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

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.

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'post-national constellation'[2] take? In particular, where lie the outer boundaries of the post-national constitutional constellation, and what kind of juridical entities in what kind of relations *inter se* describe its internal structure?

However, before posing these broad questions something should be said about multilevel constitutionalism *senso 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.[3] 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.[4] 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*.[5] 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

2 See Habermas 2001.

3 At a conference in Lausanne. See Pernice 1995: 261*ff*; 1996; 2001: 163.

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*,[6] opts for the singular, whereas the term employed by Pernice to disseminate his ideas in the Anglophone world – that of 'multilevel constitutionalism' itself[7] – consolidates the ambiguity by focusing on the abstract quality of constitutional*ism* 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 underline the fuzziness of boundaries by stressing the centrality of an interactive process of establishing, organizing, sharing and limiting powers.[8] 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.[9] 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,

6 Pernice and Mayer 2000.

7 First at a conference in Bristol, England, in 1998, see Pernice 1998. See also, Pernice 1999, 2002.

8 See, for example, Pernice 1999.

9 For other conceptions of the EU as a complex unity, see, for example, Bogdandy 2000; Curtin and Dekker 1999, 2002. As is made quite explicit in the work of Pernice (1998, 1999, 2002), Bogdandy (2000) and others, the idea of a complex, internally differentiated constitutional unity owes much to a historical understanding of federalism as a template of decentralized political organization possessing a resilient quality of internal order without necessarily being state-based. See, more broadly, Beaud 2007 and Avbelj 2009.

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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'[10] documentary constitution.[11] 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.[12]

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.[13] What is more, the notion of a unity, however dispersed and complex, evoked by the idea of a single-cloth constitutional*ism*, speaks to a degree of harmony between the state and non-statal parts that may not be endorsed by more 'pluralist'[14] 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

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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domicile of constitutionalism and the guarantor of its relevance. It was only in the late twentieth century, when the configuration of economic, political and cultural forces that produced the state-centred global framework of authority was no longer so securely in place, that the idea of multilevel constitutionalism *senso lato* – as concerned with the very possibility of constitutionalism beyond the state – could gain any traction in Europe or elsewhere. Like 'multi-level governance',[15] its even better-known sister concept in political science, the advent of multilevel constitutionalism is a product first and foremost of objective changes in the socio-political world rather than of innovation in the world of ideas. Yet for all that it is events-driven, the emergent debate over multilevel constitutionalism *senso lato* has proved to be at once highly charged and extremely fragmented. If it begins by investigating why this is the case and looks at how disagreement and disengagement have tended to manifest themselves, this will clear the ground for an examination of what is most fundamentally at stake between the proponents and opponents of multilevel constitutionalism.

An initial survey of the debate over multilevel constitutionalism *senso lato* reveals an exaggerated version of a familiar problem. As is common when dealing with social and political concepts that register both at the 'object' level of everyday use and at the 'observer' level of theoretical inquiry, the answers that many analysts seek or expect when addressing the prospects of constitutionalism seem often to be anticipated in their stipulation of the definitional preliminaries. However, just because so much uncertainty surrounds a conceptual leap of such audacious proportions as is contemplated in taking constitutionalism beyond the state, the absence of agreement over definitional preliminaries is *uncommonly* pronounced and conspicuous in the instant case. In turn, this fractured beginning leads to an unusually sharp polarization of theoretical positions. In effect, one is faced with an irony of overproduction. On the one hand, in academic circles at least, the unsettling of old taken-for-granted certainties about the place of constitutionalism within the global scheme means that never has discussion of law and politics so frequently, so explicitly and so self-consciously occurred within a constitutional register. Likewise, never has the constitutional idea been so insistently reasserted in its old state setting or so vigorously sponsored in new non-state settings. On the other hand, just because the stakes are so high and the value of the currency so volatile, never has discussion of constitutionalism cultivated such little common ground.[16] Scant cross-fertilization occurs from the different points of departure, and what exchange does take place often appears to be the dialogue of the deaf.

This is not intended as a partisan point. Those who want or expect constitutionalism to travel to sites and levels of operation beyond its traditional state domicile are as likely to load the conceptual dice in favour of their preferred conclusion as those who start from the prejudice that no such

15 See Marks, Hooghe and Blank 1996.

16 See, for example, Walker 2002.

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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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in the case of the abortive EU constitutional text of 2004),[18] that is so familiar from state public law. In the context of non-state legal and institutional orders, instruments may be found that are similarly formally constitutive in one or more of various senses; whether with reference to their norm-generative or foundational quality, their assertion of entrenched status, their precedence over other system norms, or their claim to provide an encompassing framework for and measure of the limits of the 'body politic' that they create or recognize.[19] And even where such generative, entrenched, trumping, embracing and delimiting features of a legal and institutional order are independent of a self-styled documentary Constitution, or indeed of a single and unrivalled constitutive instrument of any sort, as has been seen in the case of the advocates of WTO constitutionalism,[20] or of the constitutionalization of the international order,[21] or of the various 'civic' or 'societal' constitutions such as the *lex mercatoria* of the international economy or the *lex digitalis* of the Internet,[22] the mere emergence of some combination of these formal features may still be enough for the juridical initiative in question to be deemed constitutional in kind.

A third form of constitutionalism beyond the state, and the one to which the approach sponsored under multilevel constitutionalism *senso stricto* is closest in conception,[23] concentrates not on formal matters but on the manifestation of a family resemblance between certain *material* features of state constitutionalism and the new transnational legal outgrowth. Aspects of transnational law are deemed to be constitutional not, or not only, because they appear on the commentator's approved list, as with nominalism, but because the mechanisms or concepts in question – from general structural formulae such as separation of powers and institutional balance to more specific principles such as subsidiarity or proportionality – were long ago nurtured in the state constitutional context and, indeed, have often been self-consciously received into transnational law from these state sources.[24] However,

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18 Treaty Establishing a Constitution for Europe, 16 December 2004, OJ 2004/ C310, 1–474.

19 For a concise statement of the formalist position, see Stone Sweet 2009.

20 See, for example, Cass 2005 and Petersmann 2000.

21 See, for example, Wet 2006. For an approach which, unusually, seeks to locate the constitutionalization of the international order in documentary terms – in the form of the UN Charter – see Fassbender 1998.

22 See, for example, Teubner 2004; and Teubner and Fischer-Lescano 2004.

23 One must be careful not to overstate this. While this is certainly where much of its practical emphasis lies, multilevel constitutionalism *senso stricto*, as set out in the work of Pernice (1998, 1999, 2002), is by no means only concerned with the incidence and development of material constitutional norms beyond the state. In addition, it is concerned with the variety of formal centres of legal authority, and indeed with the 'federal' co-existence of different levels of political community and identity (see Bogdandy 2000; Curtin and Dekker 1999, 2002; Beaud 2007; and Avbelj 2009).

24 On the migration of particular constitutional concepts from national to transnational level, see Walker 2007a.

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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.[25]

If one turns, now, to those who would oppose the movement of constitutionalism beyond the state and reject any prospect of multilevel constitutionalism *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 *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 simply assumes the solipsistic idea that all meaning is constructed without extra-linguistic check or constraint, *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 *meaningless* to conceive of constitutionalism beyond the fixed and invariable limits of the state.

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 *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.[26]

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 *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'[27] 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

25 For one attempt, see Walker 2003.
26 See, for example, Grimm 2005.
27 See Loughlin 2009.

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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'[28] 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 articulate 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 of Rights or a system of inter-institutional checks and balances, and these features will remain of significant value despite being deprived of either the fuller legal 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,

28 Canovan 1996: 80.

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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 abstraction. 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.[29] 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.

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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?[30] 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

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.

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the integrity of the whole.[31] 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.[32] 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',[33] 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[34] 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 frame 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

31 See more generally, Walker 2010. For an insightful but rather different treatment of holism, treated not as the basic *organizing method* of modern political life, as in the present case, but as a descriptor of the key *ontological unit* in the ordering of political society (and so considered as equivalent to a fundamentally *pre-modern* idea of indivisible community, and contrasted with modern individualism), see Bogdandy and Dellavalle 2009.

32 See Walker 2008b; and with specific reference to the EU, see Walker 2007b: 59.

33 Connolly 1993: 14.

34 On the ways in which acts of representation of a legal object are routinely (re)constitutive of that legal object, see, for example, Lindahl 2003.

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and institutionally defined and delimited political realm, free from deference to particular interests or to any idea of transcendental 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'[35] 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 that 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.

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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 specialism 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, one 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?

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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[36] 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.[37] 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.[38]

In other cases, such as the WTO or the UN, the debate over the nature and limits of constitutional holism is very much more confined to the 'thin' legal and politico-institutional registers, with no pretence of and little ambition towards a popular constituent power or dedicated 'society' at the relevant sites.[39] 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,[40] 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.
39 See Cass 2005; Petersmann 2000; Wet 2006; and Fassbender 1998.
40 See, for example, Teubner 2004.

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a much more comprehensive move away from the holistic method, and so an even starker confrontation of the question of whether and how the broader meta-political end of regulating common affairs in accordance with considerations of the common interest can survive the erosion of the state-originated holistic constitutional method. Here, too, one begins to strain against the limits of the 'multilevel' metaphor itself. If the language of levels suggests a constellation of stable, relatively self-contained, and reasonably 'state-like' sites or platforms, the introduction of non-holistically embedded transnational societal agents suggests instead a network of fluid, intermeshing nodes of influence. And in so far as the constitutional language remains at all appropriate – a question to which a return will be made in the final section below – the transnational domain is perhaps more aptly conceived of as a 'multi-actor constitutionalism'[41] rather than as a multilevel configuration.

But in what precise sense do the new transnational societal actors represent a move away from the holistic method? If one looks first to the juridical and political-institutional layers, the idea of holistic self-containment fits ill with the combination of site-specific self-regulation and diverse external regulation which tend to be found in these sectors. While typically a dense network of structural and substantive rules exists, on will not find the same holistic framework for their co-articulation. Internally, structural rules may be found in autonomous enterprise or organizational laws. Externally, different legislative, executive and judicial bodies at national, international and supranational level will stand in various structural relationships with the actors. Substantively, again, the same complex mixture of self-regulation and uncoordinated external regulation through, for example, horizontal application of human rights rules and the general regimes of international standards bodies (e.g. Codex Alimentarius, International Standards Organization) will be found. What is lacking in either case is any idea of an integrated and comprehensive legal and institutional design external to the sector in question.

Equally, the idea of the holistic self-constitution of a popular 'subject' or of a societal 'object' does not translate easily to the domain of the new transnational societal actors. In either case – popular and societal – the wider and deeper embeddedness associated with state constitutionalism is lost in so far as no sense exists of an integrated and generic 'public' context which stands beyond the special institution in question but within which the special institution is fully incorporated. So while a significant degree of domain-specific self-authorship may exist, it neither is identical to nor delegated from any more integrated and generic public. Equally, a 'society' may be constituted in the sense of either or both a particular epistemic community or community of practice associated with

41 This is a less common term, but see, for example, National Research Council, 2002, *Global Networks and Local Values* (Washington: Computer Science and Telecommunication Board): Ch. 8.

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the domain in question, but that too is neither identical to nor a subset of any integrated and generic 'public society'.[42]

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 jurisdictional 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.[43]

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 and in other less well-developed cases – but a constitutionalism that is reconfigured 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

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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self-constitution and diffuse external constitution across all four registers – legal, politico-institutional, popular and societal.[44]

To what extent, if at all, can this new non-holistic constitutional method nevertheless be conceived of as concerned with, and as effectively engaged in, the same meta-political function as holistic state constitutionalism; namely, the reflexive consideration of the proper locus, jurisdiction, and content of the common interest in matters concerning the organization and regulation of collective decision-making? On the face of it, absent the anchorage for a working conception of the common interest provided by the coincidence of at least some, if not all, of the four holistic frames in a single 'level' under the same territorial coordinates, any prospect of a meaningful investment in these meta-political questions of the common interest would seem distinctly unpromising Yet, for at least three reasons, one should remain slow to dismiss the possibility of a non-holistic constitutionalism beyond the state.

In the first place, the question arises of the viability of other possible constitutional worlds. What are the alternatives, and so what can and what should one compare the new non-holistic candidates for constitutional status with? The most telling comparator for current trends towards decisively non-holistic forms of constitutionalism is not, as often seems to be assumed by the advocates of state constitutionalism, the *past* of state constitutionalism, but the form and circumstances of its *present* incarnation. The high-point of the holistic state constitutional method is long gone. In acknowledging this, it must also be appreciated that much of what is new in transnational regulatory development, whether in the form of hybrid structures such as the EU or WTO or through the more radical forms of societal constitutionalism, is the result not of inadvertent drift or of so many grabs for power devoid of any public justification, but instead is in some part at least a response to the growing inadequacy of the holistic state model in the face of the emergence of collective action and coordination problems that simply do not coincide with the political boundaries of the state. The new world even of the familiar and deeply embedded category of state constitutionalism, it follows, is not the same as the old. The new state constitutionalism may remain holistic in the sense that in each of the four framing registers it continues to emphasize the importance of the integrity of the whole and the interdependence of its parts, but this holism is qualified to the extent that it can no longer aspire to an all-embracing quality. Rather, state

44 One should also distinguish non-holistic societal constitutionalism from the kind of post-national constitutionalism favoured by writers like Jim Tully (1995, 2007). For him and others, the main focus of criticism remains the state form, not from the perspective of a functional differentiation which makes the holistic state constitution inadequate to the range and distribution of *collective practices* but rather from the perspective of a cultural differentiation (first nations, gendered identities, and so on) which makes the holistic state constitution inadequate to the range and distribution of *collective identities*. Accordingly, his version of non-state constitutionalism is about the re-articulation of a much greater diversity of holistic identities than the state form allows rather than the transcendence of the very idea of holistic constitutionalism.

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constitutionalism itself becomes an 'open' or 'relational' constitutionalism,[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, *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

45 See, for example, Walker 2003.

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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 over external factors of influence (understeering) that accompany the lack of 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,[46] on the widespread franchising of general regulatory standards,[47] and on the promulgation and internalization of codes of corporate responsibility[48] 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,[49] replicating and

46 See, for example, Petersmann 2000.
47 See, for example, Schepel 2005.
48 See, for example, McBarnet 2007.
49 See, for example, Kingsbury, Krisch and Stewart 2005.

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refining new modes of governance[50] and 'rolling out' local or sector-specific forms of democratic experimentation and problem-solving.[51]

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 rarified 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 rarified 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 lack of the additional, inclusively reflexive 'fifth layer' of constitutionalism within 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

50 See, for example, Búrca and Scott 2006.
51 See, for example, Sabel and Zeitlin 2008.

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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'[52] 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.

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

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