Chapter 7

Multilevel Constitutionalism: Looking Beyond the German Debate

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Two Conceptions of Multilevel Constitutionalism

Multilevel constitutionalism has both a narrow and a broad reference. Narrowly, it refers to a particular school of thinking about contemporary constitutional developments centred on the work of the German scholar Ingolf Pernice and his associates. This approach emerged in the mid to late 1990s in response to the dominant Staatsrecht tradition in German public law and as an alternative way of conceiving of constitutional authority in the face of the exponential growth of the supranational European Union. It was an approach that sparked significant interest both within and beyond the German context, resonating closely with the emerging intellectual and political project to endow the EU with a more or less formal constitutional status. However, as the term 'multilevel constitutionalism' became more familiar within legal academic discourse, it no longer remained confined to its original problématique, or even to its German and European domicile. Instead, it gradually came to be adopted as a label, or at least as an initial point of reference, for any position that maintained that constitutional ideas, institutions, norms and practices could apply in settings beyond the state.1

The main purpose of the present chapter is to examine this more expansive notion of multilevel constitutionalism – or multilevel constitutionalism senso lato. In so doing, the chapter seeks to confront the most basic questions of principle about the present and future of constitutionalism in an age of intense globalization of economic, cultural, political and legal circuits of power. First, the threshold question: is it possible even to conceive of constitutionalism as something that ranges beyond the state while remaining relevant at the level of the state, and so as applicable at multiple sites of authority simultaneously? Secondly, to the extent that it is possible, what form does the proper constitutional expression of this new applicability take? In addressing these questions, the chapter explores two main conceptions of multilevel constitutionalism: one based on a critique of the state’s monopoly on constitutional authority, and another based on an attempt to extend its reach and relevance at the national level. This exploration involves an examination of the implications of these conceptions for the future of constitutionalism in a world characterized by increased interdependence and interconnectedness.

1 To take but two examples of the diffusion of multilevel constitutionalism, both Jürgen Habermas and Ernst-Ulrich Petersmann from their quite different philosophical and normative starting points are content to use the label to endorse their in-principle support for transnational constitutionalism. See, for example, Habermas 2006: 115–93 and Petersmann 2006.
post-national constellation' take? In particular, where lie the outer boundaries of  
the post-national constitutional constellation, and what kind of juridical entities inter se describe its internal structure? 
However, before posing these broad questions something should be said about 
multilevel constitutionalism sensu stricto, and this for a number of reasons. First, 
the contribution of Pernice and his associates has been influential in its own terms, 
and not simply as the source of a popular label. Secondly, in concentrating on the 
European supranational arena, this body of work has focused upon the domain of 
legal and political development supplying the initial, the most insistent and the 
most sustained contemporary challenge to the idea that constitutionalism should 
be confined to the state. Thirdly, in the terms and in the tone of the initial debate 
between the defender and opponents of multilevel constitutionalism, much of the 
sense of deep division that has come to characterize the broader debate on the 
future of constitutionalism in the age of globalization can be seen. And fourthly, 
the circumstances leading to the coining of the multilevel conceptual currency 
may well have encouraged a certain narrowness of emphasis both in the original 
choice of terminology and its subsequent pattern of deployment, so raising an alert 
to the difficulty of capturing under the sign of multilevel constitutionalism all that 
might profitably be said about the post-national constitutional constellation. 

The German Debate 

In 1995 Ingolf Pernice proposed the idea of Verfassungsverbund to encapsulate 
the constitutional novelty of the EU. In so doing, he drew an explicit contrast 
between his position and that of the German Constitutional Court in its famous 
Maastricht Urteil of 1993. In a judgment widely interpreted then and now as 
a reassertion of the sovereign authority of the state and as a warning against 
any future demonstration of the expansionist ambition expressed by the EU in 
the Treaty of Maastricht, the Court chose to characterize the new supranational 
configuration in more modest state-derivative terms, as a Staatenverbund. All 
candidate English renditions of the two key terms in the German debate are clumsy 
and lacking in nuance, and these translation problems exacerbate what is already 
a difficult exercise in conceptualization. Whereas Staatenverbund refers, roughly 
speaking, to a compound of states, Verfassungsverbund seeks to capture the same 
sense of a composite arrangement, but one whose genetic code is constitutional 
rather than statal. Yet in replacing 'state' with 'constitution' like is not really being 
replaced with like. Whereas 'state' is clearly a nominal category, 'constitution' is 

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4 See BVerfGE89, 155; or Brunner v European Union Treaty [1994] 1 CMLR 57. 
5 A term previously used in an extrajudicial context by Paul Kirchhof, the judge 
rapporteur of the Maastricht decision. See Kirchhof 1993: para. 69.
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ambiguously poised between the nominal and the adjectival. It follows that it is unclear whether Verfassungsverbund is better translated as a single constitutional compound (or as a composite constitution) or as a system of compound (or composite) constitutions. The French translation of the German original preferred by Pernice, constitution composée, opts for the singular, whereas the term employed by Pernice to disseminate his ideas in the Anglophone world – that of ‘multilevel constitutionalism’ itself – consolidates the ambiguity by focusing on the abstract quality of constitutionalism rather than on a concrete constitutional entity or entities.

However, this is a doubt that Pernice’s theoretical enterprise can accommodate with reasonable comfort. For his deeper message is that once ‘constitution’ rather than ‘state’ is understood to be the governing regulatory category, the question of how many specific such ‘constitutional’ units or entities exist is of less moment. Whereas ‘state’ as a particularizing category suggests singularity and mutual exclusivity of public authority, ‘constitutional’ as a universalizing category suggests continuity and complementarity of public authority. Pernice’s detailed formulations of multilevel constitutionalism, underlining the fuzziness of boundaries by stressing the centrality of an interactive process of establishing, organizing, sharing and limiting powers. The multilevel constitution is citizen-centred – including a strong focus on individual rights – rather than polity-centred. In so far as it does individuate the polities or ‘levels’ of the overall configuration, it does not understand their relations in hierarchical terms. Rather, sovereignty is pooled, so that at the level both of cultural identity and of institutional function and loyalty the relations between the state and the supranational platforms are not to be regarded in either/or zero-sum terms, but rather as an interlocking, overlapping and positive-sum whole.

As already intimated, the theory of multilevel constitutionalism senso stricto stands as a significant formative influence and background frame for the idea of multilevel constitutionalism senso lato. Pernice’s theory has been highly influential, especially in the German-speaking academic world, in the development of understandings of the constitutional structure of the European juridical space as a complex and inclusive unity. This influence also acquires a practical edge. In drawing so heavily on the existing pattern of interlocking national and supranational public authority in making its own particular variant of the constitutional argument, public authority in making its own particular variant of the constitutional argument,
The Many Constitutions of Europe

The multilevel constitutionalist mindset has contributed to the case for viewing the EU in constitutional terms whether or not its constitutional status should ever come to be recognized and dignified in the form of a ‘Big-C’ documentary constitution. Such a generous approach to constitutional branding has in turn established a sharp and lasting break with the kind of constitutional nationalism reflected in the Staatenverbund approach, and in so doing has supplied a typically stark context of disputation in the argument over whether constitutionalism can and should spread beyond the state.

Yet if state-centred constitutionalism clearly marks the inner boundary of Pernice’s multilevel constitutionalism, its terms and context of application also suggests something about its outer limits. To some at least, the idea of ‘levels’ continues to imply a notion of hierarchy – of higher and lower – rather than simply one of dispersed parts, and this hint of subservience to ‘the higher level’ can reinforce the anxiety not only of the defenders of state constitutionalism but also of all who are wary of conceiving of supranational or transnational constitutionalism in ‘top-down’ regional or global terms. What is more, the notion of a unity, however dispersed and complex, evoked by the idea of a single-cloth constitutionalism, speaks to a degree of harmony between the state and non-statal parts that may not be endorsed by more ‘pluralist’ visions of the relations between different constitutional sites. And finally, the focus of the theory of multilevel constitutionalism senso stricto on the European Union, which, on the one hand, stands as a kind of advance challenge to the constitutional hegemony of the state, but on the other, is relatively ‘state-like’ in many of its own constitutional features, leaves it with little to say about those other forms of transnational constitutionalism – actual or potential – that lack the authoritative scope, institutional intensity, and breadth and depth of cultural identification of the European regional model.

The Wider Debate and the Politics of Constitutional Definition

For much of the modern age of constitutionalism inaugurated by the French and American revolutions, the kind of position struck by Ingolf Pernice and his associates would simply have been unimaginable. The modern state, understood as the key unit within the global framework of authority, was for long the undisputed key unit within the global framework of authority, was for long the undisputed

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10 See, for example, Walker 2006.
11 For example, Pernice has recently argued that, notwithstanding the failure of the 2004 Constitutional Treaty, the explicitly non-constitutional Treaty of Lisbon that has taken its place should be viewed as an example of multilevel constitutionalism in action. See Pernice 2009.
12 For a historically sensitive overview of the German debate, see Murkens 2007.
13 On the authoritarian dangers implicit in international or transnational constitutionalism, see Koskenniemi 2007.
14 See, for example, Walker 2002.
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1 domicile of constitutionalism and the guarantor of its relevance. It was only in
2 the late twentieth century, when the configuration of economic, political and
3 cultural forces that produced the state-centred global framework of authority was
4 no longer so securely in place, that the idea of multilevel constitutionalism senso
5 lato – as concerned with the very possibility of constitutionalism beyond the state
6 – could gain any traction in Europe or elsewhere. Like ‘multi-level governance’,
7 its even better-known sister concept in political science, the advent of multilevel
8 constitutionalism is a product first and foremost of objective changes in the socio-
9 political world rather than of innovation in the world of ideas. Yet for all that
10 it is events-driven, the emergent debate over multilevel constitutionalism senso
11 lato has proved to be at once highly charged and extremely fragmented. If it
12 begins by investigating why this is the case and looks at how disagreement and
13 disengagement have tended to manifest themselves, this will clear the ground for
14 an examination of what is most fundamentally at stake between the proponents
15 and opponents of multilevel constitutionalism.
16 An initial survey of the debate over multilevel constitutionalism senso lato
17 reveals an exaggerated version of a familiar problem. As is common when dealing
18 with social and political concepts that register both at the ‘object’ level of everyday
19 use and at the ‘observer’ level of theoretical inquiry, the answers that many analysts
20 seek or expect when addressing the prospects of constitutionalism seem often
21 to be anticipated in their stipulation of the definitional preliminaries. However,
22 just because so much uncertainty surrounds a conceptual leap of such audacious
23 proportions as is contemplated in taking constitutionalism beyond the state, the
24 absence of agreement over definitional preliminaries is unusually pronounced
25 and conspicuous in the instant case. In turn, this fractured beginning leads to an
26 unusually sharp polarization of theoretical positions. In effect, one is faced with
27 an irony of overproduction. On the one hand, in academic circles at least, the
28 unsettling of old taken-for-granted certainties about the place of constitutionalism
29 within the global scheme means that never has discussion of law and politics so
30 frequently, so explicitly and so self-consciously occurred within a constitutional
31 register. Likewise, never has the constitutional idea been so insistently reasserted
32 in its old state setting or so vigorously sponsored in new non-state settings. On the
33 other hand, just because the stakes are so high and the value of the currency so
34 volatile, never has discussion of constitutionalism cultivated such little common
35 ground. Scant cross-fertilization occurs from the different points of departure,
36 and what exchange does take place often appears to be the dialogue of the deaf.
37 This is not intended as a partisan point. Those who want or expect
38 constitutionalism to travel to sites and levels of operation beyond its traditional
39 state domicile are as likely to load the conceptual dice in favour of their
40 preferred conclusion as those who start from the prejudice that no such
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43 15 See Marks, Hooghe and Blank 1996.
44 16 See, for example, Walker 2002.
mobility is possible or desirable. What is more, each side tends to encourage the
other in its conceptual myopia.
On the part of advocates of constitutionalism in multiple sites and contexts
beyond the state, a whole series of conceptual starting points is encountered that
are in danger of treating constitutionalism in superficial terms – as too easily
detached from its statist moorings. This is most evident in the case of what are
best described as nominal definitions of constitutionalism. Here, constitutionalism
is deployed merely as an affirmative label for whatever concept, institution, or
attitude of governance, wherever situated, that its sponsor endorses or considers
pivotal to the regulatory regime in question, whether human rights protection, anti-
discrimination measures, or even just a commitment to ‘the Rule of Law’ is being
talked about. The purpose here is ideological: to clothe the feature(s) of governance
to which one is committed or to which one attributes central significance with the
additional gravitas of affirmation in a powerful and familiar symbolic register, or
to deny such affirmation to other approaches that lack the favoured feature(s) or
even oppose the priority given to them. Implicit in this ideological agenda stands
the conviction, or at least the unexamined premise, that simply nothing privileges
the relationship between the state and constitutionalism, so that nothing of special
value stands to be lost in the move beyond that relationship. In sum, the point
of the nominalist position is precisely not to argue the case for mobility of the
constitutional idea beyond the state but, by treating constitutionalism as a floating
signifier, to elevate the case to the exalted position of the unarguably correct. One
must be careful not to be too critical of nominalist positions. Good arguments
are often made for this or that aspect of governance from within a nominalist
position; it is just that these arguments are not enhanced by the use of constitutional
language. As will be discussed below, nominalism often shades into formalism
or materialism, and indeed formal or material borrowing from the state tradition
may be the inarticulate premise underlying the nominalist position. Moreover, nominalism may connect to the vital ‘placeholding’ function of constitutionalism,
in that through its insistence on a constitutional register it speaks not only to a
desire to obtain ideological advantage for one’s position, but also to an awareness
of how much remains at stake in the very idea of a political framing of social
arrangements.17

A second deracinated version of constitutionalism concentrates on formal features. Unlike nominalism, here the state, as the undisputed source of the modern
constitutional idea, retains some influence over the destination meaning, if much
attenuated. The formalist approach suggests that the very manner in which – the
form through which – the political world may be understood and organized from
a juridical perspective may borrow from or be inspired by the state constitutional
template. This is most obviously the case with regard to the idea of a constitutive juridical instrument, whether or not specifically so-called ‘Constitutional’ (as

17 For just one example of a writer who uses the language of transnational constitutionalism in this loose but provocative way, see Joerges 2001.
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1 in the case of the abortive EU constitutional text of 2004),\textsuperscript{18} that is so familiar
2 from state public law. In the context of non-state legal and institutional orders,
3 instruments may be found that are similarly formally constitutive in one or more
4 of various senses; whether with reference to their norm-generative or foundational
5 quality, their assertion of entrenched status, their precedence over other system
6 norms, or their claim to provide an encompassing framework for and measure
7 of the limits of the ‘body politic’ that they create or recognize.\textsuperscript{19} And even
8 where such generative, entrenched, trumping, embracing and delimiting features
9 of a legal and institutional order are independent of a self-styled documentary
10 Constitution, or indeed of a single and unrivalled constitutive instrument of any
11 sort, as has been seen in the case of the advocates of WTO constitutionalism,\textsuperscript{20}
of the constitutionalization of the international order,\textsuperscript{21} or of the various ‘civic’ or
12 ‘societal’ constitutions such as the \textit{lex mercatoria} of the international economy
13 or the \textit{lex digitalis} of the Internet,\textsuperscript{22} the mere emergence of some combination of
14 these formal features may still be enough for the juridical initiative in question to
15 be deemed constitutional in kind.
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17 A third form of constitutionalism beyond the state, and the one to which the
18 approach sponsored under multilevel constitutionalism \textit{senso stricto} is closest in
19 conception,\textsuperscript{23} concentrates not on formal matters but on the manifestation of a family
20 resemblance between certain \textit{material} features of state constitutionalism and the
21 new transnational legal outgrowth. Aspects of transnational law are deemed to be
22 constitutional not, or not only, because they appear on the commentator’s approved
23 list, as with nominalism, but because the mechanisms or concepts in question – from
24 general structural formulae such as separation of powers and institutional balance
25 to more specific principles such as subsidiarity or proportionality – were long
26 ago nurtured in the state constitutional context and, indeed, have often been self-
27 consciously received into transnational law from these state sources.\textsuperscript{24} However,
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29 \textsuperscript{18} Treaty Establishing a Constitution for Europe, 16 December 2004, OJ 2004/ C310,
30 1–474.
31 \textsuperscript{19} For a concise statement of the formalist position, see Stone Sweet 2009.
32 \textsuperscript{20} See, for example, Cass 2005 and Petersmann 2000.
33 \textsuperscript{21} See, for example, Wet 2006. For an approach which, unusually, seeks to locate the
34 constitutionalization of the international order in documentary terms – in the form of the
35 UN Charter – see Fassbender 1998.
36 \textsuperscript{22} See, for example, Teubner 2004; and Teubner and Fischer-Lescano 2004.
37 \textsuperscript{23} One must be careful not to overstate this. While this is certainly where much of
38 its practical emphasis lies, multilevel constitutionalism \textit{senso stricto}, as set out in the work
39 of Pernice (1998, 1999, 2002), is by no means only concerned with the incidence and
40 development of material constitutional norms beyond the state. In addition, it is concerned
41 with the variety of formal centres of legal authority, and indeed with the ‘federal’ co-
42 existence of different levels of political community and identity (see Bogdandy 2000; \textsuperscript{42}
43 Curtin and Dekker 1999, 2002; Beaud 2007; and Avbelj 2009).
44 \textsuperscript{24} On the migration of particular constitutional concepts from national to transnational
45 level, see Walker 2007a.
as is the case with formalism, the connection between the non-state version and
the state original from the materialist perspective is a tenuous one. It is dependent
upon analogy, and in some cases conscious imitation. How deep the analogy runs
and what is lost – or gained – in translation from one context to another is rarely
the subject of sustained analysis.\footnote{For one attempt, see Walker 2003.}

If one turns, now, to those who would oppose the movement of constitutionalism
beyond the state and reject any prospect of multilevel constitutionalism \textit{senso lato},
again they range from the primitive to the more sophisticated. Most basically, and
more commonly within everyday ‘object’ discourse than in academic ‘observer’
discourse, a position exists that holds that the category of constitution is \textit{necessarily}
restricted to the state. That position is the negative image of nominalism, and just
as impervious to counter-suggestion. Whereas nominalism holds to or more often
depicts the solipsistic idea that all meaning is constructed without extra-
linguistic check or constraint, \textit{essentialism} holds to or more often simply assumes
the opposite. It maintains that meaning is fixed and invariable in its correspondence
with some extra-linguistic reality, and so it follows that it is simply \textit{meaningless} to
conceive of constitutionalism beyond the fixed and invariable limits of the state.\footnote{See, for example, Grimm 2005.}

Beyond essentialism there are at least two positions – or rather a continuum
of possibilities framed by two positions – that treat the idea of the constitution
as deeply embedded in the state. One position is \textit{culturalist} in nature. It holds
the idea of a constitution 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’ possessing comprehensive powers of self-determination
and self-legislation. These attributes, so the claim goes, are ultimately contingent
upon certain prior or emergent socio-cultural facts concerning identity, solidarity
and allegiance, absent which any self-styled constitutional project is fated to be
either a dead letter or a much more modest affair. Since 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 that it still constitutes a standing impediment to the
development of similar cultural formations at non-state sites, no real prospect can
exist of a full constitutionalism beyond the state.\footnote{See Loughlin 2009.}

A second position runs even deeper than the culturalist argument, though
without succumbing to the semantic sting of state-centred essentialism. This
approach may be called \textit{epistemic} in that it focuses on the very idea of the modern
state and of the 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’\footnote{For one attempt, see Walker 2003.} that is prior to and prerequisite to a full, modern articulation of the idea of constitution. 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 relationship between territory, ruling
authority and people, consists not merely of the expression and fruit of a prior cultural achievement – an accomplishment of national solidarity that supplies the ‘battery of power’ necessary to run the constitutional machine effectively. More than that, it is a political way of knowing and way of being in the absence of whose emergence the very idea of a constitutional polity is simply unimaginable. Both cases – culturalist and epistemic – strongly convey the message that the modern idea and practice of constitutionalism could not have developed except in the context and through the container of the state, and while this does not, as matter of logical necessity, rule out the possibility of a similar constitutionalism emerging in multiple 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 is possible.

Constitutionalism and Meta-Politics

This brief examination of nominalist, formalist and materialist positions on the one side of the issue and of essentialist, culturalist and epistemic approaches on the other side of the issue underlines the difficulty in finding common cause in the debate about multilevel constitutionalism senso lato. How, if at all, does one move beyond this divide? Such a possibility would seem to depend upon trying to ascertain what is most basically at stake – more basically than is revealed in the various debate-closing applications of constitutional language – in the various positions, and upon locating some overlapping ground at this more basic level. Clearly, the extreme positions of nominalism and essentialism are distinguished on the one hand by blindness to any argument that would confer any special title to the state and on the other by blindness to any trace of constitutionalism beyond the state. The assumptions and arguments behind this opposition only begin to become articulated in the other, more moderate positions. On the one hand, the formalists and the materialists suggest that something of value may be retained and adapted from the state tradition when one relocates to post-state contexts. In the case of formalism, the key to translation, so to speak, is abstraction, whereas in the case of substantivism the key is disaggregation. In the former case, the very idea of a cohesive legal and institutional order is seen as the basis of certain constitutional virtues in new contexts as much as in old, whereas in the latter the implication is that one can pick some features out of the state constitutional mix, such as a Charter framework or the deeper socio-cultural context of the state. On the other hand, the culturalist and epistemic arguments see the same glass as half-empty rather than half-full. For them, the new is an inadequate pastiche of the old rather than a contextually appropriate adaptation. The post-state constitution is a machine that.

in the culturalist critique, is deprived of the crude social energy to power itself
sufficiently or, in the epistemic critique, lacks the intelligent background software
necessary to understand and activate its own operating procedures.

In the final analysis, if one is to overcome this opposition one must look
beyond the reductive commitments and self-vindicating judgments of even the
more thoughtful of the state-centred and multilevel positions. It must be asked
whether something more general is at issue that is capable of being acknowledged
within both mindsets, and which can therefore serve as a common point from
which to investigate their differences. Therefore, what is needed in methodological
terms is a way of treating constitutionalism that is alert to this possibility; a split
perspective capable of identifying common ground at one level while at another
level continuing to acknowledge difference in terms of that common ground.

Such a split perspective can be supplied, it is submitted, by recasting the debate
in functional terms; no longer as a one-dimensional contest over diverse and rival
conceptions of the ends of constitutionalism understood as ends that either are or
are not exclusively associated with the state, but as a debate over diverse and rival
conceptions of the constitutional means necessary to ends that would themselves
be capable of commanding general agreement across state-centred and multilevel
positions.

But in order to be genuinely inclusive and not simply to impose an artificial
consensus, any such definition of ends must proceed at a very high level of
apstraction. At this rarified level, what implicitly unites the two mindsets is a sense,
corroborated both by the etymology of the constitutional idea and by its range of
applications prior to the age of the modern state, that constitutionalism serves a
deep and abiding function in human affairs, namely the meta-political function of
shaping the domain of politics broadly conceived – of literally 'constituting' the
body politic. More expansively, constitutionalism in this deepest meta-political
sense may be understood as referring to that species of practical reasoning which,
in the name of some defensible locus of common interest, concerns itself with
the organization and regulation of those spheres of collective decision-making
deemed relevant to the common interest in a manner that is adequately informed
by the common interest. Furthermore, if one is to avoid simply repeating the
familiar definitional impasse at this more general level, the meta-political sense
of the 'common interest' underpinning the collective decision-making capacities
as understood in each of its three key registers – authoritative (in whose name?),
jurisdictional (covering which collective decision-making capacities?) and
purposive (to what end, and how?) – must, in addition, be acknowledged as
possessing an open, and indeed a reflexive quality. Therefore, one cannot either
stipulate in advance or treat as permanently resolved what are the appropriate
sites for pursuit of the common interest, or what are the appropriate terms of
engagement between these sites, or what kinds of things fall within the remit of
the common interest, or what is the proper relationship between individual and

29 See, for example, Maddox 1982. See also Walker 2008b.
collective goods or preferences in the identification and pursuit of the common interest. All of these are matters themselves apt for decision in accordance with the common interest, understood as located at the very deepest level of political self-understanding and self-inquiry, and so as necessarily possessing a self-challenging and self-amending quality. Accordingly, if, as is suggested, constitutionalism is equated with the deepest sense of meta-political inquiry, one cannot simply decide a priori to equate the common interest with the national or state interest, and so corroborate an initial theoretical preference for state constitutionalism. Equally, one cannot simply assume that post-state sites are as appropriate as are states as authoritative sources of the common interest, as jurisdictional containers of the common interest, or as forums and institutional mechanisms for specifying the common interest, and thus simply wish away the state legacy in favour of a multilevel perspective.

Instead, in order to advance the inquiry and find a point of contentious engagement between the two mindsets, one must turn to a second level of inquiry – to the question of adequacy of means. If the common interest conceived of as the ultimate end of the constitutional project sounds at a level of abstraction – and of perpetual contestability – that does not necessarily or even presumptively discriminate between state and post-state sites, does something about the appropriateness of the means nevertheless pull in one direction rather than another? Is something about the constitutional method available in and supported by the state context more adequate to pursuit of the common interest than is any constitutional method available in and supported by post-state contexts? To answer that question one must first ask what, if anything, is distinctive to the constitutional method that has been available in and supported by the state. Then one must inquire whether that method, or any constitutional method or combination of methods that is the instrumental equivalent of the state constitutional method, may also be available or be made available in multiple sites beyond the state.

Holistic Constitutionalism

The modern state does indeed possess a distinctive constitutional method, best understood as possessing a holistic quality. In a nutshell, the holistic method is a method of constitutional articulation and engagement in which the authority and meaning of the various parts are understood and treated as dependent on

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30 Note that this challenge, as well as querying the force of the formalist and materialist arguments in favour of post-state constitutionalism, also brings back in many of the concerns of the culturalist and epistemic critics of post-state constitutionalism. However, it does so in terms that, by more clearly specifying the distinction between (state) means and (constitutional) ends, are less at risk of reducing the connection between state and constitution to a tautology.
the integrity of the whole. As will be seen, this holistic feature is no isolated thread, but something that affords texture to the various different aspects of state constitutionalism. However, to appreciate this something more must first be said about the constitutional concept itself. In so doing, one is no longer concerned, as in the previous section, with constitutionalism in the abstract – as a theoretical concept for making sense of and evaluating the social world, but with constitutionalism in the concrete – as an ‘object’ already at use ‘in’ the social world, and in the social world of the state in particular. Considered as such an ‘object’ concept, state constitutionalism can be viewed both diachronically and synchronically. Diachronically, state constitutionalism in the modern age describes a particular high point of accumulation of various distinct layers of situated ‘constitutional’ practice that have operated separately or in different combinations in the past. These layers are juridical, politico-institutional, popular and societal. Synchronically, state constitutionalism operates in terms of its own particular formulation of these layers and of their relationship with one another. In other words, constitutionalism in (state) practice behaves as a ‘cluster concept’, associated simultaneously with a number of different but themselves interrelated definitive criteria. In each of its four layers – or, if you like, in different parts of the cluster – constitutionalism can be observed operating holistically, offering an encompassing frame for the ‘constitutive’ representation and regulation of each of the particular dimensions of social ‘reality’ with which it is concerned. What is more, in the constellation of connections made under the sign of modern state constitutionalism between each of these layers, a further ‘frame of frames,’ or ‘holism of holisms’ can also be discerned. Each of the holistic frames of state constitutionalism will now be looked at more closely, first separately, and then in combination. To begin with, the juridical frame refers to an idea of self-contained legal order, complete with rules of self-production, self-organization, self-extension, self-interpretation, self-amendment, and self-discipline, all of which combine to affirm the autonomous existence and comprehensive authority of the legal order against other internal and external normative forces. The politico-institutional sphere refers to a system of institutional specification and differentiation of the sphere of the public and the political. Whereas the idea of autonomous legal order long predates modernity and the modern state, the idea of a secular, specialized
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1 and institutionally defined and delimited political realm, free from deference
to particular interests or to any idea of transcendent order, is a key emergent
feature of modernity. It is marked by a double move away from pre-modern forms
of authority, involving both drawing a general distinction between public and
private spheres of influence domains and integration of the public into a single
and comprehensive political domain. What is more, the creation and sustenance of
this singular political domain, and indeed consolidation of the autonomous legal
order, depend upon ‘the structural coupling’ and mutual support of the two self-
contained spheres of the legal and the political.

For its part, the popular frame refers to the dimension of ‘we the people’, and
so to the idea of the specialized and integrated public institutional realm being
underpinned not just by the autonomy of the political but also by its democratic
self-constitution and self-authorship. Finally, the societal frame refers to the idea
that the constitution pertains to a particular ‘society’, self-understood and self-
identified as such. Here the framing work of the constitution is mostly symbolic
rather than normative. The constitution depends for its normative effectiveness as
a design for a reasonably cooperative and commonly committed form of common
living on the plausibility of the very idea of an integrated society – whether the
emphasis is on the thin ‘political society’ of the state or the thicker ‘cultural society’
of the nation – that its very production and perseverance as a constitution seeks to
announce and promote.

If one looks more closely at the points of interconnection between the various
frames, one can begin to appreciate how a broader ‘holism of constitutional
holisms’ emerges under the template of the modern state. At the juridical and
politico-institutional levels, the constitutional order (sometimes in conjunction
with self-styled ‘organic laws’) typically places a mix of structural (politico-
institutional level) and substantive (juridical level) requirements on public
actors, which may be either specific functional institutions (e.g. industry-specific
regulators) or generic government organs – parliament, executive and judiciary.
The structural requirements are both internal and external. They are concerned
with the internal governance system of the institution in question – decision-
making procedures, representational rules, internal review and accountability
rules, and so on, as well as with the situation of the institution in question within a
wider institutional complex – including all the classic checks associated with ideas
of horizontal separation of powers, of federated vertical division of authorities,
and of institutional balance more generally. The substantive requirements include,
in positive and constitutive vein, jurisdiction or mandate rules which specify the
public purposes of the institutions in question and the boundaries of these purposes,
as well as, in negative vein, certain conduct-constraining rules which may take the
form of general individual rights catalogues or other more detailed rules which
are likewise concerned with trans-sectoral standards (e.g. freedom of information
rules, anti-corruption rules.)

35 Luhmann 1993.
A number of points may be made about co-articulating these different types of rules. First is the dependence of the substantive rules on the structural rules. The structural rules provide a general framework of orientation, coordination, and sanction that undergird the norm-specific guidelines contained in the substantive rules. Secondly, given their various boundary-setting and transversal qualities, the substantive rules associated with a particular constitutionally recognized function presuppose and are themselves supported and rendered more effective by their situation in a legal order that ranges more broadly than the particular functional specialization in question. That broader framework constrains and informs both by locating issues of the *vires* of particular institutions in a wider context of empowered institutions and by bringing general standards of the ‘right’ to bear in qualifying the pursuit of the particular ‘good’. Thirdly, the content of both the substantive and the structural rules is inscribed in a basic constitutional code that is relatively insulated from the particular institutions that are subject to these very substantive and structural rules. In particular, the combination of the autonomous rules of production of constitutional norms and their settled quality (perhaps entrenched in ‘eternity’ clauses or protected against simple majoritarian amendment rules, or at least subject to amendment provisions not within the gift of the affected institution itself), provides a form of protection against narrow forms of self-norming. Fourthly, the constitutional code is not only insulated from particular interests, but, more positively, it is receptive at points of origin, amendment and continuing interpretation to notions of common interest informed, on the one hand, by the idea of the constitution as a form of popular self-authorization over the totality of public affairs for a territory, and on the other, by the necessary discipline of ensuring widespread cooperation and compliance within the ambient society.

In summary, this combination of structural primacy, institution-transcending substantive rules, insulation of rules of constitutional norm production and maintenance from control by the institutions affected by these norms, and the openness of the same rules to broader forms of public influence and discipline, provide the key ingredients of a holistic method of constitutionalism. The parts are supported by the whole both within and across the various different frames. Particular sector-specific rules and institutions alike depend for their meaning and authority on their location within broader regulatory and institutional orders, which broader orders are informed by a similarly wide-reaching and holistic conception of the singular public as both the source and the receptive environment of constitutional authority.

Constitutionalism Beyond the State: Multilevel or Multi-Actor?

If one looks to levels and sites of authority beyond the state, what scope is there for application of the holistic constitutional method? And where it is not available, how else, if at all, might constitutionalism’s deep meta-political concern with the source, extent and manner of pursuit of matters of common interest be met?
Clearly, some forms of post-state regimes or polities seem to fit quite well on the ‘scale’ of constitutionalism considered as a layered set of holistic frames. The recent debate about adopting a documentary Constitution for the EU, to return to the best-known and most mature example of a multilevel constitutional pattern, eventually crystallized as one about how an entity whose ‘thin’ credentials as a self-standing juridical and politico-institutional order are unarguable might also be re-imagined and reconstructed in ‘thick’ terms as a popular and indeed ‘political-societal’ constitution – one with its own democratically sensitive self-constituting authority and its ‘own’ transnational society as an object of reference. In other words, the EU clearly already possessed holistic constitutional qualities in certain layers, so that the outstanding question concerned whether this could be extended across all the layers of modern constitutional practice. Once the supporters of the project were no longer satisfied with the documentary constitutional process as an exercise in self-congratulatory consolidation of its ‘thin’ (juridical and politico-institutional) credentials, or at least once they were no longer permitted by their opponents to treat the question so complacently, the ‘thin’ versus ‘thick’ question came more clearly into focus in the constitutional debate. That this ultimately led to the idea of a European Constitutional Treaty being voted down in the key French and Dutch referenda in 2005 neither undermines the relevance of the wider discussion nor, indeed, precludes its being revisited at some future point. In other cases, such as the WTO or the UN, the debate over the nature and politico-institutional registers, with no pretence of and little ambition towards a popular constituent power or dedicated ‘society’ at the relevant sites. However, even here no doubt exists about the applicability of a holistic method, even if to a truncated conception of constitutionalism. Indeed, it is precisely the well-established quality of a modest constitutional holism in these more limited regimes as much as in the hybrid regime of the EU that feeds much of the argument for post-state constitutionalism within a multilevel constellation, with both formalist and materialist approaches trading in their different ways on the holistic qualities of the juridical and institutional layers.

However, another type of case stands more clearly detached from the tradition of state constitutionalism. Here one refers to the various other autonomy-assertive transnational societal actors exhibiting normative authority and institutional identity who increasingly claim or are deemed to possess constitutional standing, whether in the field of Internet (e.g. ICANN) or transnational commercial regulation (e.g. Lex Mercatoria) or the regulation of sports (e.g. International Olympic Committee, World Anti-Doping Agency). In this context, one finds

36 See, for example, Weiler 1999: Ch. 1.
37 See, for example, Walker 2008b, 2007b.
38 See, for example, Walker 2008a; Dehousse 2005; and Magnette 2006.
40 See, for example, Teubner 2004.
a much more comprehensive move away from the holistic method, and so an

1 even starker confrontation of the question of whether and how the broader meta-

2 political end of regulating common affairs in accordance with considerations

3 of the common interest can survive the erosion of the state-originated holistic

4 constitutional method. Here, too, one begins to strain against the limits of the

5 'multilevel' metaphor itself. If the language of levels suggests a constellation of

6 stable, relatively self-contained, and reasonably 'state-like' sites or platforms, the

7 introduction of non-holistically embedded transnational societal agents suggests

8 instead a network of fluid, intermeshing nodes of influence. And in so far as the

9 constitutional language remains at all appropriate – a question to which a return

10 will be made in the final section below – the transnational domain is perhaps more

11 aptly conceived of as a 'multi-actor constitutionalism'\textsuperscript{41} rather than as a multilevel

12 configuration.

13 But in what precise sense do the new transnational societal actors represent

14 a move away from the holistic method? If one looks first to the juridical and

15 political-institutional layers, the idea of holistic self-containment fits ill with the

16 combination of site-specific self-regulation and diverse external regulation which

17 tend to be found in these sectors. While typically a dense network of structural and

18 substantive rules exists, on will not find the same holistic framework for their co-

19 articulation. Internally, structural rules may be found in autonomous enterprise or

20 organizational laws. Externally, different legislative, executive and judicial bodies

21 at national, international and supranational level will stand in various structural

22 relationships with the actors. Substantively, again, the same complex mixture

23 of self-regulation and uncoordinated external regulation through, for example,

24 horizontal application of human rights rules and the general regimes of international

25 standards bodies (e.g. Codex Alimentarius, International Standards Organization)

26 will be found. What is lacking in either case is any idea of an integrated and

27 comprehensive legal and institutional design external to the sector in question.

28 Equally, the idea of the holistic self-constitution of a popular 'subject' or of a

29 societal 'object' does not translate easily to the domain of the new transnational

30 societal actors. In either case – popular and societal – the wider and deeper

31 embeddedness associated with state constitutionalism is lost in so far as no

32 sense exists of an integrated and generic 'public' context which stands beyond

33 the special institution in question but within which the special institution is fully

34 incorporated. So while a significant degree of domain-specific self-authorship

35 may exist, it neither is identical to nor delegated from any more integrated and

36 generic public. Equally, a 'society' may be constituted in the sense of either or

37 both a particular epistemic community or community of practice associated with

38

39

40

41

42 This is a less common term, but see, for example, National Research Council, 2002,

43 \textit{Global Networks and Local Values} (Washington: Computer Science and Telecommunication

44 Board): Ch. 8.
It follows from this that none of the connecting elements – the ‘holism of holisms’ – of state constitutionalism can be guaranteed. In the first place, given the diversity of their pedigree (both as separate sets, and, even more so, when considered together), the relationship between the set of structural rules and the set of substantive rules lacks the coherence of the state model. So the structural rules cannot provide the functions of orientation, coordination, and constraint vis-à-vis the substantive rules in the ‘close fit’ manner that characterizes their relationship within the holistic state constitution. Secondly, no commonly bound general constitutional context is available to provide the transversal controls upon and wider jurisdictonal context for sector-specific substantive rules. Because the transnational societal actor is not located within a wider complex of international societal actors, each subject to the same transversal rules and the same broader jurisdictional frame, the kinds of constraint and direction that a state constitution can provide by ensuring common negative standards and providing for the mutual coordination of different jurisdictional horizons cannot apply in the same way. Finally, the absence of any broader, singular and autonomously conceived transnational constitutional frame as an appropriate point of common reference both reflects and highlights the absence of any integrated and generic sense of the transnational public as the subject and object of any such regulatory field.

Beyond Constitutionalism?

So the new transnational societal constitutionalism, such as it is, is clearly not simply the occurrence of a more ‘thinly’ layered version of state constitutionalism at other levels with the thicker popular and societal frame absent – as in the EU in each of its framing aspects. The idea of a holistic constitution is lacking in each of the four registers. What one has instead is a complex mix of discrete of the state constitutional imaginary was always in an important sense a partial vision. It was first and foremost a ‘political society’ – it was about the mutual self-constitution of law and politics and not necessarily concerned with other social sectors or sub-systems (economics, culture, and so on). But even if one allows this important point of social epistemology, one still has to take seriously the distinctively ‘totalizing’ ambition contained in the claim of modern political society to constitute a generic and integrated public sphere, and also recognize the powerful historical synergy between this ambition and the development of a deeper ‘cultural’ nationalism.

42 One should, of course, bear in mind Teubner’s (2004) qualification that the ‘society’ of the state constitutional imaginary was always in an important sense a partial vision. It was first and foremost a ‘political society’ – it was about the mutual self-constitution of law and politics and not necessarily concerned with other social sectors or sub-systems (economics, culture, and so on). But even if one allows this important point of social epistemology, one still has to take seriously the distinctively ‘totalizing’ ambition contained in the claim of modern political society to constitute a generic and integrated public sphere, and also recognize the powerful historical synergy between this ambition and the development of a deeper ‘cultural’ nationalism.

43 On the effect of the decline of holistic constitutionalism on the overall global regulatory field, rather than on the pattern of regulation within particular sectors, see Walker 2008c.
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1 self-constitution and diffuse external constitution across all four registers – legal,
2 politico-institutional, popular and societal.44
3 To what extent, if at all, can this new non-holistic constitutional method
4 nevertheless be conceived of as concerned with, and as effectively engaged
5 in, the same meta-political function as holistic state constitutionalism; namely,
6 the reflexive consideration of the proper locus, jurisdiction, and content of the
7 common interest in matters concerning the organization and regulation of
8 collective decision-making? On the face of it, absent the anchorage for a working
9 conception of the common interest provided by the coincidence of at least some,
10 if not all, of the four holistic frames in a single ‘level’ under the same territorial
11 coordinates, any prospect of a meaningful investment in these meta-political
12 questions of the common interest would seem distinctly unpromising Yet, for at
13 least three reasons, one should remain slow to dismiss the possibility of a non-
14 holistic constitutionalism beyond the state.

15 In the first place, the question arises of the viability of other possible 15
16 constitutional worlds. What are the alternatives, and so what can and should 16
17 one compare the new non-holistic candidates for constitutional status with? The 17
18 most telling comparator for current trends towards decisively non-holistic forms 18
19 of constitutionalism is not, as often seems to be assumed by the advocates of state 19
20 constitutionalism, the past of state constitutionalism, but the form and circumstances 20
21 of its present incarnation. The high-point of the holistic state constitutional method 21
22 is long gone. In acknowledging this, it must also be appreciated that much of what 22
23 is new in transnational regulatory development, whether in the form of hybrid 23
24 structures such as the EU or WTO or through the more radical forms of societal 24
25 constitutionalism, is the result not of inadvertent drift or of so many grabs for power 25
26 devoid of any public justification, but instead is in some part at least a response to 26
27 the growing inadequacy of the holistic state model in the face of the emergence of 27
28 collective action and coordination problems that simply do not coincide with the 28
29 political boundaries of the state. The new world even of the familiar and deeply 29
30 embedded category of state constitutionalism, it follows, is not the same as the old. 30
31 The new state constitutionalism may remain holistic in the sense that in each of 31
32 the four framing registers it continues to emphasize the importance of the integrity 32
33 of the whole and the interdependence of its parts, but this holism is qualified to 33
34 the extent that it can no longer aspire to an all-embracing quality. Rather, state 34
35 44 One should also distinguish non-holistic societal constitutionalism from the kind 36
38 and others, the main focus of criticism remains the state form, not from the perspective of 38
39 a functional differentiation which makes the holistic state constitution inadequate to the 39
40 range and distribution of collective practices but rather from the perspective of a cultural 40
41 differentiation (first nations, gendered identities, and so on) which makes the holistic state 41
42 constitution inadequate to the range and distribution of collective identities. Accordingly, 42
43 his version of non-state constitutionalism is about the re-articulation of a much greater 43
44 diversity of holistic identities than the state form allows rather than the transcendence of the 44
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constitutionalism itself becomes an ‘open’ or ‘relational’ constitutionalism,\textsuperscript{45} concerned to engage in accordance with a necessarily non-holistic logic with the very hybrid polities and non-holistic spheres of governance that have been the focus of attention, and with which the norms, institutions, \textit{demoi} and societal ‘objects’ of the state constitutional order overlap. In short, by their emergence the non-holistic constitutional forms serve to indicate, and through their regulatory penetration they serve to reinforce, the inadequacy of the very model of holistic state constitutionalism with which, ironically enough, they are often unfavourably compared. And to the extent that a point of comparison remains between old and new constitutional constellations, it is a matter of more or less emphasis upon a now heavily qualified state constitutional holism rather than a stark either/or choice between holism and its opposite.

In the second place, the question arises of (meta-) political morality and prudence. Such important differences of emphasis as do remain between more or less holistic venues, and the choices associated with these, are not necessarily beyond evaluation in terms that are found constitutionally meaningful. Rather, one remains capable of articulating at least some elements of the common language that would allow one to assess the relative merits and demerits of the holistic and non-holistic approaches to meta-politics, and to do so in such a way that suggests that the more holistic solution is not always the better or more ‘constitutionally’ appropriate.

Holistic constitutionalism, even in qualified form, can lay claim to many political virtues: to the formal equality and calculability dividends that may accrue to a legal order with a single all-embracing centre; to reliable juridical transmission of the (democratically formed) political will; to coordinated and mutually vigilant forms of institutional balance; to popular collective self-determination; and to a sense of societal solidarity necessary to make that collective self-determination effective. But such a model also demonstrates instability at either edge of its precarious accomplishment. On the one side, just because of its all-embracing reach and its exhaustion of the available mechanism of political influence and restraint, holistic constitutionalism is peculiarly prone to capture by powerful special interests and ideologies in any or all of its framing registers. On the other side, the same propensity to stretch across and absorb the entirety of the political sphere may mean that holistic constitutionalism attracts certain disabling tendencies, including a tendency towards inter-institutional stasis and gridlock and towards a thinly spread culture of common commitment. That is to say, comprehensive self-containment of the political sphere may always have been the major strength of holistic constitutionalism, but it also speaks to its irreducible vulnerability and ineradicable sources of danger.

This double-edged concern illustrates and so points towards certain perennial preoccupations over the best mode of accommodation between certain contrasting but balancing virtues associated with identification and pursuit of the common

\textsuperscript{45} See, for example, Walker 2003.
interest in constitutional arrangements – between attachment and detachment, the special and the general, the particular and the universal, the passionate and the constraining. Holism in the container of the state seeks ever more regulatory distance and abstraction (in substance, in structure and in pedigree) and ever more investment in a broader scheme of political commitments as a guide to and means of avoiding concentration of power in particular institutions, all the while courting the opposite dangers of more expansive forms of political partiality or dilution of the capacity for effective mobilization of political authority.

These moral and prudential concerns are not foreign to the new non-holistic constitutionalism of transnational societal actors. Rather, it is simply the case that its institutional logic is such that these concerns present themselves in inverse form. The problem for non-holistic constitutionalism is neither the corruption and capture nor the impotence of the regulatory whole, but precisely the same dangers of oversteering and understeering under the opposite condition of the absence of any such regulatory whole. And the key design puzzle in addressing these dangers of oversteering and understeering concerns the appropriate mode of articulating the internal and external elements within the legal and politico-institutional structure (in the first two framing layers), bearing in mind the fundamental irreducibility of the ‘constituency’ and ‘own society’ of the relevant community of practice to some integrated and generic notion of the public (in the third and fourth framing layers). It is quite understandable, then, that so much of contemporary transnational ‘constitutional’ thinking is concerned to develop ‘substantive’ and ‘structural’ rules in a manner that seeks to compensate or substitute both for the myopically self-interested tendencies (oversteering) and for the absence of effective leverage embedding of narrow self-regulatory spheres in a wider, holistic constitutional framework. So, for example, one finds an increasing emphasis on the language of universal human rights, on the widespread franchising of general regulatory standards, and on the promulgation and internalization of codes of corporate responsibility as ways, primarily, of correcting for the sectoral self-interest of particular transnational societal actors, but also of encouraging or facilitating the greater mutual coherence of their regimes. On the structural side, too, a number of trends are seen that have the same double purpose and effect of addressing the dangers of oversteering and understeering. This can be observed, for instance, in attempts to develop new forms of general discipline as well as to trace new ways of joining up connected regulatory concerns through initiatives such as elaborating general principles of global administrative law, replicating and
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1 refining new modes of governance and ‘rolling out’ local or sector-specific forms of democratic experimentation and problem-solving.  
2 Admittedly, in all of this the similarities and continuities in the meta-political concern with the common interest in organizing and regulating collective decision-making between past and present – and so between more or less holistic constitutional forms – operate at a high level of abstraction, require careful translation and certainly do not admit of any easy general conclusions. Still, something is resiliently recognizable at stake between old and new understandings of these deep questions of regulation which may merit the continued use of constitutional language as an analytical and evaluative tool for both.  

This brings the debate, finally, to a third consideration, namely the practical question of the use-value of constitutionalism once it is stretched not only beyond the state but also beyond the holistic method, and, arguably too, beyond the limits of appropriate deployment of the metaphor of ‘levels’. It is one thing to contend on the raised level of theoretical inquiry that a connection can be traced between the old and the new, and to be reminded that in terms of viable political possibilities the difference is no longer one of kind but of degree. If, however, below that raised theoretical level, constitutionalism is in little actual use as a common vernacular extending across the two contexts, and if what use exists has instead the divisive and mutually alienating consequences discussed in the opening section, then what is gained by retaining the constitutional idea for the emerging realm of transnational societal actors? Moreover, this note of scepticism is deeply underscored if the key underlying reason for the scarcity of an inclusive use-language of constitutionalism in the post-state, post-holistic regulatory context is considered. This has to do with the non-holistic picture, namely the ‘frame of frames’ or ‘holism of holisms’. Absent the coincidence of the other four frames, not only, as already noted, is it objectively the case that constitutionalism is deprived of the single anchorage of a convergence of sites and frames of common interest. At the intersubjective level, too, participants will lack the common ‘we’ perspective and point of commitment from which to address all questions of the common interest. Instead, it must be accepted, in a post-holistic context, that questions of the common interest in collective decision-making are simply not questions that, at the deepest level of political self-interrogation, it can be envisaged that all interested constituencies affected will address comprehensively in common. Does this not, at last, provide the decisive argument against the value of retaining the language of constitutionalism in the non-holistic transnational context? It is contended that it does not. The explicit adoption of constitutional language in non-holistic settings may remain largely restricted to theoretical and other elite discourse. But the trend, however hesitant and uneven, is towards wider use, and, as the example of the intermediate cases of the EU, WTO, and so on...
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show, recent precedents do exist for largely theoretical discourses of post-state constitutionalism gradually to ‘catch on’ at deeper social and political levels. Much more important is what the resilience and resurgence of constitutional language, however patchy on the ground, might signify. Even — indeed especially — where, as compared to the holistic constitutional tradition, the central issues of non-holistic forms of regulation present themselves in such different ways and are offered a quite distinctive range of regulatory solutions, constitutional language retains a crucial longstop function as a kind of ‘placeholder’ for certain abiding concerns. These concerns are, quite simply, that unless the meta-political framing of politics can be addressed in a manner that remains wedded to ideas of the common interest, however difficult this may be to conceive and however far the distance travelled from the most familiar and perhaps most conducive framework for such a task, something of great and irreplaceable value will have been lost from the resources of common living.

There is a final irony here. It is precisely because the language of constitutionalism, considered as a normative technology, finds it ever more complex and difficult to address the problems of communal living it poses in and for a post-state world, that it becomes all the more important to retain the language of constitutionalism, considered as a symbolic legacy, as an insistent reminder of what and how much is at stake. The day that constitutionalism’s inability — perhaps even an expansively conceived multilevel constitutionalism’s inability — to provide stock answers to its abiding questions becomes a settled reason no longer even to ask these questions is the day that constitutionalism’s historical paradigm will truly have been exhausted.

References


52 The reference is to Koskenniemi (2007), who has made a similar point about the contemporary fate of international law.
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