power to a legal form both ancient and modern modes have been concerned with the balance between these two properties.

⁴ As in many of the *constitutions octroyées*. of the 19th century (e.g. the French Charters of 1814 and 1830, the Italian *Statuto Albertino* of 1848)