

**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

**DEPARTMENT OF LAW**

EUI Working Paper **LAW** No. 2002/1

**The Idea of Constitutional Pluralism**

NEIL WALKER

**BADIA FIESOLANA, SAN DOMENICO (FI)**

All rights reserved.

No part of this paper may be reproduced in any form  
without permission of the author.

© 2002 Neil Walker  
Printed in Italy in January 2002  
European University Institute  
Badia Fiesolana  
I – 50016 San Domenico (FI)  
Italy

# The Idea Of Constitutional Pluralism\*

Neil Walker<sup>^</sup>

## 1. Introduction

The declining years of the 20<sup>th</sup> century have been described as the ‘Weltstunde des Verfassungsstaates’ – the global hour of the constitutional state.<sup>1</sup> As an empirical generalization, there is some support for this proposition. In Eastern and Central Europe, the post-Communist establishment of liberal democratic regimes has been accompanied by the gradual emergence of new constitutional settlements, and by vigorous debate over the precise model of constitutionalism the final form of these settlements should represent.<sup>2</sup> In Germany, reunification required significant adjustment of the constitutional machinery, if not a brand new model.<sup>3</sup> In Britain, the comfortable clothes of the unwritten constitution came to assume an increasingly threadbare appearance to large sections of the political classes and New Labour’s project of institutional reform, however disappointing to some, marked a new intensity of engagement with constitutional issues.<sup>4</sup> In Western Europe more generally, the accelerated growth over the last decade of the European Union and its development of state-like characteristics such as representative institutions of government, a common currency, influence over macro-economic policy and social welfare policy, a policing capacity and a concern with the security of its own external borders, has led to a new interest in its constitutional status, direction and institutions, and also a higher public and political profile for the constitutional institutions (especially the constitutional courts)<sup>5</sup> of its fifteen national members as they

---

\* This is an amended version of a paper delivered to the MLR ‘Constitutionalism in Transition’ seminar at the University of Leeds in July 2001. Thanks to all who participated and offered comments and criticism, especially to Zenon Bankowski, John Bell, Ruth Fletcher, Colin Harvey, Allan Hutchinson, Martin Loughlin, Therese Murphy, Jo Shaw and Jim Tully.

<sup>^</sup> Professor of European Law, European University Institute, Florence; Professor of Legal and Constitutional Theory, University of Aberdeen

<sup>1</sup> P. Häberle, “Verfassungsentwicklungen in Osteuropa - aus der Sicht der Rechtsphilosophie und der Verfassungslehre,” (1992) 117 *Archiv des öffentlichen Rechts* 169-211, at 170.

<sup>2</sup> See e.g., D. Howard (ed) *Constitution-Making in Eastern Europe* (Washington DC: Woodrow Wilson Centre Press, 1993); J. Elster, “Constitution-Making in Eastern Europe,” (1993) 71 *Public Administration* 169-217.

<sup>3</sup> See e.g. K.H. Goetz and P.J. Cullen (eds) *Constitutional Policy in Unified Germany* (London: Frank Cass, 1995).

<sup>4</sup> The literature is enormous. For a recent overview, see V. Bogdanor, “Constitutional Reform,” in A. Seldon (ed) *The Blair Effect: The Blair Government 1997-2001* (London: Little, Brown and Co., 2001) 139-158.

<sup>5</sup> See e.g. A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds) *The European Court and National Courts Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford:

seek to negotiate the balance of authority between state and Union.<sup>6</sup> Outside Europe, too, there have been many instances where constitutionalism has become a more dominant political theme. To name but two, the transition to a democratic South Africa has already produced a landmark, the new Constitution of 1996 - the effectiveness or otherwise of which is generally regarded as crucial to the long-term viability and legitimacy of the new regime;<sup>7</sup> and the heightened profile of human rights institutions at both the international level (including the United Nations and regional bodies such as the Inter-American Charter and the European Convention of Human Rights)<sup>8</sup> and the domestic level (notably, the Canadian Charter of Fundamental Rights and Freedoms of 1982)<sup>9</sup> has sparked a new concern with constitutional rights jurisprudence as a way of accommodating individual entitlements and group aspirations within national, sub-national, trans-national and supra-national political spaces on every continent.

More examples of constitutionalizing trends will emerge in the course of our discussion, but a first priority is to convey something of the other side of the story. For in this very same historical 'hour', the very ideas of constitutionality – the basic structures and mechanisms through which 'actually existing' constitutions are formed and identified, and of constitutionalism – the normative discourse through which constitutions are justified, defended, criticized, denounced or otherwise engaged with<sup>10</sup> – have also been subject to an unprecedented range and intensity of attack. My aim in this paper is to map the various forms these attacks have taken, to argue that the challenges they pose to the notions of constitutionality and constitutionalism are genuine and serious, yet to contend that these ideas remain worth defending and promoting, and are best done so through a version of what is termed constitutional pluralism.

---

Hart, 1998).

<sup>6</sup> On the debate over the constitutionalization of the European Union more generally, see e.g., C. Joerges, Y. Meny and J.H.H. Weiler (eds) *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (Florence: Robert Schuman Centre, 2000); J.H.H. Weiler, *The Constitution of Europe "Do The New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999).

<sup>7</sup> See e.g. H. Corder, "South Africa's Transitional Constitution: Its Design and Implementation," [1996] *Public Law*, 291-308.

<sup>8</sup> See e.g., H.J. Steiner and P. Alston, (eds) *International Human Rights in Context: Law, Politics, Morals*, (Oxford: OUP, 2000, 2nd ed.)

<sup>9</sup> See e.g., D. Beatty, "The Canadian Charter of Rights: Lessons and Laments," (1997) 60 *Modern Law Review* 481.

<sup>10</sup> On terminological questions, see e.g., N. Walker, "European Constitutionalism and European Integration," [1996] *Public Law*, 266-90; P.P. Craig, "Constitutions, Constitutionalism and the European Union," (2001) 7 *European Law Journal* pp.125-152.

## 2. Five Critiques of Modern Constitutionalism

### (a) *The Critiques in Outline*

Five major lines of explicit or implicit criticism of modern constitutionalism run as follows. A first criticism holds that constitutionalism, given its traditional statist framework and continuing statist legacy, is increasingly unable to explain or to act as a container and steering mechanism for the major contemporary circuits and flows of political, economic and social power which escape the state. A second criticism focuses on the dangers of what we might term constitutional fetishism. This criticism holds that an undue concentration upon – even enchantment with – constitutionalism and constitutional structures overstates the explanatory and transformative potential of constitutional discourse and frustrates, obstructs or at least diverts attention from other mechanisms through which power and influence are effectively wielded and political community is formed and which should instead provide the central, or at least a more significant, focus of our regulatory efforts and public imagination. A third criticism concerns the normative bias of modern constitutionalism, its tendency to favour certain interests and values over others and its failure to provide a level playing field within which all relevant interests and values may be authentically and fairly engaged. A fourth criticism concerns the role of constitutionalism as an ideological resource and the propensity of many to clothe their interests, ideas or aspirations in constitutional garb, not because of a commitment to certain normative standards which may be represented or suggested by constitutionalism but because of the symbolic authority which they hope to draw upon by so doing. Each of the different critiques considered thus far has different starting points and trajectories. Within each critical posture, moreover, there is considerable diversity, but there is also a great deal of convergence and overlap *between* these positions, not least in that they are all informed by or at least lent new urgency by the gradual escape of political power and authority from the state. A fifth and final criticism, in turn, is closely and complexly related to the other four considered collectively - indeed, in a sense is a cumulation of the other four critiques and the various responses to these critiques. It concerns the disputed or debased conceptual currency of constitutionalism. Constitutionalism, from this angle, has become a highly protean notion, its field of possible signification increasingly wide and diverse, so raising the prospect of its supplying too indeterminate a discourse to be of any compelling or even persuasive normative value in principle or to provide a viable point of reference for the mobilization of a broad consensus of public and political opinion in practice.

If these lines of criticism – statist legacy, fetishism, normative bias, ideological exploitation and debased conceptual currency - speak to the range of criticisms of modern constitutionalism, they also provide a measure of its intensity. This is because each line of criticism has the potential not only to challenge particular forms of constitutional discourse, but even to cast doubt

upon the abiding value of the very idea of constitutional discourse in some if not all settings. As we shall see, the arguments from state-centredness and fetishism may suggest the refashioning of constitutionalism along more relevant and appropriate lines, but may equally suggest that constitutionalism is beyond rehabilitation as a major container of public power or source of political imagination in a globalizing world. The argument from normative bias may indicate various ways of correcting that bias, but may on the other hand indicate that the very form of constitutionalism is inherently and irremediably prejudiced in favour of this or that set of interests or values. The argument from ideological exploitation may view such exploitation as an unattractive yet bearable cost of a basically affirmative practical discourse, or as irredeemably corruptive of that discourse. And finally, reinforcing the intensity of the overall challenge to constitutionalism, it is precisely the diversity of the attempts to engage with the first four problems *within* constitutionalism rather than through a rejection of constitutionalism which accounts for the contemporary acuteness of the fifth criticism, the increasingly stretched and disputed intellectual currency of constitutionalism. Let us now flesh out this line of argument by looking at each of the first four criticisms in a little more detail, before returning to the fifth criticism as a point of departure for replotting the constitutional map.

*(b) State-centredness*

The increasing marginality and distorting effect of a state-centred constitutionalism has become a familiar refrain of legal and constitutional thought, just as the limitations of a state-centred perspective as a redoubt of social and political theory and practice provides an increasingly common point of reference for much contemporary work on ‘globalisation’ within the cognate disciplines of sociology, political theory, political science and international relations.<sup>11</sup> A broad array of arguments converge around the basic proposition that the homology of territory, community and political capacity which was the historical project of the national or plurinational<sup>12</sup> state of the Westphalian age has come to an end.<sup>13</sup> Increasingly, through the denationalization of capital

---

<sup>11</sup> For a richly cross-disciplinary introduction to this burgeoning literature, see D. Held, A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations* (Cambridge: Polity, 1999), and its companion reader, D. Held and A. McGrew (eds) *The Global Transformation Reader*, (Cambridge: Polity, 2000).

<sup>12</sup> See e.g. M. Keating, *Plurinational Democracy: Stateless Nations of the United Kingdom: Spain, Canada and Belgium in a post-Sovereign World* (Oxford: OUP, 2001).

<sup>13</sup> To name but three particularly clear and incisive recent overviews; M. Zürn, “Democratic Governance Beyond the Nation-State: The EU and Other International Institutions,” (2000) 6 *European Journal of International Relations*, 183-221; C. Offe, ““Homogeneity” and Constitutional Democracy: Coping With Identity Conflicts Through Group Rights,” (1998) 6 *Journal Of Political Philosophy*, 113-41; M. Keating, “Europe’s Changing Political Landscape: Territorial Restructuring and New Forms of Government,” in P. Beaumont, C. Lyons and N. Walker (eds) *Convergence and Divergence in European Public Law*, (Oxford: Hart, 2001, forthcoming).

investment, culture, travel and communications media we confront form of power and social organization which escape the template of the state into more local, private or transnational domains, and both in response to and reinforcing this dislocation, we find new forms of legal rule and political community in and between sub-state, trans-state, supra-state and other non-state units and processes. At the constitutional level, this challenges the role of the modern state constitution as “a central mechanism which enabled the recognition, co-ordination, assimilation and self-legitimation of the legal and political systems.”<sup>14</sup> Instead these organizing and legitimating mechanism are now dispersed across a broad range of sites of authority, from the EU – by far the most pressing challenge to and counter-indicator of state constitutionalism in the eyes of European commentators at least – to other more or less mature forms of legal regulation at the local, regional and global level, and ranging across a wide organizational continuum from ‘public institutions’ whose claims to legitimacy and regulatory capacity display significant similarities to those of the constitutional state to ‘private’ processes which concentrate on the self-regulation of particular communities of interest or domains of practice.

We should be careful neither to overestimate nor to underestimate the extent to which contemporary thinking on constitutionalism is alert to this challenge. As already noted, there is now a critical mass of constitutional writing which is aware or claims to be aware of the limitations of state constitutionalism. Yet we can easily be misled by this. To begin with, the volume and degree of consensus within one particular political and academic community should not prompt the facile conclusion that ‘we are all post-nationalists now’. By and large, and reflecting a trend evident in the division of labour across the humanities and social sciences generally,<sup>15</sup> those who write about post-national tendencies tend to be those who are already convinced that these trends are important, while those who do not and who instead continue to work on state-framed questions presumably do so because they believe them to be at least equally worthy of attention. And while in turn this state-centredness by no means necessarily implies dismissal of the value of the post-national project, it certainly does not imply its uncritical acceptance.

But in any case we cannot properly grasp the quality of the challenge to state-centred constitutionalism and the quality of response to that challenge by a simple head count - by a crude calculation of the division of labour. For we must also address a more significant set of objections to the statist legacy which concentrates on influence rather than focus. This set of objections holds that

---

<sup>14</sup> D. Chalmers, “Post-Nationalism and the Quest for Constitutional Substitutes,” (2000) 27 *Journal of Law and Society*, 178-217, 179.

<sup>15</sup> See in a rather different context, B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity, 2001), ch.1; commenting critically on the suggestion within the ‘multiculturalist’ literature that because its basic premises are rarely challenged head-on they are now generally accepted within political theory.

even those whose constitutional horizons extend beyond national borders continue to view these horizons through a blinkered statist lens and thus to misread or distort what they see. This objection is made in both general terms - and here again the echoes sound across the social sciences and humanities generally- and also in three more specific, law-centred forms.

As to the general objection, this has to do with exposing certain deep epistemic assumptions carried over from the Westphalian age. As Shaw and Wiener nicely put it, the “often invisible touch of stateness”<sup>16</sup> is apt to compromise understanding of non-state or post-state entities or processes. Similar sentiments underpin Michael Zurn’s critical categorization of much of the mainstream of international relations and comparative politics as premised upon a “methodological nationalism” which continues to view “states and their governments as the basic units of political analysis”,<sup>17</sup> or Anne-Marie Slaughter’s exposure of and challenge to the ontology of “interdependence” which has traditionally reduced the general condition of global relations to one in which “states are mutually dependent on and vulnerable to what other states do.”<sup>18</sup>

But along which particular routes – or, more pejoratively – down which blind alleys do these deep epistemic assumptions lead in the field of legal and constitutional analysis? First, and most obviously, there is the route taken by an obdurately defensive internationalism. This approach which, premised on the continuing integrity of state sovereignty, is the external complement and intellectual counterpart to internal state constitutionalism, seeks to grasp and contain all the transformations of authoritative structures and processes beyond the state within the traditional paradigm of international law. As regards the debate about the proper legal character of the EU, for example, there is a school of thought which emphasizes the continuing role of the states as ‘master of the treaties’ and which, on that basis, continues to depict the new legal order in terms of a very old international law pedigree.<sup>19</sup> In so doing, it resists or

---

<sup>16</sup> J. Shaw and A. Wiener, “The Paradox of the European Polity” in M. Green Cowles and M. Smith (eds) *State of the European Union 5: Risks, Reform, Resistance and Revival* (Oxford: OUP, 2000).

<sup>17</sup> M. Zurn, “On the Conceptualization of Postnational Politics: The Limits of Methodological Nationalism.” Paper presented to Workshop on Global Governance, Robert Schuman Centre, Florence, April 2001

<sup>18</sup> A-M. Slaughter, “Abram Chayes: A Tribute” (2001) 114 *Harvard Law Review*, 682, at 684.

<sup>19</sup> See, e.g. A. Pellet, “Les Fondements Juridiques Internationaux du Droit Communautaire,” *Collected Courses of the Academy of European Law*, Volume V (1994), Book 2, 211. See also T. Schilling, “The Autonomy of the Community Legal Order: An Analysis of Possible Foundations,” (1996) 17 *Harvard International Law Journal*, 389, together with his “Rejoinder: The Autonomy of the Community Legal Order,” (1996) *Harvard Jean Monnet Working Paper Series*; responding to Joseph Weiler’s reply to Schilling’s earlier article; Weiler, *op. cit.*, n.6, ch.9.



downgrades an alternative and increasingly influential constitutional account, which would concentrate instead upon the self-affirming constitutional discourse of the European Court of Justice in a series of key early judgments, upon the cue subsequently taken by other European institutions, and upon all that has flowed from that in terms of the flourishing of a broader public debate on European constitutionalism.<sup>20</sup> Of course, *in their own terms*, neither narrative is false or incoherent. It makes no sense, and leads nowhere, to enter into a factional debate about the proper intellectual copyright of the new European legal order. We cannot find firm epistemological ground beyond the world-views of the different disciplines upon which to declare that the new order is *either* international (and intergovernmental) or constitutional (and supranational), or even that is *more* of one than of the other, for it is entirely in keeping with the canons of internal consistency for internationalists to conceive of it one way and for constitutionalists to conceive of it the other. The point is that neither discourse is adequate in itself. We miss something of significance if we disregard the internationalist origins, but we surely also miss something of more novel significance if we disregard the subsequent emergence of a mode of institutional thinking at the EU level which bears at least a family resemblance to the forms of institutional thinking with which we are familiar from the constitutional traditions of states. International law can no longer tell the whole story, and to the extent that it still claims to do so, it remains trapped in the limiting framework of thought referred to above.

In the second place, even if defensive internationalism is overcome, there are a series of “problems of translation”<sup>21</sup> of the core normative concepts of constitutionalism from the state to the non-state domain. There is an enduring tendency, as Shaw and Wiener, have observed, to measure many of the supposed normative shortcomings of post-state entities such as “deficits of democracy, legitimacy, accountability, equality and security”<sup>22</sup> in terms of a statist template and against the benchmark of a (real or imagined) statist standard. This is unsurprising. After all, the vocabulary with which we seek to make normative sense of political entities, including all the key values listed above, even if it does not originate with the modern state it has nonetheless undergone centuries of development and refinement within the context of the state. For example, as is now familiar ground within the European debate, the idea of democracy makes a particular kind of sense, suggesting particular types of institutional possibilities and supporting particular types of general normative objectives, in the context of the relatively culturally homogenous ‘demos’ of the nation state. In the EU setting by contrast, the ‘demos’ is, at best, a more fragile accomplishment, requiring a different type of institutional programme to nurture or sustain it, and, indeed, the overall normative purpose of democracy at the EU

---

<sup>20</sup> See e.g. Craig, *op. cit.* n. 10.

<sup>21</sup> Weiler, *op. cit.* n.6, 270.

<sup>22</sup> *Op. cit.* n.16.

level must also be adjusted to take account of the new multi-level articulation of democratic institutions and our assessment of the nature of the relationship between the different levels. In this new enterprise, the lessons of state democracy are only of limited use, and indeed they can skew understandings of what is at stake and distort projected responses unless this limitation is acknowledged.<sup>23</sup> And, of course, what is true of the difficulties of normative translation of individual terms such as democracy may be even more resoundingly true of the portmanteau idea of constitutionalism, which seeks to provide an organizing framework of practical reasoning for the application and balancing of particular political values.

A third limitation associated with the deep epistemic assumptions of state-centred constitutionalism is more vaguely defined, but in a sense more deep-rooted. What we are concerned with here might be termed the ‘public institutional prejudice’ of the state constitutionalist legacy. Even if we can free ourselves from the straitjacket of traditional international law, and even if we can overcome the formidable hurdle of normative translation, it may be argued that the very institutional *form* of constitutional thinking is inadequate to capture post-national trends. It is undoubtedly true that constitutional thought is dominated by the image of public institutions holding the centre of political and economic life. A simple comparison underlines this point. In political science there has been an active debate in recent years over the so-called ‘new institutionalism’,<sup>24</sup> But in constitutionalism, because of its emphasis upon the polity-constitutive or polity-consolidating role of the juridically sanctioned organs of the state, there has never been *anything but* institutionalism as an anchoring idea, even if the justificatory discourses for this institutionalism have been richly varied and fiercely contested.<sup>25</sup> Yet for some commentators on post-national trends, this public institutional form is viewed as every bit as much a doubtful legacy as is the state-derivative content of constitutional norms. From this perspective, constitutionalism beyond the state is not, or not principally about the emergence of new but apparently familiar institutional complexes in emerging political centres or ‘polities’ such as the EU, still less in the less

---

<sup>23</sup> See e.g., Weiler, *op. cit.* n.5, ch.8.

<sup>24</sup> Emerging around 1970 in the area of comparative politics, notably in the work of Jean Blondel, Samuel Finer and Juan Linz, all of whom were instrumental in redirecting the attention of political scientists to the design, normative structure and influence of government(and other) institutions and away from the functionalists’ and system analysts’ concentration on inputs and outputs. For an overview, see e.g. J-E Lane and S. Ersson, *Comparative Politics: An Introduction and New Approach* (Cambridge: Polity, 1994), 20-24; for a recent restatement, see the same authors’, *The New Institutional Politics: Performance and Outcomes*, (London and New York: Routledge, 2000).

<sup>25</sup> For a recent treatment of this variety, reassessing the constitutional significance of the three major models of law as custom, law as command and law as foundational right, see M. Loughlin, *Sword and Scales: An Inquiry into the Relationship Between Law and Politics* (Oxford, Hart, 2000).

developed orders of the WTO,<sup>26</sup> NAFTA<sup>27</sup> or the ‘international community’ as represented through the United Nations Charter and Treaties<sup>28</sup> - all of which emerging centres have also attracted the interest of institutionally-oriented constitutionalists. Instead, it is argued, post-national constitutionalism or legal post-nationalism more generally should be seen as a species of normative order which is to be found in processes or relations<sup>29</sup> or networks<sup>30</sup> or in forms of private,<sup>31</sup> hybrid or pluri-political ordering<sup>32</sup> which are not institutionally-nested and polity-centred in the same way as the traditional state constitutional order. As suggested by the range of labels used to brand legal post-nationalism, and indeed in the differing views as to whether this new product should be marked ‘constitutional’ at all, these non-institutional visions themselves exhibit a rich variety, and are by no means mutually compatible. Yet these perspectives are united in one view at least - that a post-national constitutionalism exclusively or even predominantly of public institutions - of post-state polities, is an unhelpfully limiting perspective, perhaps even an implausible starting point for a form of practical reasoning trying to capture and shape the quality of a post-state configuration of constitutional authority.

(c) *Constitutional Fetishism*

Whereas the first critique is concerned with the disabling legacy of the statist frame within which constitutionalism has been nurtured, the second is concerned with the more general limitations of any constitutional discourse as a means to capture the nature of social and economic relations and articulate the contours of political choice. Two examples, in many respects very different in theoretical grounding, tone and sympathy will serve to illustrate this second theme.

In response to a burgeoning literature dedicated to thinking normatively and strategically about the development of a European Constitution<sup>33</sup> -

---

<sup>26</sup> On the constitutional dimension of the WTO, see e.g., G. de Burca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart, 2001).

<sup>27</sup> On the place of NAFTA within the emerging complex of postnational economic institutions, see F.M. Abbott, “The North American Integration Regime and its Implications for the World Trading System,” in J.H.H. Weiler (ed) *The EU, the WTO and the NAFTA: Toward a Common Law of International Trade* (Oxford: OUP, 2001).

<sup>28</sup> See e.g. B. Fassbender, “The United Nations Charter as Constitution of the International Community,” (1997) 36 *Columbia Journal of Transnational Law*, 529-619.

<sup>29</sup> J. Shaw, “Process and Constitutional Discourse in the European Union,” (2000) 27 *Journal of Law and Society*, 4-37.

<sup>30</sup> K.-H. Ladeur, “Towards a Legal Theory of Supranationality - The Viability of the Network Concept” (1997) 3 *European Law Journal* 33-54.

<sup>31</sup> See e.g. G. Teubner, “‘Global Bukowina’: Legal Pluralism in the World Society:” in G. Teubner (ed) *Global Law Without a State?* (Aldershot: Dartmouth, 1997) 3-30

<sup>32</sup> See e.g., C. Joerges and J. Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology,” (1997) 3 *European Law Journal*, 273-99.

<sup>33</sup> And focusing in particular upon Weiler *op. cit.*, n.6 and to L. Siedentopf, *Democracy in*

documentary or otherwise - and to a marked increase in the ‘constitutional tempo’ of the “semi-permanent Treaty revision process”<sup>34</sup> as highlighted by the recent promulgation of a Charter of Fundamental Rights for the EU and the inauguration of a strong post-Nice agenda of constitutional reflection, Ian Ward has cast a critical eye over the object of these preoccupations.<sup>35</sup> His basic premise is a simple one - that “political imagination” is not or not merely a function of constitutional discourse. While “the ‘new’ Europe chooses to press on, from Treaty to Treaty, Directive to Directive, immersed in a legalistic twilight that means nothing to the overwhelming majority of its alienated citizenry,”<sup>36</sup> it neglects the cultivation of a broader discourse of political community, one which Ward seeks to retrieve from an earlier tradition of European thought, from the pan-European humanism of Erasmus and Althusius and the “universal jurisprudence” of Leibniz.<sup>37</sup>

It is not easy to untangle the various thread’s of Ward’s argument, but his critique of constitutionalism is explicitly or implicitly in accord with a number of important themes more or less familiar within the critical legal tradition. There is, to begin with, more than a whiff of Marx’s ‘opiate of the people’ in the idea of constitutionalism as a secular religion whose technocratic and essentially tinkering institutional preoccupations serve the purpose of “‘placatory discourses’, apologetic approximations to real democracy which are designed to enervate real political engagement.”<sup>38</sup> Equally, there is a sense in which constitutional solutions are seen as the occupational disability of the constitutionalist, just as, in a complementary sense, political solutions in the form of Treaties and the like are seen as the occupational disability of the politician. The “temptations”<sup>39</sup> of sticking to what you know can be explained in rational choice terms, as the self-interest of the academic in protecting the value of his intellectual capital or of the lawyer or the politician in defending the relevance and authority of his role, or in deeper cultural terms, as the deeply-embedded mind-set of a particular community of theory or practice. Yet Ward digs deeper than this. There is a more fundamental sense in which the constitutional scholar cannot get to the heart of the matter - not just because of an ideological agenda, or self-interest, or deep cultural immersion - but because of the intrinsic limits of constitutional discourse itself. The kind of public philosophy which Ward sees as being the necessary cement and lubricant of

---

*Europe* (London: Penguin, 2000).

<sup>34</sup> B. De Witte, “The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process,” in Beaumont, Lyons and Walker, *op. cit.* n.13.

<sup>35</sup> I. Ward “Beyond Constitutionalism: The Search for a European Political Imagination” (2001) 7 *European Law Journal* 24-40.

<sup>36</sup> *Ibid.* p.39

<sup>37</sup> *Ibid.*, pp.32-37

<sup>38</sup> *Ibid.* p.28

<sup>39</sup> *Ibid.* pp.28 and 31.

European integration and the European polity is portrayed as “a state of mind”<sup>40</sup> rather than a parchment proclamation. Constitutionalism, with its general platitudes, with its articulation of abstract rights, even with its most incisive feats of institutional engineering designed to change how people deliberate and decide together, simply cannot deliver this altered collective state of mind, and those actors and institutions who neglect this basic limitation court the risk of *hubris* in their advocacy of the constitutional way.<sup>41</sup>

Utilizing a quite different type of intellectual compass and less focused on Europe,<sup>42</sup> Emiliios Christodoulidis comes to rather similar conclusions, although his final emphasis is more upon the inadequacies of the political process as conceived of in law rather than upon the public imagination which may or may not be the inspiration and beneficiary of that process.<sup>43</sup> His immediate target is something called ‘republican constitutionalism’, although this is a much wider target than it might seem at first glance. It embraces ‘liberal’ constitutionalists such as Dworkin, ‘discursive’ constitutionalists such as Habermas, and ‘critical’ constitutionalists such as Unger, as well as the familiar litany of American ‘civic republicanism’, notably Ackerman, Sunstein and Michelman. What this diverse array of positions has in common, according to Christodoulidis, is the general ‘republican’ conceit that law can somehow ‘contain’ politics - that we can trust in constitutional law to deliver an expansively participatory version of popular sovereignty.<sup>44</sup> Christodoulidis invokes systems theory, notably the work of Niklas Luhmann, in the pursuit of his thesis, although his conclusions are decidedly more politically radical than those of his intellectual mentor.<sup>45</sup> If law is merely conceived of as one system among many in the social formation, and if politics is conceived of as a system in its own right, then law cannot contain politics in the expansive sense that it aspires so to do. If law views the world through its own normatively closed shutters, in particular through the binary code of legal/illegal, then it will contain politics only in the limited and restricting sense that it recodes political struggles in legal terms - reducing not only their complexity but also their potency in the process, rather than in the

---

<sup>40</sup> *Ibid.* p.24

<sup>41</sup> For a more general discussion of constitutional *hubris* in the European Union, see N. Walker “The White Paper in Constitutional Context,” in C. Joerges, Y. Meny and J.H.H. Weiler, *Responses to the White Paper on Governance*, (Florence: Robert Schuman Centre, 2001 forthcoming).

<sup>42</sup> Although he has subsequently developed his ideas in the context of the debate over European constitutionalism. See in particular, Z. Bankowski and E. Christodoulidis, “The European Union as an Essentially Contested Project,” in Z. Bankowski and A. Scott (eds), *The European Union and its Order: The Legal Theory of European Integration* (Oxford: Blackwell, 2000) 17-30.

<sup>43</sup> E. Christodoulidis, *Law and Reflexive Politics*, (Kluwer: Dordrecht, 1998).

<sup>44</sup> *Ibid.* esp. chs.6, 8 and 11-14.

<sup>45</sup> And in some respects closer to, though still quite distinct from, those of Gunther Teubner, probably the most influential exponent of Luhmannian systems theory within legal studies.

sense of including and embracing the whole of political struggle. And even in its own terms, law will be by no means fully successful in its project of restrictive containment, since politics will continue to follow and reproduce its own systemic logic with only indirect, complexly-mediated regard to how its actions are monitored and ordered within the legal system.

So for Christodoulidis, as for Ward, constitutional law cannot fully grasp and articulate that which is key to the world of politics. For Christodoulidis the reasons are more generally epistemological, to do with the endemic mutual misrecognition of all systems, which remain nonetheless the only standpoints from which we can know the world. For Ward, it is more a matter of aesthetics, the practical reason of law lacking the creative sensibility to articulate and inculcate a new ethic of belonging. As intimated, their solutions too display different emphases. For Christodoulidis, what is needed is a reflexive space of participative politics within which the very drawing of the distinctions on the basis of which the political agenda is formed is reclaimed *from* law and *for* politics.<sup>46</sup> For Ward, what is needed, and what cannot be supplied by law, is the re-enchanting “leap of the imagination” by which Europe can generate the “‘romantic’ visions”<sup>47</sup> necessary for a collective life.

The challenge posed to constitutionalism by these two very different critiques of constitutional fetishism is powerful. At the very least, they advocate a demystification of constitutionalism, its evacuation of the “sacred centre”<sup>48</sup> of the social and political order - national and post-national - and its adoption of a more modest and marginal role. More radically, they perhaps indicate that constitutionalism simply *cannot* transform itself in that way, not only because of the selfish group or individual interests that it represents or because of the inertia of cultural tradition, but because constitutionalism as a metaphor for the apex of an ‘internal’ legal order organized in a hierarchical manner to regulate ‘external’ society according to a similar ‘top-down’ command logic, is *the* crowning conceit of a legocentric model of social engineering.<sup>49</sup>

Yet the debate remains open, perhaps beyond resolution, because there are inevitably tensions and recalcitrant temptations in their own positions. How *do* we foster a reinvigorated transnational humanism or a brave new world of inclusive participative politics? One answer comes from the revolutionary Marxist tradition, that theory can never predict the strategies of *praxis*, that these emerge in the context of the transformative struggle itself, a transformative struggle merely predicated upon - and perhaps inspired by - theory. But when did this caution ever harden into a genuine self-denying ordinance for those committed to change? At most, it serves as an injunction towards an incremental

---

<sup>46</sup> *Op. cit.*, n.43, chs.19-20

<sup>47</sup> *Op. cit.* p.40

<sup>48</sup> See E. Shils, *The Constitution of Society*, (Chicago: University of Chicago Press, 1982) p.80.

<sup>49</sup> See e.g. Teubner, *op. cit.* n.31.

and pragmatic campaign, to a series of small cumulative moves and tactics rather than one comprehensive blueprint issued in advance. Another answer to the problem of radical or disjunctive transformation, then, might be through any medium *but* law. But the problem with this is that the limits of our imagination of the institutional dimension of alternative political possibilities seem inextricably bound up with the limits of our imagination of law. There is no conceivable way within our present epistemic framework of thinking about large-scale institutional change without considering the rule that law might have to play in that process of change.<sup>50</sup> And while the radical vision to which such change is directed, whether a new *universitas* or a more fully participatory procedural politics, might require much more than institutional change, it will often involve at least and necessarily that, however modestly prescribed and projected. So we reach the paradoxical conclusion that the very constitutional law which threatens to suffocate the political imagination nevertheless seems indispensable to our efforts to support and inspire that imagination.<sup>51</sup>

(d) *Normative Bias*

Constitutions are charged with various different types of normative bias. For example, the indictment of constitutional fetishism is often accompanied by the accusation that the empty or overblown rhetoric of the falsely elevated constitution systematically serves the interests of the existing dominant interests within society.<sup>52</sup> Equally, especially before 1989, socialist constitutions have often been accused of - and readily pled guilty to - anti-capitalist bias, while the tradition of Western constitutions, with their unqualified or qualified assertion of private property rights, clearly remains incompatible with socialist systems of comprehensive public planning and control.<sup>53</sup> And, of course, particular constitutions at particular times and places stand accused of any number of particular biases, as when their interpretation of this fundamental right or that limitation on the competence of any specific government or level of government works against a particular set of interests or aspirations. However, apart from constitutional fetishism, which has already been dealt with, and which in any case concerns bias *consequential* upon a feature of constitutionalism rather than *intrinsic* to constitutionalism, and given the decrease in controversy over the economic bias of any general constitutional model (at the state level at least)<sup>54</sup>

<sup>50</sup> See, e.g. R. Unger, *What Should Legal Analysis Become?* (London: Verso, 1996).

<sup>51</sup> That Ward, faced with this paradox, has not in fact eschewed all forms of constitutionalism is suggested by his endorsement of Habermas's deliberative constitutional vision as respecting the precept that "a constitution is a mere expedient, a medium for facilitating debate, nurturing sentiment, forging political imaginations." *op. cit.* n.35 p.39

<sup>52</sup> See e.g. S. Griffin, "Constitutionalism in the United States: From Theory to Politics," (1990) 10 *Oxford Journal of Legal Studies* 200-220.

<sup>53</sup> See e.g. T. Daintith and M. Sah, "Privatization and the Economic Neutrality of the Constitution," (1993) *Public Law* 445-67.

<sup>54</sup> Although such charges are still often made against post-state constitutional entities such as the EU and WTO with a strong 'free trade' mission arguably insufficiently balanced by

since 1989, if not necessarily of the particular governments who operate within the broad free market parameters ordained or presupposed by the dominant general model, there are few areas today where constitutions can be accused of systematic bias in a way which threatens to undermine their general legitimacy. In one sense indeed, the vigour with which particular disputes over the meaning of this or that constitutional provision or trend are pursued bears testimony to the normative open-texture of many constitutional arrangements. The unending battle for the body and soul of the American constitution, for instance, presupposes its deep susceptibility to different interpretations and to significant adjustments of direction,<sup>55</sup> and the same is clearly true of the still unwritten British constitution.<sup>56</sup>

However, one possible and highly significant exception to the absence of systematic bias concerns the broad category of what might be called identity politics, or the politics of difference. Since, in the broadest terms, the politics of difference is about the growing demand for recognition of distinctive group interests or rights, whether based on national or regional identity, aboriginal or ethnic minority status, gender or other cultural difference, the key question is how adequately such claims can be accommodated within available constitutional forms. While many obvious critical targets for identity politics are again provided in particular constitutional arrangements - the value judgment informing a specific judicial decision, executive act or legislative instrument, the imbalance of representation of diverse identities within existing government institutions, the lack of veto or supermajoritarian checks against the abuse of particular minority interests, the absence of dedicated group institutions, etc., - this does not necessarily extend to a general critique of constitutionalism. Indeed, even in the extreme case, where the demand is for secession and autonomy, the critique tends to be centred on the existing allocation of sovereign constitutional units rather than the very idea of the sovereign constitutional unit itself.<sup>57</sup>

Yet some would go further and see in the catalogue of constitutional disappointments suffered by the proponents of the politics of difference a cumulative indictment of constitutionalism as systematically skewed against the

---

redistributive or other mechanisms of social protection. On the EU, see e.g. F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999); on the WTO, see e.g., R. Howse and K. Nicolaidis, "Legitimacy and Global Governance: Why Constitutionalizing the WTO is a step too far," in P. Sauve and A. Subramanian (eds) *Efficiency, Equity, Legitimacy and Governance: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings Institute Press, forthcoming).

<sup>55</sup> See e.g., P. Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell, 1991).

<sup>56</sup> On the range of political theory which can be invoked in justification of UK constitutional arrangements, see e.g. P.P.Craig, "Public Law, Political Theory and Legal Theory [2000] *Public Law* 211-39; N. Walker, "Beyond the Unitary Conception of the British Constitution?" [2000] *Public Law* 383-404.

<sup>57</sup> Walker, *op. cit.* n.56.



recognition and support of diverse identities. If the evidence is indeed suggestive of this, why should this be so? Arguably, a plausible case for such systematic bias rests on two sets of conditions.

The first concerns the objective difficulty of resolving identity conflicts within any particular constitutional framework. Claus Offe has usefully addressed this point on the basis of a threefold classification of the sources of heterogeneity and potential conflict in constitutional polities.<sup>58</sup> First, there are pure interest-driven conflicts concerning the control and distribution of resources. Their historical articulation as ‘class’ conflicts tells us how endemic such conflicts are and how fiercely they can be engaged. Yet their reasonably effective containment within modern constitutional democracies also tells us how successfully they can be managed. For Offe, the key to such management lies in an awareness of mutual interdependence, and a willingness to compromise at the margins of one’s interests for fear of the alternative prospect of a “negative-sum game”<sup>59</sup> which favours none of the categories of interests engaged. Next, and more difficult to resolve, are ideological conflicts. Because of the depth and comprehensiveness of the beliefs involved, these conflicts are less easily dealt with through compromise, and the polarization of world-views which ideology invites makes mutual trust and learning between parties difficult to nurture. Finally, and least tractable of all, there are identity conflicts. These tend to be even more hostile and polarized since within the very process of identity formation and sustenance there is a structural tendency to deny or ostracize the other, or otherwise to cast the other in a negative light. Furthermore, whereas ideological adversaries tend to try - or at least to pretend to try - to convince one another, and therefore to engage with one another, frequently proponents of identity politics speak only or mainly to their own reference group and may have no interest in, means of, or - in their own terms - perhaps even legitimate justification for trying to persuade the other.

Of course, this taxonomy is too simple and too crude. By no means all actors engaged in the three categories of debate behave in the manner predicted. The categories in any case cannot be hermetically sealed off from one another. The social construction and political articulation of identity is often tied up with ideological claims or the pursuit of general social and economic interests.<sup>60</sup> Yet, perhaps if we view Offe’s taxonomy instead as a continuum, we can still differentiate political struggles in terms of the extent to which the identity element prevails over the others, and the extent to which, consequently, the sorts of objective conflict-resolution problems he identifies pertain.

---

<sup>58</sup> *Op. cit.* n.13, 119-24.

<sup>59</sup> *Ibid.* p.120

<sup>60</sup> See e.g. J. Tully, “Struggles over Recognition and Distribution,” (2000) 7 *Constellations* 469-82; and also P. Markell, “The Recognition of Politics: A Comment on Emcke and Tully,” (2000) 7 *Constellations* 496-505.

Objective difficulty begets systematic constitutional failure, however, only if the constitutional framework is typically blind to or unsympathetic towards these objective difficulties. That this is the case for much of modern constitutionalism is the nub of James Tully's recent influential thesis.<sup>61</sup> For him, the three most authoritative traditions of language and interpretation in the modern constitutional canon are liberalism, communitarianism and nationalism.<sup>62</sup> Far from being sympathetic to diversity, each of these three traditions rests upon a presumption of homogeneity, articulated respectively, "as a society of undifferentiated individuals, a community held together by the common good or a culturally defined nation."<sup>63</sup> This depiction of an "empire of uniformity"<sup>64</sup> involves a very broad and ambitious claim, and Tully qualifies it by pointing to the "hidden constitutions of contemporary societies,"<sup>65</sup> those margins of modern constitutional culture where an older and more diversity-accommodating form of constitutional reasoning retains a voice. Yet even with this qualification, Tully's assessment, although highly appealing to many,<sup>66</sup> has attracted some skepticism. This is in part empirical, some doubting the accuracy of his account of modern constitutionalism, and in part conceptual, some doubting whether the dominant traditions of which he speaks, particularly liberalism, are as unaccommodating of diversity as he contends.<sup>67</sup>

---

<sup>61</sup> J. Tully, *Constitutionalism in an Age of Diversity* (Cambridge: CUP, 1995).

<sup>62</sup> *Ibid.* p.36.

<sup>63</sup> *Ibid.* p.41

<sup>64</sup> *Ibid.* ch.3

<sup>65</sup> *Ibid.* p.99

<sup>66</sup> In the context of European constitutionalism, for example Tully's work has been drawn on extensively by Jo Shaw, Richard Bellamy and Dario Castiglione *inter alia*. See e.g., Shaw *op. cit.*, n.29, Bellamy, "The "Right to Have Rights:" Citizenship Practice and the Political Constitution of the EU," in R. Bellamy and A. Warleigh (eds) *Citizenship and Governance in the European Union*, (London: Continuum, 2001); R. Bellamy and D. Castiglione, "Normative Theory and the European Union: Legitimising the Euro-Polity and its Regime," in L. Tragardh (ed) *After National Democracy: Rights, Law and Power in the New Europe*. (Oxford: Hart. forthcoming).

<sup>67</sup> See e.g. W. Scheuerman, "Constitutionalism and Difference," (1997) 47 *University of Toronto Law Journal* 263-80; for a somewhat intemperate critique, see B. Barry *op. cit.* n.15, ch.7. More generally, there is a huge literature on the compatibility or otherwise of identity politics with liberalism. Within the multiculturalism literature, see for example Galston's distinction between 'autonomy liberalism' and 'diversity liberalism', and Kymlicka's similar distinction between those 'liberalisms' that cite 'autonomy' as their fundamental premise and those that cite 'tolerance': W. Galston, "Two Concepts of liberalism"(1995) 105 *Ethics* 516; W. Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: OUP, 1995). For a critique of this distinction, and in particular an argument that 'diversity' or 'tolerance' liberalism is not in fact that a credible form of liberalism at all, see B. Barry *op. cit.* ch.4. Barry's criticism of multiculturalism is as much for its inequalitarian consequences as for its illiberal consequences. For a sophisticated attempt to reconcile multiculturalism and equality through the idea of an entitlement to culture as a constituent of equal well-being, see C. Sypnowich, "The Culture of Citizenship," (2000) 28 *Politics and Society*, 531-55; Within

That having been said, his account of modern constitutionalism remains a highly suggestive one. Moreover, the more closely it is linked with an appreciation of the objective difficulty of resolving identity conflicts, the more suggestive it becomes. For the deeper these problems run, the greater a challenge they pose to *any* constitutional culture or philosophy, and the higher the threshold of sympathetic contemplation required to engage with them seriously and constructively. On this view, even a constitutional culture modestly weighted towards a homogenizing ethic and a set of constitution-generating principles moderately disinclined to recognize group differences, is enough to nurture a systematic bias against, or deprioritization of social identity claims other than those which correspond with and reinforce the boundaries of the constitutional polity in question.

In the final analysis, Tully himself does not believe that the systematic bias of our mainstream constitutional tradition is irredeemable. Building on the hidden constitutional traditions, he postulates that it is possible to forge an “inter-cultural dialogue in which the culturally diverse citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity.”<sup>68</sup> In the end, for him, no radical rupture is required, no renunciation of the contemporary corpus of constitutionalism *per se* is called for, but rather an ongoing conversation newly attuned to the primacy of the three conventions. And in advocating this “agonistic”<sup>69</sup> form of constitutional democracy, Tully stresses the positive role of irreducible disagreements in fostering a critical and inclusive democratic ethos, in so doing distinguishing his position from the consensus-orientation of another radical constitutional alternative – Habermasian deliberative democracy. Yet this vision is in essence exhortatory and cannot guarantee deliverance from the scenario which its prior moment of critique indicates. So it, and similar critiques which might be mounted from the standpoint of identity politics, notwithstanding any commitment to rehabilitation they might harbour, cannot but cast further doubt on the viability of our contemporary constitutional language and culture.

*(e) Ideological Exploitation*

The ideological claim to be the ‘true or ‘best’ interpreter of a particular constitutional tradition or language, and the corresponding claim that ones adversaries bear false witness, is as old as constitutional politics itself. Although

---

the feminist literature, for a recent strong restatement of the compatibility of feminism with liberalism, see M. C. Nussbaum, *Sex and Social Justice*, (Oxford: OUP, 1999). For a critique, see A. Phillips, “Feminism and Liberalism Revisited: Has Martha Nussbaum Got It Right?” (2001) 8 *Constellations* 249. See also I. M. Young, “Equality of Whom? Social Groups and Judgments of Injustice,” (2000) 9 *Journal of Political Philosophy*, 1-18.

<sup>68</sup> Tully, *op. cit.* n.61, 30.

<sup>69</sup> See, e.g. J. Tully, “The Agonic Freedom of Citizens” (1999) 28 *Economy and Society* 161-82; and *op. cit.* n.62..

particular claims, self-affirming or other-denying, can of course be irresponsible and damaging to the political culture, in its traditional statist context this deep-rooted syndrome does not in itself necessarily pose a threat to the general authority or legitimacy of constitutional discourse. Instead, the frequency of such claims serves as a tribute, albeit a somewhat back-handed one, to the extraordinarily pervasive and resilient power of constitutional discourse. That is to say, it is only because there is so much at stake symbolically in the acceptance of a position or argument as constitutional or otherwise, that constitutional actors invest so much, and sometimes without scruple, in the effort to win such acceptance or to deny it to others. Of course, the critique of constitutional fetishism might see this as but one more perverse consequence of constitutionalism's unhealthy status as a secular religion, but that limiting possibility apart, many would view the possibility of ideological manipulation as an acceptable price for a state to pay for a serious investment in constitutional morality.

If we move beyond the state level, however, the texture of this debate changes. Both at the sub-state level and at the supra-state level, the struggle to claim constitutional authority tends to be as much about whether a particular domain or site of struggle deserves to be conceived of in constitutional terms *at all* as about which side has the better claim within a commonly accepted constitutional discourse. The EU again provides a prime example of this trend. Various brands and shades of 'Euroscepticism' have engaged in a symbolic practice of "constitutional denial,"<sup>70</sup> claiming that the EU is not an appropriate subject for constitutional debate and design. The concern that motivates this approach is that the very acceptance of the EU as an appropriate site for constitutional debate should endow that entity with greater authority and momentum as a putative self-standing polity than is deemed appropriate by the Eurosceptic, typically jealous of creeping encroachment on national sovereignty and perhaps also skeptical of the objective legitimacy of the EU's constitutional claim – particularly in the light of its 'democratic deficit' and its anaemic conception of citizenship. Equally, the opposing claim of 'constitutional affirmation' can be viewed as ideologically motivated in the same way, as a strategy to set the terms of debate in a way that already denies and dismisses the skeptic's skepticism, and which may imply an objective constitutional legitimacy which the polity has not yet earned.

Exactly the same considerations apply in the many debates on 'constitutional' claims to sub-state sovereignty, or indeed for lesser forms of autonomy, both within and beyond the EU. And a similar matrix of considerations comes into play in the burgeoning debate about the constitutional status of other less mature post-state entities, notably the WTO where discussion

---

<sup>70</sup> N. Walker, *op. cit.* n.10, 278-9; *op. cit.* n.41; see also Craig, *op. cit.* n.10.

has recently been joined with particular vigour.<sup>71</sup> Indeed, the tension in question is not restricted to the constitutional ‘status rights’ of emerging or putative polities. Anywhere beyond the traditional state locale that a connection is made between some species of regulatory discourse and constitutionalism, or the various normative themes which are symbolically associated with and evocative of constitutionalism – say in the debate over the constitutionalism of trans-polity processes and arrangements or of private economic spheres, or about ‘world citizenship’<sup>72</sup> – at least part of the sub-text of the debate is about ownership of the image, and about the strivings and suspicions that this symbolic prize might generate.

Why does this tendency threaten to undermine post-national constitutional discourse in a general sense? It does so, first, because, to revert to the language of the lawyer, the issue becomes one of jurisdiction rather than substance, of how far constitutionalism’s writ runs rather than the merits of contending constitutional arguments. But even this metaphor is misleadingly affirmative, for there is no jurisdictional court, no common meta-site of authority to which the parties can appeal, and so no definitive or perhaps even plausible common organizing frame on the basis of which the debate can proceed with the confident anticipation of mutual learning and a deepening level of consensus or mutual accommodation over what counts as a credible language of constitutionalism. What is more, for those in the denial camp, there is an element of self-fulfilling prophecy in their approach. If certain claims to constitutional status are considered invalid, then there is the prospect that the *political* force of that argument will deny the asserters the circumstances of *praxis* necessary to test the legitimacy of their constitutional vision. As one of the hidden injuries of ideological manipulation, therefore, constitutional novelty and experimentation and the gradual development of a new sense of constitutional possibilities may simply be strangled at birth.

### 3. ADDRESSING THE CHALLENGE

#### (a) *A Debased Conceptual Currency?*

How do we address this set of formidable challenges to constitutionalism? Some might suggest that in the final analysis there is no problem to address. To be sure, constitutionalism is an increasingly polymorphic idea, but is this not simply a necessary and politically and intellectually healthy response to the manifest deficiencies of an older template of constitutionalism, and indeed to the contested legitimacy and plausibility of various suggested replacements or adaptations? The profound difficulty remains, however, that the resulting

---

<sup>71</sup> See e.g. Howse and Nikolaidis, *op. cit.* n.54; N. Walker, “The EU and the WTO: Constitutionalism in a New Key,”; E.-U. Petersmann, “European and International Constitutional Law, both in De Burca and Scott (eds) *op. cit.* n.26, at 31-58 and 81-110 respectively.

<sup>72</sup> See e.g., D. Heater, *What is Citizenship?* (Cambridge: Polity, 1999) ch.4.

diversity is of an order and intensity about which none of the contributors to that diversity can be sanguine. Many of the differences and disagreements under the canvas of diversity are fundamental - disagreements, if you like, about the very concept of constitutionalism rather than simply distinct conceptions of a shared concept. And many of the solutions offered to these disagreements manifestly continue or even exacerbate these differences. Whether it is the range of institutional and non-institutional responses to the problem of state-centredness, or the different ways in which the critics of constitutional fetishism might escape the temptations of law, or the different routes to accommodating cultural diversity within a normative framework historically incongenial to such a task, the diversity of possible treatments simply dramatizes the profundity of the problems faced and the difficulty of developing new common ground in the face of these. As the character of these puzzles and puzzle-solutions reminds us, moreover, constitutional reasoning, like all legal reasoning, is a form of practical reasoning.<sup>73</sup> It is anchored in the social and political world and purports to make a difference to that world – often, indeed, as our discussion of ideological exploitation brings home, in ways which are tied to selfish or factional interest and are unconcerned with, sometimes even positively hostile to, the pursuit of a more inclusive and consensual constitutional discourse. So radical disagreement and disengagement is not simply an intellectual challenge, but - as has been highlighted perhaps more than ever before by the seismic events through which in 2001 the articulation and perception of fundamental difference and disagreement in our post-Westphalian order manifested themselves - a pressing political challenge to the many, including this perplexed participant-observer, who believe they cannot do without the idea of constitutionalism but, by the same token, fear that they can no longer collectively do anything with it.

*(b) Criteria for Renewal*

In order to begin to meet the many, varied, and seemingly frequently incompatible objections of the critics, what criteria would a revised concept of constitutionalism have to meet? Six general and cumulative criteria are suggested, which in turn can be organized into three sets of pairs - spatial, temporal and normative.

The spatial criteria are perhaps the least controversial. To begin with, any notion of constitutionalism which sought to address the various criticisms would have to continue to take the state seriously as a significant host to constitutional discourse. Even those who would most urgently contend that constitutionalism has to encompass post-national trends or that constitutionalism is an increasing irrelevance or obstacle to understanding or steering forms of social and political organization, would hardly deny the state its place in the

---

<sup>73</sup> See e.g. N. MacCormick, "Contemporary Legal Philosophy: The Return of Practical Reason," (1982) 10 *Journal of Law and Society* 1-18.

constitutional scheme, however modest or expansive that scheme and however modest or expansive the place of the state in such a scheme might be. The post-Westphalian order may be one which moves beyond the state in important ways in its vesting of legal and political authority, but the state - however modified and however diminished - continues to be a player in the emerging multi-dimensional, multi-level order. Secondly, and almost equally uncontroversially, a revised conception of constitutionalism should of course then also be open to the discovery of meaningful constitutional discourse and processes in non-state sites and processes. Even for those who are most skeptical or pessimistic about the viability of constitutionalism beyond the state, their position is based either upon an incapacity to imagine the form in which such post-state constitutionalism might be effectively articulated and institutionalized or upon an unwillingness to concede that the time is yet ripe for such an enterprise, rather than upon a refusal *in principle* to contemplate that a constitutional steering mechanism, or its functional equivalent, might be appropriate for significant circuits of transnational power.<sup>74</sup> Taken together, these two spatial criteria provide a balanced and inclusive recognition of the concerns which animate the critique from state-centredness.

If we turn then to the temporal criteria, thirdly, there is a requirement of historical continuity. However radically the concept of constitutionalism has been transformed, there must remain a plausible and recoverable causal connection with its historical origins. Unless we can trace a lineage of historical use, adaptation and transmutation, we lack the contextual knowledge to make sociological sense of the different uses of constitutionalism in different times, places and circumstances and for different purposes, and without that contextual knowledge we lack the sympathetic understanding to reconcile these different uses within a coherent framework of ideas. Fourthly, and relatedly, there is a requirement of discursive continuity. We must be able to understand constitutionalism not only as a history of the response to and of the (re)shaping of events and structures, but also as a history of a particular discourse, in which the core ideas of that discourse, however radically transformed, are meaningfully connected between different times and places. That is to say, whereas the requirement of historical continuity imposes a discipline of connection from the socio-political 'outside', the requirement of discursive continuity imposes a discipline of connection from the ideational 'inside'. These

---

<sup>74</sup> For example, in the European debate, see the sophisticated, but not unconditional defence of constitutionalism as a property of states in D. Grimm, "Does Europe Need a Constitution?" (1995) 1 *European Law Journal* 282-302. Arguably, too, even the famous decision in *Brunner v. The European Union Treaty* [1994] 1 CMLR 57, (to which Grimm in his judicial capacity contributed) which has emerged as *the* leading totem of state-bound constitutionalism in the European Union, does not rule out the possibility of a mature constitutionalism beyond the state, however difficult and remote the conditions that would permit such a development.

two disciplines, it is submitted, combine to provide the only plausible basis upon which the deep indeterminacy and disagreement which would debase constitutionalism's conceptual currency may be contested and averted.

If we turn finally to the normative criteria, fifthly, there is a requirement of inclusive normative coherence. This is best seen as a balanced response to the criticisms of normative bias and ideological exploitation. On the one hand, constitutionalism should be defined in a sufficiently inclusive and open-ended way as not to militate in favour of some and against other constitutional aspirations or claims, provided these aspirations or claims meet certain minimal standards. On the other hand, the very boundaries of legitimate constitutionalism - the definition of minimal standards - should be coherent with this inclusionary ethic. That is to say, the boundaries should be defined such as to require healthy skepticism and interrogation of any claims which seek to define constitutionalism, either as a discourse of transformation or as a conservative discourse supported by and supportive of existing institutional arrangements or procedures, within a final and incontestable framework - whether as a way of asserting selfish or sectional strategic interests, a comprehensive conception of the good, or indeed a particular but contestable theory of just institutions (even if such a theory of justice, as in Rawls, is claimed to be 'free-standing' and so not tied to a particular comprehensive conception of the good).<sup>75</sup> To adapt and extend Jeremy Waldron's formulation, the existence (1) of disagreement about how to develop and secure just institutions and, (2) - particularly in an age where, as we have noted, the legitimacy of particular voices within and beyond the boundaries of the polity are a matter of heightened dispute - of disagreement about which is the appropriate constituency or what are the appropriate constituencies for whom and by whom such institutions should be developed, together with (3) the resilience of the commonly felt need to develop these institutions notwithstanding such disagreement, are the elementary "circumstances of [constitutional] politics,"<sup>76</sup> and it is axiomatic that these circumstances be

---

<sup>75</sup> J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) p.12. The fundamental weakness of Rawls's position, as Waldron brings out well, is not so much the lack of plausibility of his argument that it is possible to conceive of a 'free-standing' theory of justice (although that remains a standing objection, and part of the explanatory context for the subsequent pragmatic objection) within a hypothetical 'well-ordered society', but that, more pragmatically, in 'the real world' no such agreement on the content of such a 'free-standing' theory exists and that instead our politics are, *inter alia*, "dedicated quite explicitly to grappling with fundamental disagreements about justice." See J. Waldron *Law and Disagreement* (Oxford: OUP, 1999) p.158

<sup>76</sup> J. Waldron, *op. cit.* n.70, 159-60 Waldron is discussing the "circumstances of politics" *per se*, rather than of constitutional politics, but it follows from his critique of Rawls's attempt to develop a theory of self-standing just institutions unconnected with and unbiased towards any particular comprehensive conception or conceptions of the good (or indeed selfish or sectional interests) and in particular his criticism of Rawls's failure to come to terms with the fact of



acknowledged and respected. In other words, inclusive normative coherence should exclude or challenge those positions which themselves do not comply with the standard of inclusive normative coherence - which seek, whether within a transformative discourse or within a particular existing constitutional framework, to close off or demean alternative constitutional aspirations (which themselves should meet the standards of inclusive normative coherence) and which do not permit interested parties “to enter into processes of contestation and negotiation of the rules of recognition.”<sup>77</sup> What this entails, more concretely, is a commitment within constitutional theory and practice to a highly reflexive conception of democracy, one which is constantly vigilant; first, of its capacity to provide an adequate representation and reconciliation of the diversity of democracy-respecting interests and aspirations within and beyond the *demos* that may be affected by and thus have a legitimate claim to a voice in the political practice of that *demos*; and, secondly, and at a deeper level of reflection, of the appropriateness of the current (and always contingent) boundaries of its political self-characterization as a *demos* as a framework to optimize that representative and reconciliatory capacity.

Sixthly, and finally, there should be a requirement of external coherence. That is to say, it is clearly not enough for constitutionalism merely to convince the constitutionalists. If constitutionalism is intended as a form of practical reasoning, it must have something relevant say to those who are skeptical about the claims it makes to continue to provide an important steering mechanism and normative lodestar for the key circuits of social, economic and political power of the post-Westphalian order and who are critical of its propensity to divert attention from other such regulatory devices; or, indeed, to those who make no such explicit critique of constitutional discourse but who simply choose to concentrate on other forms of practical reasoning but within areas which constitutionalist would also consider to be within *their* legitimate contemplation. In other words, constitutionalism must be capable of generating forms of explanatory knowledge and normative guidance which are relevant to other discourses of regulation and political imagination, notably those preferred by the explicit and implicit critics of constitutionalism’s tendency to fetishism or to public institutional bias, and to the concerns and aspirations which these other discourses display in the face of the rapidly changing global configuration of authority.

---

reasonable disagreement about justice (see n.75), that such a characterization of the circumstances of *constitutional* politics (i.e. those politics directly concerned with just institutions rather than the whole range of substantive public policy on social and economic matters) should also hold.

<sup>77</sup> Tully, *op. cit.* n.60, 477.

## The Idea of Constitutional Pluralism

### *Constitutional Pluralism in the European Union*

I now want to make a modest claim for a particular conception of constitutional pluralism as the best way of meeting these six challenges and fulfilling the criteria they set, and so of making sense of contemporary trends in global constitutionalism and of working with the grain of these trends in a normatively defensible and productive manner. The term ‘modest’ is applied in recognition not just of the formidably complex questions of understanding, evaluation and projection which attend any endeavour to come to terms with such a large topic in a single essay, and so of the inevitably partial and provisional nature of the formulations that follow, but also of the daunting threshold which the sheer force of the ‘circumstances of disagreement’ affecting constitutional discourse set for anyone attempting to devise a framework for the contemplation and the negotiation of such disagreement. If, against such an imposing backdrop, the approach sketched below achieves nothing else, hopefully it will convey something of the spirit in which such a task should be conducted.

For purposes of clarification, the idea of constitutional pluralism here defended should be distinguished from the various more general ‘legal pluralisms’ which mark our academic landscape.<sup>78</sup> Not everything which meets the test of legal or other qualifying normative order under the rubric of these various pluralisms also qualifies as constitutional discourse, at least as it is defined here, although it is of course consistent with the requirement of external normative coherence that constitutional pluralism should recognize and have something to say about the plural legal orders and phenomena which are recognized by the wider categorical schema insofar as such orders and phenomena have implications for those general circuits of significant political, social and economic power that are increasingly remote from the reach of a traditional, state-centred constitutional framework.

In what sense, then, *is* constitutional pluralism pluralistic? To answer this question, we should look first to the literature which has already begun to use the language of constitutional pluralism in a self-conscious fashion.<sup>79</sup> It is no

---

<sup>78</sup> See e.g. B. Tamanaha, “A Non-Essentialist Version of Legal Pluralism,” (2000) 27 *Journal of Law and Society* 296-321; G. Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism,” (1992) 13 *Cardozo Law Review* 1443; B. de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995); W. Twining, *Globalisation and Legal Theory*, (London: Butterworths, 2000) chs.3 and 8; see also the classic analysis of J. Griffiths, “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism* 1. .

<sup>79</sup> See e.g. Weiler, *op. cit.* n.6; N. MacCormick, *Questioning Sovereignty? Law, State and Nation in the European Commonwealth* (Oxford: OUP, 1999); C. Richmond, “Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law,” (1997) 16 *Law and Philosophy* 377-420; M. Kumm, “Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and

coincidence that this literature has emerged out of the study of the constitutional dimension of EU law, for it is EU law which poses the most pressing paradigm-challenging test to what we might call constitutional monism. Constitutional monism merely grants a label to the defining assumption of constitutionalism in the Westphalian age which we discussed earlier, namely the idea that the sole centres or units of constitutional authorities are states. Constitutional pluralism, by contrast, recognizes that the European order inaugurated by the Treaty of Rome has developed beyond the traditional confines of inter-*national* law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states. The relationship between the orders, that is to say, is now horizontal rather than vertical - heterarchical rather than hierarchical.

Looking more closely, we can discern three different dimensions to this pluralist claim. First, and perhaps least controversially, there is an explanatory claim. On this view, we can only begin to account adequately for what is going on within the European constitutional configuration if we posit a framework which identifies multiple sites of constitutional discourse and authority. As noted earlier in our critique of state-centredness, to try to explain the new emerging post-Westphalian order in one-dimensional terms, by reference to national delegation, intergovernmentalism and the traditional law of international organizations, is to try to force square pegs into round holes, and to understate the extent and distort the character of the transformation which is underway. Secondly, there is a normative claim associated with pluralism, one which acknowledges the account given by explanatory pluralism and welcomes its implications, contending that the only acceptable ethic of political responsibility for the new Europe is one that is premised upon mutual recognition and respect between national and supranational authorities. This is not to say, however, that normative pluralism necessarily follows from explanatory pluralism, as it is also possible to acknowledge explanatory pluralism and respond by advocating that we either somehow ‘rewind’ to the earlier Westphalian order of fully sovereign states, or else ‘fast-forward’ to a full-blown European state which absorbs and replaces the existing member states, in so doing retaining but simply repositioning the one-dimensional sovereigntist order.

A third pluralist claim which is defended here is described as epistemic pluralism.<sup>80</sup> Both explanatory and normative pluralism necessarily follow from

---

the European Court of Justice,” (1999) 36 *Common market Law Review*, 351-386, M. La Torre, “Legal Pluralism as an Evolutionary Achievement of Community Law,” (1999) 12 *Ratio Juris* 182-95.. Many other post-national constitutional scholars in the European context have built on at least some of the assumptions and arguments patented by the likes of Weiler and MacCormick.

<sup>80</sup> See in particular the work of Hans Lindahl and Bert van Roermund; “Law Without a State? On Representing the Common Market,” in Bankowski and Scott (eds) *Sovereignty and*

epistemic pluralism and on that basis acquire a distinctive texture, but epistemic pluralism does not itself necessarily follow from either of the other two claims.<sup>81</sup> On this view, the very representation of distinct constitutional sites - EU and member states - as distinct constitutional sites implies an incommensurability of the knowledge and authority (or sovereignty) claims emanating from these sites. That is to say, it is only possible to identify the different sites as different units if we already acknowledge that the underlying symbolic work involved in representing each of these sites as units - and so also as *unities* - requires a different way of knowing and ordering, a different epistemic starting point and perspective with regard to each unit(y); and that so long as these different unit(ies) continue to be plausibly represented as such, there is no neutral perspective from which their distinct representational claims can be reconciled.

As intimated, this position<sup>82</sup> has important implications for our understanding both of the 'explanatory' and of the 'normative' moment in pluralism. In explanatory terms, it means that there is no sure basis of historical knowledge - no Archimedean point - from which we can evaluate the strength and validity of the different, and in some respects contending, authority claims made from national and supranational constitutional sites. We must simply accept either that the claims are each plausibly sustained and incommensurable and the strong version of explanatory pluralism that flows from that, or that one claim continues to prevail over and subsume the other, in which case we cannot meaningfully talk of a plurality of unit(ies) at all, but merely of the resilience or reassertion of an old (state-based) or emergence of a new (EU-based) monistic unity, with 'pluralism' restricted to whatever diversity may be accommodated *within* and in accordance with the terms of the (old or new) monistic unity.<sup>83</sup> In normative terms too, the implications are radical. The incommensurability of authority claims - in particular of the discrete claims to final authority over the

---

Representation in the European Union," *op. cit.* n.42, 1-17; see also Lindahl, "Sovereignty and Representation in the European Union, in N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, forthcoming). MacCormick appears to have moved away somewhat from his original position, which tended towards epistemic ( See e.g. MacCormick, "Beyond The Sovereign State" (1993) *Modern Law Review* 1) towards a position which still upholds a strong explanatory and normative pluralism but which, in a move which owes something to one version of Kelsen's monism, advocates a final and decisive authority for international law; *op. cit.* n.79, ch.7

<sup>81</sup> Weiler, for example, would certainly endorse explanatory and normative pluralism, but not epistemic pluralism *op. cit.* n.6 269. For extended discussion, see N. Walker, "All Dressed Up," (2001) 21 *Oxford Journal of Legal Studies*, 563-82, 567-71. For McCormick's position, see n.80 above.

<sup>82</sup> Which is analogous in significant respects to some of the claims made within modern systems theory; see e.g. Bankowski and Christodoulidis, *op. cit.* n.42.

<sup>83</sup> Which in terms of key *political* indicators of pluralism such as group rights, federated or 'devolved' legislatures, executives and administrations etc., may be by no means insubstantial; see Walker *op. cit.* n.56.

interpretation and extent of jurisdiction of the various political units implicit in the very process of representing these units as unities, means that the idea of a fully consensual ‘sharing’, ‘pooling’ ‘division’ or ‘co-ordination’ of authority between units, still less of the transcendence of the need for a vocabulary of authority in a ‘post-sovereign’ future, can never be more than an aspiration whose full realization is frustrated by the resilient distinctiveness and authoritativeness-in-the-last-instance of the units who might pursue it. Although many creative forms of mutual recognition, co-operation and transformation are possible - indeed as is explained below the ‘relational’ (between constitutional units) dimension is increasingly central to the new constitutionalism - the constitutional profile associated with each site in the final analysis will develop in accordance with the representative claims peculiar to that site, and with the particular traditions, social pressures and normative dynamics - including those which derive from and/or encourage openness to the claims of other sites - which shape these claims.

Constitutional pluralism on this model, whether or not reinforced by epistemic pluralism, hardly begins to answer the challenges posed above. It recognizes the authority of both state and non-state sites, but so far only in a restricted context. Its ideas of historical and normatively continuity are at best lightly sketched, and it does not yet engage with the problems of internal and external coherence. Accordingly, in the embryonic terms stated above, it has little of interest or comfort to offer those whose concerns about the statist legacy run deeper than can be assuaged merely by putting to rest defensive internationalism, and who retain misgivings about the viability of normative translation or about public institutional bias, or to those who fear constitutional fetishism, divine systematic normative bias, or despair of ideological manipulation. Indeed, on one reading, constitutional pluralism remains markedly institutionalist in emphasis, failing to recognize non-state entities and processes other than the highly developed ‘state-like’ EU, and, more generally, simply extends and strengthens the hegemony of the particular kind of constitutionalism which gave rise to the five critiques in the first place.

Of course, such a reading would be a ‘reading down’ of constitutional pluralism. What has been presented here is merely a lowest common denominator position, a series of preliminary steps beyond which the various pluralists mentioned and many others have gone their own ways in pursuit of their own particular agendas, on the way sometimes engaging with at least some of the concerns I have sought to identify. In what follows,<sup>84</sup> I propose a scheme for building upon a baseline of strong epistemic pluralism that seeks to

---

<sup>84</sup> Which elaborates on earlier work I have done in this area. See.e.g. Walker, ‘Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe’, in G. de Burca and J. Scott, *Constitutional Change in the EU: Between Uniformity and Flexibility* (Oxford: Hart, 2000) 9-30; *Policing in a Changing Constitutional Order* (London: Sweet & Maxwell, 2000) ch.10; and the works cited at notes 56 and 71.

address the various critiques and meet the criteria of renewal, in so doing ranging beyond the particular focus of the European Union.

There are two major, and closely related, elements within this scheme, one conceptual, and the other structural. Conceptually, it is argued that in order to capture the full range of the 'constitutional experience' and imagine the full range of constitutional possibilities within the new plural order, constitutionalism and constitutionalization should be conceived of not in black-and-white, all-or-nothing terms but as questions of nuance and gradation. There is no unitary template in terms of which constitutional status is either achieved or not achieved, but rather a set of loosely and variously coupled factors which serve both as *criteria* in terms of which forms of constitutionalism can be distinguished and as *indices* in terms of which modes and degrees of constitutionalization can be identified and measured. In structural terms, it is argued that in order to appreciate the practical significance of the various constitutional phenomena identified through the application of these abstract criteria, we must assess the *variable position* of the different types of polity or political process with which these phenomena are linked within the global configuration of authority, and also examine the *relationship between* these polities or political processes. That is to say, as already intimated, constitutionalism in a plural order is *necessarily* conceived of not only as an property of polities and political processes but as a medium through which they interconnect - as a structural characteristic of the relationship between certain type of political authority or claim to authority situated at different sites or in different processes as well as an internal characteristic of these authoritative claims.

*(b) The Conceptual Dimension*

Mindful of the requirements of historical and normative continuity, let us begin the conceptual inquiry by revisiting the context within which ideas of modern constitutionalism took hold. The notions of constitution and constitutionalism, however else we may dispute their meaning, are unarguably bound up with, indeed provide the normative vocabulary for, the mutual articulation of law and politics.<sup>85</sup> Historically, moreover, constitutional law and discourse as originally conceived typically concerned themselves not just with the articulation of law and politics in general, but with their mutual articulation within a particular polity - a polity which as the Westphalian order gradually and unevenly consolidated itself after 1648 began to take the form of the sovereign state.<sup>86</sup> Indeed, within this emerging political configuration constitutional law's role was a highly ambitious one, nothing less than the

<sup>85</sup> See e.g. Lindahl and. van Roermund *op. cit.* n.80, Lindahl, *op. cit.* n.80; Loughlin, *op. cit.* n.25, ch.1

<sup>86</sup> On the pre-Westphalian foundations of constitutional discourse, see J.-E. Lane *Constitutions and Political Theory*, (Manchester: Manchester University Press, 1996) chs. 1-2: see also Grimm, *op. cit.* n.74

elaboration of the very idea and scheme of normative order in terms of which the state polity identified and regulated itself *qua* state polity. In its historical setting, therefore, constitutional law and discourse should be understood not, or not just, as an external map of the polity, but as one of the polity's key defining and constitutive features. This is not to argue in Kelsenian terms for a purely legal-constitutional understanding of polity formation and development, but rather to posit the mutual constitution of law and politics in a dynamic and ongoing process. Politics – in the grounded sense of the affairs of a polity – could not be conceived of without a *constitutive* legal setting and framework. Yet on the other hand, constitutional law always supposed some prior political setting. In this process of mutual constitution and containment, therefore, constitutional law was recursively involved in both the *presentation* and – recalling our earlier discussion of the epistemic singularity of constitutional imagining – in the *representation* of the polity, both seeking or purporting to reflect the prior political state and in that process simultaneously translating and redefining that prior political state in legal-constitutional terms.<sup>87</sup>

Three important points flow from this analysis for our attempt to forge a meaningful link between constitutionalism in its historical Westphalian setting and constitutionalism in the new order. In the first place, constitutional law was historically located in the Westphalian order as an internal and intrinsic characteristic of a polity. There could be no polity without a constitutional discourse, just as there could be no constitutional discourse without a polity as its object of analysis and representation. Secondly, as the idea of a polity, or *political community*, is simply that of a site which has the twin attributes of a plausible claim to authority (the *political* dimension) and a sense of identity with that site on the part of a particular population (the *community* dimension) it is not bound to or exhausted by the idea of the modern national state.<sup>88</sup> Indeed, even as a matter of etymology, the idea of a polity derives from the city-state, or *polis*, of archaic and classical Greece, and in principle it may be applied to post-state forms just as it applied to pre-state forms. In turn, therefore, we must recognize constitutional law, or some functionally equivalent discourse, as necessary to and constitutive of the legal normative order of contemporary non-state and post-state polities just as it is necessary to and constitutive of the legal normative order of state polities.

Thirdly, though, what of contemporary constitutional discourse which does not present itself as 'polity-bound' either in the strict statist sense or even in the looser sense of an emergent post-state polity? What, for example, of sub-state political movements, which seek to locate their aspirations, which may or may not amount to the construction of a separate 'polity', within a constitutional discourse? Or what of the constitutional status of these regulatory processes –

<sup>87</sup> See e.g. H. Lindahl, "Sovereignty and Symbolization," (1997) 28 *Rechtstheorie* 3, drawing upon the work of Ernst Cassirer.

<sup>88</sup> For a fuller discussion, see Walker, *op. cit.* n.41.

such as the EU Comitology system which balances in the form of the procedures, reporting relationships and internal composition of a number of important policy committees the enormous delegated power of the Commission in EU affairs against the interest of member states in retaining a voice in these matters<sup>89</sup> - which are best viewed as 'relational' between polities in their constitutional origins yet, on one view at least, may be capable of developing a normative method and discourse which transcend these origins? Are these important regulatory processes, often self-understood as constitutional, merely to be excluded from the constitutional universe by definitional fiat? Such a possibility recalls our earlier critique of the potential institutional and normative bias of 'lowest common denominator' constitutional pluralism. By excluding important 'constitutional phenomena' at the developmental edge of post-Westphalian politics it threatens both internal coherence - the recognition of other reasonable constitutional visions - and external coherence - the ability to comprehend important social and economic processes which lie beyond the conventional remit of constitutionalism. These dangers may be avoided by including both sorts of phenomena - 'aspirational' and 'relational', within a new structural mapping of constitutional pluralism, but a logically prior step is clearly to secure their inclusion at the conceptual level.

How, then, *do* we 'stretch' the idea of constitutional discourse in a manner which is relevant to and coherent between these different possibilities, and in particular which is relevant to state polity, post-state polity and even post-polity or non-polity settings? The requirements of historical and normative continuity demand that we specify a number of factors in terms of which constitutional discourse does its representational work on behalf of a polity, each of which factors, as already intimated, serves as a criterion in terms of which we can map the distinguishing constitutional features of that polity and provides an index to measure the trajectory and intensity of its constitutionalization process. This aggregative - and so also *disaggregative* - approach clearly allows us to distinguish between state polities on the one hand and non-state polities at different stages and following different vectors of development on the other. Crucially, the disaggregative approach also allows us to recognize constitutional phenomena which are not 'polity-bound', which do not, or do not necessarily follow a developmental trajectory towards polity status, but which nevertheless register in terms of some of the criteria specified and so are worthy of consideration in constitutional terms.

What are these criteria? To begin with, there are two basic *constitutive* criteria, concerning the founding dynamic of the constitutional phenomenon in question. First, and an indispensable foundation for all constitutional sites and processes, there is the development of an explicit constitutional discourse - the emergence of a constitutional self-consciousness on the part of those associated

---

<sup>89</sup> See e.g., Joerges and Neyer, *op. cit.*, n.32.



with the polity or political process with respect to that polity or political process. Secondly, and indispensable to constitutional polity status, there is the claim to foundational legal authority, or sovereignty. Then there are three *governance* criteria, concerning the scope and nature of governance capacity. First, there is development of jurisdictional scope - the delineation of a sphere of competence. Next, there is the claim to interpretive autonomy - to the entitlement of an organ internal to the polity or political process to construe the meaning and extent of these competences. And as the last criterion in this category, there is the constitution and regulation of an institutional structure to govern the polity. Finally, there are two *societal* criteria, concerning how the constitutional phenomenon articulates and legitimates its relationship with the social entities and processes to which it relates. Of these, there is, first, and just as indispensable to polity status on the 'community' side as sovereignty is on the 'authority' side, the specification of the status, conditions and incidents of membership of or association with the polity - the criteria and rights and obligations of 'citizenship' - broadly defined; and secondly and closely related, there is the manner in which and procedures by which the voice of the membership registers - the mechanisms, democratic or otherwise, by which their interests and aspirations are articulated and taken into account. Let us now seek to justify and to explore these three categories - generative, governance and societal - and seven indices of constitutionalism - discursive self-awareness, authority, jurisdiction, interpretive autonomy, institutional capacity, citizenship and voice - in rather more depth.<sup>90</sup>

First, and a *sine qua non* of constitutional status in *all* circumstances, there is the existence of a self-conscious discourse of constitutionalism. Why should the mere existence of a relevant domain of constitutional discourse and debate be taken seriously as a constitutional benchmark, particularly as vigorous debate often reflects equally vigorous disagreement about the proper content of constitutionalism, and even of the legitimacy of such a discourse? Is there not at least a suspicion of solipsism, of wish self-fulfillment on the part of any particular and partial constitutional claim and perspective, in the inclusion of this criterion?

The answer to this objection is twofold. In the first place, recall the proposition that constitutional law and politics are mutually constitutive. Constitutional law and discourse is no mere reflection of a prior political order or process, but is recursively implicated in the elaboration of that order. Just as there can be no constitutional discourse in the absence of a referent polity or political process - achieved or aspired to, so there can be no polity or other constitutional process in the absence of a referent constitutional discourse. To put it another way, the polity or other constitutional process cannot be or

---

<sup>90</sup> For a more extended discussion of the applicability of these criteria to the EU and the WTO, see N. Walker, *op. cit.* n.56.

become a polity or other constitutional process in the absence of its constitutional *representation* as such, and it is precisely that “discourse of conceptualization and imagination”<sup>91</sup> which has the capacity to invest the authoritative claims, the institutions and the principles associated with the putative polity or constitutional process with polity-affirming or process-affirming, and thus constitutional status. In this intensely reflexive process, constitutionalism is not, or not simply, about observing appropriate types of data “out there [in the] constitutional landscape,” but is necessarily itself a constitutive endeavour. Of course, the relevant discourse of representation may be more or less successful in convincing key audiences of the authenticity of this or that claim to constitutional status on behalf of a polity or a political process, but this is merely to reiterate the point that constitutionalism and constitutionalization are best conceived of as matters of degree and intensity.

In the second place, the discourse of constitutional conceptualization and imagination also has profound consequences for the normative content of the discourse in question - its claim to embody certain ‘constitutional’ principles or protocols of a substantive or procedural nature - many of which are relevant to the other criteria and indices of constitutionalism considered below. This is of course trivially and generally true in the sense that no constitutional order is static, but is in a continuous process of reconceptualization and reimagination - of *representation*. But it is also true in the more subtle and specific sense that a (more or less) successful process of imaginative transformation towards or sustenance of constitutional status itself has the potential to change the texture of the relevant claims, institutions and principles in significant ways. For the claim to constitutional status is always also an assertion of a *right* to self-government in the case of a polity or putative polity, or at least of a general entitlement to be endowed with the symbolic authority associated with constitutional status in the case of another non-polity-based political process. And so, in turn, such claims also necessarily involves an acknowledgment of the *demands* of responsible self-government or of the expectations raised by any claim to constitutional status, with all that that entails in terms of crafting a legitimate normative order.

As well as supplying a criterion qualifying as ‘constitutional’ those phenomena which fail or register only weakly in terms of the other criteria, whether because they are merely aspirational or because they concern processes which do not fit many aspects of a more rounded, ‘polity-based’ definition, the idea of a self-conscious constitutional discourse also supplies a strong answer to those who are broadly skeptical of constitutional claims on the grounds of ideological exploitation. In the final analysis, the ideological dimension of constitutional politics - its role in the strategic assertion of institutional power and of the interests served by that power - is not the enemy of a normative discourse of responsible constitutionalism but its necessary accompaniment -

---

<sup>91</sup> Weiler, *op. cit.* n.6, 223.

and, indeed, an ineliminable aspect of its generative context. The normatively continuous idea of constitutionalism is linked in a powerful and resilient chain of signification to a whole series of core governance value - such as democracy, accountability, equality, the separation of powers, the rule of law and fundamental rights - with their strong association to the freedom and well-being of the individual within a framework of collective action and protection. Those who wish, from whatever motive or combination of motives, to make a plausible claim to constitutional status, must at least *be seen to* take these values seriously, which in turn imposes real constraints and has real consequences for what they propose and enact. To put this point in perhaps unduly cynical terms, just as hypocrisy can have civilizing effects,<sup>92</sup> the invocation of constitutionalism, because of the expectations thus aroused and the constituencies and arguments thus mobilized, tends to structure the ensuing debate between those who would claim, challenge or counterclaim its associated symbolic power - and, in turn, tends to inform the institutional consequences of that debate - in ways which escape the intentions of the original protagonists. The record of constitutional debate in non-state entities such as the EU, the WTO and the UN all testify to the fact that once the constitutional genie is out of the bottle, it will not easily be re-captured by any of the interested parties.<sup>93</sup>

If the existence of a self-conscious constitutional discourse is the most open-ended of the various generative criteria, the idea of sovereignty or fundamental authority is perhaps the most state-centred. Sovereignty is 'will', where discourse is 'reason'. One relates to the authority of ultimate command, the other to the authority of the argument. Yet, the two are complexly intertwined in the history of state politics,<sup>94</sup> and sovereignty, particularly 'popular sovereignty' can of course be the friend as well as the enemy of a broadly reasoned and inclusive constitutional discourse. In essence, sovereignty consists of a *plausible claim to ultimate authority* made on behalf of a particular polity.<sup>95</sup> This has both subjective and objective dimensions. Subjectively, there has to be common assertion or acceptance by the key officials of the polity in question - in particular its judges - that it is a sovereign polity. Objectively, there must be evidence of a high level of general obedience to the framework of laws which are valid in accordance with the system's ultimate criteria of validity.<sup>96</sup>

---

<sup>92</sup> J. Elster, "Introduction" in J. Elster (ed) *Deliberative Democracy* (Cambridge, CUP, 1997) 1-18, 14.

<sup>93</sup> In the context of the WTO, see Walker, *op. cit.*, n.56, 50-54.

<sup>94</sup> See e.g. M. Loughlin *op. cit.* n.25, esp. chs 8-10 and 14.

<sup>95</sup> N. Walker, "Sovereignty and Differentiated Integration in the EU," (1998) 4 *European Law Journal*, 355-88, 356-60.

<sup>96</sup> Sovereignty also has closely related internal and external aspects. Internal sovereignty involves the claim that fundamental authority over the internal ordering of the polity is located in or between (a) certain institutional site(s) within the polity in accordance with a rule of recognition broadly accepted within that polity, while external sovereignty involves

In its traditional statist version, the claim to sovereignty or ultimate authority implies both autonomy and exclusivity. Autonomy, because a derivative or dependent authority is by definition not ultimate. Exclusivity, because a world order of states is generally<sup>97</sup> one of discrete and mutually exclusive territorial jurisdictions. The symmetrical logic of such an order implies that a non-exclusive authority is typically a dependent one, in the sense that any other authority claim made over the jurisdiction can only be made by a rival state, which if plausible and effective, as in the tradition of Western imperialism, then becomes an extension of the exclusive claim to authority of that rival state, so defeating or debasing the indigenous claim.<sup>98</sup> In other words the mutual exclusivity of comprehensive territorial jurisdictions in the one-dimensional global map of states implies a corresponding mutual exclusivity of effective claims to sovereignty.

Given its strong statist foundations, does the idea of sovereignty, of fundamental authority, have anything to contribute to our understanding of post-state constitutional polities, or, indeed, even to state polities in a configuration where their authority begins to be rivaled by these post-state polities? Arguably, it has. Sovereignty retains a strong popular and intellectual currency in constitutional discourse, and it is arguable that the current phase is more appropriately described as one of “late sovereignty” rather than “post-sovereignty.”<sup>99</sup> The crux of this argument is that in the emerging post-Westphalian order, it becomes possible to conceive of autonomy without exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms. This is because of the emergence of polities whose posited boundaries are not, or not merely territorial, but also sectoral or functional.<sup>100</sup> That is to say, claims to ultimate legal authority are no longer limited to (state) claims to comprehensive jurisdiction over a particular territory, but now also embrace sectorally and functionally limited claims, whether such claims are also territorially limited, as in the EU, or global, as in the WTO. Crucially, the development of sectorally or functionally limited claims is self-reinforcing to the

---

the claim that fundamental authority to represent the polity in its external relations rests with the polity itself, the question of who or which institutional configuration exercises this external sovereignty being a secondary question of internal constitutional law.

<sup>97</sup> The condominium, an arrangement in which sovereignty is jointly exercised over two or more states, provides an exception to this rule. Historically, condominiums have existed in a variety of locations from the Sudan to the New Hebrides.

<sup>98</sup> See e.g. R. Jackson, “Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape,” (1999) 47 *Political Studies*, 431.

<sup>99</sup> See N. Walker, “Constitutional Pluralism and Late Sovereignty in the European Union,” in N. Walker (ed) *op. cit.* n.80 above.

<sup>100</sup> On the distinction between sectoral and functional limitations, and on the use of both types of jurisdictional boundary in the EU context, see B de Witte and G. de Burca, in A. Arnall and D. Wincott (eds), *Legitimacy and Accountability in the European Union*, (Oxford: OUP, forthcoming)

extent that it allows of the possibility of overlap without subsumption. To be sure, the boundaries between different polities are still deeply contested. Indeed, in a configuration in which overlap and intersection become the norm, these boundary disputes, as we shall see, become more systematic. Yet even so, the advent of sectorally or functionally limited polities means that the assertion of authority around a disputed boundary does not necessarily impugn the integrity of the other polity *qua* polity. So, for example, to the extent that the claim to sovereignty of the European Union over a range of competences previously within the exclusive jurisdiction of the fifteen Member States is plausible and effective, this does not seriously question the continuing sovereignty of the fifteen member states as regards their remaining areas of territorial jurisdiction, however significantly, imprecisely and progressively limited the ambit of this sovereignty might be.<sup>101</sup>

If we accept that in the post-Westphalian order the Gordian knot tying autonomy to territorial exclusivity within the definition of sovereignty has been severed, and that autonomy alone becomes a sufficient basis for sovereignty, that does not mean that every bare claim to autonomy should be accepted as evidence of sovereign authority. Such claims must still be plausible in the subjective and objective senses set out above. In these terms, the EU clearly has a stronger claim to sovereignty than, say, the WTO, which in turn has a stronger claim than NAFTA. This is true both in terms of the beliefs of key institutional

---

<sup>101</sup> To the extent that such questioning does take place, it tends to derive at least in part from a confusion between sovereignty and interpretive autonomy and a consequential exaggeration of the significance of the ECJ's power to determine the boundaries of its own jurisdiction. So according to Lenaerts, there "is simply no nucleus of sovereignty that the Member States can invoke, as such, against the Community." This proposition tends to overlook two points (1); that as the jurisdiction of the Community/Union remains a textually limited one, even in the EU's own terms that which lies outside these textual limits presumably continues to be part of the nucleus of sovereignty of the Member States, albeit that they cannot as a matter of EU law invoke this against the Community, and (2); that in any event, in their own constitutional terms rather than those of the EU, the Member States do retain a nucleus of sovereignty which they can invoke in their own courts; see K. Lenaerts, "Constitutionalism and the Many Faces of Federalism", (1990) *American Journal of Comparative Law*, 205-63, 220. See text below for further discussion of the relationship between sovereignty and interpretive autonomy.

The territorially non-exclusive representation of sovereignty by the EU is, however, not reciprocated by the Member States. Continuing claims of state sovereignty tend not to concede that any part of that sovereignty has been or is even capable of being irrevocably transferred to the EU, instead maintaining that in the final analysis the EU has no plausible or legitimate sovereign claim against the states as opposed to a plausible and legitimate claim to have been delegated certain substantial powers by the states. For a possible exception to or modification of this position in the case of The Netherlands, where the concept of sovereignty does not explicitly figure in official constitutional discourse, and where constitutional procedures are particularly receptive to the transfer of powers to the EU, see B. De Witte, "Do Not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and the Netherlands," in N. Walker (ed) *op. cit.* n.80.

actors, inspired by the early jurisprudence of the ECJ on supremacy and direct effect,<sup>102</sup> and, objectively, in terms of the high-level of compliance with the corpus of European law, facilitated by a sophisticated set of EU-member state inter-systemic bridging mechanisms centred around the preliminary reference procedure, which - in a prime example of the management of overlapping autonomies - allows each system virtually seamlessly to claim a persuasive sovereign pedigree for that same corpus.<sup>103</sup> Nevertheless, as I have argued elsewhere, there is at least some evidence of the 'lesser polities' beginning to develop a sovereign world-view, and of others beginning to take them seriously.<sup>104</sup> And what this suggests is that, within the more fragmented, fluid and contested configuration of authority of a multi-dimensional order, sovereignty too, like the other indices of constitutionalism, becomes more amenable to understanding as a graduated and tenuous property of normative order. While mutual exclusivity remained intrinsic to our definition of sovereignty, a more absolutist, black-and-white mode of analysis and understanding was appropriate, with relatively discrete areas of contestation which themselves tend to be approached and resolved in zero-sum terms and within a limited time-frame. Under the new conditions, sovereignty may be viewed as a emergent and precarious characteristic of many post-state polities within a longer, open-ended time frame, as we have seen of the EU and as we are now witnessing of the WTO. In turn, to what extent and in what ways these sovereignty claims become more or less grounded depends upon the other graduated indices of constitutionalism, to which we now turn.

The first of the governance-centred criteria of constitutionalism and indices of constitutionalization, then, is jurisdictional scope. If polities within a multi-dimensional order can be sectorally or functionally delimited, how far can such limitation be permitted without undermining the very idea of a constitutional *polity*? On the one hand, sectoral or functional scope is patently a matter of degree, and so fits easily into our understanding of constitutionalism and constitutionalization as also questions of degree. On the other hand, our sense of an entity as an identifiable polity seems to require a minimum regulatory range. The practice of politics, and of constitutional government, as generic activities, as opposed to the pursuit of a single policy or a discrete regulatory goal, implies the co-ordination of a number of spheres of activity and the treatment of their mutual ramifications through consideration, negotiating and balancing of the multiple public goods and private interests involved.

---

<sup>102</sup> See e.g., B. De Witte, "Sovereignty and European Integration: The Weight of Legal Tradition," in Slaughter, Stone Sweet and Weiler (eds) *op. cit.* n.5, 276.

<sup>103</sup> See e.g. Walker, *op. cit.*, n.95 375-378; S. Weatherill, *Law and Integration in the European Union*, (Oxford, Clarendon, 1995) chs.4-5; N. MacCormick, *Questioning Sovereignty: Law State and Practical Reasoning* (Oxford: OUP, 1999) esp. ch.7.

<sup>104</sup> N. Walker, *op. cit.* n.56, 40-42.

The history of the expanding competence of the EU from its origins as an organization to promote regional trade through a common market, and also, if less immediately, to consolidate post-war peace in Western Europe is too well known to require even a brief synopsis.<sup>105</sup> Suffice it to say that in considerably widening and deepening its sphere of competence, both through extended economic integration in areas such as competition, agriculture and monetary policy and beyond that into social and environmental policy, it manifestly supplies a distinct level of governance. The remit of the WTO, for purposes of comparison, is clearly more modest, but it too increasingly conforms to a multi-functional template. Even the original GATT 47, restricted to the liberalization of trade in goods, involved a complex balancing of values and interests. Each of its four fundamental working principles – non-discrimination, reciprocity, market access and fair competition – is open-textured and, their iterative interpretation and conciliation required a complex balance between liberalization on the one hand and a wide range of national and regional policy interests and the diversity of other public goods these interests articulate or are claimed to articulate on the other.<sup>106</sup> Like the European Union, moreover, the complex and many-tentacled ramifications of free trade has led to a gradual ‘spillover’ of explicit competence into other sectors, including the Uruguay Round Agreements on Trade in Services (GATS) and Trade Related Aspects of Intellectual Property Rights (TRIPS) and extension into other broad policy areas such as competition, investment, agriculture and environmental policy.

What the discussion of the early years of GATT also suggests, however, is that the complex balancing of different values and interests to which wide-ranging constitutional discourse is applicable need not be exclusive to broad multi-functional polities, but can also apply in apparently narrow fields, provided the agency in question retains a high level of discretion - an extensive optional scope - within that area. In other words, provided the issue within jurisdiction is ‘polyvalent,’ and the agency charged with its treatment empowered to have full regard to this polyvalence, a wide-ranging constitutional discourse can be engaged. That it is possible for more limited constitutional processes, which lack the capacity to co-ordinate, trade-off or redistribute between policy sectors, nevertheless to engage in sophisticated constitutional balancing is further vindicated by the example of the Council of Europe’s main ‘constitutional’ Treaty and instrument, the European Convention of Human Rights. Clearly, the exclusive focus on the rights dimension of issues raising a much wider range of public policy issues does not preclude this body from contributing to a rich constitutional discourse around the meaning and relationship of concepts such as liberty, equality, privacy and the rule of law,

---

<sup>105</sup> See e.g. Weiler, *op. cit.* n.6 ch.2.

<sup>106</sup> See e.g., M. Farrell, *The EU and WTO Regulatory Frameworks: Complementarity or Competition?* (London: Kogan Paul, 1999) ch.1.

and to highly influential effect in other constitutional settings, both state and post-state.<sup>107</sup>

Interpretive autonomy,<sup>108</sup> - the power to have the last, and so constitutionally decisive word on the meaning of a mandate, is on the surface straightforward. On closer examination, however, it is a tenaciously elusive idea, one which has given rise to a great deal of confusion - confusion which has caused the idea of interpretive autonomy on the part of non-state polities to be falsely challenged or denied. Like so many of the difficulties with charting the post-Westphalian order, these confusions are as earlier intimated associated with the statist legacy - stemming from an obdurate reliance upon the paradigm of state constitutionalism in contexts to which it is increasingly inappropriate. Two confusions in particular need to be addressed.

In the first place, there is a confusion of meaning - or at least, a tendency to overstate the mutual dependency - between interpretive autonomy, or the power to be ultimate arbiter of disputes about the meaning of the polity's governing constitutional text, including disputes over its jurisdictional reach, on the one hand (i.e. "judicial *Kompetenz-Kompetenz*"), and an open-ended capacity of the polity to determine the extent of its legislative competence on the other (i.e. "legislative *Kompetenz-Kompetenz*").<sup>109</sup> In the context of the Westphalian one-dimensional order of sovereign states, where legislative *Kompetenz-Kompetenz* is the constitutional norm, the interpretive and adjudicative setting of the Supreme or Constitutional Court is typically where this open-ended jurisdictional authority is articulated, applied and affirmed. In these circumstances, the two capacities are closely linked, although still conceptually distinct. Where, on the other hand, a polity is sectorally or functionally limited by its constituent text, then those who exercise interpretive autonomy on behalf of the polity must equally be subject to these sectoral or functional limits. In other words, interpretive autonomy is always the dependent variable, tied to the jurisdictional claims of the constituent text of the polity in question. To the extent that these claims are sectorally or functionally limited, so too is the power of interpretive autonomy. To be sure, such interpretive power may be applied in a controversially extensive manner, may even on some views be abused, but an interpretation of a sectorally or functionally limited text, however expansive, remains an act circumscribed by an acknowledgment of

---

<sup>107</sup> The most recent evidence of this is the prominence accorded to the European Convention on Human Rights in the drafting of the new European Union Charter of Fundamental Rights. See e.g., G. de Burca, "The Drafting of the EU Charter of Fundamental rights," (2001) 26 *European Law Review*, 126.

<sup>108</sup> T.Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations," (1996) 17 *Harvard International Law Journal*, 389, 389-90.

<sup>109</sup> Schilling *ibid*, and "Rejoinder: The Autonomy of the Community Legal Order," (1996) *Harvard Jean Monnet Working Paper Series*; responding to Joseph Weiler's reply to Schilling's earlier article; Weiler, *op. cit.*, n.6, ch.9.



boundaries within the terms set by a particular interpretive community, rather than a license to expand jurisdiction indefinitely. Interpretive autonomy, therefore, cannot slip the sectoral or functional leash, and need not on that ground be excluded as indeterminately open-ended from the constitutional profile of a sectorally or functionally determinate post-state polity.

A second confusion mirrors that which attends the transformation in the meaning of sovereignty. If ultimate authority in the post-Westphalian order is consistent with autonomy rather than exclusivity, so too the power of ultimate arbitration and interpretation in domains of overlapping jurisdiction need not be exclusive. Interpretive autonomy means precisely that. It does not necessarily mean that from an external point of view “only the institutions of that particular order are competent to interpret the constitutional and legal rules of that order,”<sup>110</sup> but merely that this can be plausibly asserted from an *internal* point of view. In a configuration of overlapping and rival polities - in a landscape of contested boundaries - the supreme judicial authorities of these rival orders will each claim the right to police these contested boundaries in terms of the normative pedigree of their own order and by reference to the rules of adjudication associated with that normative pedigree. In other words, on a pluralist reading the assertion of rival plausible claims to have the last judicial word on an overlapping or disputed question of competence, provided these claims are seriously made, confirms rather than denies the interpretive autonomy of each of the polities or putative polities in question.

For all that it does not imply legislative omnicompetence or unrivaled powers of adjudication, interpretive autonomy remains a powerful index of constitutional maturity. Interpretive autonomy has been long been claimed by the European Court of Justice on behalf of the European legal order, giving rise to a series of high-profile constitutional collisions with national constitutional courts staking rival claims.<sup>111</sup> Again, however, interpretive autonomy is very much a matter of degree, and does not necessarily correspond to high levels of fulfillment of other criteria. So, for example, the European Court of Human Rights clearly has a high degree of interpretive autonomy, despite its narrow competence and lack of polity status or aspirations in terms of the ‘community’ dimension of ‘political community’, whereas the WTO, although comparatively well-developed in some other criteria, has only since the 1994 Uruguay Round, when it established a Standing Appellate Body, developed an adjudicatory mechanism of sufficient independent authority to begin to justify that claim.<sup>112</sup>

---

<sup>110</sup> Schilling, *op. cit.*, n.108, 389-90.

<sup>111</sup> See e.g. De Witte, *op. cit.* n.102.

<sup>112</sup> See e.g. M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (London and New York: Routledge, 1999, 2nd ed.) 54-58; J.H.H. Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement” (2000) *Harvard Jean Monnet Working Paper Series*, 2.

As regards institutional capacity, from the point of view of constitutional development this refers both to effectiveness - a capacity of a regulatory body to 'make a difference' to the activities regulated, and also to the extent to which in so doing the body instantiates constitutional principles of a structural kind, such as judicial independence *within* the institutional structure, (as opposed to independence *from* external interference, considered under the previous heading) separation of powers and inter-institutional balance more generally, subsidiarity etc. On both counts, the EU is again the paradigm case of the post-state polity, boasting an effective and relatively well-resourced enforcement capacity and a complex and constitutionally articulated and monitored, if by no means uncontroversial, system of internal institutional differentiation and balance. Other bodies, such as the WTO, may have a fairly highly developed system of institutional differentiation, but more limited resources and implementation capacity. For constitutional bodies and processes with more limited functions, institutional differentiation tends to be less pronounced, and equally the applicability of state-derivative structural constitutional principles is less relevant.

As noted above, just as sovereignty is key to the 'political authority' dimension of polity or political community, so the first of the societal criteria, namely citizenship or membership and the sense of identification with the polity associated with its attendant system of rights and obligations, is key to the 'community' dimension. Again, however, even though within modern constitutional discourse the notion of citizenship or polity-membership has tended to become bound to and bounded *by* the state,<sup>113</sup> this need not be the case. The notion of citizenship, like those of polity and constitutionalism, pre-date the modern state, supplying one of the "classical ideals"<sup>114</sup> of ancient Athenian and Roman civilization. And in the EU context, the language of non-state citizenship has achieved sufficient currency in the post-Westphalian age to be promoted, since Maastricht, as an explicit legal status of Union membership under which are grouped a number of specific provisions.<sup>115</sup>

Although this heading describes a rather meagre catalogue of political and mobility rights, if we free ourselves from a rigid legal formalism,<sup>116</sup> we can

---

<sup>113</sup> Z. Bankowski and E. Christodoulidis, "Citizenship Bound and Citizenship Unbound," in K. Hutchings and R. Danreuther (eds) *Cosmopolitan Citizenship*, (Basingstoke, Macmillan, 1999). See, typically, the definition of citizenship provided in Janoski's influential study as "passive and active membership of individuals in a *nation-state* with certain universalistic rights and obligations at a specified level of equality (emphasis added)" T. Janoski, *Citizenship and Civil Society: A Framework of Rights and Obligations in Liberal, Traditional and Social Democratic Regimes* (Cambridge: CUP, 1999) 9

<sup>114</sup> J.G.A. Pocock, "The Ideal of Citizenship since Classical Times," in G. Shafir (ed) *The Citizenship Debates: A Reader* (Minneapolis and London: University of Minnesota Press, 1998) 31.

<sup>115</sup> Arts 17-22, EC Treaty.

<sup>116</sup> See e.g., J. Shaw, "The problem of Membership in European Union Citizenship," in

move beyond the self-understanding of the treaties in our treatment of citizenship in at least two ways. First, we can impute to many of the other substantive provisions of European law a citizenship-constitutive quality. Even in textual terms, the self-proclaimed incidents of European citizenship by no means exhaust the entitlements of citizenship. These are generally taken to include certain universal entitlements *re* the polity in both the classical sphere of negative freedoms and in the sphere of political voice and participation, as well as an equality of basic social entitlement sufficient to provide a minimum threshold of well-being and the wherewithal to enjoy and exploit these liberal and political rights.<sup>117</sup> On this wider view the European Union provides a developed infrastructure of entitlements to the “market citizen”<sup>118</sup> around the four freedoms and a more muted recognition of the wider catalogue of classical first-generation rights through its acknowledgment of the Council of Europe’s ECHR as a constitutional source.<sup>119</sup> It also supplies a range of political rights centred on direct representation in the European Parliament, and - notwithstanding the continuing absence of significant resources for and mechanisms of redistribution at the European level - a growing range of social rights in employment, and, increasingly, in matters of discrimination more generally.<sup>120</sup> In this broader context of citizenship rights, the growing yet still uneasy and uneven commitment of the EU to an expansive conception of constitutional citizenship is perhaps typified in the freshly minted Charter of Fundamental Rights in the European Union - unprecedented in non-state polities for its breadth and depth of rights coverage yet its edge blunted by its merely declaratory status.<sup>121</sup>

As intimated, however, there is also a deeper dimension to citizenship. It is not simply an abstract status of passive belonging to a polity, defined in terms of the sheer scope and density of formal rights and obligations connecting the citizen to the polity. It is also about membership of a political community in an active or affective sense. It is about ones connection with an entity being of sufficient phenomenological significance to affect significantly ones social and political *identity* - or to put it another way - to add to ones social and political *identities*. It is about being able to think of oneself with some conviction as both a national and a European in constitutional terms. One index of this is the level of active engagement in a polity, another the breadth and depth of appreciation by individual and groups that their interests and aspirations are significantly

---

Bankowski and Scott (eds) *op. cit.*, n.42, 65.

<sup>117</sup> See Janoski, *op. cit.* n.113.

<sup>118</sup> M. Everson, “The Legacy of the Market Citizen,” in J. Shaw and G. More (eds) *New Legal Dynamics of European Union* (Oxford: OUP, 1995) 73.

<sup>119</sup> Art.6 TEU.

<sup>120</sup> Art. 13 EC Treaty

<sup>121</sup> See e.g. B. De Witte, “The Legal Status of the Charter: Vital Question or Non-Issue?” (2001) 8 *Maastricht Journal of European and Comparative Law* 81-89.

represented within the decision-making structure of the polity. In turn, the strength of these indices is bound up with the level and quality of articulation of *voice* within the polity - which is our last index of constitutionalism

Thus the question of citizenship of the EU is necessarily linked to the question of its democratic credentials, the pejorative starting-place for discussion of which is invariably its so-called 'democratic deficit'.<sup>122</sup> The democratic empowerment of the European Parliament has been slow, grudging and incomplete, the resulting variability in its capacities and procedures imposing further costs in terms of public understanding. Formal powers aside, the Parliament's remoteness, its lack of political cohesion, its low media visibility, its lack of voter interest and the consequential weakness of its electoral mandate, further diminish its representative capacity. Underlying much of this, there is the famous 'no demos' thesis,<sup>123</sup> the idea that the absence of a prior European political identity sufficiently grounded in ethnic or cultural homogeneity, still allegedly the exclusive preserve of the member states, makes the very idea of an active European democracy a false conceit of social engineering.

Yet for all that it points to the genuine problems of a new political community pulling itself up by its own bootstraps, the no demos critique, which also has clear parallels in some of the debates about the relative and competing democratic - and constitutional - credentials of existing states and of sub-state nations who wish to secede from these states in contexts as diverse as Canada, Turkey, Russia, Spain and Ireland,<sup>124</sup> is surely overstated, its essentialist premise unsustainable.<sup>125</sup> To recall an earlier proposition, from a broad constitutional perspective law and politics are most aptly conceived of as mutually constitutive and mutually contained, thus challenging the presumption of the credibility, still less of the necessity, of an *a priori* political community. And, it is a key point of a new generation of citizenship studies, and the new generation of citizenship practice to which these studies refer, that the decision-making and adjudicatory fora of the European political space allows scope, however variable and circumscribed, for the construction and development not only of a generic European identity but also of new transnational identities, not just amongst powerful producer interests but also for new social movements in areas as diverse as labour, environmental and sexual politics.<sup>126</sup>

---

<sup>122</sup> See e.g. Weiler, *op. cit.*, n.6, ch.8.

<sup>123</sup> Associated in particular with the decision of the *Bundesverfassungsgericht* in *Brunner*, *op. cit.* n. 74.

<sup>124</sup> See e.g., J. McGarry and B. O'Leary, *The Politics of Ethnic Conflict Regulation*, (London: Routledge, 1993); W. Kymlicka and W. Norman (eds) *Citizenship in Diverse Societies* (Oxford: OUP, 2000).

<sup>125</sup> See e.g. Weiler, *op. cit.*, n. 6, chs 7 and 10.

<sup>126</sup> See e.g., Shaw, *op. cit.*, n.116.

If the idea of citizenship is more appropriate to mature polities, then quality of voice and democratic representation more generally, in accordance with our earlier discussion of the internal normative coherence of constitutionalism, is a key measure of the legitimacy of all self-acclaimed constitutional entities or processes. This may not be readily apparent from a conspectus of contemporary constitutional inquiry, since the debate about the relationship between democratic representation and constitutionalism, in particular whether the entrenchment of fundamental rights, if needed at all, is needed as a protection *of* or *from* democracy, tends to be framed as one of *the* key controversies of modern state constitutionalism.<sup>127</sup> Yet this controversial surface exaggerates the degree of democratic animadversion within contemporary constitutional thought. Even where constitutionalism is presented as a protection from democracy, it is more precisely as a protection from democratic *excess*. It is an approach typically rationalised in terms of the dangers of majoritarian tyranny, and so continues to accept, and at least implicitly to support, the basic legitimacy of democratic process and popular voice within a broader constitutional ethic and constraint.<sup>128</sup>

In any event, while this remains an important debate at the European level - and a particularly topical one in the light of the new Charter of Fundamental Rights, in the post-state and even the post-polity context another at least equally important debate about representation has gained momentum. The relevant tension here is between general democratic voice and participation on the one hand and the special voice of functional representation and/ or technocratic expertise on the other. Again the European Union, originating on one influential view as a special organization to take certain key economic issues out of the general political arena and away from the vicissitudes of aggregative democratic voice,<sup>129</sup> has been a key laboratory for this debate.<sup>130</sup> But it has now extended from the macro-level to many of the key relational margins of the EU polity, where European and member state polities negotiate the boundaries of their respective jurisdictions in conjunction with other national and transnational interests. Comitology, the new Open Method of Co-ordination (OMC), and regionally-based public/private partnerships are all examples of the 'new methods of governance' which address and seek to resolve this tension in novel ways,<sup>131</sup> with a particular rich and intense focus of debate being the

<sup>127</sup> For an overview, see e.g. Waldron, *op.cit.*n.75, chs.10-13.

<sup>128</sup> See e.g. N. Walker, "Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism," in Beaumont, Lyons and Walker (eds) *op. cit.* n.13.

<sup>129</sup> See e.g., G. Majone, "The European Community between Social Policy and Social Regulation," (1993) 31 *Journal of Common Market Studies*, 153-70.

<sup>130</sup> For an overview, see F. Scharpf, *op. cit.* n.54.

<sup>131</sup> See e.g. C. Joerges and E. Vos(eds) *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999), *op. cit.*, C. Sabel and J. Cohen, "Sovereignty and Solidarity in the EU: A Working Paper where we face some facts," Paper for the Conference on Reconfiguring Work and Welfare in the New Economy: A Transatlantic Dialogue. EU Centre, Madison,

degree and forms of democratic representation within particular complex contexts of risk assessment required (or permitted) in order to provide optimal ‘deliberative’ forums and processes in which particular interests and perspectives are subordinated to a new sense of common good.

These questions strike an important new key. They are a telling instance of how constitutionalism’s new and extended field of reference can change the texture of particular normative debates in significant ways, and also of how perilous the work of translation between old and new context. Nonetheless, they remain intimately connected with a long tradition of voice-centred questions within constitutional discourse, some older forms of which, as we have seen in the democracy/rights debate, still also have a considerable currency. So the new questions are best considered as extending rather than eclipsing that older discourse, and indeed as requiring to be addressed simultaneously and in co-ordination with the more venerable questions in a manner which is itself democratically legitimate so as to ensure the overall democratic credentials of the constitution-generating process as well as the particular calibre of the discrete decision-making structures that it generates.<sup>132</sup>

(c) *The Structural Dimension*

Having suggested a way of reconceptualizing the constitutional field in a more inclusive manner, connecting state constitutionalism with post-state and post-polity constitutionalism within a graduated scheme, let us conclude by briefly mapping out the post-Westphalian territory of constitutionalism with the aid of these conceptual cues.<sup>133</sup> In so doing some additional ways in which this elaborated version of constitutional pluralism might help meet the challenges posed earlier are indicated.

As should be clear from the above conceptual analysis, the post-Westphalian constitutional map contains a number of different phenomena, state, post-state-polity and non-polity, each with their own separate but related discourses. To begin with, there is an aspirational constitutional discourse which seeks to reshape the traditional intra-state constitutional sphere of the relations between different groups - national, ethnic, territorial, religious,

---

May 20001, F. Scharpf, “Notes Towards a Theory of Multilevel Governance,” Max Planck Institute Discussion Paper 00/5, (November 2000); O. De Schutter, C. Lebesis and J. Paterson (eds), *Governance in the European Union*, (Brussels: European Commission, Forward Studies Unit, 2001); O. Gerstenberg and C.F. Sabel, “Directly-Deliberative Polyarchy: An Institutional Ideal for Europe,” in C. Joerges (ed) *Good Governance in the European Union*, (Oxford: OUP, forthcoming). And for a more general overview, see W. Scheuerman, “Reflexive Law and the Challenge of Globalization,” (2001) 9 *Journal of Political Philosophy* 81.

<sup>132</sup> On the close relationship between constitution-generating processes and the institutions thus generated in the legitimation of particular constitutional ‘regimes’ - and indeed in the legitimation of post-national polities more generally, see Walker, *op. cit.* n.41.

<sup>133</sup> Some of what is discussed below is pursued in more detail in Walker, *op. cit.* n.84, “Flexibility within a Metaconstitutional Frame.”

gender, linguistic or other cleavage - within the state in ways which go beyond those legal forms of 'identity politics,' in particular the protection of minority rights and the special representation of minority voices in political institutions, that can be comfortably accommodated within the existing constitutional framework and ethos. That is to say, this discourse makes claims which at the limits fundamentally challenge the existing normative or representative basis of constitutional authority, either through secessionist or quasi-secessionist demands, or in seeking a 'constitutional revolution' - a new constitutional settlement within the existing territorial frame. Just as interesting, perhaps, is what happens 'short of the limits'. Short of, and typically in the shadow of these revolutionary limits, what counterfactual constitutional politics tends to seek is precisely the type of 'mutual recognition' to which Tully alludes - that is to say, a recognition within the authoritative (and so officially 'recognized') constitutional vision, of the legitimacy of other constitutional visions, and an 'agonistic' process of negotiation between these alternative visions on the basis of consent and mutual respect.<sup>134</sup> At first sight, the possibility of evenly weighted negotiation between different frameworks of constitutional thought *within* an authoritative structure traditionally dominated and informed by one of the frameworks in question seems counter-intuitive. Arguably, however, this is a possibility that is gradually taking shape, however slowly, unevenly and unsurely, in divided polities such as Ireland and Canada.<sup>135</sup>

What is more, the results of these negotiations or peace-processes can give rise to new proto-constitutional forms between states, as in the new institutional structures for North-South and East-West dialogue and policy consultation under the Irish Good Friday Agreement - structures which supplement and modify the internal structures of two states - United Kingdom and Ireland.<sup>136</sup> But that is but one relatively undeveloped species of a new legal genus in which traditional 'international' relations between states develop in new 'constitutional' ways, interfering directly in the institutional structures and normative frameworks of domestic law. The paradigm case here is human rights law, with various global and regional human rights systems in the second half of the twentieth century challenging the Westphalian premise of untrammelled external state sovereignty which had previously prevented international law

---

<sup>134</sup> See esp. Tully, *op. cit.* n. 69.

<sup>135</sup> On the centrality of human rights considerations to this process of constitutional reconciliation between British and Irish in Northern Ireland in the wake of the Belfast Agreement, see C. J. Harvey, (ed) *Human Rights, Equality and Democratic Renewal in Northern Ireland*, (Oxford: Hart, 2001).

<sup>136</sup> See e.g. Harvey, *ibid.*; R. Wilford and R. Wilson, "A 'Bare Knuckles Ride': Northern Ireland," in R. Hazell (ed) *The State and the Nation: The First Year of Devolution in the United Kingdom* (London: The Constitution Unit, 2000) 79-116.

from addressing individuals as well as states themselves as the subject of legal rights as well as the object of legal rules.<sup>137</sup>

In turn, this kind of development shades into another type of postnational constitutional phenomenon, namely the emergence of sites which show sufficient maturity along various of the criteria set out above to begin to be considered fully-fledged post-state polities in their own right. Since a major theme of our graduated scheme is to discourage black-and-white categorization, it makes no sense on that basis to reintroduce a rigid classification of the different structures in question, suffice it to say that bodies such as WTO and NAFTA, both in terms of their 'political authority' dimension and even more so as regards their affective 'community' or citizenship dimension, clearly remain at a modest point on the continuum of emergent post-state political communities or polities, whereas the EU is by far the most accomplished case to date.

Finally, at the most extreme level of remove from traditional state constitutionalism, there are relations between state and post-state constitutional polities and processes - as in the new methods of governance at the uncertain edges of EU and member state competence, and also relations amongst post-state constitutional polities and processes - as in the EU and the WTO's interaction in the field of trade liberalization or in the EU and the Council of Europe's interaction over human rights, which also produce their own constitutional processes and phenomena. These developments are symptomatic of the increasing significance of the relational dimension generally within the post-Westphalian configuration. In this plural configuration, unlike the one-dimensional Westphalian configuration, the 'units' are no longer isolated, constitutionally self-sufficient monads. They do not purport to be comprehensive and exclusive polities, exhausting the political identities, allegiances and aspirations of their members or associates. Indeed, it is artificial even to conceive of such sites as having separate internal and external dimensions, since their very identity and *raison d'être* as polities or putative polities rests at least in some measure on their orientation towards other sites. The overlap of jurisdictions and governance projects is emerging as the norm rather than the exception, the constitutional processes developed to address these becoming 'central at the margins.'

Elsewhere I have characterized the internal logic and external or relational perspective of these new sites and processes as metaconstitutional.<sup>138</sup> The 'meta' prefix, as with meta-ethics and metaphysics, denotes a secondary discourse, in two different senses in the instant case. Metaconstitutional discourse is secondary, first, in the sense that its ultimate source and formative influence is the constitutional discourse of the state. That is to say, metaconstitutional discourse at post-state sites, however transformed in purpose

---

<sup>137</sup> See e.g. Steiner and Alston, *op. cit.* n.8.

<sup>138</sup> See references at note 84.



and content, always can trace its historical and discursive origins in the actions and ideas of constitutional states - in their decisions to set in motion processes which led to the development of post-state forms and in the conceptions of governmental design which they patented at state level.

But metaconstitutional discourse is also a secondary discourse in a quite different sense - one that is ultimately more important for our purposes and that refers to the kind of legitimacy typically claimed for post-state constitutional norms. Recall that the rules which are validated within a post-state discursive site or process have the same general subject matter - the constitution and regulation of key governance processes - as constitutional rules located at state sites, and increasingly operate in a mesh of uncertain and overlapping jurisdictional boundaries with each other and with the state sites. At the wide contested margins of this crowded constitutional space, post-state constitutional polities and processes typically come to claim not only a normative authority independent of and irreducible to the historical state source (the counterclaims of state sources notwithstanding), but perhaps even a deeper or higher normative authority than state constitutional rules or rules situated at other sites. Indeed, rule-making authorities at the expansive relational edges between sites typically seek to instruct, authorize, shame, persuade, influence, encourage or provide an example to one another, and likewise, the rules that they promulgate typically seek to constrain, qualify, supplement or supplant rules emanating from other sites. And it is precisely in order to prevail in this multi-dimensional world of overlapping boundaries and undercutting claims that those who are already supplied with an internal authorization to make rules within various sites and processes typically seek a meta-authorization, a deeper set of normative arguments for their position than would be required if, as in the one-dimensional state world, their constitutional constituency and mandate was purely self-contained.

Now, this might seem an unlikely terminus for an argument seeking to find common ground in which various constitutional discourses can find something relevant to say to one another and some effective way of steering a world of globalizing social and economic power and conflict which seems increasingly to escape the constitutional grasp. Is a vision of proliferating constitutional sites each seeking their own particular meta-authority not one calculated to exacerbate conflict and pathologise communication? This is certainly a danger. Indeed, it could be contended, with some justification, that the proliferation of local metaconstitutional claims, with their myopic imperviousness to universal constitutional possibilities, has been an aggravating factor in the deep fracturing and fragmentation of our contemporary constitutional discourse even as, paradoxically, that institutional proliferation has developed in response to the very suite of problems associated with traditional state constitutionalism which lie at the root of discursive fragmentation.

Yet, if, in conclusion, we situate the idea of metaconstitutionalism more closely within our broader pluralist perspective it begins to emerge in a more positive light. In the first place, if the post-Westphalian world is viewed in constitutional terms as a plurality of unities, as I have argued it should, then the pattern of deeper normative justification to which the metaconstitutional idea refers must track this plurality of unities. That is to say, on the one hand, there can be no transcendental and universal normative justification short of the transcendence of the extant unities in a new universal unity - a prospect of 'global constitutional order' which is as undesirable as it is unlikely. Equally, and at the other extreme, there can be no *effective* local forms of constitutional justification, including those which are aspirational constitutional units or which are relational between units, which do not find a final accommodation with a particular unit or particular units of constitutional representation and the discourse of metaconstitutional justification associated with these units, however much they might influence that final accommodation.

Secondly, however, this by no means rules out the creation of new authoritative constitutional units and processes from the old. Indeed, the proliferation of accomplished or putative post-state constitutional sites and new inter-site relational processes each with their own metaconstitutional framework of justification is a central feature of the post-Westphalian age. Once the orderly pattern of mutually exclusive sovereign state authorities is broken, the development of new authoritative units from the interaction of existing units is structurally facilitated, and the map of constitutional authority becomes a complex and ever-shifting mosaic of the new and the old, the emergent and the mature, the relations between these new and old units as constitutionally significant (and transformative) as the units themselves.

Thirdly, just as the configuration of unities is not fixed, neither is the normative content of that which is represented by these unities. The represented unity of constitutional orders, and of their metaconstitutional justification, is a purely formal unity. It implies nothing about the substantive normative discourse through which a particular unit achieves its metaconstitutional justification nor about the substantive framework of constitutional norms which this metaconstitutional justification supports. Rather, the increasing prominence of an expectation and practice of metaconstitutional justification implies quite the opposite. Metaconstitutional justification suggests a continuous reflection on the legitimacy of authoritative decision-making - whether the exercise of constitutional authority in general or in particular areas<sup>139</sup> - and thus an openness to challenge, critique and revision from both internal and external sources. A brief consideration of the context from which this trend has emerged may help to reinforce the sense of a new constitutional openness.

---

<sup>139</sup> For an analysis of the particular policy field of policing (private, sub-state, state and supra-state) in metaconstitutional terms, see my *Policing in a Changing Constitutional Order*, *op. cit.* n.84, chs.5-10.

As remarked earlier, the paradigm form of the state constitution in the Westphalian age tended not to experience pressing problems of effective authority except in particular moments of crisis (which could of course be many and frequent). State constitutions tended - and still to some extent do - to be traditionally legitimated, difficult to amend or overhaul except through solemn and often formidable procedures, and protected by a monistic conception of authority which assumed the exclusive jurisdiction of the state within a particular territorial space. That is to say, the context in which state constitutions tend to be legitimated and sustained was highly self-referential. They pulled themselves up by their own positivist bootstraps, drawing upon resilient sources of symbolic power and institutional strength, and with little concern (except in the academy) for deep normative reflexivity.<sup>140</sup> Post-state sites and processes in an increasingly diversified constitutional order have none of these 'advantages'. They lack tradition, and often, too, well-defined or broadly respected rules of amendment. Like state constitutional sites, they live in the shadow of a growing pluralist conception of authority, but unlike state sites they have no untouchable core (however quickly diminishing even in the state case), and rival discourses overlap with and may challenge their jurisdiction in every functional and territorial corner. Post-state constitutional phenomena may be necessary institutional incidents of the post-Westphalian order, but they lack the ideological niche carved out by their more venerable state counterparts. Their legitimacy is much more precarious, and this is a double-edged sword.

On the one hand, it may indeed encourage a strident fundamentalism, a refusal of dialogue with other sites and processes or with internal challenges to their authority, a searching for metaconstitutional roots merely to entrench their difference and self-righteous superiority. On the other hand, the assertion of metaconstitutional authority and the demand for metaconstitutional justification which that necessarily invites from both external and internal audiences may be genuinely educational and transformative. It may free up debate, encouraging greater resort to the ample tool-kit of state-constitutionalism, more active cross-fertilization of ideas between sites - including state sites themselves as their previous authority is challenged and they are increasingly drawn into the process of metaconstitutional reflection - and a more thoughtful engagement with the 'problems of translation' which that invites. The more precarious the legitimacy

---

<sup>140</sup> Dworkin may lovingly reconstruct the American constitution as a liberal utopia, or Ackerman narrate its history and conceive its potential in civic republican terms, but state constitutional practice, even most judicial practice, has its own pragmatic dynamic which rarely countenances the need for explicit metaconstitutional justification. This is not to say, however, that the general idea of metaconstitutional justification is unknown in state constitutional analysis. See, for example, the discussion in L. Alexander, "Introduction," in L. Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) 1-15.

of a particular metaconstitutional site or context, the greater the danger of failure, but, equally, the greater the opportunity for innovation.

Fed by such an open-ended dynamic, the ‘agonistic’ process of negotiation between and within different constitutional authorities is rich with possibilities of mutual learning both through regulatory competition and emulation in contexts of strategic rivalry and through open dialogue and cross-experimentation in more consensual contexts.<sup>141</sup> And if constitutional law cannot but set the limits of our institutional imagination, the new framework of engagement might in turn serve to extend these imaginative limits in ways less likely to invite and justify accusations of fetishism, normative bias, ideological manipulation and general inadequacy to and incoherence before the complexity of a changing global order, that cast such a long shadow over contemporary constitutional discourse as it ventures beyond its statist domicile.

---

<sup>141</sup> On the distinction (and continuum) between strategic and dialogic forms of constitutional interaction, see “Flexibility in a Metaconstitutional Frame,” *op. cit.* n.84, 25-30; *Policing in a Changing Constitutional Order*, *op. cit.* n.84, ch.10.