

Constitution and Jurisdiction in Neal Stephenson's Speculative Fiction

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Abstract

A common feature of Neal Stephenson's speculative fiction is the richly imagined political communities inhabited by his characters. Geographically defined constitutional states are reimagined, often with a focus on associations based on shared social identity or beliefs, as opposed to nation-state citizenship. Stephenson's works offer an imaginative space for exploring possibilities of alternative political communities, and questions of constitution and jurisdiction. Modern territorially sovereign nation-states have presented constitutional scholars with a fixed framework. People sharing physical space constitute a political association stemming from a moment of legal constitution. Thus constituted, the nation-state authorises governmental entities to oversee the populace within the shared geographical space. Stephenson's rich imagination offers constitutional scholarship an imaginary for exploring alternative conceptualisations of constitution and jurisdiction. This article proposes that recovery of medieval conceptualisations of overlapping networked jurisdictions might aid in sensemaking of models of political communities beyond the territorially sovereign nation-state.

Keywords: Constitution; jurisdiction; speculative fiction; legal pluralism; constitutional theory.

1. Introduction

It has been noted for some time that the contemporary territorially sovereign nation-state structure by which we make sense of our geopolitical organisation is coming under increasing stress. Wendy Brown has famously described it as "waning."¹ While acknowledgements of the stresses placed on this conceptual model are widespread, comprehension of the full spectrum of challenges is not. Not least among the issues is that the tools for making sense of our contemporary framework often serve to exclude from comprehension some of the very challenges presented to the current framework of understanding. Challenges to our understanding of sovereign states often originate externally from the contemporary model.

Within western liberal – and particularly Anglo-American – constitutionalism, we are conditioned to expect the state to take on a general structure. Weber's classic definition tells us "that a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory."² In other words, "the state is a relation of men dominating men ... supported by means of legitimate ... violence."³ Alongside the importance of the legitimate monopoly on violence, Weber also highlights that "territory is one of the characteristics of the state."⁴ According to Weber's sociological schema, legitimacy is based on three ideal types: charismatic, traditional and rational (or legal).⁵ In terms of the definition of the state, and the experiences of modern western constitutionalism, legitimacy is perceived due to states being based on legal

¹ Brown, *Walled States, Waning Sovereignty*, referring to the book's title.

² Weber, "Politics as a Vocation," 78 (original emphasis).

³ Weber, "Politics as a Vocation," 78.

⁴ Weber, "Politics as a Vocation," 78.

⁵ Weber, *Economy and Society*, 212–311.



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constitutional structures providing a perception of rational legitimacy.⁶ The domination of the state is secured through law, and the monopoly on law-making processes. State constitutions are the foundations upon which the model rests; this is also the legal and normative order that underpins the territorial claims of states.

This mode of thinking, and the emphasis on the constitution and legality, encourages a legal positivist approach to conceptualising constitutional states. This is exemplified in Kelsen's *Pure Theory of Law*.⁷ The *Grundnorm* as the authorising principle of law achieves a position of unassailable legal supremacy.⁸ According to Kelsen, "norms of a legal order must be created by a specific process."⁹ The norms of a legal order must stem from a presupposed norm, "the basic norm determines the basic fact of law creation and may in this respect be described as the constitution."¹⁰ The constitution as a presupposed norm represents the *Grundnorm* of the state as, "The form of government is merely the method of creating law at the highest level of legal order, namely at the level of the constitution."¹¹ In the contemporary model, the constitution becomes a manifestation of the sovereign power of a territorially bounded nation-state. The People of the nation authorise the state through grant of their sovereignty, and their perception of the legitimacy of the state to hold the monopoly on power, law and violence.¹² The constitution functions to facilitate the state's use of its powers through providing structure to the offices and agencies of the state and providing legal governance of those relationships and the interactions between the People and the state. The constitution "must constitute public authority" and "condition that authority".¹³ Indeed, "establishing and conditioning the exercise of public authority [are] fulfilled in the very act of creating a constitution."¹⁴

Modes of political association and their identities are broader than the basic model of territorially sovereign nation-states, yet western legal constitutional scholarship struggles to look beyond the traditional framework of understanding. While evidence of challenges is seen, the source of the challenges can be excluded from study as they fail to conform to the expected conceptual model. The aim in this article is to consider how the speculative fiction of Neal Stephenson might assist in providing an alternative imaginary to facilitate consideration of alternative sensemaking frameworks.¹⁵ The contemporary framework has served to exclude many and varied communities from consideration in the study of constitutionalism. Baines and colleagues have highlighted how basic assumptions and the gendered grammar of Anglo-American constitutionalism served to exclude women from participation in key constitutional processes during the development of the contemporary model.¹⁶ Davies has commented on the dominance of what she describes as restricted legal theory, and articulated why it is so prevalent within western constitutionalism:¹⁷ "Restricted legal theory ... looks mainly at the *law of the nation-state*."¹⁸ "[R]estricted legal theory ... theorises and adds solidity to the paradigm of legal positivism that is widely practiced and has proven efficiencies", yet in doing so "it suppresses diversity of interpretations and of subjects, and downgrades or ignores non-state law".¹⁹ Alternative sensemaking frameworks can aid scholars in better comprehending challenges facing the contemporary western territorially sovereign nation-state model.

Recent years have seen a series of challenges to contemporary western states, such as the events of 6 January 2021 at the United States Capitol Building²⁰ and the 2022 uncovering of a coup d'état plot in Germany.²¹ These enterprises and their associations

⁶ Weber, *Economy and Society*, 215–16.

⁷ Kelsen, *Pure Theory of Law*.

⁸ Kelsen, *Pure Theory of Law*, 8.

⁹ Kelsen, *Pure Theory of Law*, 198.

¹⁰ Kelsen, *Pure Theory of Law*, 199.

¹¹ Kelsen, *Pure Theory of Law*, 280, 315. It is helpful to think in terms of norms rather than simply law, especially in the context of British political constitutionalism, which requires attention to both politics and law. The constitution serves the same purpose and function, but political norms are as integral as legal norms. See judgments in the two Brexit-related *Miller* cases: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, 136–51, discussing the Sewell Convention and the various devolution Acts; *R (Miller) v The Prime Minister* [2019] UKSC 41, 41–42, discussing parliamentary sovereignty and prorogation.

¹² Grimm, *Sovereignty*, 119–20; Jones, *Constitutional Idolatry and Democracy*, 10; Loughlin, *The Idea of Public Law*, 72–98.

¹³ Gordon, *Parliamentary Sovereignty in the UK Constitution*, 21.

¹⁴ Gordon, *Parliamentary Sovereignty in the UK Constitution*, 21.

¹⁵ In considering sensemaking frameworks, I am following the presentation of interpretive research in Schwartz-Shea and Yanow, *Interpretive Research Design*. It is suggested that the focus of interpretive research is on how "meaning-making [interpretive research] seeks knowledge about how human beings, scholars included, make individual and collective sense of their particular worlds," 46.

¹⁶ Baines, "Introduction," 1.

¹⁷ Davies, *Law Unlimited*.

¹⁸ Davies, *Law Unlimited*, 23 (original emphasis).

¹⁹ Davies, *Law Unlimited*, 23.

²⁰ Pengelly, "US Capitol."

²¹ Oltermann, "Reichsbürger."

have grown from or been aided by digital media.²² The state has comprehended these challenges as criminal activities: conspiracies and coups.²³ The associations driving these enterprises are rarely considered through the prism of constitutionalism. The intention here is not to argue that all such eventualities should be the subject of constitutional study. The point being articulated is that the current sensemaking framework cannot facilitate this study, whether it is wanted or not.²⁴

Jones observes that “the US Constitution has so successfully become a symbol of national pride and is cherished so widely among citizens that it is now frequently used as a weapon”, and that challenging dominant interpretation can be considered “heresy”.²⁵ Wilkinson suggests that post-World War II European reconstruction produced a fixation with economic constitutionalism, but also an interpretation of constitutional law that sought to insulate the state from the popular sovereignty of the People.²⁶ This is echoed in other descriptions of the restriction of popular sovereignty from constitutional practice.²⁷ It can also be seen to manifest in the exclusion of communities from constitutional participation within the system, as seen in the above examples. An alternative conception of political association, and the logic of constitution and jurisdiction, is required to facilitate study of alternative political associations and communities.

It is suggested that Neal Stephenson’s richly imagined political environments offer a conceptual space within which to experiment with alternative frameworks for sensemaking, one that allows us to temporarily postpone concerns about democratic political ethics to address the issue of structural understanding. In developing this suggestion, the remainder of this article unfolds through five sections. Section 2 considers the nature of state constitution and territorial jurisdiction, establishing the framework of the western territorially sovereign nation-state. Section 3 provides a brief introduction to two of Neal Stephenson’s novels, *Snow Crash* and *The Diamond Age*. Following this, Sections 4 and 5 consider the concepts of first constitution and second jurisdiction in a critical framing. Section 6 then undertakes analysis of these critical conceptualizations through applying them to the imagined political communities and plural jurisdictions of Stephenson’s novels. Section 7 concludes the article.

The argument is that alternative concepts of constitution and jurisdiction can aid in facilitating comprehension and study of alternative political associations and communities. Within this, it is proposed that these alternative conceptions could include looking back at western medieval legal theory in order to recover the plural conception of spiritual and temporal political jurisdictions that preceded the development of early modern territorially sovereign nation-states in Europe; this will help to make sense of the future challenges that new digital environments and the political communities that can inhabit them may pose.

2. The Constitution of States and Territorialisation of Jurisdiction

The sensemaking framework of territorially sovereign nation-states is built on twin legal theoretical foundations laid during the establishment of early modern European states and their colonial expansion and empire building. For early modern theorists, the focus was the concentration of power in a foundational office of the sovereign.²⁸ During European colonial expansion, the aim was to erase challenges to this newly emergent state sovereignty and model of territorially sovereign nation-state structures.²⁹ In reflecting on colonial history and empire-building, Benton argues that:

One narrative portrays European expansion as acting to further the rationalisation of space. Another story depicts the gradual consolidation of a global order based on agreements between political units enjoying territorial sovereignty. In both tales, the consolidation of empires appears ... to corral law into conventionally defined jurisdictions.³⁰

²² Morris, “Conspiracy.”

²³ For an alternative analysis of similar challenges as crises, through reference to the state of exception, see Hirvonen, “Fear and Anxiety.”

²⁴ Whether radical fringe political communities should be included or excluded from democratic participation in the constitutional structure is a related but separate issue. See, Jones, *Constitutional Idolatry and Democracy*; Loughlin, *Against Constitutionalism*; Wilkinson, “Public Law and the Autonomy of the Political.”

²⁵ Jones, *Constitutional Idolatry and Democracy*, 2.

²⁶ Wilkinson, “Public Law and the Autonomy of the Political,” 199, discussing German Ordo-liberalism.

²⁷ See Jones, *Constitutional Idolatry and Democracy*, 58–86, discussing the power of constitutional review vs. popular sovereignty; Loughlin, *Foundations of Public Law*, 407–35; Loughlin, *Against Constitutionalism*, 72–74 at 74, discussing West German Ordo-liberal constitutionalism as “an influential constitutional model.”

²⁸ See Bodin, *On Sovereignty*, 46–58; Hobbes, *Leviathan*, 136–39. Although Locke produces a slightly different centre of power, sovereignty still serves to centralise state power and restrict internal challenges to the state: Locke, *Two Treatise of Government*, 330–38.

²⁹ See Barr, *A Jurisprudence of Movement*, 1–30; Benton, “Just Despots”; Ford, “Laws Territory,” 866–88; Maier, *Once Within Borders*, 14–81.

³⁰ Benton, *A Search for Sovereignty*, XII; on this point, see also the Introduction to Maier, *Once Within Borders*.

Anderson has famously argued that conceptualizations of nationalism and nationalist political ideologies share these foundations.³¹ A core focus during these processes was control of space and the creation of territory: “Territory can be understood as the political counterpart to this notion of calculating space, and can therefore be thought of as the *extension of the state’s power*.”³² The result was the early modern appearance of singular European state structures, often involving hierarchical expressions of sovereign power. Subsequently, relatively small territorial states established a constitutional core from which to exert power over large, often scattered hinterlands. The agents of control claimed empowerment by sovereign authority stemming from the constitutional core. As Benton suggests, “As they moved, subjects performed legal rituals and acted as (sometimes self-appointed) representatives of European powers, tracing pathways that became conduits for law and even corridors of jurisdiction.”³³ Where they went, law and its jurisdiction(s) went with them.³⁴

This is a simplified narrative; however, while the picture on the ground has been shown to be much more complex and nuanced, it is acknowledged that the general model of territorially sovereign state control held sway.³⁵ It can also be seen to act as a foundation for the modern geopolitical order that has emerged following the withdrawal of western powers from the bulk of their territorial empires during the last half of the twentieth century. The framework through which western constitutional scholarship traditionally makes sense of state structure and power is built around sovereignty, stemming from the population and expressed through a constitution. Jurisdiction brings order to the law of the sovereign state, whether it be through territorial demarcation or the organising of legal systems within state territory: “State law is unified, hierarchically organized, comprehensive, monopolistic, and supreme over all other orders within society.”³⁶ The result is a focus on hierarchy and singularity, rather than plurality and complexity; as Tamanaha observes, “this entrenched view of state law almost by definition holds a monopoly over law”.³⁷

This means western legal knowledge has a decent handle on understanding state structure and power but is ill-equipped to address challenges external to that framework. In order to be comprehended, subjects of study have to meet particular criteria, including a population, a constitution, a government and territory.³⁸ As with the examples from the United States and Germany discussed above, contestation of any of these criteria is rejected. State power includes the monopoly on violence to police counter-claims. Communities or associations not demonstrating any engagement with, or participation in, this model fail to be comprehended as potential actors within the system. Therefore, they are excluded as subjects of study.

This state-centred focus is the foundation of constitutional thought and how it engages with novel experiences. This is a problem. It can clearly be seen to manifest in tech law scholarship as questions of internet jurisdiction are raised. Sovereign states desire control of physical things, especially within their territory. These are subject to their regulatory and adjudicative jurisdiction(s), as the method through which law interacts with them. The internet (along with many other aspects of technological development) challenges this on a foundational level.³⁹ Recent scholarship on internet jurisdiction has grappled with this issue, identifying state sovereignty and the legal logic that underpins it as highly problematic regarding virtual environments. As Svantesson argues, “To move forward we must recognise that the territoriality principle and the associated but partially clashing concept of territorial sovereignty no longer serve as useful starting points for the analysis of jurisdictional claims.”⁴⁰ This framework fails to comprehend the impossibility of exerting jurisdictional control over the internet due to its abstract and ephemeral nature. The logic of the territorially sovereign nation-state means law struggles to comprehend the internet, let alone organise it. Tech law scholarship has made attempts to reconceptualise the necessary legal frameworks, through engaging with critical jurisdiction scholarship (addressed in more detail below). However, escaping from the dominant

³¹ Anderson, *Imagined Communities*, 5–7.

³² Elden, *The Birth of Territory*, 322 (original emphasis).

³³ Benton, *A Search for Sovereignty*, 31; for an extended analysis of movement and jurisdiction in colonial territory, see Barr, *A Jurisprudence of Movement*.

³⁴ Barr, *A Jurisprudence of Movement*, 3: “to put it bluntly, there is no law without movement.”

³⁵ On this point, see the introductions to Benton, *A Search for Sovereignty*; Maier, *Once Within Borders*. Both authors provide nuanced and detailed accounts of the complexities of colonial expansion and imperial governance. Rarely, if ever, did European powers succeed in wholly and uniformly transplanting or localising their western state models in colonial territories.

³⁶ Tamanaha, *Legal Pluralism Explained*, 6, critiquing this view.

³⁷ Tamanaha, *Legal Pluralism Explained*, 169. Those challenging this view are described as “[d]issenting voices over the centuries,” 7.

³⁸ Weber, *Politics as a Vocation*, 82–83: “the modern state is a compulsory association which organizes domination.” This is domination over the population of a territory through a constituted government. Shaw describes these as the elements of state citizenships “Westphalian core”: *The People in Question*, 4. While Berman ascribes these criteria as fundamental to the assertion of jurisdiction, tying them to “conceptions of geographic space, community membership, citizenship, boundaries and self-definition.” See *Global Legal Pluralism*, 195.

³⁹ Hörnle, *Internet Jurisdiction*, Ch. 2; Svantesson, *Solving the Internet Jurisdiction Puzzle*, Ch. 2.

⁴⁰ Svantesson, *Solving the Internet Jurisdiction Puzzle*, 57.

paradigm has proved challenging, as jurisdiction is still considered a legal tool of categorisation wielded among sovereign states.⁴¹

Science fiction offers imaginative spaces to explore conceptual alternatives, free from the constraints of real-world frameworks of knowledge.⁴² Neal Stephenson's works are particularly apt here, as will be seen in the next section. Not only do they engage with imagining a highly technological environment, both virtual and temporal; they also provide a rich space for reconceptualising political association and organisation. This provides an opportunity to experiment with conceptualising the constitution of political communities, as well as our understanding of jurisdiction as a manifestation of law. Tomlins suggests we should "open our minds to the risk of new mistakes" in order to "be generous, plural, imaginative".⁴³ The stakes of considering taking alternative political associations seriously in constitutional thought force us to address some naive implicit assumptions of liberal constitutionalism: that the majority of people can be coerced into cooperating at a basic level once bound into a political (sovereign nation-state) community; and that those who resist can be validly and automatically excluded and/or sanctioned. Allowing ourselves to experiment in spaces of science-fictional imagination lowers the ethical stakes and allows easier acknowledgement of the nightmares that might lurk in facilitating plural constitution of political associations.⁴⁴

3. Neal Stephenson's Imagined Communities

Due to the subject of this article being constitution and jurisdiction the main focus is on the richly imagined political environments frequently found in Stephenson's works. This is as opposed to attention being paid to the plots and characterisation, which nonetheless are equally textured and rewarding to readers. For the purposes of this article, I have focused on two novels, both from the mid-1990s, which explore ideas of nanotechnology and the internet.

The two titles in question are *Snow Crash*⁴⁵ and *The Diamond Age*.⁴⁶ *Snow Crash* is likely Stephenson's best-known novel, certainly in tech law circles, and is credited as the origin of the term "metaverse".⁴⁷ It features elements of ancient Sumerian mythology and linguistic development alongside conceptualisation of the internet and imaginings of cyberspace.⁴⁸ The primary interest here is the imagined environment – both temporal and virtual – inhabited by the characters. The novel is set in a recognisable near future, largely within the sprawling cityscape of Los Angeles. The United States has crumbled under the incessant march of capitalist commercialisation.⁴⁹ Everyday aspects of life, such as accommodation, employment and even roads, have been commercialised.⁵⁰

This has led to the establishment of "franchise states".⁵¹ Recognisable territorially sovereign nation-state structures have apparently collapsed;⁵² in their place, rampant commercialisation is supreme. Franchise outposts are dotted throughout the strip mall-style environment.⁵³ The neon glare of the "loglo" permeates the "franchise ghetto", tempting passers-by to avail themselves of everyday commercial services, but also to join an array of citizen communities.⁵⁴ An individual's identity as a citizen of a sovereign state has been replaced by an overlapping constellation of identities formed through their choices about

⁴¹ Hörnle, *Internet Jurisdiction*, 10. While acknowledging the potential for plural jurisdictional claims within states, the author underpins her analysis with sovereignty despite having apparently engaged with critical jurisdictional scholarship debunking this idea (addressed in more detail in Section 3).

⁴² As a recent example considering natural rights in speculative constitutionalism, see Hamilton, "Speculative Constitutions in Ursula K. Le Guin's Hainish Cycle and the Rights of Nature."

⁴³ Tomlins, "Marxist Legal History," 538, is referring to legal historiography but the sentiment is apt in this context. He calls on scholars to "shun the four horsemen," which include "political correctness." It is inescapable that the imagined environments of *Snow Crash* and *The Diamond Age* are not pleasant, either materially or ideologically.

⁴⁴ A related argument concerning an implicit under-appreciation of the importance of political ethics in liberal philosophy is made in Green, "The Importance of Dystopian Hypotheticals," 67–73.

⁴⁵ Stephenson, *Snow Crash*.

⁴⁶ Stephenson, *The Diamond Age*.

⁴⁷ A fully immersive virtual environment, in *Snow Crash* it is a globally accessible community loosely based on replicating a large cityscape. Mark Zuckerberg's Meta has since created the Metaverse as an individually customisable virtual space. See Ravenscraft, "Metaverse."

⁴⁸ Stephenson, *Snow Crash*, 191–205.

⁴⁹ The dystopian commercialisation of *Snow Crash* suggests some imaginary parallels with Patrick Keiller's *Robinson Trilogy* of fictionalised documentaries: see Butler, "Inhabiting the Ruins of Neoliberalism," 226–27.

⁵⁰ Stephenson, *Snow Crash*, 130.

⁵¹ Crawford, "Re-Reading Borders and Migration," 19.

⁵² The former United States has devolved into one of the community options, the "Feds": Stephenson, *Snow Crash*, 261–69.

⁵³ Crawford, "Re-Reading Borders and Migration," 17–21.

⁵⁴ Stephenson, *Snow Crash*, 19.

which political communities (if any) they have joined. These choices include where one lives and what job is held, as well as encompassing ethno-cultural affiliations, political associations and religions.

The Diamond Age is set in a technologically advanced future, driven by the development of nanotechnology. The plot revolves around interactions with *The Young Ladies Illustrated Primer*, part interactive adventure story part role-playing educational game.⁵⁵ Once again, the focus of attention is the imagined political background, where the contemporary geopolitical order has dissolved as the result of an obscure event. The capacity of nanotechnology wielded by non-state corporate actors to terra-form new land for their own settlement has altered the understanding of territorial sovereignty.⁵⁶ Individuals are again presented with a wide-ranging spectrum of communities, or “phyles”, that they can choose to join. Some are based on ethno-cultural groupings, while others are founded on ideology or religion.⁵⁷ Both works explicitly offer richly imagined alternative political associations that exist outside of contemporary territorially sovereign nation-state structures, where characters inhabit environments foundationally distinct from our own.

These richly imagined political environments are of considerable interest. Part of the background tapestry to Stephenson’s novels, for a constitutional scholar they provide intriguing intellectual laboratories – spaces in which reconceptualisation of constitution and jurisdiction can be attempted without having to face concerns over real-world political ethics and an experimental environment freed from the orthodox sensemaking frameworks of state structure. In the next two sections, the scene is set through consideration of the conceptualisation of first constitution and then jurisdiction.

4. Conceptualising Constitution

Within Anglo-American and wider western legal thought, the framework for making sense of constitutions is well understood. Following a positivist approach, similar to Kelsen’s legal theory, orthodox constitutional scholarship understands two facets to the subject of study:⁵⁸ the organisation and empowerment of governmental structure; and governance of the relationships between the people and the government, and between branches of government. This classic model has developed over time, but conceptually has remained relatively unchanged since the early modern advent of so-called popular revolutions and westernised liberal constitutional government from the late eighteenth century.⁵⁹

Conceptions of what a constitution is exist on a spectrum. The underpinning logic holds that a constitution is the scaffold upon which government is manifested, organised, empowered and managed. At one end of the spectrum is the pure legalist position: a codified constitution is the wellspring of law and law-making power. “The form of government is merely the method of creating law at the highest level of legal order, namely at the level of the constitution.”⁶⁰ At the opposite end sits the pure political position: a constitution is the framework of political agreements and processes of governance. At this end of the spectrum, “Everything that happens is constitutional.”⁶¹ What is shared across the spectrum is that constitutions are necessary to provide the capacity for formation and governance of sovereign states.⁶² The subjects of study are national constitutions and state structures, or system subcomponents located either above or below nation-state level. Anything that falls outside this framework is occluded. Once constituted, “a legal system can be viewed abstractly as a system of norms” but “standing within such a system, one never gets beyond it.”⁶³ While it might be of interest, any political association that manifests according to a different model is excluded from legal constitutionalism: it is something to be studied as a political association, not a constitutional structure of governance.

Just because a political community is obscured by the orthodox framework does not automatically mean it has no interest in constitution and should be excluded from constitutional examination. Whereas legal positivist thought begins with a/the constitution, from the critical perspective constitution is understood as a process: to constitute.⁶⁴ Working from this starting point, constitutionalism becomes the study of processes of formation and association rather than the study of any formal frameworks for legal governance that might be spat out the end of such processes. This allows comprehension of a wide range

⁵⁵ Stephenson, *The Diamond Age*, 91–96, 106–10.

⁵⁶ Stephenson, *The Diamond Age*, 14–19.

⁵⁷ Stephenson, *The Diamond Age*, 30.

⁵⁸ Kelsen, *Pure Theory of Law*, whereby the constitution becomes the authorising *Grundnorm* of state legal power.

⁵⁹ Loughlin, *Foundations of Public Law*, 183–272.

⁶⁰ Kelsen, *Pure Theory of Law*, 280.

⁶¹ Griffith, “The Political Constitution,” 19.

⁶² Christodoulidis, *The Redress of the Law*, 194–95: “let us dispense quickly with the unhelpful circularity of theorising “legal constitutionalism” as pitted against ‘political constitutionalism’.”

⁶³ Kahn, *Political Theology*, 33; see also Christodoulidis, *The Redress of the Law*, 196; Thornhill, *A Sociology of Constitutions*, 10–11.

⁶⁴ Kumar, “Revolutionary Constitutionalism and International Law.”

of different systems and approaches, as well as different modes of association. This includes the potential for constitutional study of political associations and communities that might be non-territorial. This is as opposed to requiring subjects of study to possess a traditional framework of governance and/or a trajectory towards achieving territorially sovereign nation-state status. Clearly this could include experimentation within Neal Stephenson's imagined political communities. If one is studying political communities and associations through an alternative critical constitutionalism, then a rethinking of jurisdiction and its territoriality may also be required.

5. Conceptualising Jurisdiction

Orthodox western conceptualisation of jurisdiction is narrow and restrictive, focused on territory and coercive power.⁶⁵ Jurisdiction can be understood in three principal ways: (1) as a container of law⁶⁶ – in other words, the constitutional boundary; (2) as a method of categorisation to distinguish between areas of law – public or private, common law or equity, criminal or administrative, contract or tort;⁶⁷ and (3) as a system of organisation.⁶⁸ This is similar to the categorisation, but instead of distinguishing abstracted categories, it organises subdivisions into vertical and horizontal adjudicative structures. Consider the organisational hierarchy of a court structure, state vs. federal or county and magistrates' courts vs. senior courts. In this understanding, jurisdiction is a second-order tool of sovereign governance: "Jurisdictional knowledge is in a sense the practical knowledge of how to do things with law."⁶⁹ Jurisdiction serves to shape constituted state power and organise the system of legal norms for practical use.

In counterpoint, a critical perspective offers a radical reconceptualisation – one that inverts the orthodox logic of jurisdiction. It conceptualises jurisdiction as a generative technology of law rather than merely an organisational one.⁷⁰ Part of the approach to this critical school of thought has included recovery of concepts of jurisdiction that pre-date our contemporary nation-state structures and conceptual frameworks. This has facilitated a destabilisation of the basic assumptions about jurisdiction as a legal concept.⁷¹ When understood in this way, jurisdiction becomes a primary technology of law. As Dorsett and McVeigh suggest, "Jurisdiction is, however, more than simply pronouncing existing law. In some formulations jurisdiction inaugurates law itself. Thus, to exercise jurisdiction is to bring law into existence."⁷² Whereas historically formal written law was described as *lex*, jurisdiction was understood to relate to customary practice, *ius*.⁷³ In this understanding, the generative performance of jurisdiction precedes posited written law:

Ius refers to speech, a saying of the law, but it does not refer to legislation or the making, the positing of the law. *Lex* is written, the root of the word being *legere*, to read ... [*i*]us, the unwritten dictate of nature, the donation of divinity, the aura of the system, has its force by virtue of having been said already ... not an exertion of the power of the legislator or judge who re-enacts the anterior norm.⁷⁴

This reconceptualisation of jurisdiction requires consideration of the performative dimension of jurisdiction as a legal technology, as well as how it might precede other elements of governance practice.⁷⁵ Sovereignty no longer subsumes jurisdiction. "There can be no sovereignty without jurisdiction because it is jurisdiction that reveals the form of sovereignty itself."⁷⁶ Jurisdiction becomes the foundational technology of law, even to the point of whether or not a decision is made to exercise jurisdiction. When thinking this way, it must also be considered that study of jurisdiction needs to be able to

⁶⁵ Berman, *Global Legal Pluralism*, 195.

⁶⁶ Volk, "The Problem of Sovereignty in Globalized Times," 718–19 describes a space container theory. While applied to analysis of sovereignty, I would suggest that the idea also aligns closely with the territorialised jurisdictions of sovereign nation-states.

⁶⁷ Dorsett and McVeigh, *Jurisdiction*, 4, 37–38.

⁶⁸ For discussion of this concept of jurisdiction, see Hörnle, *Internet Jurisdiction*, Ch. 2; Svantesson, *Solving the Internet Jurisdiction Puzzle*, Ch. 2.

⁶⁹ Dorsett, *Jurisdiction*, 4.

⁷⁰ See Dorsett, *Jurisdiction*; Matthews, "Plasticity, Jurisdiction, and the Interruption of Sovereignty"; Matthews, "From Jurisdiction to Juriswriting"; Ridler, "The Exercise of Jurisdiction and the Absent Author of Law's Speech."

⁷¹ See the literature review of Ridler, "The Exercise of Jurisdiction and the Absent Author of Law's Speech," 73–75; see also Cormack, *A Power to do Justice*; Dorsett, *Jurisdiction*; Hutson, "A Power to do Justice"; Matthews "Plasticity, Jurisdiction, and the Interruption of Sovereignty"; Matthews, "From Jurisdiction to Juriswriting"; Mussawir, "The Activity of Judgment"; Mussawir, *Judgment in Deleuze*; Rogers, "Humiliation, Justice and the Play of Anxiety in Competing Jurisdictions"; Van Rijswijk, "Across Islands and Oceans."

⁷² Dorsett, *Jurisdiction*, 4.

⁷³ Dorsett, *Jurisdiction*, 4 "Jurisdiction is derived from the Latin *ius dicere*"; see also Matthews, "Plasticity, Jurisdiction, and the Interruption of Sovereignty," 430; Matthews, "From Jurisdiction to Juriswriting," 353.

⁷⁴ Goodrich, "Visive Powers," 218.

⁷⁵ Cormack, *A Power to do Justice*, 9–10; Ridler, "The Exercise of Jurisdiction and the Absent Author of Law's Speech," 75.

⁷⁶ Matthews, "Plasticity, Jurisdiction, and the Interruption of Sovereignty," 353.

comprehend moments within political association and actions within political communities that manifest potential performances of jurisdiction – whether the political association and community conform to the orthodox framework or not. Here we can see the (potentially) necessary alignment to an alternative conceptualisation of constitution.

Study of western medieval jurisdiction(s) offers a partial illustration of the immense potential of this scholarship. Prior to rejecting the jurisdictional pluralism of temporal political and spiritual communities, for the imposition of singular centralised governmental structures – which emerged as part of the early-modern wave of constitutional revolutions – the conceptualisation of medieval jurisdiction was more complex, as was its performance.⁷⁷ Within Europe, the origins of the “Western Legal Tradition” experienced a complex interweaving and overlapping network of jurisdictions.⁷⁸ Spiritual jurisdiction stemming from the Roman Catholic church coexisted and interacted with temporal monarchic jurisdictions. Individuals could be representatives of different jurisdictions based on particular offices or functions at different points. Similarly, individuals could be subject to different temporal or spiritual jurisdictions based not only on their location but also their actions (physical or mental) at any given moment.⁷⁹ This multiplicity of jurisdictions goes against the grain of contemporary understanding; the history of both territorially sovereign nation-states and colonial imperialism aid us in understanding how the early modern reconceptualisation took place.⁸⁰ However, that is outside the scope of this article.

Jurisdiction can be understood differently. This in turn allows for scholarship to make sense of jurisdictional plurality, whether based on religion, ideology, culture or ethnicity, not merely state membership and territorial location. This understanding can be used to facilitate experimentation with the constitution of alternative political associations and communities. In the next section, a critical conception of both jurisdiction and constitution will be deployed to examine Neal Stephenson’s richly imagined political environments. Both *Snow Crash* and *The Diamond Age* allow us to imagine a future beyond contemporary territorially sovereign nation-state structures and explore the potential for constitutional and jurisdictional pluralism beyond this framework.

6. Speculative Legal Fictions, or the Application of Critical Concepts to Neal Stephenson’s Speculative Fiction

As can be seen from the above discussion, critical scholarship can offer different perspectives. When considering constitution and jurisdiction as foundational concepts within the sensemaking framework of contemporary territorially sovereign nation-states, the challenges present in understanding novel political associations and communities – including those existing in virtual spaces – become apparent. By engaging with critical scholarship and recovering older conceptualisations of legal technology, an appreciation of a more complex field of study is possible – one with the potential to comprehend communities and associations that do not conform to the traditions of modern western territorially sovereign nation-states, including those that may themselves entirely reject the mainstream logic of constitutional territoriality. This reconceptualisation requires challenging some basic assumptions. Within constitutional study, sovereignty is the central concept.⁸¹ Stemming from this, a/the constitution becomes a core subject of study. As a result, jurisdiction is relegated to a second-order technology of administrative demarcation, organisation and categorisation, as reflected in the title of this article.

When engaging with critical reconceptualisation, jurisdiction precedes sovereignty, which can then be considered as an aspect of jurisdiction rather than the other way around.⁸² The sovereign nation takes shape formally at the conclusion of the initial jurisdictional performance. This in turn forces a division between the codified constitutional document, or the formal constitutional arrangements and the clearly related – but distinct – processes of formation, not to mention a potential reordering of the concepts themselves. Jurisdiction and constitution exist co-dependently; however, to fully appreciate this, constitutional scholarship has to expand beyond the study of formalised frameworks, thus allowing comprehension of different associations and communities. When utilising Neal Stephenson’s imagined political environments for experimentation with these reconceptualisations, attention will be paid to two vignettes – one from each novel – that offer illustrations of the imaginary potential for reconceptualising our contemporary western sensemaking framework of territorially sovereign nation-states.

⁷⁷ Brunkhorst, *A Critical Theory of Legal Revolutions*, 90–95; Dorsett, *Jurisdiction*, 34–35.

⁷⁸ Berman, *Law and Revolution*.

⁷⁹ See Berman, *Law and Revolution*, 192–93, 207; Brunkhorst, *A Critical Theory of Legal Revolutions*, 94; Elden, *The Birth of Territory*, 164–66.

⁸⁰ On this point and the link to territory as a political technology of early modernity, see Elden, *The Birth of Territory*, 322. Addressing the link to colonisation and development of jurisdiction in relation to territory see Benton, *A Search for Sovereignty*, 31–33; Benton, “Just Despots,” 225; Maier, *Once within Borders*, 9–10.

⁸¹ Brunkhorst, *A Critical Theory of Legal Revolutions*, 44–57; Gordon, *Parliamentary Sovereignty in the UK Constitution*, 21–32; Grimm, *Sovereignty*; Loughlin, *The Idea of Public Law*, 72–98.

⁸² Dorsett, *Jurisdiction*, 4.

6.1 *The Diamond Age: Legal Pluralism and Criminal Processes in the Coastal Republic*

Early in the novel, our first vignette finds Bud, a minor character, on trial in the court of Judge Fang, a local Confucian magistrate, in the territory of the Coastal Republic (CR).⁸³ This trial follows on from Bud's earlier mugging of two members of the Ashanti phyle.⁸⁴

... Now Bud, Mr Kwamina here has accused you of certain activities that are illegal in the Coastal Republic. You are also accused of actionable offenses under the Common Economic Protocol, to which we are a subscriber ...” Judge Fang nodded [at the Protocol representative], who took the cue. “The CEP code, ... governs all kinds of economic interactions between people and organizations. Theft is one such interaction. Maiming is another, insofar as it affects the victim's ability to fend for himself economically. As Protocol does not aspire to sovereign status, we work in cooperation with the indigenous justice system of CEP signatories in order to pursue such cases.”⁸⁵

The Common Economic Protocol (CEP) is presented as a global agreement to which communities such as the CR are signatories. The reference to sovereignty implies that the CEP lacks any regulatory or enforcement measures of its own, seemingly piggybacking onto localised justice systems. However, it appears as though the Protocol representative is an active participant in proceedings on behalf of Mr Kwamina, notwithstanding the lack of sovereignty. The interplay between the jurisdiction of the CEP and the CR appears to be complementary rather than competitive. The result feels somewhat familiar to readers from a western legal tradition. Bud has committed a crime and the victim seeks justice through the local legal system. As part of the proceedings, we are informed that, “As the offender has no significant assets, and as the value of his labor would not be sufficient to compensate the victim for his injury, Protocol terminates its interest in this case.”⁸⁶ So readers are not presented with details of how this jurisdictional interplay might have resolved, robbing us of an explicit opportunity to examine how “legal pluralism creates uncertainty”.⁸⁷ That said, there is still plenty of interest here concerning jurisdiction.

While the CEP denies itself sovereignty, the CR comfortably assumes it, along with the jurisdiction to administer justice. This vignette captures some crucial features of jurisdiction as a legal technology. Berman suggests that we expect jurisdiction to be an exclusive prerogative of a territorially sovereign nation-state; however, here we can see an illustration of his argument that “the assertion of jurisdiction ... can also open up space for articulation of norms that function as alternatives to ... sovereign power”.⁸⁸ The sovereignty of the CR is never in question, yet the CEP has status within the justice system. The CEP representative is able to perform jurisdiction, albeit a negative performance. This suggests that “we must look not so much at the power to *enforce* legal norms as at the ability to *articulate* them”.⁸⁹ The CEP articulates a separate set of norms covering the activity of mugging, which render it in economic terms as opposed to criminal. The CEP's jurisdictional performance offers a glimpse of a way by which “we can think about various alternative conceptions of [norm articulating] community”, which in turn allows us to conceptualise law as “a language for imagining alternative future worlds”.⁹⁰

What is unclear in the vignette is that, prior to his capture by the Ashanti, Bud had sought refuge.⁹¹ While notionally a resident of the CR, Bud is not a citizen (seemingly of anywhere); fleeing the Ashanti, he attempts to obtain sanctuary through joining an alternative community.⁹² During his quest, he rules out several ethno-cultural and religious phyles before selecting an ideological community as his intended safe haven. It appears that had Bud succeeded in entering the phyle's enclave and joining the community, he may have been able to avail himself of a further articulation of norms that could have prevented his prosecution or mitigated its ultimate severity. When the Ashanti turn him over to the custody of the CR jurisdiction, a local constable inquires about whether he is affiliated with any communities “claiming status under the CEP”.⁹³ This query, coupled with Bud's attempt at seeking sanctuary, suggests that the jurisdictional plurality at play stretches further than the CEP and CR. It raises a question about whether the CR is the only sovereign community within the territory – a challenge that is more fully realised in the imagined environment of *Snow Crash*.

⁸³ Stephenson, *The Diamond Age*, 38–43.

⁸⁴ Stephenson, *The Diamond Age*, 26–28. Phyles are non-territorial communities seemingly based on ethno-cultural and/or ideological affiliations. The Ashanti are a privileged black ethno-cultural community, 28–29. The name and some cultural elements seem inspired by the Ashanti/Asante people of West Africa.

⁸⁵ Stephenson, *The Diamond Age*, 40.

⁸⁶ Stephenson, *The Diamond Age*, 41.

⁸⁷ Tamanaha, *Legal Pluralism Explained*, 1.

⁸⁸ Berman, *Global Legal Pluralism*, 210.

⁸⁹ Berman, *Global Legal Pluralism*, 214.

⁹⁰ Berman, *Global Legal Pluralism*, 214.

⁹¹ Stephenson, *The Diamond Age*, 29–30.

⁹² Stephenson, *The Diamond Age*, 29–31.

⁹³ Stephenson, *The Diamond Age*, 33.

6.2 *Snow Crash: Folk Legal Pluralism and Unilaterally Performative Franchise-state Jurisdiction(s)*

While the above discussion still revolves around the core of an apparently territorially sovereign nation-state, the second vignette questions how jurisdictional pluralism might operate without that central support pillar.⁹⁴ Our second scene sees the main characters YT and Hiro pursued through LA's franchise ghetto.⁹⁵ Seeking sanctuary, they avail themselves of Hiro's citizenship of Mr Lee's Greater Hong Kong (MLGHK),⁹⁶ one of the "FOQNEs, Franchise-Organized Quasi-National Entities".⁹⁷

Mr Lee's Greater Hong Kong is a private, wholly extraterritorial, sovereign, quasi-national entity not recognized by any other nationalities and in no way affiliated with the former Crown Colony of Hong Kong, which is part of the People's Republic of China. The People's Republic of China admits or accepts no responsibility for Mr Lee, the Government of Greater Hong Kong, or any of the citizens thereof, or for any violations of local law, personal injury, or property damage occurring in territories, buildings, municipalities, institutions, or real estate owned, occupied, or claimed by Mr Lee's Greater Hong Kong.⁹⁸

MLGHK explicitly claims sovereignty, however, it is extraterritorial and irrespective of the recognition of other franchise states. Members of this alternative political community are labelled as citizens and can access the estate of MLGHK. Yet, while the real estate provides a physical connection to the community, it apparently embodies an existence more closely analogous to a high-street store than national embassy.

MLGHK proclaims itself to be a sovereign entity. However, it is defined – at least in part – through rejecting the usual trappings of constituted territorially sovereign nation-states, and the recognition of such communities. This presents an imagined situation where performance of jurisdiction, or articulation of norms, is expressed as a unilateral declaration. Jurisdictional pluralism as described by Berman founders in this imaginative space.⁹⁹ Instead, an alternative sensemaking framework is required. In trying to address the issue of "over-inclusiveness" in legal pluralism, Tamanaha has argued for focusing on whether communities perceive themselves as subject to law, as opposed to attempting to define law and then apply that to cultural study.¹⁰⁰ Accordingly law "is whatever people collectively view as law within social communities", which means, "there is no universal ... theory of law."¹⁰¹ As a result "folk legal pluralism identifies law by asking what people in a given social arena collectively recognise and treat through their social practices as law".¹⁰²

Within the imaginative environment of *Snow Crash*, MLGHK is far from the only FOQNE.¹⁰³ While some seemingly reject participation in a wider community of franchise states, for others reciprocal agreements are clearly in place, and individuals can opt into membership of multiple communities (although some FOQNE memberships are mutually exclusive).¹⁰⁴ The multidimensional nature of membership and the self-declarative jurisdictional performance of community in *Snow Crash* provides a problematisation of our understanding of contemporary state structures. Folk legal pluralism offers a sensemaking framework based on perception of legal relationships and jurisdictional performance. Within Stephenson's imagined Los Angeles, individuals navigate through an environment stripped of territorially sovereign nation-states but perceive their community memberships as interchangeably based on their actions and their immediate spatial location. The closest real-world analogy appears to be the interweaving of medieval temporal political and spiritual jurisdictions in the western legal tradition.¹⁰⁵

⁹⁴ It emerges as a theme that plural jurisdictions operate in the shadow of the dominant state paradigm, so even when state centrism is critiqued, it is hard to escape – which is unsurprising, given that legal pluralism theorises real-world legal relationships: see Berman, *Global Legal Pluralism*, 195–243; Merry, "Legal Pluralism"; Tamanaha, *Legal Pluralism Explained*, 169–208. In contrast, the recovery of conceptualisations of jurisdiction that pre-date contemporary state structures requires stepping beyond this shadow: see Dorsett, *Jurisdiction*, 4; Goodrich, "Visive Powers."

⁹⁵ Stephenson, *Snow Crash*, 76–78.

⁹⁶ Stephenson, *Snow Crash*, 84–93.

⁹⁷ Stephenson, *Snow Crash*, 14.

⁹⁸ Stephenson, *Snow Crash*, 92.

⁹⁹ Berman, *Global Legal Pluralism*, 195–243.

¹⁰⁰ Tamanaha, *Legal Pluralism Explained*, 170, 169–208.

¹⁰¹ Tamanaha, *Legal Pluralism Explained*, 175.

¹⁰² Tamanaha, *Legal Pluralism Explained*, 176.

¹⁰³ Stephenson, *Snow Crash*, 42–43.

¹⁰⁴ Stephenson, *Snow Crash*, 12, 41–42. Hiro is simultaneously a member of (at least) MLGHK and Nova Scillia, a mafia franchise state.

¹⁰⁵ See Berman, *Law and Revolution*, 192–193, 207; Brunkhorst, *A Critical Theory of Legal Revolutions*, 94; Elden, *The Birth of Territory*, 164–166.

7. Conclusion

It has been suggested that science fiction provides an imaginative laboratory to undertake conceptual experimentation. In addition, an argument has been tentatively advanced that critical scholarship and the recovery of historical conceptions of jurisdiction may aid this experimentation.

Challenges presented to contemporary frameworks of legal understanding in constitutional scholarship can fail to be comprehended within the framework itself. This is especially so when these challenges may come from alternative political associations and communities that do not conform to our existing constitutional and jurisdictional expectations. Within Neal Stephenson's richly imagined political environments, we can find opportunities to test reconceptualisations. These may take the form of individuals with multiple overlapping political identities, facilitated by communities constituted on the basis of non-exclusive or non-continuous membership. These communities suggest a jurisdictional logic founded upon plurality as opposed to "monistic state law".¹⁰⁶

When considering an environment of plural political identities and multiple layered jurisdictions, medieval conceptualisations of jurisdiction offer a pathway to understanding how individuals can manifest different constitutional and jurisdictional subjectivities related to their spatial location, but also their offices and actions. Recovering these historical understandings may aid in understanding and adapting to the technological developments we currently experience. The waning of the nation-state model of sovereignty may require a (partial) return to previous legal conceptions. Whereas previously political communities lacked sufficient coherence and power to impose singular dominant constitutional jurisdictions, future developments – or at least the science-fictional imagination – may once again reduce the centrality of territorially sovereign nation-states. New legal fictions may be (very nearly) the same as old ones.

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¹⁰⁶ Tamanaha, *Legal Pluralism Explained*, 4.

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