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Postnational Constitutionalism and Postnational Public Law: a tale of two neologisms

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Abstract

This paper examines how ideas of postnational constitutionalism and postnational public law have developed and will likely continue to develop in ways that are in some respects complementary and in other respects in tension. Both terms are neologisms - recently emergent concepts seeking to adapt legal-normative ideas suited to one (state) context to another (postnational) context. To subscribe to either, or to both, is already to take sides against a broad church of postnational sceptics, and instead to view the legal forms and vocabulary of statehood as a mobile resource and as an indispensable part of any answer to the question of the authority of the expanding domain of law beyond the state under conditions of globalisation. Yet beyond this basic threshold of agreement, postnational constitutionalists and postnational public lawyers tend to differ in emphasis. Whereas the former focus on the 'constitutive' or 'input' side of state-like law at the myriad new sites of postnational authority, the latter tend to concentrate on the 'throughput' or 'output' side of state-like law in postnational contexts. For the former, authority and legitimacy tend to be a function of particular pedigree and collective subjectivity, whereas for the latter authority and legitimacy tend to be a function of general 'public' norms and procedures and supposedly objective standards. These differences are motivated by normative preferences, and also by differing diagnoses of the postnational environment and different estimations of law's possibilities and limitations under these circumstances. Other approaches that try to reach beyond this normative and diagnostic division to combine or reconcile input and output, particular and general, subjective and objective, must do in appreciation of the fact that the basic opposition in question cannot be entirely eradicated. Rather, it reflects the deep and resilient ambivalence of the aspirational horizon associated with the age of political modernity - as relevant to the postnational phase as to the state-centred phase - in which the values of autonomy and equality within a constructed socio-political project have displaced earlier notions of conformity and status in accordance with a pre-given order of things. For under these modern conditions law must be concerned both to endorse and facilitate the collective pursuit of autonomy and equality and to protect the core individual expression of these values from collective encroachment.

Keywords

Postnational; constitutionalism; public law; global administrative law; societal constitutionalism; constituent power; input legitimacy; throughput legitimacy; output legitimacy

Postnational Constitutionalism and Postnational Public Law: a tale of two neologisms

(i) Two Neologisms

A great deal of conceptual contestation, and no less confusion, attends the busy contemporary debate over the prospects and desirability of constitutionalism beyond the state, or what is sometimes called postnational constitutionalism. The idea of 'public law,' or of a more general association of 'law' with 'publicness', is sometimes offered as a crucial move in this debate. It is presented as a way of staking out of the semantic high ground, the key to resolving differences of perspective.¹ But since, as we shall see the meaning and scope of a postnational 'public law' is also unclear and conflicted, this device contains no magic formula and can offer no decisive resolution of the higher profile contestation about constitutionalism beyond the state.²

This should not surprise us. Both key terms – postnational constitutionalism and postnational public law - are neologisms. They are recently emergent formulations coined in recognition of an ever denser web of transnational legal relations, which is one important dimension of the contemporary pattern of globalization.³ Both terms, and the themes they address, are products of

¹ See, for example, B. Kingsbury, "The Concept of 'Law' in Global Administrative Law" (2009) 20 *European Journal of International Law* 23-57; "International Law as Inter-Public Law" in H. S. Richardson and M.S. Williams (eds) *Moral Universalism and Pluralism* (New York: NYU Press, 2009) 167-2004; N. Krisch, *Beyond Constitutionalism?* (Oxford: OUP, 2010); A Von Bogdandy, P. Dann and M. Goldmann, "Developing the Publicness of Public International Law: Towards a legal framework for Global Governance Activities" (2008) 9 *German Law Journal* 1375-1400; See J. Waldron, "Can There be a Democratic Jurisprudence?" in *New York University Public Law and Legal Theory Working Papers* (2008) 35. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280923.

² My claim is not that the debate about transnational constitutionalism has a higher profile than the debate about transnational public law in the sense of being regarded as more important or attracting more intense debate *within* legal scholarship. That is a moot point, and undoubtedly the academic debate on law's 'publicness' has attracted increasing attention in recent years. See e.g. C. Michelon, G. Clunie, C. McCorkindale and H. Psarras (eds) *The Public in Law* (Aldershot: Ashgate, 2012) My argument is a more basic one; that at the level of wider public awareness and participation, the constitutional debate retains the greater resonance, particularly in Europe in the context and in the aftermath of the debate over a written Constitution for the European Union; see ns52-55 below.

³ See e.g. P. Zumbansen, "Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order" (2012) 1 *Global Constitutionalism* 16-52.

the disruption of the state-centred “order of orders”⁴ of the high modern age, and of the open-ended search for a new language of legal authority adequate to a shifting global political and economic configuration. Both terms, therefore, have a speculative quality, at best a tentative hold on the legal imagination.⁵ They have arisen out of a shifting legal landscape and address still unsettled features of that landscape. So we should not expect one term to guarantee the stable grounding that the other cannot provide for itself.

Nevertheless, there is merit in pursuing discussion of these two concepts on the same page. For, importantly, ideas of postnational constitutionalism and postnational public law or legal publicness, while displaying significant differences of focus and emphasis, begin from the same broad approach to the problem of legal authority in a globalizing age. They start from the premise that is both desirable and possible to adapt a historically state-concentrated discourse of legal authority to the increasingly dense post-state regulatory environment. They both suppose, in other words, that the kind of law which for long was the exclusive or predominant domain of the state, and whose very authority is intimately associated with that of the state – whether ‘constitutional’ or ‘public’ law – ought to be and is capable of being drawn upon and applied to new non-state-based contexts of regulation.

Situating postnational constitutionalism and postnational public law within the one framework of inquiry, therefore, as the present chapter seeks to do, can help us to clarify and address much of what is at stake in the broader debate about law’s transnational resonance. As a threshold concern, this inclusive framework allows us to specify and illuminate the division between those *who see the legal forms and vocabulary of statehood as a mobile resource, and as an indispensable part of any answer to the question of the authority of the expanding domain of law beyond the state*, and those who do not. Beyond that threshold, our framework then allows us to identify the main options available in adapting a state-concentrated discourse to a postnational environment, permits us to tease out the strengths and weakness of these options, and invites us to explore the important points of agreement and contention between them. In conclusion, it will be argued that the possibilities and the difficulties of reconciling these various adaptations, far from demonstrating the intrinsic inappropriateness of taking ideas of

⁴ N. Walker “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders” (2008) 6 *International Journal of Constitutional Law* 373-396.

⁵ *Ibid.* See also N. Walker *Intimations of Global Law* (unpublished manuscript, 2012)

constitutionalism and public law beyond the state, indicate quite the opposite. For what we are faced with is in fact strongly reminiscent of the mix of mutual support and tension between different dimensions of constitutionalism and public law that has long obtained in the state setting.

But before embarking on this course of inquiry, we need to provide some further clarification of our focal terms. The comparison between postnational constitutionalism and postnational public law is facilitated by the fact that, in addition to their *substantive* common ground – their sharing of the same combination of endorsement of the statist legacy and post-state aspirational horizon, they also display the same basic range of *forms* of reference. Each root term, ‘constitutionalism’ and ‘public law’, is used both, in the manner of an *external* account, to indicate the materials of an established genre of practical reason, and to articulate an open-ended set of claims *internal* to the established genre, including both ‘jurisdictional’ claims about the applicability of the genre to different contexts and action-generating claims drawing upon the resources of the genre in deciding practical questions. Each term, it follows, embraces both a (quasi) descriptive⁶ dimension, as viewed from a detached standpoint, as well as diagnostic and prescriptive dimensions, as assumed from an engaged standpoint.

First, at the level of external description, we refer, using the ‘c’ word or the ‘p’ word, to the inventory of existing legal forms, institutions and discourses that are conventionally understood as ‘constitutional’ or ‘public’. So, in this descriptive mode, we use the terms constitutional law and public law to record and report upon the vast array of structures - from written Constitutions to the various organs of government - and of processes - from democratic legislation to judicial review - that fall within the relevant established canon of positive law. Secondly, at the diagnostic level, we invoke our key terms to refer to the range of situations, including but not necessarily limited to those that already exhibit the relevant legal forms, institutions and discourses, which we deem to be appropriately understood and evaluated in ‘constitutional’ or ‘public’ terms. So we conceive, in this diagnostic mode, of situations or circumstances as of ‘constitutional’ import, not only because the conventional legal materials

⁶ Of course, reporting on social ‘facts’ is always more than mere description. No social phenomena are self-describing and no account of social phenomena is uninfluenced by the perspective and priorities of the account-giver. Even the most detached account of a relatively stable and institutionally embedded social phenomena such as legal rules, therefore, involves an element of selection and interpretation. Hence the qualifier ‘quasi’.

may be much in evidence, but also where we deem deeper standards of fit to be met; where, for instance, the relevant situations or circumstances presuppose or conduce to the establishment of fundamental legal authority or engage basic rights. Similarly, we conceive of situations and circumstances as appropriate vehicles for or venues of 'public law' not only because the relevant doctrinal forms are already in place, but also where, for example, particular populations self-understood or recognized as 'publics' are addressed, supposedly 'public' functions or interests are engaged, or certain collective characteristics of the production and supply of benefits obtain - as in the classical economic conception of "public goods"⁷. Thirdly, at the prescriptive level, we use the language of 'constitutionalism' or invoke the 'public' quality of law to call upon a set of standards and values of legal provision - again including but not necessarily limited to those standards and values already contained in existing legal forms, institutions and discourses. The various standards and values involved operate at different levels of abstraction; from highly general ideas such as dignity, equality and liberty, through broadly institutionalized goods, such as the Rule of Law, separation of powers or Parliamentary Government, to more specific standards and mechanisms of general pertinence across government (e.g., standards of 'good administration' or of probity in public office,) or between government and citizens (e.g., catalogues of individual 'freedom' and forms of judicial and other redress).⁸

We will have more to say about the different dimensions of constitutional and public law in the sections below. However, one broad conclusion can be anticipated. For constitutional and public law, in their strongly overlapping but distinct ways, the relationship between the three dimensions, relayed along a mutually reinforcing circuit, accounts for a strong bias towards a state-embedded conception of law. Both our diagnosis of the appropriateness of contexts to treatment in constitutional or public law terms and our sense of the relevant standards and values of treatment are heavily influenced by the vast, cumulative datum of established state institutions and practice. Reciprocally, the standing – and our understanding - of existing state institutions and practice *as* paradigmatically 'constitutional' or 'public' is corroborated by our continuously reinforced sense of what counts as appropriate 'constitutional' or 'public' contexts, values and

⁷ Which counts public goods as those displaying the twin attributes of non-excludability and non-rivalness of consumption. See e.g. J. M. Buchanan, "Public Goods in Theory and Practice: A Note on the Minasian-Samuelson Discussion." (1967) 10 *Journal of Law and Economics* 193–197.

⁸ For one particularly rich discussion of the range, variety and diverse levels of constitutional goods, see A. Brudner, *Constitutional Goods* (Oxford: OUP, 2004).

standards. What remains to be seen is what, if any, scope there is for either constitutionalism or public law to break out of this confirmatory circle of state-centredness.

2. Four Perspectives on Postnational Law

We can distinguish four main positions around which to organize our discussion. These are located along a continuum between scepticism and affirmation of the relevance of public law and constitutionalism to the transnational context. First and addressing our threshold concern about the very possibility and desirability of transposing a state-concentrated and state-embedded discourse, there are those who deny the prospects of robust forms of constitutionalism beyond the state and who also, typically for closely connected reasons, dismiss the prospects of robust forms of public law and publicness beyond the state. We can call this stance, in which there is a close causal and conceptual link between publicness, constitutionalism and statehood, one of *double scepticism* of legal transnationalism. Beyond that wholesale rejection of the prospects of the transnational relocation of robust forms of state-centred law, there are two more selectively sceptical positions. Secondly, then, there are those who are sceptical about the prospects of robust forms of constitutionalism beyond the state but not about the prospects of robust forms of public law beyond the state. We can call this position one of *transnational constitutional scepticism*. Thirdly, as an alternative form of selective scepticism, there are those who, conversely, are sceptical about robust forms of transnational public law, but not about robust forms of constitutionalism beyond the state. We can call this position one of *transnational public law scepticism*. And finally, at the opposite end of the continuum, there are those who, with differing emphases, are sceptical neither about robust forms of constitutionalism beyond the state nor about transnational public law. We can, in shorthand, call this range of positions one of *double affirmation* of the translation of paradigmatically statist forms of legality to the transnational domain.

We must at the outset say something about the significance of the adjective 'robust' in the above classificatory scheme. The point is a simple but important one. For reasons we develop in our exploration of *double scepticism*, no-one, however broadly resistant to the general transferability of notion of constitutionalism and public law to the postnational context, would disallow that these notions retain *some* resonance beyond the state. That, indeed, is why we use the language of scepticism rather than outright *denial* in characterizing various positions. As we

shall see,⁹ the reasons why even strong sceptics are bound to concede something to the postnational position are relevant to our overall conclusions, since they point to features of our key concepts that are significant in considering their future prospects. Our immediate priority, however, is to sharpen our analytical tools by insisting that a clear line can and should, nevertheless, be drawn between the affirmation of 'robust' and 'non-robust' postnational forms. By robust forms we mean to include only those forms, first, that indicate *significant* features of the transnational legal landscape, as opposed to marginal phenomena or exotic instances; and, secondly, that are or claim to be relatively self-standing and so *autonomous* from the national roots of constitutional and public law.

3. Double Scepticism

(a) Two versions of double scepticism

The double sceptics of transnational constitutionalism and transnational public law range across two positions – or, rather, a continuum of possibilities framed by two positions. What these positions have in common is that they treat ideas of 'constitution' and of 'public law' alike as so deeply embedded within and as so closely intertwined with the modern state, and as so closely implicated in its development, that it becomes difficult if not impossible to conceive of how they might prosper once detached from that context. For these positions the confirmatory circle of state-centredness is indeed a closed one.

One such position is *culturalist* in nature. It holds the idea of a constitution and of public law to be hollow, or at least deficient, in the absence of certain attributes, including the idea of a democratically self-constituting and self-constituted 'people' – a self-realizing 'public' - possessing comprehensive powers of self-determination and self-legislation; in so doing introducing, as a second sense of 'publicness', an internal distinction between a capacious and integrated sphere of 'public' and so politically negotiable affairs of government, and a domain of private and so legal-rights-protected interests. It is claimed, in other words, that our built environment of legal and political forms and institutions is ultimately contingent upon certain prior or emergent socio-cultural facts concerning identity, solidarity and allegiance, lacking which any self-styled constitutional project and any framework of public law dedicated to a

⁹ Section 3(b) below.

particular ‘public’ and its publicly self-acknowledged affairs and institutions is fated to be either a dead letter or a much more modest accomplishment.¹⁰ Both constitutionalism, typically in the form of a foundational event and document, and public law more generally, as the resilient yet adaptable normative framework and principles of government, are, on this view, first, products of and, only secondly, subsidiary causes and reinforcing guarantees of a certain socio-cultural formation. As only the modern state has known such a socio-cultural formation, and since even if the modern state is no longer so robust in these terms it still constitutes a standing impediment to the development of similar socio-cultural formations at non-state sites, there can be no tangible prospect of a full constitutionalism and a full development of public law beyond the state.

A second double-sceptic position runs even deeper than the culturalist argument and puts a state-centred conception of constitutionalism and public law more clearly to the forefront. This approach, closely associated in the UK context with the work of Martin Loughlin, has a profoundly *epistemic* quality. It focuses on the very idea of the modern state and of the legal and political imaginary associated with the idea of the modern state as embracing “a scheme of intelligibility... a comprehensive way of seeing, understanding and acting in the world”¹¹ that is simultaneously jurisgenerative and politico-generative in quality. It involves a framing or constitutive sense of ‘public law’ - of *ius publicum* or *droit politique* – that is necessarily prior and prerequisite to a full, modern articulation of the idea of the ‘constitution’ and ‘public law’ conceived of as positive law. The key insight here, and what distinguishes it from the culturalist position, is that the concept of the modern state, understood as a particular type of pre-positive but nevertheless jural relationship between territory, ruling authority and people, is cause rather than consequence. It is not the mere expression and fruit of a prior cultural achievement – an accomplishment of national affinity and solidarity supplying the “battery of power”¹² necessary to run the constitutional machine effectively. More than that, the category of the modern state involves a way of knowing and a way of being that embrace the idea of a self-constituting and self-regulating collective subject with no mandate or justification beyond the compact or consent of its individual agents; and in the absence of the self-assertion and self-comprehension of such an abstract constituent subject the very idea of a constituted polity is simply unimaginable.

¹⁰ See e.g., D. Grimm, “The Constitution in the Process of Denationalization” (2005) 12 *Constellations* 447-65.

¹¹ See e.g., M. Loughlin, “In Defence of *Staatslehre*” (2009) 48 *Der Staat* 1-28.

¹² M. Canovan, *Nationhood and Political Theory* (Edward Elgar: Cheltenham, 1996) 80.

For all their differences, the two positions – cultural and epistemic – have certain important features in common. In both cases the message is strongly conveyed that the modern idea and practice of constitutionalism and public law could not have developed in the first place except in the context and through the container of the nation and the state, which are themselves in one vision (epistemic), but not the other (cultural), already juridical categories. Importantly, both approaches conceive of legal authority in similar ways. Both involve a *pedigree* conception of the authority of constitutionalism and of public law, as somehow derived from and dependent upon a particular socio-political lineage. Both also involve an emphasis on the affirmative dimension of that authority – its manifestation as governing capacity or *gubernaculum* - as vital and prior; though also, as a feature of the reduction of that capacity to positive law, a strain of self-discipline and self-limitation in recognition of the underlying rights and interests of the individual who make up the collective subject of government.¹³ That is to say, it is the putatively democratic or meta-democratic source, whether the cultural substratum of peoplehood or the epistemic framing of publicness, that is fundamental and indispensable in bequeathing legitimacy to the positive forms of constitutional law and public law more generally and so in securing the institutional edifice of an expansive and integrated but self-containing system of government, which is the equally fundamental and indispensable expression of public power. And while this way of conceiving of legal authority may not, as matter of logical necessity, entirely rule out the possibility of a new pedigree and a similarly intense governing capacity - and so of a comparable constitutionalism and public law - emerging in other contexts and through a container other than the state, it certainly stacks the odds against such a development and places a heavy burden on the defenders of post-state constitutionalism to explain just how this might be possible.

The strength of the sceptical case is enhanced by one further feature that culturalist and epistemic versions share. In both approaches constitutionalism and publicness are closely connected and strongly complementary themes. The constitution is either both the consequence of a prior sense of the ‘public’ as a putative political community and the source of a further normative distinction between the ‘public’ and the ‘private’ conceived of as domains of activity and interest of that political community, as in the culturalist vision; or it is the deep frame through which both these aspects of ‘publicness’ are assumed, as in the epistemic vision. In

¹³ See e.g., Loughlin n11 above. See also Loughlin, *The Idea of Public Law* (Oxford: OUP, 2003) ch.7; *Foundations of Public Law* (Oxford: OUP, 2010) ch.12.

either case, then, each term - constitutionalism and publicness - tends to reinforce the other in foregrounding the nation state horizon.

It follows from their emphatic state-centredness that proponents of the double sceptical view of constitutionalism and public law tend towards what Mattias Kumm calls the “nostalgic” approach to global legal development.¹⁴ For all the force of their arguments that the intertwined ideas and ideals of constitutionalism and public law cannot be unbundled from the state without significant cost, the danger of this approach, as always with nostalgia, is of a kind of imaginative cul-de-sac. When considering the resources of constitutionalism and public law in a globalizing age, their default becomes one of optimism towards the past and pessimism in the face of the future. Their options, given their dismissal of any plausible prospect of the comprehensive adaptation of the state-suffused registers of constitutionalism and public law in a postnational environment, narrow to a defensive consolidation of the reduced remit of a state-centred law, a wishful rewinding of that legacy to its Westphalian pomp, or a fatalistic acceptance of the exhaustion of a paradigm.¹⁵

(b) Concessions to postnationalism

Yet we should be careful how far we push this analysis. As already intimated, even the most pronouncedly sceptical position would not deny some significance to constitutionalism or public law beyond the state.

If we consider, first, postnational constitutional law, we can point to two distinct strands of residual recognition from a sceptical standpoint. On the one hand, the constitutional label, here understood as a basic and non-exclusive brand, may be presented as a familiar descriptor of the

¹⁴ M. Kumm, “The best of times and the worst of times” in P. Dobner and M. Loughlin (eds) *The Twilight of Constitutionalism* (2010) 202-219.

¹⁵ See e.g. Grimm n10 above. Not all double sceptics strike a pessimistic tone, only those (many) who believe something is lost in the non-translatability of the resources of constitutionalism and public law to the postnational setting. There are two other possibilities. First, the resources of constitutionalism and public law, while still deemed appropriate to the nation state context, may be viewed as entirely inappropriate to the market context of postnational relations, for which another form of law, far from being ‘second best’, is considered more suitable. See e.g., U. Haltern “Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination” (2003) 9 *European Law Journal* 14-43. Secondly, the resources of constitutionalism and public law may be viewed as of limited and declining value even in the nation state context, a conclusion reinforced by the changing nature and less dominant role of the state in an age of increasing transnational power and authority. See e.g. K. H. Ladeur “We the European People - Relache?” (2008) 14 *European Law Journal* 147-167. See also Teubner, n41 below, Sabel and Zeitlin, n49 below.

foundational regulatory framework of many forms of social organization other than states that we find situated either within or across states. Legally, these might range from highly informal normative arrangements, as with the constitutive rules of many of the intermediate associations of national and transnational civil society - from NGOs and charities to political parties and sporting associations - to much more formal structures such as the United Nations Charter or other framework treaties of international organizations. The consequence, and sometimes - as in a prominent British politician's famous comparison of the abortive EU Constitutional Treaty of 2004 to the constitution of a Golf Club - the explicit aim¹⁶ of this concession, is to dilute and devalue the currency of constitutional language. The suggestion is that many entities can be described as constitutional in a thin normative sense without possessing the thick social imaginary or cultural roots associated with the modern state. What is merely the topsoil of positive rules in the deeply sedimented structure of the state may, therefore, be the sole or primary bonding agent in many lesser collective projects that neither possess nor demand the breadth or depth of common sympathy or commitment of the state. But where the normative framework does stand alone in this way, so the argument runs, what we have is merely a kind of constitutionalism-lite; or, to put it another way, a "constitution without constitutionalism"¹⁷ - a regulatory superstructure which neither feeds nor is fed by a strong socio-cultural base.

In the second place, the sceptic might concede the postnational relevance of constitutionalism if registered or conceived of as a constraint upon government authority rather than as the prior establishment of that authority. The typical motivation here, as befits the sceptical temper, is one of suspicion of postnational authority. Constitutionalism is understood negatively. It embraces the limiting dimension of 'constituted' authority - the legal reduction and restriction of governmental power.¹⁸ This involves an actual or projected set of measures intended to limit or monitor the flow of power towards a new postnational entity and so away from the state, which is thereby preserved as the proper source and site of constitutional law conceived of affirmatively - as the basic capacity to govern. Again the EU Constitutional Treaty provides a case in point. When in the heat of debate avowedly Eurosceptical sources such as *The Economist* magazine were won over to the idea of a European Union Constitution, it was because

¹⁶ See e.g., M. Kumm, "Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called" (2006) 54 *American Journal of Comparative Law* 505-530.

¹⁷ J. Weiler *The Constitution of Europe* (Cambridge: CUP, 1999) 298.

¹⁸ See Section 2 above.

such a document, by dint of new or enhanced mechanisms such as a Charter of Rights and a competence catalogue, was seen as way of conditioning and reining in rather than embedding and augmenting supranational capacity.¹⁹

What these two cases reveal, on closer inspection, is a link between the diverse roots of the constitutional idea, with its expansive range of descriptive, diagnostic and prescriptive references, and its flexible response to new circumstances. On the one hand, both in descriptive and diagnostic vein, the sense of *a* constitution as a canonical document or set of documents containing a discrete body of positive law - upon which one strand of the sceptical concession to postnational constitutional law depends - has long existed alongside the sense of *the* constitution as referring to the deep and interlayered structure of established power within the polity. As far back as the classical Roman state, the idea of constitution has incorporated this double sense,²⁰ ambiguously poised between reference to the process or immediate product of legal ‘constituting’, and reference to what we recognize as firmly established – as already ‘constituted’.²¹ The thin positive and the thick non-positive versions of constitutionalism today track this etymological duality.

On the other hand, and in both descriptive and prescriptive vein, there is just as venerable and just as resilient a distinction between constitutional law as *gubernaculum* and constitutional law as *jurisdictio*, with the one referring to the establishment of governmental capacity and the other to the forms - actual or ideal - of its restraint.²² The invocation of constitutionalism as a bridle upon new forms of postnational power refers back, once again, to one just one half of a continuing distinction.

If we now turn to the ways in which postnational public law is acknowledged in minor key from a sceptical perspective, a similar pattern emerges. On the one hand, markedly more so than in transnational constitutionalism, which, considered *as* law, tends to remain merely aspirational,

¹⁹ See *The Economist*, December 15th, 2001.

²⁰ In imperial times the decrees of the emperor, which collectively defined the extent of state action, were known as *constitutiones*; see G. Maddox, “A Note on the Meaning of ‘Constitution’” (1982) 76 *American Political Science Review* 805-809; D. Grimm “Types of Constitution” in M. Rosenfeld and A. Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP, 2012) 98-132.

²¹ According to one author, the idea of constitution, by embracing such contrasting emphases, “seems to cut across the essentialist-nonessentialist distinction” D. Lutz *Principles of Constitutional Design* (Cambridge: CUP, 2006) 188.

²² See e.g., C. H. McIlwain *Constitutionalism Ancient and Modern* (Ithaca: Cornell University Press, 1958, 2nd ed.).

or implicit, or limited to sub-legal regulatory contexts, there are many solid traces of publicness in transnational legal doctrine. In any external account, therefore, these will be unavoidably and so uncontroversial described as such. For example, a number of key concepts in both EU law and the law of the European Convention of Human Rights (ECHR) - the continent's two most prominent transnational legal orders - invoke the idea of publicness. These include public morality, public policy, public health, public security, public safety and public order.²³ In the one case - EU law - the relevant terms qualify the unconstrained transnational circulation of the factors of production, while in the other - the ECHR - they qualify the transnational protection of rights and freedoms. And while the superficial thrust of these and similar concepts may be *against* transnationalism, with the 'public' point of reference for the interest or good in question often being the public of a specific state, or at least the public located in the territory of a specific state, that by no means tell us the whole story. Sometimes the interest or good of a wider transnational public constituency is clearly in contemplation,²⁴ and in all cases the concepts themselves are defined by reference to broad state-indifferent and -transcendent standards, subject to the authoritative interpretation and enforcement of the transnationally located and empowered judicial and administrative organs of the EU and ECHR.

Let us now switch focus from first-order *doctrine* to the second-order *disciplinary* classification of legal material²⁵ - a category which, in its double connotation of the 'passive' collation of doctrinal materials and their 'active' arrangement, straddles the distinction between detached and engaged, and between descriptive, diagnostic and prescriptive. Here we can report, first, a further uncontroversial, if modest, core of common understanding of public law's transnational resonance. Today, the idea of a state-internal discipline of 'public law' as concerned to demarcate those areas in which the state and its emanations and analogues are in direct relation with individuals and other legal persons, or in which different organs or agencies of the state are in relationship with one another, remains common ground as an organizing and educating frame – as one of the essential maps through which we contemplate and comprehend

²³ See variously, Treaty on the Functioning of the European Union, Arts 36, 45 and, 52; European Convention on Human Rights, Arts 8-11.

²⁴ For example, as regards restrictions on free movement between states within the EU on grounds of public health, given the form taken by the threat in question those controls designed to prevent the spread of diseases with epidemic potential are clearly aimed at safeguarding the European 'public' in general and not just particular national or territorial publics; see Directive 2004/38/EC (Citizens' free movement rights), Art 29.

²⁵ I develop this distinction at length in "On the Necessarily Public Quality of Law" in C. Michelon *et al* (eds) n2 above, 9-34.

the legal world. Equally, no-one would deny the continuing cartographical relevance of the disciplinary domain of ‘*public* international law’. It remains the key classificatory term to distinguish the corpus of law that subsists between states from the corpus of choice-of-law rules concerning the appropriately applicable internal state law in situations where there is more than one candidate, which latter goes under the label of ‘*private* international law’.²⁶

For sceptics, of course, the publicness of public international law has been, and remains, a derived or delegated characteristic, and so, on account of its lack of autonomy, of only marginal contribution to the fund of postnational law. It is branch of law qualifying as public precisely because authorized between the primary locations of ‘publicness’, namely the states. However, beyond this uncontroversial core meaning, the disciplinary label that the sceptics are prepared to endorse has long been the subject of a more expansive reading. Here, at the cutting diagnostic and prescriptive edge of disciplinary classification, the publicness of public international law has always been understood, in the alternative, in state-unbound cosmopolitan terms - as a separately sourced *ius gentium*.²⁷ And even for sceptics, importantly, there are some features of the doctrinal field framed by public international law, such as general principles or *ius cogens*, which it is difficult to make sense of without conceding something to a vision which claims validity and authority other than as the delegated product of state consent.²⁸

We will have more to say about more expansive disciplinary renderings of postnational public law below.²⁹ The immediate point to pursue is that our sense of publicness of law, at least as much as that of constitutionalism, is widely ramified, with diverse historical roots and resonances across pre-modern and modern ages. Although perennially concerned with the framing either of the self-recognizing subjects or of the resilient contexts of collective action and interaction that reach beyond the confines of family or other special affinity, the idea of the public in law has had many and diverse particular orientations.³⁰ Sometimes our sense of legal

²⁶ On the origins of the distinction between public and private international law, see H. Muir Watt “Private International Law Beyond the Schism” (2011) 2 *Transnational Legal Theory* 347-428.

²⁷ See e.g., J. Waldron, “Foreign Law and the Modern *Ius Gentium*” (2005) 119 *Harvard Law Review* 129-147; N. Walker, “Out of Place and Out of Time: Law’s Fading Co-ordinates” (2010) 14 *Edinburgh Law Review* 13-46.

²⁸ See e.g. E. de Wet, “The International Constitutional Order” (2006) 55 *International and Comparative Law Quarterly* 51-76.

²⁹ See Section 4(a).

³⁰ Raymond Geuss captures this diversity well: “there is no such thing as *the* public/private distinction, or, at any rate, it is a deep mistake to think that there is a single substantive distinction here that can be made to do any real philosophical or political work.” *Public Goods, Private Goods* (2003) (106). Instead, he claims, it is a division that

publicness concerns the openness or expansiveness of modes of access to or control over property, space or information; sometimes it concerns the realm of matters that concern everyone as opposed to purely personal or group concerns (i.e. *res publicae*); and sometimes the emphasis is on the limits rather than the extent of the public domain - on the 'liberal' demarcation of a protected area of private activity and autonomous choice.³¹ Depending on the context and the background, doctrinal questions may vary, the public/private boundary may be drawn at a different diagnostic point, and the prescriptive consequences of the classificatory choice may diverge.

Publicness in law, then, even from a sceptical vantage point, is perhaps more accurately described as a disseminating rather than as a disappearing category. And in that dissemination, and especially as it crosses the 'species barrier' between state and non-state, we see evidence, at the margins, of legal doctrine and thought evolving in a reflexive manner. Legal concepts of publicness, whether first-order doctrinal practice or second-order disciplinary framing, do not come to be applied to non-state contexts randomly, but rather through an iterative and progressive process of conscious adaptation, or tacit affirmation of resemblance, to the statist heritage. Even for those most sceptical of transnational legal publicness, therefore, the propensity for non-robust strains of legal publicness to pass from state to transnational must be recognized as an inevitable feature of the evolution of law's discursive register in an age of the development of new transnational circuits of economic and cultural power.

4. Selective Scepticism

So far, in emphasizing both the underlying statist bias of constitutionalism and public law and the undeniability of a postnational supplement, we have concentrated on what our two key notions have in common. In the present section, as we come to consider more discriminating forms of scepticism, the focus will switch to the ways in which they differ.

(a) Transnational constitutional scepticism

has grown over pre-modern and modern times, bringing together "[d]isparate components – conceptual fragments, theories, folk reactions, crude distinctions that are useful in highly specific practical contexts, tacit value assumptions - from different sources and belonging to different spheres". (10)

³¹*Ibid* chs 2-4.

Let us turn, first, to the transnational constitutional sceptics. Unlike the double sceptics, they believe in a robust conception of public law beyond the state, while remaining sceptical about transnational constitutionalism. This position is perhaps most closely associated with the work of the Global Administrative Law project,³² but includes other similar transnational visions of public law.³³ The focus is on the proliferating regimes of transnational regulation that exercise authority of the kind traditionally associated with the public authority of the state, but where the link with the original authority of the state has been radically attenuated or lost. These new regimes range widely in form and substance, including the globally extended administrative and regulatory activities of UN bodies such as the World Health Organization and the Financial Action Task Force; informal transnational financial networks such as the Basle Committee of heads of central banks; bottom-up co-ordinated administration between national regulators with overlapping objectives in matters such as nuclear safety and biodiversity conservation; hybrid public/private transnational representative bodies such as the Internet Corporation for Assigned Names and Numbers; and purely privately initiated but broadly publicly-endorsed bodies such as the International Standardisation Organization, concerned with product harmonization, or international sport's World Anti-Doping Agency.³⁴

In the development of this orientation we observe the drawing of a key distinction - one which, at we shall see, implicitly informs much position-taking in the postnational debate. For in the perspective of Global Administrative Law, the emphasis tends to be on 'throughput' or process, and 'output' or substantive outcomes, over 'input' and pedigree. On the one hand, this kind of approach doubts the prospects of the constitutional form being reproduced at the transnational level - at least the deep form associated with a "foundational constitutionalism"³⁵ grounded in the constitutive pact of the self-identifying people. On the other hand, continuity is claimed with the state public law tradition in terms of basic ideals and operating system. According to one prominent scholar of Global Administrative Law, for example, the manifold sites of transnational administrative justice operating in the absence of - or attenuated from - state constitutional roots, should be framed and guided by general principles of legality,

³² The literature is huge. For the formative text, see B. Kingsbury, R. B. Stewart and N. Krisch "The Emergence of Global Administrative Law" (2005) 68 *Law and Contemporary Problems* 15.

³³ See e.g. Von Bogdandy *et al* n1 above; D. Dyzenhaus (ed) *The Unity of Public Law* (Oxford: Hart, 2004).

³⁴ See Kingsbury *et al*, n32 above.

³⁵ See N. Krisch *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP, 2010).

rationality and proportionality, together with respect for the Rule of Law and basic protection of human rights.³⁶ Over time, it is claimed, these normative ideals, all of which are concerned, not with the original pedigree or the generation of political power, but with the tasks of “channeling, managing, shaping and constraining political power”³⁷ during or ‘after the fact’ of its emergence in the countless crevices of transnational authority, tend to circulate more widely and more readily. Gradually, “as the layers of common normative practice thicken, they come to be argued for and adopted through a mixture of comparative study and a sense that they are (or are becoming) obligatory.”³⁸

The accent, therefore, is on how newly ‘publicized’ forms of authority can compensate for the kind of ordinary constituent power that we associate with the state constitutional tradition and which is difficult if not impossible to replicate in the postnational context. On this reading, the public quality of legal authority is defined first and foremost in contradistinction to a purely private conception, where only the personal or narrow sectional interests of particular individual or populations count and where law is merely instrumental to these interests. Instead, the affirmation of the ‘public’ quality of law involves the insistence that the collective interest of “the whole society”³⁹ somehow be served. That collective interest may be identified and acted upon by reference to general criteria of ‘good’ governance, whose overall objectivity and situational appropriateness is guaranteed by a combination of strong process standards of transparency, reason-giving and accountability and a complex dynamic of social learning and reinforcement and mutual responsabilization across the myriad sites of transnational regulation.

It is worth stressing, however, that this kind of approach engages only part of our understanding of law’s ‘public’ quality. As was mentioned earlier, ‘publicness’ registers at two levels in our imagination of modern law. It applies both to the particular collective ‘public’ as the source or reference point of law, and to the domain of ‘public’ matters and interests which are to be treated as matters of general concern through law. The first sense of public is particular and nominal, while the second is general and adjectival. And it is only the second sense that tends to

³⁶ See Kingsbury, “The Concept of ‘Law’ in Global Administrative Law” n1 above; “International Law as Inter-Public Law” n1 above.

³⁷ Kingsbury, ‘The Concept of Law’ n1 above, 32.

³⁸ *Ibid* 30.

³⁹ Waldron n1 above, 39.

be emphasized by the transnational constitutional sceptics.⁴⁰ They do so armed with the double conviction that a general political ethic of ‘public’ reason and concern can seek to fill the absence of a constitutive ‘public’ - can simulate the kind of commitment to individual-respecting pursuit of the common good that any such voluntary collective would be bound to endorse - and that, in any case, there is little or no scope in the transnational domain to remedy that absence.

(b) Transnational public law scepticism

Conversely, those who are sceptics of transnational public law but affirmers of transnational constitutionalism tend to be more interested in new origins and ‘input’ – in the distinctiveness of the motivating source - than in the form of the throughput or the content of the output. The focus here is on the *familiarly* ‘constitutive’ nature of the regulation of increasingly differentiated social fields, themselves *unfamiliar* in terms of and irreducible to the general public/private divide. Gunther Teubner, a leading exponent of the theory of ‘societal constitutionalism’, has developed one of the most refined - not to say rarified - versions of this approach.⁴¹

For all his use of constitutional language, Teubner is at pains to distinguish his approach from the conventional wisdom of foundational constitutionalism. The idea of the constitution as a documentary initiative through which pre-political collective potential, or constituent power, is transformed into full-blown legal and political community is one he finds misleading and underspecified even at the level of the state, and all the more inadequate in the highly fragmented transnational sphere where the “general ubiquity”⁴² of state action knows no parallel. The collective subjects of transnational regimes are more specialist and their remit is more restricted. The idea of a cosmopolitan ‘people’ or ‘public’ forming the basis of an encompassing normatively-ordered political society, therefore, holds little relevance - even as founding myth still less as an empirical substrate. Not only are the ‘public policy’ sectors familiar from the integrated state polity divided into so many transnational regimes, but different societal sub-systems which extend beyond the traditional purview of public policy, for example in the organization of the economy, or of education or sport, or of the arts or the sciences, operate

⁴⁰ Krisch (n35 above) is a notable exception. His critique of state-centred foundational constitutionalism does not prevent him from promoting an idea of ‘public autonomy’, which, significantly influenced by Habermas, is as concerned with the constitutive conditions of publicness in postnational sectors as it is with the means by which and the standards according to which it is sustained ((89-105)

⁴¹ See in particular, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: OUP, 2012).

⁴² *Ibid.* 132

according to codes which employ the normative incentives of law in variable and or more or less central ways.⁴³

Yet Teubner would maintain that the idea of transnational constitutionalism, quite differently conceived from the statist original, nevertheless remains important as a way of accounting for a highly differentiated societal formation and understanding the legitimacy requirements of the new global configuration. Drawing on the insights of systems theory, rather than discard the idea of constituent power, he reinterprets it as “*a communicative potential, a type of social energy*”⁴⁴ - a way of characterizing the collective “‘constitutional subject’ [as] not simply a semantic artifact ... but rather a pulsating process at the interface of consciousness and communication”.⁴⁵ Teubner, in short, wants to treat societal constitutionalism as a fluid form of sectoral *self*-constitution. And in so doing he distinguishes between the widely replicated and increasingly intensified function of sectoral differentiation and specialization, which he sees as a key feature of the general dynamic of transnational society, and the particular self-generating process followed and form taken, which varies significantly not only from the original statist paradigm but also between different global sub-sectors. The many “capillary constitutions”⁴⁶ of transnational society, to which more or less formal legal documents - from framework treaties to industry codes - contribute to a variable extent, supply in their very different contexts both a symbology of collective self-understanding and self-projection and an operating code or social technology for the framing of collective action.

In a key set of insights, Teubner argues that in their discrete specialization and functional concentration the sub-spheres of transnational society escape our received modern distinction between a generically public and a generically private sphere, and so cannot be assessed and evaluated in accordance with conventional standards of a holistic public interest and public good. Rather, we should understand and judge their constitutional adequacy in terms of their success in achieving a balance between the autonomy and self-limitation of different functional sectors *inter se* in a highly fragmented global order – with autonomy as a deep freedom and equality-

⁴³ *Ibid.* Ch.4

⁴⁴ *Ibid.* 62.

⁴⁵ *Ibid.* 63.

⁴⁶ *Ibid.* 83.

respecting modern ideal retained and inherited from the statist tradition.⁴⁷ On this view, the key ‘constitutive’ puzzle faced by the stakeholders of relatively autonomous global subsectors and by those who occupy their various external environments, namely how to balance the freedom of those most centrally concerned with and affected by a practice to govern that practice against the need to limit its expansion into other spheres and to curb its tendency to encroach on the autonomy of others sectors of social practice and their key stakeholders, can nevertheless still be rendered in constitutionally recognizable terms. For, arguably, is the moral equivalent under a globally differentiated order of the constitutive design puzzle of the high modern order; namely, how to safeguard the ‘internal sovereignty’ of ‘the people’ while ensuring that their ‘external sovereignty’ did not compromise the internal sovereignty of others.⁴⁸

This approach, many of its insights endorsed by those who do not share Teubner’s attachment to systems theory,⁴⁹ provides the reverse image to transnational constitutional scepticism. Just as law’s ‘publicness’, through historical and continuing usage, is a fertile enough signifier to include input as well as throughput and output dimensions, so, conversely, constitutional law, as we have seen, is a sufficiently versatile category to include not just the constitution but also the regulation and restraint of political authority; to repeat, not just the exercise of constituent power and its transformation into *gubernaculum*, but also *jurisdictio*. So while the point of departure may be different, each term ultimately extends across the same territory, and, indeed, has done so - with different emphases at different times and places - throughout the modern age in which it has served as a state-centred discourse.⁵⁰ Yet just as constitution-sceptic projects such as Global Administrative Law tend to engage only that part of law’s public quality which does not deal with ‘constitutive’ matters,⁵¹ so, conversely, public-law-

⁴⁷ See e.g. G. Teubner, “Constitutionalising Polycontextuality” (2011) 20 *Social and Legal Studies* 209-234.

⁴⁸ *Ibid.* See also Krisch, n35 above, espousing very similar views about the need to “balance inclusiveness and particularity” (101) in autonomous sectors, while eschewing the language of constitutionalism (see also n40 above).

⁴⁹ See Krisch n35 above; see also the work of Charles Sabel and his collaborators, e.g. C.F. Sabel and J. Zeitlin “The New Architecture of Experimentalist Governance in the EU” (2008) 14 *European Law Journal*, 271-327; from a more culturally informed conception of difference, see J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: CUP, 1995); and from a more international law-focused perspective, see A. Peters “Membership in the Global Constitutional Community” in J. Klabbers, A. Peters and G. Ulfstein (eds) *The Constitutionalization of International Law* (Oxford: OUP, 2009) 153-263, 201-3

⁵⁰ On these shifts of emphasis, see N. Walker “Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship” in (2010) 39(3) *Rechtsfilosofie & rechtstheorie* 206-233, 206-13.

⁵¹ But see Krisch ns 35 and 40 above. We should not, however, be surprised by such exceptions. As becomes more generally evident in our discussion of double affirmation in Section 5 below, the deep and resilient distinction between particular and general, input and throughput/output, is only loosely reflected in the discriminating choice of

sceptic projects such as societal or sectoral constitutionalism engage only that dimension of constitutionalism that *does* deal with such matters. In other words, whereas transnational constitutional scepticism eschews the nominal and particular in favour of the adjectival and the general, transnational public law scepticism tends to do precisely the opposite. It concentrates on the many particulars of a fragmented constitutional landscape, as well as the relations between these particulars, at the expense of any conception of internal standards which are general across domains.

An only selective *scepticism*, therefore, as in the two above cases, is, equally, an only selective *affirmation* of the transferability of a state-centred legal rubric to the transnational domain. Selectivity, of course, does not imply arbitrariness. Each approach has its reasoned elaboration. Transnational constitutional scepticism is born of a sense that the prospects of a postnational constituent power are remote, while it is possible to replicate other parts of the public law portfolio. Transnational public law scepticism is born of a sense that generic publicness lacks traction in the fragmented transnational world, yet that it remain possible, *mutatits mutandis*, to identify the formative influences and take seriously the constitutive credentials of these fragments. But, of course, neither side can be correct in their selective critique without undermining the other; and by dint of their disagreement, they threaten to return us to the double sceptical position. Are there any other alternative which allow the affirmative dimension of one or both positions to be salvaged?

5. Double affirmation

If we turn, finally, to the double affirmers of transnational constitutionalism and transnational public law, they seek to provide a positive answer to our last question. Again we can identify two distinct positions. Unlike the selective sceptics, these positions do not start from the premise that the promise of the state-centred approach can only be *partially* redeemed at the transnational level. Rather, while they continue to focus on the mobility of one aspect of the statist legacy,

the language of constitutionalism or publicness. As noted in Section 3(b) of the text, the terms are just too broad and varied in their historical signification to become narrowly compartmentalized and consistently applied in contemporary postnational use. See also n73 below.

they view this as the key aspect, and, therefore, as capable of securing a full(er) reiteration of the virtues of the state-centred approach transnationally. Yet these approaches remain inherently one-sided. Just as between the transnational public law sceptics and the transnational constitutional sceptics, in their development and defence we can observe a continuing tension between an input or pedigree conception of authority and a throughput or output conception.

(a) Postnational constituent power

In the first place, there are those who have argued for the applicability of a version of constitutionalism bearing a significant family resemblance to state-based foundational constitutionalism to post-state entities such as the EU. The idea here – one I have endorsed⁵² - is that even in the “post-constituent”⁵³ remoteness of a mature transnational regulation system which first emerged as a merely intergovernmental compact, it is possible, through a documentary constitutional settlement presented as a self-standing political pact, to homologate or nurture a sense of a meta-democratically validated transnational political community with a wide-ranging political agenda and a distinct sense of the public good. On this view, the vital coordinates of a robustly autonomous legal supranationalism - namely transnational demos, transnational public sphere and transnational public law – need not be contradicted by or precluded by an extant sense of political community and framework of constitutional and public law at the national level.⁵⁴

Of course, such a view remains vulnerable to failure of initiative – as in the EU case, or, even if the initiative were to be successful, to the possible failure of its long-term post-initiative gambit to reinforce the socio-political contours of political community that it presupposes.⁵⁵ It also remains vulnerable, on a broader front, to the charge that this kind of popularly endorsed constitutional initiative is, in any case, quite inappropriate to most contexts of transnational regulation, and that the alternative ‘constitutive’ and self-regulatory foundations of the sectoral

⁵² See e.g. N. Walker, “The European Union’s Unresolved Constitution” in Rosenfeld and Sajo (eds) n20 above, 1185-1208.

⁵³ See N. Walker, “Post-constituent Constitutionalism? The Case of the EU” in Loughlin and Walker (eds) *The Paradox of Constitutionalism* (Oxford: OUP, 2007) 247-68.

⁵⁴ Habermas is a key reference point here. See e.g. his “Why Europe Needs a Constitution” (2001) 11 *New Left Review* 5; “The Crisis of the European Union in the Light of a Constitutionalization of International Law” (2012) 23 *European Journal of International Law* 335-48.

⁵⁵ See e.g., A Moravcsik, “What Can we Learn from the Collapse of the European Constitutional Project?” (2006) 47 *Politische Vierteljahresschrift* 2.

‘post--public’ regimes cited by the champions of societal constitutionalism in these other and increasingly typical contexts of transnational regulation provide at best a poor substitute in terms of ‘democratic’ pedigree.⁵⁶

One riposte to this criticism, recalling the general charge of undue pessimism leveled at the double sceptics, is that we should not underestimate the potential for the democratic regeneration of international organizations, even if this does not take the Big ‘C’ Constitutional form attempted in the EU. In recent year, there has, for instance, been a revival in ideas of transnational parliamentarianism, building on existing examples in institutions such as the Assembly of the Council of Europe, the MERCOSUR Parliament, the Pan-African Parliament of the African Union, and the ASEAN Inter-Parliamentary Assembly.⁵⁷ Yet, with the exception of certain radical but only marginally supported schemes for a global popular assembly,⁵⁸ and of others which seek to build on a strongly international communitarian reading of the post-war founding of the United Nations,⁵⁹ such models tend to renounce or marginalize any ambition to found such democracy in a constitutive transnational ‘people’. Rather, the emphasis tends to be on how democracy can be reconfigured in ways which stress more or less direct forms of representation, and upon proxy values such as transparency and deliberation.⁶⁰

What is most revealing about this strain of thinking, and the reservations it incorporates or provokes, is that transnational foundational constitutionalism is challenged not just because of its false or misplaced empirical credentials. What we find is not only a questioning of the plausibility of a transnational popular sovereignty, or a fear that, to the extent that it is plausible, this would result in an unwelcome hollowing out of national democracy – attitudes which we find variably distributed amongst both the double skeptics and the transnational constitutional sceptics. In addition, though sometimes obscured by these more prominent objections, even many of those who appear relatively optimistic about transnational democratic potential and well-disposed towards its fulfillment, nevertheless seem to be anxious about asking for too much

⁵⁶ See e.g., D. Grimm “The Achievement of Constitutionalism and its Prospects in a Changed World” in P. Dobner and M. Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford: OUP, 2010) 3-22.

⁵⁷ See e.g., A Von Bogdandy, “The European Lesson for International Democracy: The Significance of Articles 9-12 EU Treaty for International Organizations” (2012) 23 *European Journal of International Law* 315-334.

⁵⁸ See e.g., R. Falk and A. Strauss, “On The Creation of a Global People’s Assembly: Legitimacy and the Power of Popular Sovereignty” (2000) 36 *Stanford Journal of International Law* 1.

⁵⁹ See e.g., B. Fassbender ‘The United Nations Charter as the Constitution of the International Community’, (1998) 36 *Columbia Journal of International Law*, 529.

⁶⁰ See e.g. Von Bogdandy n57 above, 326 *et seq*

of a good thing. Rather than bemoan or apologize for the cultural limits to transnational democratic growth, they tend to emphasize the importance of other forces – expertise, impartiality, policy long-sightedness - and values – individual and minority rights, associational autonomy – as supplementary and even moderating influences in the transnational constitutional domain.⁶¹ What this suggests, importantly, is that inasmuch as the double affirmation of the transnational relevance of constitutionalism and public law is claimed to rest predominantly upon the constitutive side of the equation – on the authorizing legitimacy and energizing effect of new sites of constituent power and their attendant public spheres – there is a standing reluctance to treat this as an unalloyed good.

(b) Cosmopolitan public law

An alternative doubly affirmative vision is of a continuous and “cosmopolitan”⁶² constitutionalism and public law. For Mattias Kumm – a thoughtful and influential exponent of this view - the modernist past, understood *sensu largo*, remains the key to the future. The philosophical core and basic ‘political imaginary’⁶³ of constitutionalism and public law - terms which, tellingly, he treats as entirely compatible, indeed as virtually interchangeable, in the postnational domain⁶⁴ - has not altered since the advent of modern constitutionalism through the medium of the maturing state system of late 18th century Europe and America. Crucially, what is constitutionally basic for him is not a matter of institutional architecture, still less of the conception of pedigree that informs that architecture, but of the underlying normative principles and the imagining of society that nurtures these normative principles. These normative principles flow from the basic modernist constructivist ambition with which we are already familiar from the perspective of the state-centred double sceptics.⁶⁵ This involves a vision, distinct from the coercive, personal or metaphysically valorized power systems of the mediaeval ages, of persons self-conceived as free and equal individuals acting collectively to deliberate, develop and

⁶¹ *Ibid.* See also G. De Burca, “Developing Democracy Beyond the State” (2008) 46 *Columbia Journal of Transnational Law* 221

⁶² See e.g. M. Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State” in J. L. Dunoff and J.P. Trachtman (eds) *Ruling the World?* (Cambridge: CUP, 2009) 258-325. For a similar cosmopolitan perspective, see A. Stone Sweet, “A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe” (2012) 1 *Global Constitutionalism* 53-90.

⁶³ See C. Taylor *Modern Social Imaginaries* (Durham: Duke University Press, 2003).

⁶⁴ See M. Kumm “How Does European Law Fit into the World of Public Law?” in J. Neyer and A. Wiener (eds) *Political Theory of the European Union* (Oxford: OUP, 2011) 111-138

⁶⁵ Section 3(b) above.

implement their own conception of the common interest or public good. From these origins, according to Kumm, we can derive a set of universal constitutional and public law commitments to principles of legality, subsidiarity, adequate participation and accountability, public reason and rights-protection.⁶⁶

Against this larger canvas, it is argued, the detail of the traditional state-centred public law system assumes a more modest significance than is often appreciated within constitutional thought. It is exposed as but one institutional blueprint for giving effect to the underlying principles, rather than an exclusive, dominant or even optimal template for constitutional government. Instead, under conditions of intensifying globalization the basically cosmopolitan texture of *any* constitutionalism committed to universal principles becomes more apparent, and the state is now but one constitutional player on a wider stage. As free and equal persons operating under certain constraints of interest, information, geography and affinity, we continue to respect particular contexts of decision-making and public interest formation, and the principles of subsidiarity, participation and accountability recognize this. However, as free and equal persons we are also categorically committed to acknowledgment of the freedom and equality of all others, and so to the universalisability of our political condition. In this way, we can reconcile our attachment to particular polities and sites of authority with a belief in an overarching normative framework which informs the terms of our various particular manifestations of public authority. In the final analysis, the global division of the world into particular polities remains inevitable, but the particular form that such a division takes is not so; rather, it is contingent upon shifts in the underlying circuits of social and economic power. What is more, the universalist pole of the commitment implies that the particular pedigree, including the immediate democratic deficiencies of that pedigree – is less important than commitment to the very ideals and principles which both underpin democratic pedigree and would provide its ‘natural’ complement.

For all its suggestiveness, the Kumm thesis is open to a range of criticisms that mirrors the challenge to the idea of postnational constituent power. On the one hand, there is an empirical critique. Even if we are attracted to its vision, is the cosmopolitan approach not vulnerable to the charge of utopianism, or of complacency? If understood primarily in aspirational terms, is there

⁶⁶ Kumm, n62 above.

not a chasm between the cosmopolitan principles and the actual state of global politics and economics, a pattern marked by the combination of fugitive power – of collectively unauthorized and unaccountable concentrations of transnational interests, and an increasingly obtuse and incoherent network of legal authority? Against this, Kumm counters that cosmopolitanism, far from describing a distant ideal, is actually the ‘best’ interpretation of much historical and existing constitutional practice both in and beyond the state. Yet while he is adept at showing how certain legal sites do demonstrate a sophisticated appreciation of the demands of cosmopolitan public reason, it is notable that these tend to be judicial sites, and tend to be situated in the European stronghold of mature postnational governance.⁶⁷ There remains a danger of complacency in this assessment, a failure to explain how public reason can systematically prevail over private interest in contexts where the conditions of public will formation, and the epistemic and authoritative weight associated with such will formation, are often conspicuous by their remoteness or absence.

On the other hand, there is a normative critique, which connects to and reinforces elements of the empirical critique. In theory as well as in practice, does the universalism and singularity of Kumm’s vision, - the idea that the general principles of constitutionalism and public law are applicable to all circumstances and can always be interwoven to form one cloth -not threaten to subordinate the nominal and particular dimensions of constitutionalism and publicness unduly to the adjectival and general? Certainly, the emphasis on subsidiarity and participation shows that Kumm is far from blind to the need to recognize the authority of collective voice. But does cosmopolitanism’s uniform algebra - its insistence on situating the voice of any particular public within a universal formula of good global governance - not unduly ‘cabin’ and curtail the idea of constituent power? In a nutshell, does his confidence in cosmopolitanism’s objective ability to discern and balance the principles of good governance not risk the very “triumphalism”⁶⁸ which he himself so rightly diagnoses as the equally unpalatable polar alternative to the double sceptic’s constitutional nostalgia. Is this, in the final analysis, not just one more hegemonic move on behalf of a holistic constitutional vision, one that illegitimately downplays democratic pedigree?

⁶⁷ Kumm, ns 62 and 64 above.

⁶⁸ Kumm n14 above.

6. Conclusion

The retention of both constitutionalism and public law as central terms in the global legal prospectus speaks both to the promise and the challenge, the hopes and the fears, associated with a certain way of thinking about the world of law and politics. Beyond the state-reductivism of double scepticism, what the various conceptions of the transnational considered above suggest, and what is made most explicit in Kumm's cosmopolitanism, is that in considering the continuing relevance of ideas of constitutionalism and public law we should draw a distinction between the architecture of a state-centred order and the deeper legal and political imaginary of the modern age. The state-centred architecture has certainly supplied the most developed articulation of that underlying imaginary, but just because the former may be eroding does not mean the latter should not or cannot be sustained. Continued investment in the 'c' word and the 'p' word in the postnational context reflects that belief. Yet because both terms, as we have seen,⁶⁹ operate across various levels of abstraction and can refer as much to concrete design as to underlying orientation, their retention also starkly poses the question - and exposes the difficulties - of finding and constructing a new and suitable architecture for a postnational modernity.

Yet it is important to insist that the onus of responding to a shifting global power mosaic does not rest only with the postnational sympathizers. Even for the double sceptics, as we have seen, our key terms cannot but retain some currency in the postnational domain, whether as doctrinal innovation or descriptors of informal normativity, or as resources of disciplinary construction - and so of legal imagination more generally.⁷⁰ What this underlines is that the resilience of our key concepts is not just about certain future possibilities to which only some subscribe, but about the insistent weight of our legacy and the inescapability of present circumstances, which all are bound to recognize. The legal world cannot be rethought and remade *ab initio* and holistically, but only with the doctrinal and conceptual resources we already have at our disposal and only through first addressing the particular circumstances in which we are already and inevitably implicated. Even for those who are pessimistic about their adequacy to any long-term vision of a postnational world, therefore, extant notions of constitutionalism and

⁶⁹ See Sections 1 and 3(b) above.

⁷⁰ See Section 3(b) above.

public law remain vital, and so must be treated as at least minimally pliant resource in the short-term - in the unavoidable matter of reflecting upon and responding incrementally to discrete shifts in our jurisgenerative circumstances. What is more, as there *never* can be a legal *tabula rasa* - as the contemplation of legal change always does and always will start with the here and now, and so with what is already in place - short-term response and long-term vision, in any world-view, are ultimately inextricable, necessarily mutually informative. This does not mean, of course, that the double sceptics are bound to become subscribers to robust postnational conceptions of constitutionalism or public law by default. But it does mean that they cannot avoid the long-term questions which lead some to offer such general postnational conceptions, or escape the fact that short-term and particular responses and solutions already and inevitably implicate the long-term and the general.

Where, beyond the deep reservations of double scepticism, the debate over the future of constitutionalism and public law *does* become fully engaged, it tends to reduce to a tension between pedigree and process or content-centred definitions of law's publicness. This we can already observe negatively, in the nostalgia of the double sceptics with their strong emphasis on pedigree. But it is also vividly present in the competing visions of the transnational public law sceptics and the transnational constitutionalists sceptics, as well as in the tensions between different forms of double affirmation of transnational constitutionalism and public law.

In conclusion, we can offer two thoughts about this stubborn fault-line - reflections which may themselves on first impression seem to stand in uneasy juxtaposition. On the one hand, the tension between input and output, subjective and objective, is one that is bound to recur and to renew itself in different postnational contexts. On the other hand, the recurrence of that tension and the divisions it provokes should not lead us to think that we are asking the wrong questions. In particular, it should not be taken as proof that the discourses of constitutionalism and public law are, after all, inappropriate to the postnational domain. Quite the opposite. Far from displaying the exhaustion of a paradigm, the tension in fact does no more than reflect the deep and resilient ambivalence of the modernist heritage of individual autonomy and equality as concerned simultaneously to valorize the collective expression of that autonomy and equality and to protect its individual expression from collective encroachment.⁷¹ This, as is evident from the

⁷¹ See Walker, n50 above, 223-233.

formulations of the double sceptics, has been as much a defining antinomy of the state-centred age and its legal expression as it is of our emergent postnational horizon. Long-standing opposition in the state context between collective and individual, voice and rights, supremacy of legislation and finality of adjudication, constituent power and constituted authority, and between the two resonances of constitutionalism - particular and universal,⁷² speak to precisely the same foregrounding of two orientations which provide necessary mutual support and supplementation while also being locked in mutual contestation.⁷³ Each pole is both condition of and corrective to the other. What supplies vital balance also - and inexorably - breeds conflictual interplay. Just as in the state context, the contribution of the postnational iteration of constitutionalism and public law to the long course of modernity depends upon a continued appreciation that this is a relationship which, however altered its background circumstances, can and should know no final resolution.⁷⁴

⁷² *Ibid* 206-223.

⁷³ Indeed, to muddy the terminological waters still further, in some times and places the same key tension does not name publicness as such, but has instead been presented as one of constitutionalism versus democracy. On this view, far from emphasising foundations and *gubernaculum*, constitutionalism is understood solely as *jurisdictio*. See Walker n50 above 206-213, 223-233. This reinforces the argument about the linguistic openness of our key terms; see n56 above.

⁷⁴ See Walker n50 above. And for a similar approach, see G. Palombella, "The Rule of Law and its Core" in G. Palombella and N. Walker (eds) *Relocating the Rule of Law* (Oxford: Hart, 2009) 17-42. My own approach also owes something to Habermas's analysis of the symbiosis of public and private autonomy as the key to the justification of the political settlement of modernity, but differs in emphasising the "incompleteness" of their reconciliation. See e.g., J. Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" (2001) 29 *Political Theory* 766-81. For a more recent development of a Habermasian position that is highly sensitive to the diverse forms of contemporary law, see R. Forst "A Right to Justification: Elements of a Constructivist Theory of Justice" (New York, Columbia University Press, 2011, J. Flynn (trans)). For a critique of my own position from a Habermasian perspective, see S. Rummens, "The Co-originality of Law and Democracy in the Moral Horizon of Modernity" (2010) 39(3) *Rechtsphilosophie & rechtstheorie* 256-266, and for my response, see, N. Walker, "Constitutionalism and the Incompleteness of Democracy; A Reply to Four Critics" (2010) 39(3) *Rechtsphilosophie & rechtstheorie* 276-288.