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Abstract

In recent years, the idea that constitutional modes of government are exclusive to states has become the subject of sustained challenge. This is due to the development in regional and global sites of regulatory institutions and practices which meet criteria normally associated with constitutional governance, as well as to the growing tendency towards the affirmative or critical conceptualisation of these existing or alternative post-state institutions and practices in constitutional terms. The aim of the essay is threefold. It asks why taking constitutionalism beyond the state might be viewed as an innovation worthy of comment and in need of explanation and justification, a question that requires us to engage with the definition of constitutionalism and with the contestation surrounding that definition. Secondly, and on the basis of these definitional concerns and conclusions, it specifies and elaborates upon the main dimensions of constitutionalism and of its post-state development. Thirdly, and joining the concerns of the first two sections, it seeks to identify the key current tensions – or antinomies – surrounding the growth of post-state constitutionalism with a view to identifying what is vitally at stake in the future career of this concept.

Keywords

Constitutionalism – Constitution Building – Law – Legitimacy – Treaty Reform – Transnational Governance

Introduction

In recent years, the modernist idea that constitutional modes of government are for states and for states alone has been the subject of diverse and sustained challenge. Anticipating our definitional discussion, we can comprehend this challenge as having both material and ideational dimensions. It refers, first, to the development beyond the states of certain regulatory institutions and practices which meet criteria normally associated with constitutional governance; in particular (i) in *regional* organisations such as the European Union (EU) and the North Atlantic Free Trade Association (NAFTA), (ii) in *functional* organisations as diverse in their remit and in their pedigree (public or private) as the World Trade Organisation (WTO) and the Internet Corporation of Assigned Names and Numbers (ICANN), as well as (iii) under the general *global* umbrella of the UN Charter and institutions or the international legal framework more generally (Walker, 2002; Fassbender, 2007).[1] It refers, secondly, to the affirmative or critical conceptualisation of such existing regulatory institutions and practices in constitutional terms, as well as to the 'constitutional' imagination or sponsorship of alternative regulatory or practical institutions and practices. The aim of the present essay is threefold. It asks why seeking to take constitutionalism beyond the state might be considered remarkable and problematical in the first place – an innovation worthy of comment and in need of explanation and justification. This basic task requires us to engage in some detail with the contested question of the definition of constitutionalism. Secondly, on the basis of these definitional concerns and conclusions, the essay sets out to specify and elaborate upon the main dimensions of constitutionalism and of its post-state development. Thirdly, and rejoining the concerns of the first two sections, the essay seeks to identify the key current tensions – or antinomies – surrounding the growth of post-state constitutionalism with a view to identifying what is at stake in the future career of this concept.

The Statist Legacy and the Problem of Definition

We can identify four kinds of objection which, often cumulatively, are levelled against taking constitutionalism beyond the state, each referring to a different way in which constitutionalism is implicated or invoked in contemporary social and political relations. Constitutionalism beyond the state may be rejected or challenged as improbable, as irrelevant, as inconceivable or as illegitimate. Let us briefly examine these four 'i's in turn.

The argument from improbability refers to the way in which constitutionalism is implicated in existing relations of authority. Any constitutional order is also a framework for the organisation and application of political power. And since actually existing constitutional orders tend be centred on the state, the 'state system' (Falk, 1975) has long served as a mechanism of *authoritative pre-emption* frustrating the pursuit of non-state constitutional initiatives, or at least ensuring that such initiatives remain within the delegated authority of states. In this way the established Westphalian configuration of mutually exclusive states with mutually exclusive domains of constitutional authority, joined by an essentially state-parasitic framework

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

of international law conceived of as a set of agreements *between* sovereigns, serves continuously to reproduce itself and to repress or marginalise any challenge to its domination.

The argument from irrelevance refers to the way in which constitutional techniques and values are invoked as a form of *normative resource* in law-mediated endeavours to articulate values and objectives relevant to 'good government' and to supply institutional technologies for achieving these values and objectives. From this perspective, as the solutions provided within the normative arsenal of constitutionalism are historically tailored to the problems of states, they may well be relevant only or primarily to the problems of states (e.g. Majone, 2002) For instance, the historical preoccupation of constitutions with the separation of powers, with the independence of the judiciary, with institutional checks and balances more generally, with the federal dispersal of power and with government-constraining Bills of Rights, may be viewed as directed to the dangers of tyranny or arbitrariness associated with the concentration of political power in the modern state with its claim to the monopoly of legitimate authority over discrete territorial populations (Madison, Hamilton and Jay, 1987)). Conversely, that very same concentration of power in the state also points to the scale and depth of its positive responsibility as the primary point of political initiative. In so doing, it focuses attention on the importance of ensuring against decision-making gridlock (through aspects of intra or inter-institutional balance and co-operation such as majoritarian voting rules or co-decision devices) or against decision-taking inflexibility and unresponsiveness (through various methods of executive empowerment, including expansive prerogative powers and the 'political questions' doctrine), In either case, the particular, and sometimes conflicting, imperatives of constraint and empowerment, and the mechanisms appropriate to their pursuit and reconciliation, are arguably peculiar to the state and to its highly privileged place as an exclusive or dominant repository of legal authority and political power in the global configuration. As such, these mechanisms are not directly relevant to any other type of entity with a less comprehensive depth and range of capability and responsibility.

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

The argument from illegitimacy, finally, concerns the way in which constitutionalism is invoked as an *ideological claim*, as a way of adding or detracting symbolic value from an actual or projected state of affairs on the basis of its supposedly 'constitutional' or 'unconstitutional' qualities. The case here is a straightforwardly consequential one. If constitutionalism, on one or more of the three objective grounds considered above, can only properly be conceived of as a matter of and for the state, then any attempt to claim the mantle of constitutionalism beyond the state is by necessary inference *illegitimate* (Klabbers, 2004; Grimm 2005b, Weiler, 2003).

How, if at all, might one respond to these sceptical perspectives? A first step, one of immanent critique, is to ask how persuasive each of these perspectives is, even in it own terms, in excluding the possibility of constitutionalism beyond the state. A second step, one of external critique, is to ask whether and on what basis the definition of the terms of the various sceptical perspectives and the assumptions that lie behind such terms might in any case be justified. In practice, however, the former level of inquiry tends to collapse into the latter, and the definitional questions become pivotal, including, crucially, the question of the relationship between the concerns evoked in the four sceptical perspectives. We can demonstrate this by again looking at each sceptical perspective in turn.

The argument from improbability claims that there is no state-independent source of power that may assume the mantle of constitutionalism, and in so doing it treats constitutionalism as a question of power. The immanent critique of this position would begin by reiterating that, despite the historical authority of state-based constitutionalism, there is increasing evidence of constitutional development at non-state sites. But this immediately begs the definitional question. What counts as constitutional development? Is it sufficient that there are merely 'subjective' claims, as in the ideological register, or must they refer to actual or projected states of affairs - to 'objective' conditions - under the normative and epistemic registers?

The argument from irrelevance claims that the tools of constitutionalism are the wrong size and shape for non-state polity problems, and is so doing treats constitutionalism as an instrument of 'how to' practical reasoning. The immanent critique of this position would begin by pointing out that at least some of the techniques of prudential reasoning and design associated with constitutional statecraft are relevant to other types of political arrangement with more limited concentrations of political power. But this immediately raises the question of whether the definition of constitutionalism can properly admit of degrees, particularly in the light of the epistemic claim, with its all-or-nothing threshold qualification.

According to that epistemic claim, the constitutional way of addressing the world is inconceivable other than in the context of the state, and so it treats constitutionalism as a limited and limiting situation and perspective from which to imagine the world. Its immanent critique would begin by questioning whether those supposedly limited and limiting presuppositions of the constitutional imaginary – the ideas of system, society and dedicated collective agency – must indeed be tied to the state, or whether they may not possess a broader significance. But, again, this is finally a conceptual or definitional question rather than one of immediate empirical testing, since it depends upon how we are able and prepared to flesh out the relevant ideas of system, society and dedicated collective agency. What is more, if the conceptual chips duly selected stack up against a permissive and mobile understanding of the range of these

epistemic preconditions, then this simply returns us to the prior definitional question considered above – whether we are simply stuck with the unimaginability of post-state constitutionalism under a pure, all-or-nothing conception, or whether we may still contemplate its moderate incidence under a more-or-less conception.

If, finally, we revisit the argument from illegitimacy, the contention that the discursive claim is itself important in rendering something constitutional and that such a claim is not justified of any post-state context, treats constitutionalism as a 'speech act' or rhetorical claim, and in this case as a quite unsubstantiated one. Yet the immanent critique would again begin by asserting that there is by now enough emergent evidence of constitutionalisation under the other three registers to rebut the charge that any such rhetorical claim is empty. And to the extent that the objective evidence does not convince, the external critique of the argument from illegitimacy would ask whether and why in any case the imaginative prospect and projection of constitutionalism should in any case be entirely in thrall to constitutionalism's historical achievement rather being considered as a self-standing and open-textured feature of the constitutional enterprise.

This encounter with constitutionalism's 'politics of definition' (Anderson, 2005, ch.6) helps clarify what is at stake in the endorsement or otherwise of each or any of the four critical perspectives, and allows us to draw a number of conclusions which will steer our substantive discussion of post-state constitutionalism. To begin with, patently the definition of constitutionalism and the question whether and to what extent constitutionalism might extend to the post-state context is both controversial and complex. There are various points of contention, and these typically concern the closely interdependent relationship between the different contexts of implication and invocation of constitutionalism in contemporary social and political relations to which each of the four critical perspectives refers. Such deep controversy and complexity indicates the need, as a basic orienting premise, to contemplate the potential range of constitutionalism in open-ended terms so as to avoid the premature exclusion of the possibility of post-state constitutionalism by definitional fiat.

Secondly, and in the spirit of that open-ended brief, we should be careful not to settle *a priori* the question whether constitutionalism beyond the state may be understood in more-or-less, incremental terms, or whether it requires to be judged in all-or-nothing, holistic terms. To that end, we need to think of constitutionalism as something that can be parsed or disaggregated into its component parts or dimensions in such a way that, on the one hand, we at least possess the conceptual tools to comprehend it as a matter of degree and partial realisation, without, on the other hand, denying the possible significance of the pattern of combination of these dimensions and so the potential force of the holistic argument.

But, how, thirdly, should this parsing exercise proceed? What are the key dimensions of constitutionalism to serve as a checklist for its post-state variant, and how should we think of the relationship between these dimensions? To answer that question we must appreciate that what underlies the significance of constitutionalism in each of its four critical registers is its status as a form of practical reasoning. Whether in terms of its authoritative locus, epistemic horizon, normative resources or ideological claim, constitutionalism is concerned, in the broadest possible sense, with the question: what can and what should we do in the practical situation of developing or interpreting relations of governance of collective action? Accordingly, constitutionalism cannot on

the one hand be a purely idealistic discourse, concerned to name and pursue certain ends independently of whether these ends are ones that are broadly endorsed or (relatedly) are feasible to achieve. This pushes us towards the conventional and the historical as indicators of and controls upon what constitutes a valued and plausible political enterprise, and so to the identification of certain dimensions of constitutionalism in objective terms as socially realised, and, it follows, primarily state-situated or at least state-rooted forms of organisation and practice. Yet we cannot on the other hand defer entirely to history and convention and to their 'externally' verifiable record The 'ought' dimension of practical reasoning always also suggests either an endorsement of or a critical rejection of existing practice, and, if the latter, the possibility of the revision of the ethical core of constitutionalism in light of past experience and the novelty of the practical context – most notably for present purposes the transnational context. This brings back in the subjective and evaluative dimension - the importance of the 'internal' construal of 'external' developments in constitutional terms - and the idea of constitutionalism as an ethical discourse under a constant process of reimagining and reconstruction. In a nutshell, in our parsing of constitutionalism as a layered form of practical reasoning, precisely because it *is* a form of practical reasoning constitutionalism in general and post-state constitutionalism in particular must avoid the twin dangers of the solipsism of excessive idealism (on the subjective side) and the apologetics of excessive conventionalism (on the objective side), and so must employ each dimension to check the other.

The Frames of Transnational Constitutionalism

A typological approach that takes us to the core of the constitutional idea and speaks to both of the large methodological tensions identified above – the more-or-less versus all-or–nothing question and the balance between objective and subjective factors – involves thinking about the different dimensions of constitutionalism as a series of reinforcing frames. The idea of constitutionalism as a framing mechanism is already present in the etymological roots of the constitutional idea. It is visible in the original shift from the literal reference to the composition and health of the human organism to the metaphor of the 'body politic,' first as a descriptor of the already 'constituted' polity and only later augmented by a sense of prescription and projection of its 'good working order' (Grimm, 2005b). In the modern state tradition in which this shift found its dominant expression five forms of constitutional and indeed 'constitutive' framing of the polity have tended, albeit with highly uneven application and variable success, to take hold and to converge - namely juridical, political-institutional, self-authorizing, social and discursive (Walker, 2007a).

What typically counts, as constitutional in terms of the juridical frame is the idea of a mature rule-based or legal order – one that reaches or aspires to a certain standard both of independent efficacy and of virtue that we associate with legal 'orderliness'. What typically counts as constitutional in political-institutional terms is the presence of a set of organs of government that provide an effective instrument of rule across a broad jurisdictional scope for a distinctive polity as well as promising a fair form of internal balance between interests and functions. What typically counts as constitutional in self-authorizing terms is that the legal and political-institutional complex may plausibly be attributed to some *pouvoir constituant* that is both original to and distinctive of that polity and qualified to claim a legitimate pedigree or

authorial title. What typically counts as constitutional in social terms is a community sufficiently integrated to be the subject of legal regulation and institutional action that is both plausibly effective in terms of collective implementation and compliance and capable of locating and tracking some meaningful sense of that community's common good. And finally, what typically counts as constitutional in discursive terms is precisely the device of labeling certain normative phenomena or prospects under the binary logic of constitutional/unconstitutional, with all that that implies in terms of the 'constitutional' relevance and worthiness of the phenomena so framed.

How does this approach allow us to handle without prejudice the two large methodological question of post-state constitutionalism we have identified? In the first place, as regards the more-or-less versus all-or-nothing question, the basic criterion of internal distinction permits access to both readings. The possibility of an incremental reading is retained through the very idea of the separability of the frames, a notion vindicated by the fact that in the state tradition the layering of the frames has tended to follow a historical trajectory of reinforcement. This has involved the overall structure being reinforced by the later addition of the self-authorizing and social frames to the original juridical and political-institutional frames, with the increasing resonance of the discursive frame reflecting and reinforcing this gradual thickening (Walker, 2007a). Equally, the possibility of a holistic reading is kept open by the very structure of the framing idea. If we recall the epistemic basis of the holistic critique of post-state constitutionalism, it is found in the ideas of system, dedicated collective agency and society. In each case there is an explicit fit with one or more of our defining constitutional frames – system to the juridical and the political-institutional, dedicated collective agency to the self-authorizing and society to the social. Indeed, each of the three epistemic preconditions presupposes the very idea of integrity and boundedness which is implicit in the very notion of a frame, just as it is present in the etymological roots of the idea of constitution. If, in this way, the framing idea captures what the various epistemic preconditions have in common and the basis on which they complement one another, as well as their shared affinity with the very roots of the constitutional idea, then it poses a difficult challenge to those who would seek to disaggregate that constitutional form into its component parts and treat no part as indispensable.

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

The Five Frames Considered

Let us now look at these five framing dimensions in turn. To begin with *legal order*, this refers to the circumstances under which we may conceive of a certain domain of law *qua* legal order, as something systemic and self-contained (Raz, 1980). The fine details may be viewed differently across jurisprudential schools, but the very idea of legal order is commonly understood as a necessary incident, or at least precondition,

of any constitutional system. Legal order involves a cluster of interconnected factors, in particular self-ordering, self-definition, self-enforcement and self-discipline. The quality of self-ordering refers to the capacity of a legal system to reach and regulate all matters within its domain or jurisdiction, typically through its successful embedding of certain law-making 'secondary' norms as a means to generate and validate a comprehensive body of 'primary' norms (Hart, 1994, ch.5)). The quality of self-definition refers to the independence of the legal system from external normative control and its capacity, typically through an adjudicative organ, to have the final world both as regards its jurisdiction or ambit of competence and as regards the interpretation of its own normative meaning and purpose more generally. The quality of self-enforcement refers to the capacity of the legal order, through the development of a body of procedural law and associated sanctions, to ensure the effective application of its own norms. The quality of self-discipline refers to the positively evaluative dimension of 'legal order,' for which the first three dimensions provide a necessary, if insufficient platform. Once the legal order reaches a certain threshold of certainty and reliability in its production and of comprehensiveness in its coverage of its primary norms (self-ordering), once it has reached a certain threshold of effectiveness in its rules of standing, justiciability and liability (self-enforcement), and provided it can guarantee sufficient autonomy from external influences in these systemic endeavours (self-definition), it is then in a position to achieve two related aspects of self-discipline. In the first place, it can offer a certain level of generality and predictability in the treatment of those who are subject to its norms, and in so doing help cultivate a system-constraining cultural presumption against arbitrary rule. Secondly, and more specifically, the consolidation of a legal order with mature claims to autonomy, comprehensiveness and effectiveness provides the opportunity and helps generate the expectation that even the institutional or governmental actors internal to the legal order need and should not escape the discipline of legal restraint in accordance with that mature order. Indeed, these two core ideas - of the 'rule of law, not man' and of a 'government limited by law', (Tamanaha, 2004, ch.9) - provide a key element of all Western legal traditions, whether couched in the language of 'rule of law', or *état de droit* or *Rechtstaat*, and so supply a cornerstone of constitutionalism understood as a value-based discourse.

Whereas this first building block of modern constitutionalism can be traced back to the Roman roots of civilian law, albeit its 'rule of law' characteristics developed later, by contrast the second feature was one of the distinctively novel features of the modern state as it emerged as a new form of political domination in continental Europe in response to the confessional civil wars of the sixteenth and seventeenth centuries. What we are here concerned with is the establishment and maintenance of a *system of specialized political rule*, a development which achieved an early stylistic maturity in the form of the French and American documentary Constitutions of the late 18th century. For such a system neither its title to rule nor its ongoing purpose flows from prior and fixed economic or status attributes or concerns, or from some notion of traditional or divine order external to the system itself, as in pre-modern constellations of political power. Instead, authority rests upon a putative idea of the individual as the basic unit of society and as the (presumptively equal) source of moral agency, with the very idea of a political domain built upon and dedicated to that secular premise - one that develops its own authoritative yardsticks for conflict-resolution and its own mechanisms for collective decision making (Loader and Walker, 2007, ch.2; Loughlin, 2003, ch.3).

This development speaks to a new stage in the differentiation of social forms, one in which there is for the first time a separate sphere of the public and political that in its operative logic is distinctive from the society over which it rules. Such a specialized system has the dual attributes of immanence and self-limitation. On the one hand, it purports to be self-legitimating. What justifies the continuing claim to authority of the autonomous political domain and the higher order rules through which that authority is inscribed is nothing more or less than the operation of the political domain itself and the secular interests it serves. On the other hand, as the flip-side of this there emerges a general sphere of purely private action and freedom that lies beyond either the specialist domain of politics or the now redundant special mixed regimes of public and private right and obligation based upon prior forms of privilege or natural order (Grimm, 2005b, pp. 452-3; Habermas, 2001). The regulatory structures of the new specialist political order echo its distinctive attributes. Positively, and reflecting the quality of immanence, they take the form of third order institutional rules and capacities for making (legislature), administering (executive) and adjudicating (judiciary) the second-order 'legal system' norms through which the co-ordination of first-order action or the resolution of first-order disagreement within a population is secured. Negatively, and reflecting the quality of self-limitation, they take the form of checks and balances and monitoring mechanisms – of constitutionalism as 'limited government' - aimed at protecting a separate sphere of private individual or group freedom, one safe from incursions at the third order level of public authority or infraction at the second order level of the substantive norms of the legal system.

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

The institutionalisation of a normatively separate and specialist sphere of political contestation and decision and a correspondingly broad and deep normative ambition as defining features of a polity do not necessarily imply either a democratic founding or a continuing democratic warrant. The operational autonomy, specialist nature and expansive normative scope of the political sphere may be consistent with a set of arrangements in which the original authorisation comes from beyond the system, as in many subaltern constitutions (Wheare, 1960), or where the original authority is located within the system but is presented as monarchical or aristocratic rather than popular. So the autonomy and capaciousness of the political sphere need not imply that all those affected by the operation of the system participate or be represented in its institution or even its subsequent homologation. It need imply merely that a logic of political action should prevail, whether this be presented in terms of *raison d'état or salus populi* or some other version of the collective good, that is adequate to its claim and character *as* a special and encompassing sphere of political action - one where

there is no transcendental or otherwise overriding external justification as well as freedom from special interests. Yet the specialized system of political rule, just because it introduces the idea of a sphere of authority which must construct itself and provide for its own secular justification, cannot indefinitely avoid the very question of 'who decides who decides' that it bring into sharp relief for the first time, and so tends to be a precarious achievement unless and until joined by a claim of collective *self-authorship*.

Within constitutional thought, this third frame of self-authorship is typically conceived in terms of the idea of constituent power, or the ultimate sovereignty of the people (Kalyvas, 2005). Again, the documentary form that centres modern state constitutionalism engages this dimension, with such texts typically claiming to be not only *for* the people but also *of* the people, and their drafting procedures - typically through the involvement of constituent assemblies and popular conventions - dramatising a commitment to substantiate that claim of popular authorship (Arato, 2000). So prevalent, indeed, is the ethic of democratic pedigree in modern state constitutionalism – of democracy as a meta-value in terms of which other governance values are understood and articulated (Dunn, 2005) - that debate tends to centre not on the question of its appropriateness but only on the adequacy of its instantiation. This may manifest itself in the critique of those constitutional settlements that lack a founding documentary episode, or at least a plausible narrative of subsequent popular homologation (Tomkins, 2005), or in the claim that the constitution has betrayed its popular foundations, or in the criticism that for all its derivative concern with democracy in the everyday framework of government, the constitution is not autochthonous, but instead remains dependent upon the 'constituted' power of another polity or polities (Walker, 2007a).

Modern (state) constitutionalism is not only about the generation through an act and continuing promise of democratic self-authorisation of the wherewithal for the operation of a self-sufficient legal order underpinned by its own institutional complex and normatively expansive framework of political rule. Alongside these normative or juridical products, the state constitution also either presupposes or promises (and typically both), as a fourth framing achievement, a degree of *societal integration* on the part of the l constituency in whose name it is promulgated and to whom it is directed (Grimm, 2005a). Unless there is already in place some sense of common cause to endorse those interests or ideals that the constitutional text has identified as being well served by being put in common and to affirm and so vindicate the capability of the institutional means that the constitution deems instrumental to the pursuit of these common interests or ideals, then the constitution is in danger of remaining a dead letter. What this prior propensity to put things in common or basic sense of political community amounts to is an issue of much controversy, and in any event is something better conceived of as a matter of degree. As a basic minimum, however, it refers to a sense of common attachment or common predicament within the putative demos sufficient to manifest itself in three interrelated forms. It should be sufficient to ensure that most members demonstrates the minimum level of sustained mutual respect and concern required to reach and adhere to collective outcomes that may work against their immediate interests in terms of the distribution of resources and risks. Reciprocally, it should be sufficient to ensure that each is prepared to trust the others to participate in the common business of dispute-resolution, decision-making and rule-following on these same other-respecting terms. Finally, and building on the first two, it should be sufficient to

support a basic common idiom or political vernacular through which the diversity of individuals and groups can find the means to resolve some of their differences and make common sense of and accept those that remain (Canovan, 1996; Miller, 1995).

Yet just because it cannot supply the necessary social supports of respect and concern, trust and common political vernacular merely through normative enunciation does not mean that the constitution is incapable of influencing the measure of social integration necessary to its effective application and must merely passively presuppose its prior existence. To begin with, its normative framework of political rule seeks to provide a settled template for living together in circumstances free from despotism or intractable conflict, and to that extent offers an incentive to all who are attracted by such a template to secure the floor of common commitment necessary for its effective implementation. Secondly, the act of making the constitution may have a mobilisation dividend that goes beyond agreement on the particular text in question. The value of the process is not exhausted by its textual product (Sadurski, 2001), but may extend to the generation or bolstering of just these forms of political identity necessary to the successful implementation of the text. Thirdly, as constitutions in the modern age are typically viewed as the expression and vindication of the constituent power of a 'people', the successful making of a constitution has come to assume a special symbolic significance as a totem of peoplehood. So powerful, indeed, is the chain of signification developed under the modern banner of popular, nation state constitutionalism, that regardless of how it came into existence, the very fact that a constitution exists is typically understood and widely portrayed as testimony to the achievement of political community. Fourthly, insofar as the constitution crystallises such general common ends or values as are the subject of agreement in the constitution-making moment and as may also be already present in the pre-constitutional ethical life of the relevant social constituency, it may have a 'double institutionalization' effect (Bohannan, 1967, p.45). The addition of the constitutional imprimatur may amplify the importance of and the extent of common subscription to these common values and ends, and in so framing and reinforcing a common political vernacular, strengthen the societally-integrative relationship between that common political vernacular and mutual respect, concern and trust which is indispensable to political community. Fifthly and finally, we may look beyond the founding moment of the constitution to see how it can become an ongoing source of intensification of the social foundations necessary to its effective implementation. This operates in at least two ways. On the one hand, the constitution may function as a reminder of community. Insofar as common political identity often develops alongside and feeds off the collective memorialization of claimed common events, achievements and experiences, constitutional history provides one such stream of sanctified tradition. The constitution may thus write itself into collective history (Margalit, 2002, p.12). Secondly, the constitution may provide a resilient but flexible structure for political-ethical debate, an anchor for a continuing conversation about the meaning of political community that operates in a Janus-faced manner to strengthen that political community. Looking back, it supplies a token not only of the supposed depth and extension of common experience, but also of the weight of accumulated collective wisdom. Looking forward, the constitution may be sufficiently open-ended and sufficiently understood as a work of trans-generational authorship for its structures and values to be capable of being inflected in ways which retain the symbolic gravitas of accumulated wisdom yet are adapted to contemporary forms of political vernacular and understandings of trust and solidarity. In other words, the constitution may provide a repository, and so a corroboration and a vindication of the

viable ethical threshold of political community, as well as a vehicle for its continuous adaptation (Habermas, 2003).

Fifth and finally, there is 'constitution talk' - the discursive frame. Some aspects of this we have already considered under the 'symbolic' aspect of the community dimension. However, in line with the original rationale for embracing a subjective element in our definition – namely the idea of retaining critical distance from actually-existing government practice, the crucial feature of 'constitution talk' must be its internal relationship to the idea of responsible self-government (Walker, 2007a). Constitutional discourse is not unique in its reference to legal order, specialized political system, extensive normative capacity, constituent power or political community, but it is epistemically unique in its potential to join these elements together in a singular discourse *about a polity*.[2] That is to say, it is capable of proving an encompassing and self-reflexive vocabulary for imagining the polity in political-ethical terms. Of course, 'constitution talk' can also be used ideologically and strategically. As we have seen in our discussion of its social dimension, such a socially powerful discourse is constantly invoked as a way of reinforcing particular claims and judgements, whether positive or negative - constitutional or unconstitutional – about particular political acts or practices or categories of political acts or practices. Indeed, its ethical centrality and its susceptibility to ideological exploitation and strategic manoeuvre are two sides of the same coin – accounting for the status of constitutionalism as a 'condensing symbol' (Turner, 1974) to whose terms a whole series of debates about how we do and should live together are continuously reduced.

The Five Frames in Transnational Context

We can observe the growth of all five constitutional frames in the post-state context. Undoubtedly the most developed, and best-known example of transnational constitutionalism is found in the European Union, culminating in the EU Constitutional Treaty (CT) of 2004 – even if its implementation remains in deep jeopardy following the protracted failure to overcome the difficulties posed by the Dutch and French 'no' votes in ratification referendums in 2005. For despite these recent tribulations, the EU experiment as it has unfolded before and after the 2004 watershed has succeeded in registering across all five constitutional dimensions (Walker, 2007a, 2007b). It is based upon a legal order with many of the attributes of self-containment. The so-called *acquis communautaire* - the accumulation of 50 years law under the Treaty framework – has provided the ample fruit of the doctrines of supremacy and direct effect, with their strong self-ordering and self-defining elements. The EU also boasts its own specialized and well-established political system - Council, Commission, European Parliament, European Court of Justice etc. Today that system embraces a very broad normative scope – much wider that its original market-making remit under the 1957 Treaty of Rome, and since 2000 incorporating a Charter of Rights. Through the intermediation of a diversely representative (Constitutional) Convention on the Future of Europe to provide the initial draft of the 2004 CT, the EU now seeks to found itself on the authority not just of the states but also of the 'peoples' of

[2] Constitutionalism is more comprehensive in this regard than its transnational 'juridical' competitors such as human rights or the recently popular idea of 'global administrative law' (see e.g. Kingsbury, Krisch and Stewart , 2005), each of which tends to (a) take the traditional view of polities as exclusively or largely restricted to states, and (b) stress the importance and independent legitimacy of juridical relations which cut *across* different (state) polities.

Europe – to claim a constituent power, in other words, which is not simply derivative and aggregative of the constituent powers of its member states. The Convention process and the promulgation of the CT were also clearly concerned with the mobilisation and amplification of the idea of a European-wide society to complement national political societies. And, finally, it certainly stimulated the migration of transnational 'constitution talk' from the arcane world of European judges, Brussels elites and specialist university departments to much broader contexts of political deliberation.

Elsewhere, we see the same trend, if as yet much less fully developed. Still on the regional front, the continental human rights organisations, in particular the Council of Europe's European Convention on Human Rights, have begun to attract 'constitutionalizing' claims, in particular for the normative ambition and trumping (over domestic norms) qualities of their substantive human rights provision and their emergent sense of a continental 'public order' and common societal standard (Greer, 2003). If we look at the functional organisations, The World Trade Organisation, to take the most prominent example, has recently become the subject of an intense debate over its 'constitutionalization' (Dunoff, 2006; Howse and Nicoladis, 2001; Trachtamn, 2006; Petersmann 2000). Over the last 15 years, its legal order has become more robust, particularly through the strengthening of its judicial branch or Appellate Body and the widening of its normative remit from the confines of the predecessor GATT jurisdiction. More generally, its political architecture has become more independent of its member states, and its defence of certain individual rights – with a particular emphasis on trading rights – against state and regional protectionist interests has become more robust and effective. Similar debates are taking place in a lower key elsewhere, not least with regard to the 'civil constitutions' associated with traditionally non-state and non-public sectors such as the internet and the organisation of sports (Teubner and Fischer-Lescano, 2004).

At the global level, the constitutional debate is not so new, but its recently growth has arguably been more exponential than in any other sector. Since the Second World War and the birth of the UN Charter, there has been an intensified interest in the idea of the international legal order as a constitutional system, one never entirely extinguished by the *realpolitik* of the Cold War. Today, the combination, positively, of the post-war resilience of the UN and its institutions (as opposed to its inter-war League of Nations predecessor) and, negatively, of the new threats to *any* notion of a multilateral global order posed by American exceptionalism and neo-imperialism on the one hand and the rise of fundamentalist challenges to the pluralist premises of contemporary cosmopolitanism on the other, has created the conditions for a renewed interest in the discourse of constitutionalism. Jürgen Habermas has been perhaps the most prominent thinker (e.g. Habermas, 2006) to argue for a new overarching global authority at least in certain narrow but vital areas of the global public good – war, security and human rights – organised around the reform of the UN in general and its Security Council in particular. In so doing, he has built upon a significant tradition of (strongly German influenced) thinking on an idea of global constitutionalism pivoting upon the common interest of the 'international community' (e.g. Fassbender, 1998, 2007; Simma, 1994; Tomuschat, 2001; Von Bogdandy, 2006) and underwritten by those *ius cogens* norms and *erga omnes* obligations that emphasises universal values over multilateral or bilateral negotiations (De Wet, 2006).

The Antinomies of Transnational Constitutionalism

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

The most profound irony of transnational constitutionalism is that just at the moment of its consolidation in the legal (and to a lesser extent) political vernacular – when it has reached a point of discursive 'no return', it has also plumbed unprecedented depths of contestation. Again the EU provides a key case in point. The documentary Constitution of 2004 may have become irretrievably bogged down in ratification difficulties, but it is hard to see the constitutional debate being quietly laid to rest. There is sufficient dissatisfaction with the classically indirect state-centred discourse of EU constitutionalism – one that continues to rely on the traditional tropes of national sovereignty, internationalism and state delegation as the standard structuring devices of regional political community notwithstanding the qualitative shift of political and economic power away from the state – to ensure that even if there is no consensus on the optimal 'constitutional' form, the general momentum in favour of a thickening of the supranational constitutional frame will for the foreseeable future provide a standing critique of the anachronism of a purely state-centred 'misframing' (Fraser, 2005).

But this discursive strengthening remains problematic in at least two senses. First, while it may be potent enough to destabilise the state-centred view and challenge its presumptive authority, it is not sufficient to resolve in an affirmative manner the second order debate about whether the EU should indeed have constitutional status. Rather, the view that constitutions should remain an affair exclusively or primarily of states continues to hold significant sway. Secondly, there are those who believe, from the other flank, that the discourse of EU constitutionalism, far from being too heterodox a departure, may constitute an insufficiently radical break with the epistemic and normative properties of the Westphalian frame (Tully 2007a, Watkins, 2005); that in borrowing from the state tradition it also endorses a set of assumptions about the autonomous, top-down, centralised, law-fetishizing, self-contained, exclusionary and presumptively imperializing polity that has blighted that state tradition.

And if the second-order debate – constitutional framing or not – remains unresolved – the danger is that we are left in a state of constitutional limbo. The inability to find a constitutional settlement is eloquent testimony to the problem of legitimising the postnational or supranational order, but the similar lack of consensus on the continuing adequacy of a non-constitutional settlement show that there is no longer an uncontentious second-order statist default position, whatever the fate of particular constitutional initiatives (Walker, 2006). And although the debate is not so well advanced anywhere else, arguably we are approaching deep second-order contestation in other contexts too – whether the WTO, the regional human rights

organisations or, increasingly, the UN and the global order – with some treating constitutionalism as the key to breaking the Westphalian frame and others treating it as a continuation of a familiar structure of power by other means.

In turn, the exploration of the second-order debate reveals a more detailed level of contestation over the first-order meaning of constitutionalism in terms of the significance or otherwise of the dimensions set out earlier, and in so doing demonstrates the resilience of the division between incremental and holistic understandings of constitutionalism. For some, the thick state-derivative frame, with all five dimensions in place, remains the non-negotiable *sine qua non* of constitutional status. Unless a polity boasts an autonomous legal order, a distinctive institutional architecture of legislative, executive and judicial powers and a wide normative ambit, a democratic founding and a resilient democratic pedigree, a political community of common attachment and commitment and a lively discourse of constitutional critique and self-interrogation, then it is at best a form of 'constitutionalism-lite' (Klabbers, 2004) and at worst a fraud. For others, a more selective approach to constitutional status should not be viewed pejoratively as constitutional defusion, but should instead be seen as the potentially healthy diffusion of the constitutional idea. So it may be argued that it is neither feasible nor necessary for many transnational organisations to have the democratic foundations or the level of societal integration or the broad normative scope of national constitutions, or even of the constitutions of a relatively state-like polity such as the EU. Some exponents of WTO constitutionalism, for example, concentrate largely on its capacity to offer secure forms of protection of the private sphere of economic rights (Petersmann, 2000). Equally, some exponents of the global constitutionalism of the UN concentrate on the universal and so polity- and society-unspecific claim of the UN legal order and political system (Fassbender, 2007). Whatever the wide diversity of detail in these partial claims, the argument is typically that not only is it not plausible to look for full-pedigree constitutionalism at the postnational level, but that we would not even like it if we found it; that the virtues of political community are not always reducible to democratic will and popular implementation, but can lie in certain matters being insulated from politics, in policy being developed by experts, or rules being implemented in interested and knowledgeable communities of practice (Majone, 2002; Joerges, 2005; Mair, 2005: Pettit, 2004). In this vein constitutionalism serves as a 'subjective' register of debate about the optimal political resolution of collective action problems which carries open-ended implications, rather than as an 'objectively' decisive and reductive resource in its resolution.

This brings us to the final antinomy – between intensification and incoherence. The simultaneous development of various postnational constitutional initiatives creates a very uneven and untidy global scenario. It announces or portends a multi-dimensional configuration of overlapping and variously and partially constitutionalized polities. This is quite different from the constitutionalized world of Westphalia – a one-dimensional order of mutually exclusive and uniformly and comprehensively constitutionalized polities. Of course, this was always a stylisation, a template that operated within the imperial world centred on Western Europe rather than across imperial-subaltern relations (Anderson, 2005; Tully 2007b). There was, nevertheless, a coherent imaginary of constitutionalism at work, one that divided the world into the domestic law of sovereigns (and, ideally, of democratically endorsed sovereigns) and international law (however unstable) between sovereigns. Every place on the Westphalian map, at least in terms of its official legend, was the subject

of a singular and determinate set of juridical relations. Legal pluralism was a purely external pressure – the occasional incursions of alternative regulatory logics, of local or trans-local customary law and the like. Under the new order, pluralism is internal - written into the emergent frame itself. We see this, for example, in the relations between state orders and the EU, or between the EU and the WTO, or, between state or regional bodies and various UN Charter organs and global treaty regimes (Koskenniemi, 2007).

The problem of incoherence, of there being opposite or unclear messages at work within the global juridical framework with its proliferation of authority sources, moreover, is not just one of the relational margins – of the occasional boundary dispute. For just as there is no agreement on the meaning of constitutionalism – diffuse or defused – or even on the justification in-principle of its migration beyond the political agency of the state, so there is no meta-agreement on how the various more or less agreed parts of the post-Westphalian jigsaw should fit together, if at all. Can we imagine a polyarchy of regions and strong states? Or can we imagine, with Habermas (2006, ch.8), a narrow and modest global peak, underpinned by new regional sites of 'global domestic policy' and with the base continuing to be made up of states? Or must we fear the *ersatz* liberal internationalism of a world under the constitutional as well as the military shadow of American unipolarity? Or can we envisage a horizontal rather than a vertical principle of coherence, one based upon values rather than hierarchy, as in some forms of 'multi-level constitutionalism' (Pernice, 1999) and indeed of many new forms of cosmopolitanism. (Held, 2004) And, if so, where is the guarantee of the genuine rather than hegemonic universality of the values (Koskenniemi, 2007)? And if not, are we not simply left with a fragmented postnational legal order, where the attempt to track fugitive political power in postnational legal arrangements, leads, to embellish Michael Walzer's famous phrase (1983, p.39), to countless 'petty juridical fortresses,' with no principle of mutual coherence? Or does such a radical pluralism of overlapping polity forms provide its own power-levelling virtues (Krisch, 2006)?

Transnational constitutional discourse, in summary, appears to capture both the possibilities and the pathologies of the post-Westphalian political imaginary. Its authoritative, ideological, normative and epistemic power – its capacity to compel, to persuade, to intervene and even to 'make sense' - is rooted in its statist origins. Yet that statist legacy, by the very same token, provides a powerful continuing counterpoint to transnational constitutionalism at the authoritative and ideological level, one with the accumulation of practice and tradition very much on its side, as well as a distorting influence at the epistemic and even the normative level. If constitutionalism can be a bridge to a new post-Westphalian framework, it is one that must perforce contend with heavy traffic from the state side.

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