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Legal Pluralism and the Politics of
Constitutional Definition

Gavin W. Anderson



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In order to preserve a clear focus within this broad theme, the scope of the Forum was limited to four distinct but complementary themes, each of which had its own coordinator. Theme 1: 'The Idea and the Dynamics of the European Constitution' was coordinated by Professor Neil Walker; Theme 2: 'The 'East' Side of European Constitutionalism' was coordinated by Professor Wojciech Sadurski; Theme 3: 'The Constitutional Accommodation of Regional and Cultural Diversity' was coordinated by Professor Michael Keating; and Theme 4: 'The Market and Countervailing Social Values in the Constitution of Europe' was coordinated by Professor Martin Rhodes.

Abstract

This paper addresses the counterhegemonic potential of rights constitutionalism in the age of globalization, and in particular its capacity to respond to the rise of significant forms of private power. It locates this issue in the context of the paradigmatic debate of modern law between liberal legalism and legal pluralism. The latter challenges the core epistemological assumptions of orthodox constitutional thought that law is exclusively state law (by positing the existence of non-state legal orders) and that this tends towards coherence and effectiveness. For legal pluralism, constitutionalism's importance does not lie primarily in the outcome of normative argument, but in symbolic terms as a legitimating discourse. Accordingly, to claim that law only emanates from state institutions, and is an effective tool of social engineering, is not simply an analytical statement, but reflects a substantive political agenda. The politics of definition of classical liberalism and the 'new constitutionalism' are contrasted to consider how they set the parameters for political debate. The former, which views constitutionalism as negative limits on the state, reinforces hegemonic interests by its narrow conception of political power as inhering in public institutions, whereas the latter, by locating constitutional norms, for example in the actions of multinational corporations, potentially opens up private power to constitutional scrutiny. It is concluded that the prospects for counterhegemonic constitutionalism lie in opening up the politics of definition of constitutional law to critical debate.

Keywords

Globalization, constitutionalism, liberal legalism, legal pluralism.

Introduction

This paper is concerned with interrogating some core assumptions of modern constitutional thought. Let me begin then with some assumptions of my own. First, the globalisation of the economy is the source of radical geo-political changes which are circumscribing and transforming (though not eliminating) the exercise of state sovereignty.¹ Second, a key feature of these changes is the significant enhancement of the political power of global economic actors (e.g. multinational corporations) and institutions (e.g. the WTO).² Third, these developments undermine democracy both formally, when political decisions are disaggregated from electoral accountability,³ and substantively, when narrow conceptions of economic citizenship (reflecting values of neo-liberalism⁴) prevail over more expansive ideas of social citizenship.⁵

These developments present important challenges for constitutionalism. Given the link posited between constitutionalism and democracy,⁶ how relevant is the traditional focus on the state if major sources of political authority now increasingly reside elsewhere? Put differently, how credible are constitutionalism's promises of liberty and equality if the nation-state is no longer democracy's exclusive or principal 'container'?⁷ Acknowledging this perceived inadequacy of existing constitutional thought, a number of writers have begun to rethink the conceptual bases of constitutionalism in response to the exigencies of the age.⁸ Specifically, there have been proposals to rework constitutionalism to deal more effectively with burgeoning private power, whether by extending the reach of constitutional provisions to private actors,⁹ or deepening their scope to promote a broader constitutional vision of social justice.¹⁰ These debates highlight what I contend are the key questions for contemporary constitutionalism, viz.: what is the relation between constitutionalism and globalisation? In particular, can constitutionalism operate as a source of transformative politics for advancing counterhegemonic values?

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- 1 My position here is close to the 'transformationalist' stance (in contrast with both 'hyperglobalists' and 'globalisation-sceptics') of David Held *et al.*: 'At the core of the transformationalist case is a belief that contemporary globalization is reconstituting or 're-engineering' the power, functions and authority of national governments [...] the notion of the nation-state as a self-governing, autonomous unit appears to be more a normative claim than a descriptive statement. The modern institution of territorially circumscribed sovereign rule appears somewhat anomalous juxtaposed with the transnational organization of contemporary economic and social life': D. Held, A. McGrew, D. Goldblatt and J. Perraton, 1999. *Global Transformations: Politics, Economics and Culture*. Cambridge: Polity Press, p. 8.
 - 2 According to Held *et al.*, globalisation has resulted in 'a complex interrelationship between corporate and state power' which 'enhances the global power of corporate capital': *ibid.*, p. 261.
 - 3 See C. Leys, 2001. *Market-Driven Politics: Neoliberal Democracy and the Public Interest*. London: Verso.
 - 4 Richard Falk describes the key neo-liberal tenets of the so-called 'Washington consensus' as: '[...] liberalization, privatization, minimizing economic regulation, rolling back welfare, reducing expenditure on public goods, tightening fiscal discipline, favouring free flows of capital, strict controls on organized labor, tax reductions, and unrestricted currency repatriation.' See R. Falk, 1999. *Predatory Globalization: A Critique*. Oxford: Polity Press, p. 2.
 - 5 See e.g. V. George and P. Wilding, 2002. *Globalization and Human Welfare*. Basingstoke: Palgrave.
 - 6 See C. Sunstein, 2001. *Designing Democracy: What Constitutions Do*. Oxford and New York: Oxford University Press.
 - 7 S. Marks, 2000. *The Riddle of All Constitutions*. Oxford: Oxford University Press, p. 81.
 - 8 See e.g. J. Tully, 2002. 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy', *Mod.L.Rev.*, 65, p. 204; and N. Walker, 2002. 'The Idea of Constitutional Pluralism', *Mod.L.Rev.*, 65, p. 317.
 - 9 See e.g. O. Gerstenberg, 2001. 'Private Law, Constitutionalism and the Limits of the Judicial Role', in: C. Scott, (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Oxford and Portland, OR.: Hart Publishing, p. 687.
 - 10 See e.g. I. Hare, 2002. 'Social Rights as Fundamental Human Rights', in: B. Hepple, (ed.), *Social and Labour Rights in a Global Context: International and Comparative Developments*. Cambridge: Cambridge University Press, 2002, p. 153.

In this paper, I address these issues from the perspective of legal pluralism. My central argument is that the paradigmatic debate of law between liberal legalism and legal pluralism shows how any purported definition of constitutionalism is always related to an underlying political agenda which prioritises certain forms of inquiry over others: in other words, we are always involved here in a *politics of definition of constitutional law*. This understanding points up the attraction of an alternative, legal pluralist, knowledge which suggests that constitutionalism's importance may not lie principally in terms of institutional design, or the outcome of adjudication, but rather in symbolic and rhetorical terms as a legitimating discourse.¹¹

The structure of the paper is as follows: I first introduce and briefly outline the paradigmatic debate, and discuss how legal pluralism undermines the assumptions on which our dominant knowledge of constitutionalism rests. I then place this epistemological critique in context and develops the idea of the politics of definition. Finally, I contrast the competing definitions of liberal and new constitutionalism to show how each seeks to legitimate a certain political agenda. I conclude that which knowledge of constitutionalism is accepted as commonsense is the key to understanding the counterhegemonic potential of constitutionalism.

The Paradigmatic Debate: Liberal Legalism and Legal Pluralism

The central challenge for legal theory posed by globalisation is the 'passing' of the 'inexorable linkage of law with sovereignty and the state'.¹² As Martin Loughlin notes, the success of the modern state has been predicated on 'its ability to promote economic well-being, to maintain physical security and to foster a distinctive cultural identity of its citizens'.¹³ However, this notion of sovereignty in terms of the state's capacity to exercise political power is increasingly under threat in the globalising world.¹⁴ The consequences are profound for our conceptions of law as the command of the sovereign state.¹⁵ If that sovereign is no longer able to command, or others' commands are more authoritative, there may be no necessary connection between the state and law. Martin Shapiro, for example, points to the 'movement towards a relatively uniform global contract and commercial law'¹⁶ through the global organisation of business practices. The relative unimportance of the state is underscored by his further claim that this

11 Before proceeding, a caveat about the scope of the argument. My focus here will be on the politics of definition underlying *rights* constitutionalism. First, within the confines of this article, this presents a relatively discreet case-study within which to test the utility of the politics of definition. Second, rights constitutionalism is arguably the dominant mode of constitutional discourse today: when people speak of 'world constitutionalism', (see B. Ackerman, 1997. 'The Rise of World Constitutionalism', *Vir.L.Rev.*, 83, p. 771) of the 'globalisation of constitutionalism' (see H. Klug, 2001. 'Constitutional Transformations: Universal Values and the Politics of Constitutional Understanding', in: C. Sampford and T. Round, (eds.), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism*. Sydney: Federation Press, p. 191 at p. 192), they generally refer to the global reach of judicially administered charters of rights, entrenched as higher law. Third, some writers have drawn connections between economic and constitutional globalisation, pointing out that some of the principal actors in the former have been key agents in promoting the latter (see J. Jenson and B. de Sousa Santos, 2000. 'Introduction: Case Studies and Common Trends in Globalizations', in: J. Jenson and B. de Sousa Santos, (eds.), *Globalizing Institutions: Case Studies in Social Regulation and Innovation*. Aldershot: Ashgate, p. 15). Accordingly, this sharpens the political context for discussing what interests are at stake in the politics of definition.

12 N. MacCormick, 1993. 'Beyond the Sovereign State', *Mod.L.Rev.*, 56, p. 1 at p. 1.

13 M. Loughlin, 2000. *Sword and Scales: An Examination of the Relationship Between Law and Politics*. Oxford and Portland, OR.: Hart Publishing, p. 145.

14 Evidence of the state's diminished political capacity is perhaps strongest in the context of economic globalisation. If we adjust our focus upwards, we see regional and global institutions, such as NAFTA (see D. Schneiderman, 1996. 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada', *U.T.L.J.*, 46, p. 499), or the WTO (see B. M. Hoekman and M. M. Kostecki, 2001. *The Political Economy of the World Trading System: The WTO and Beyond*, 2nd ed.. Oxford: Oxford University Press, at Chs. 1-8, which, although created by states, now have considerable power over states, to ensure the latter do not deviate from the path of economic liberalisation (see generally Held *et al.*, *supra* note 1, pp. 258-259).

15 Loughlin, *supra* note 13, p. 139.

16 M. Shapiro, 1993. 'The Globalization of Law', *Glob.Leg.St.J.*, 1, p. 37 at p. 38.

‘system of private lawmaking’ can successfully exist in the absence of a ‘transnational court or transnational sovereign to resolve disputes’.¹⁷ These developments provoke (or render transparent) the paradigmatic debate of modern law between *liberal legalism* and *legal pluralism* which focuses on whether ‘the equation between nation, state and law’¹⁸ is sufficient to ground an account of legal phenomena. The outcome of this debate has important implications for our knowledge of constitutionalism.

Liberal legalism is the dominant paradigm in western legal thought, informing the popular imagination, as well as legal scholarship and practice. In this view, law is formal state law, the most important actors are lawyers and legislators, and its ‘epitome’ is ‘the court of law and the trial according to law’.¹⁹ At its base, is the doctrine of the rule of law, which while giving rise to different normative conceptions, is premised on three descriptive assumptions: that law is exclusively state law, that state law tends towards system and order, and that state law is the primary (and effective) tool of social engineering.²⁰

Legal pluralism charges first that the reduction of law to state law is empirically unsustainable. Its historical mission has been the mapping of traditional state law functions, whether the adjudication of disputes,²¹ or social control,²² in non-state settings. In the last century, this scholarship developed first in the colonial setting,²³ then transposed to western socio-legal studies,²⁴ and has more recently addressed globalisation.²⁵ This last context moves legal pluralism from the margins of legal theory given the importance of what Gunther Teubner calls a global *lex mercatoria* (having no provenance in state law) in understanding the global economy.²⁶

Legal pluralism’s second charge is that not only can we find law beyond the state, but that formal state law fails to exhibit the special characteristics claimed on its behalf. In particular, it is often incoherent and instrumentally ineffective, thus undermining the command theory of law. Take, for example, the relation between state law and corporations. Under liberal legalism, a vertical hierarchy between the two is assumed, so that concerns over corporate power are addressed through (state) law reform. However, legal pluralism inverts this relationship, raising the empirical objection that norms generated by corporations may have a stronger influence over nation states, for example, when regulating market exchanges.²⁷

The legal pluralist charge that liberal legalism rests on a fundamental misdescription of law is particularly relevant for constitutional study. Rights constitutionalism, sitting at the apex of a hierarchy of formal norms, can be seen as the ultimate expression of liberal legalism. Its commands are the highest legal prize available, having a special status by virtue of their provenance, trumping ordinary law. It promotes a methodology located in ‘an ideal of the autonomy of law’ which ‘highlights law’s

17 *Ibid.*

18 B. de Sousa Santos, 2002. *Toward a New Legal Common Sense*. London: Butterworths, p. 86.

19 J. N. Shklar, 1986. *Legalism: Law, Morals and Political Trials*. Cambridge, Mass: Harvard University Press, p. 1.

20 These elements of liberal legalism can at least be traced back to A.V. Dicey’s influential exposition of the rule of law in the nineteenth century: see H. W. Arthurs, 1979. ‘Rethinking Administrative Law: A Slightly Dicey Business’, *O.H.L.J.*, 17, p. 1 at p. 6.

21 See e.g. M. Galanter, 1981. ‘Justice in Many Rooms: Courts, Private Ordering and Indigenous Law’, *J.Leg.Pluralism*, 19, p. 19; and R. C. Ellickson, 1991. *Order Without Law: How Neighbours Settle Disputes*. Cambridge, Mass.: Harvard University Press.

22 See J. Griffiths, 1986. ‘What is Legal Pluralism?’, *J.Leg.Pluralism*, 24, p. 1 at p. 50.

23 See e.g. M. B. Hooker, 1975. *Legal Pluralism: An Introduction to Colonial and Neocolonial Law*. Oxford: Clarendon Press, and; S. F. Moore, 1978. *Law as Process: An Anthropological Approach*. London: Routledge and Kegan Paul.

24 See R. L. Abel, (ed.), 1982. *The Politics of Informal Justice, Vols. 1 and 2*. New York: Academic Press.

25 See G. Teubner, (ed.), 1997. *Global Law Without a State*. Gateshead: Athenaeum Press.

26 G. Teubner, 1997. ‘“Global Bukowina”: Legal Pluralism in the World Society’, in: Teubner, (ed.), *ibid.*, p. 3 at p. 9.

27 Santos, *supra* n.18, p. 390.

adjudicative nature and control functions and therefore its rule orientation and conceptual nature'.²⁸ This has led to the prominence across jurisdictions of a normative approach, focusing on two questions: the *interpretive question* of what constitutions mean—reflecting the assumption that doctrine can be coherently reordered—and the *instrumental question* of what ends constitutions should promote—reflecting the assumption of law's effectiveness. On this account, rights constitutionalism's relation to political-economic globalisation depends on the outcome of normative debate.

However, if liberal legalism's knowledge of law can be successfully challenged, then constitutionalism may not work quite in the manner its protagonists assume. If we take first the instrumental question in constitutional law, the energy devoted to persuading judges to uphold rights, whether expression, association or privacy, rests on the assumption that law operates as an external factor on society, shaping behaviour directly through the threat of sanctions or the offer of rewards. This understanding perhaps best explains why activists are increasingly resorting to litigation to advance their causes. However, legal pluralists contend that assumptions about the linear effectiveness of state law are misplaced.

The theoretical move which undermines the instrumental view is to situate state law first in a world of multiple, constantly interacting, legal orders. The leading account here is given by de Sousa Santos, whose complex 'structure-agency map' of modern capitalist society correlates six forms of law to six distinct 'structural places': the state (or territorial) law of the citizenplace; the domestic law of the householdplace; the production law of the workplace; the exchange law of the marketplace; the community law of the communityplace, and; the systemic law of the worldplace. The structural places not only explain the nature of different types of law, but more crucially, their relation to each other:

[T]he legal nature of social regulation is not the exclusive attribute of any form of law, but rather the global effect of the combination of different forms of law and of the modes of production thereof.

To take an example: liberal legalist approaches to domestic abuse might see this as a problem remedied by better (state) law, whereas legal pluralists would see it in terms of the interaction of domestic and state law, where patriarchal power relations in the former may be the stronger norm, and so relatively resistant to reshaping by the latter. Thus, state law's effectiveness depends on its articulation with other forms of law.

In the constitutional sphere, there is mounting evidence against the efficacy of constitutional adjudication as an instrument of social change.²⁹ For example, we can cast doubt on the received version of the civil rights story in the US, that the Warren Court's judgments, beginning with the seminal *Brown*, led to 'great changes' in American society.³⁰ Rather, it is now thought that the Court was relatively ineffective in reducing discrimination in comparison with other branches of government,³¹ and moreover that its decisions were counterproductive, provoking a backlash in the south.³² Similarly, despite the charged picture of court-house demonstrators beseeching judges on the constitutional right to abortion, the evidence shows the most important norms affecting women's

28 M. Loughlin, 1992. *Public Law and Political Theory*. Oxford: Clarendon Press, p. 60.

29 See G. Rosenberg, 2001. 'Constitutional Cants', in: Sampford and Round, (eds.), *supra* n.11, ch. 18.

30 A. Lewis, 1987. 'An Ingenious Structure', *The New York Times Magazine*, 13 September, p. 39 at p. 40.

31 G. Rosenberg, 1991. *The Hollow Hope: Can Courts Bring About Social Change?*. Chicago and London: University of Chicago Press.

32 S. Scheingold, 1989. 'Constitutional Rights and Social Change: Civil Rights in Perspective', in: M. W. McCann and G. L. Houseman, (eds.), *Judging the Constitution: Critical Essays in Judicial Lawmaking*. Boston: Scott, Foresman/Little Brown, p. 73 at p. 78.

decisions either emanate elsewhere, e.g. in clinics,³³ or are located in ‘invisible background norms’, which both shape and reflect matters of sexual politics.³⁴

If the foregoing depicts the *external* legal pluralism between different sites of normativity, others emphasise the *internal* legal pluralism within normative regimes. This challenges the assumption underlying the interpretive issue that constitutional doctrine can be remade into a coherent whole. Charles Sampford, for example, argues that any attempt to theorise law in terms of system and order should be abandoned.³⁵ He portrays society as a ‘disorganized struggle’ where social peace is the result of the disorder between institutions. State law is part of this larger web of varied and complex social relations. Accordingly, it is also marked by asymmetry—for example, where the promulgation of rules passes through chains of legal relations between officials and citizens, where at each point, the main protagonists have a different perception of the rule at stake.

Sampford’s view of asymmetrical legal relations receives support in the well documented tendency—whether in Washington,³⁶ Ottawa³⁷ or Strasbourg³⁸—toward judicial disagreement in constitutional adjudication. Some studies try to explain this by retaining a doctrinal focus, highlighting the variety of interpretive moves used by judges in actual jurisprudence,³⁹ or showing how some judges employ different techniques in the same case, or between cases, resulting in doctrinal incoherence.⁴⁰ Other explanations step outside this internal perspective, and posit a number of ‘extra-legal’⁴¹ influences on the disposal of cases, whether under the rubric of horse-trading,⁴² strategy,⁴³ or ideology.⁴⁴ Both sets of studies support the view that in practice judges are not engaged in the Herculean labour of restoring coherence to the legal narrative—rather, as a collectivity, they are not trying to build systems at all.⁴⁵

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- 33 See W. A. Bogart, 1994. *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada*. Toronto: Oxford University Press, pp. 146-154.
- 34 K. L. Karst, 1993. *Law’s Promise, Law’s Expression: Visions of Power in the Politics of Race, Gender, and Religion*. New Haven and London: Yale University Press, p. 52.
- 35 C. Sampford, 1991. *The Disorder of Law*. Oxford: Blackwell, Chs. 7 and 8.
- 36 See M. V. Tushnet, 1983. ‘Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles’, *Harv.L.Rev.*, 96, p. 781.
- 37 See F. L. Morton, P. H. Russell and M. J. Whitey, 1992. ‘The Supreme Court of Canada’s First One Hundred Charter of Rights Decisions: A Statistical Analysis’, *O.H.L.J.*, 30, p. 1 at p. 37.
- 38 See C. A. Gearty, 1993. ‘The European Court of Human Rights and the Protection of Civil Liberties: An Overview’, *Camb.L.J.*, p. 89 at p. 126.
- 39 See P. Bobbitt, 1982. *Constitutional Fate: Theory of the Constitution*. New York: Oxford University Press, chs. 2-6.
- 40 See S. Peck, 1987. ‘An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms’, *O.H.L.J.*, 25, p. 1.
- 41 F. Schauer, 2000. ‘Incentives, Reputation, and the Inglorious Determinants of Judicial Behaviour’, *U.Cinn.L.Rev.*, 68, p. 615 at p. 620.
- 42 B. Woodward and S. Armstrong, 1981. *The Brethren: Inside the Supreme Court*. New York: Avon Books.
- 43 L. Epstein, 1998. *The Choices Judges Make*. Washington: CQ Press.
- 44 See e.g. J. A. G. Griffith, 1979. ‘The Political Constitution’, *Mod.L.Rev.*, 42, p. 1; A. Stone, 1992. *The Birth of Judicial Politics in France*. Oxford: Oxford University Press; M. Mandel, 1994. *The Charter of Rights and the Legalization of Politics in Canada*, rev.ed., Toronto: Thompson Educational Press; and M. V. Tushnet, 1988. *Red, White and Blue: A Critical Analysis of Constitutional Law*. Cambridge, Mass.: Harvard University Press.
- 45 ‘[J]udges do not tend to build systems of any kind [...] Rather they see themselves using (conveniently ill-defined) judicial techniques to deal with the material presented to them during the arguing of cases. Some of these techniques involve authority- and source-based arguments. Some involve content- and principle-based arguments. Some involve consequentialist and pragmatic arguments. Each technique is available, and judicial discretion exists as much in the choice of technique as the different uses to which it is put’: Sampford, 1991, supra n. 35 p. 87. Even if it is conceded that we can say is that adjudication represents a series of individual searches for principle, the problem here being, as Sampford puts it, that such systems ‘are created in the mind of an individual’, and remain there (*ibid.*, p. 151).

Critical Legal Pluralism and the Politics of Definition

Legal pluralism then argues that constitutionalism is not important in the manner liberal legalism claims: in what ways is it important? The key here, I suggest, lies in pursuing a recent turn towards a *critical* legal pluralism. Rather than seeking to replace one positivistic account with another, more plural version, this places the law-creating subject at the centre of analysis. Rather than focusing on which legal order individuals belong, this asks in which legal orders do individuals perceive themselves to be acting. This account ‘rejects the supposition that law is a social fact. Instead, it presumes that knowledge is a process of creating and maintaining myths about realities’.⁴⁶ A critical legal pluralist approach affects our inquiry in two important ways: First, we should focus more on what is involved in making claims that ‘law is *x*’ rather than focusing on whether we accept claims that ‘law is *x*’. Second, and related, this enables us to see the epistemological claims made on behalf of law in rhetorical terms. A critical legal pluralist approach accordingly brings to the surface the politics of definition of law. This directs our attention to the political purposes served in seeking to have any purported definition of law—which Santos argues is necessarily a ‘complex intertwining of analytical and political claims’⁴⁷—accepted as commonsense in the imaginations of law-creating citizens. In the following section, I develop these ideas by considering two major objections to legal pluralism—its inability to proffer a satisfactory alternative definition of law, and its valorising of the pathological.

Analytical and Instrumental Objections to Legal Pluralism

Such is the hold of liberal legalism that to most lawyers ‘law’ denotes simply state law: referring e.g. to ‘informal’ law is immediately suspect given the qualifying adjective. This onus on legal pluralism to justify abandoning the dominant paradigm is underscored by objections to its analytical and instrumental utility.⁴⁸ First, legal pluralist accounts of law which do not take the state as its primary referent are ultimately incoherent. Brian Tamanaha argues that attempts to assert a universal definition of law, covering state and non-state settings, rest on a flawed basis.⁴⁹ He contrasts the contention that ‘law can be conceptualized independent of state law’⁵⁰ with legal pluralist definitions of law which show that ‘law’s conceptual connection to the state cannot be severed’.⁵¹ According to Tamanaha, these generally posit the criteria of law ‘by extracting or emulating those elements which appear to be essential to *state law*, then subtracting all trappings of state law’.⁵² Thus, legal pluralists have not made out the case that there is something essential about ‘law’ which justifies collapsing social norms into law; there may well be ‘normative’ pluralism, but the question remains over whether this should also be labelled ‘legal’ pluralism.

Allied to this is a second objection, that there is an important value served by restricting use of the term ‘law’ to those formal acts of the state which accord with the rule of law. In this regard, T.R.S. Allan warns of the dangers of the ‘uncritical identification of ‘law’ with any and every assertion of governmental authority’ as this would make the citizens and their property ‘objects of administration’.⁵³ *A fortiori*, this normative delineation of the legal applies in the non-state setting. For example, Tamanaha asks the value of regarding domestic relations of the family as a site of law: for

46 M-M. Kleinmans and R. A. Macdonald, 1997. ‘What is a Critical Legal Pluralism?’, *Can.J. of Law & Soc’y*, 12, p. 25 at p. 39

47 *Ibid.*

48 I borrow these headings from Brian Tamanaha, although I employ them in a different manner: see B. Z. Tamanaha, 2000. ‘A Non-Essentialist Version of Legal Pluralism’, *J.L. & Soc.*, 27, p. 296 at p. 297.

49 See B. Z. Tamanaha, 1993. ‘The Folly of the ‘Social Scientific’ Concept of Legal Pluralism’, *J.L. & Soc.*, 20, p. 192.

50 *Ibid.* at 201.

51 *Ibid.*

52 *Ibid.* (emphasis in original). ‘Thus, the state law model inescapably provides the kernel of the concept of non-state ‘law’.

53 T. R. S. Allan, 2001. *Constitutional Justice: A Liberal Theory of the Rule of Law*. Oxford: Oxford University Press, at p. 16.

him, this leads to terminological confusion, and also brings a potential political detriment, by suggesting that domestic violence may be acceptable under the non-state legal regime.⁵⁴ This position could be extended to the context of neo-liberal globalisation, as to argue that conflating that corporations are sources of law is to accord their activities an unwarranted legitimacy.

These objections raise important points. The first underscores the difficulty legal pluralists necessarily have in ‘essentialising’ law. At its most elemental level, legal pluralism is a rebellion against the possibility of an all-encompassing normative system. Legal pluralists who say ‘law is *x*’ open themselves up to their own critique, i.e. why should we centralise the meaning of law around a different set of co-ordinates which merely reproducing the difficulties of giving a comprehensive account of legal phenomena? The second highlights the uneasy relationship between description and prescription in legal pluralism, of whether we should attach normative connotations to law purely on account of its non-state provenance.

These objections take our inquiry forward by showing that the significance of legal pluralism for contemporary constitutionalism does not principally lie either in offering an alternative definitive account of law, or in valorising non-state law in its own terms. They suggest that the more relevant implications of the paradigmatic debate flow from focusing on its process rather than its eventual outcomes—on what it entails to challenge dominant methodological conceptions than what their final replacements might be. Thus, the key point of the paradigmatic debate does not lie in asking the question ‘what is law?’ but rather ‘why is the answer to the question ‘what is law’ important?’ This points to the importance of a rhetorical conception⁵⁵ of legal knowledge:

What is especially characteristic of struggles for law [is] how these disputes about meaning have been framed by disputants as matters of definition [...] What is important is not to ‘prove’ the ‘empirical truth’ of [any] definition—itself a problematic exercise that rests on second-order definitions—, but rather to acknowledge the ideology and the objectives that drive the particular perspective chosen.⁵⁶

On this view, the equation of law with state law should be regarded as a ‘rhetorical strategy’ rather than a ‘stipulative definition’.⁵⁷ The point is not so much that liberal legalism misdescribes law, by omitting aspects of a more accurate and/or comprehensive definition, but that it misrepresents the nature of the question ‘what is law?’ by suggesting that this can be answered purely by analytical categorisation. Instead, in John Griffiths’s classic formulation, the idea that ‘law is and should be the law of the state’ should be seen for what it is: as an ‘*ideology*’.⁵⁸ The insight that questions about the meaning of law should be regarded principally in rhetorical terms leads to an important shift in focus: the central issue is now what ends are promoted by propagating the liberal legalist paradigm.

A brief historical excursus illustrates the political interests that have been served in the name of state-centred definitions of law. James Tully, for example, discusses how apologists of colonialism in the seventeenth century contrasted the historical stage reached by European states and their advanced political systems, with North American Aboriginal societies which still subsisted in the lawless state of nature.⁵⁹ Consequently, only Europeans had the power to exercise legal sovereignty, through

54 Tamanaha, 2000, *supra* n. 48, at p. 304: ‘This phraseology should give discomfort to opponents of domestic violence, for the reason that the term ‘law’ often possesses symbolic connotations of right’.

55 Santos, 2002, *supra* n.18, p. 354.

56 Kleinhans and Macdonald, 1997, *supra* n. 46, at p. 33, fn. 21.

57 *Ibid.*

58 Griffiths, 1986, *supra* n. 22 at p. 3 (emphasis added and omitted). The full quote is: ‘According to what I shall call the ideology of *legal centralism*, law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions’.

59 See J. Tully, 1995. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge: Cambridge University Press, at pp. 71-78.

property rights, over land.⁶⁰ In this way, the idea that European societies were uniquely ordered according to law—ultimately identifiable as the positive law of the state—legitimated the appropriation of land, notwithstanding its long-standing occupation by Aboriginals, as the exercise of right, not might. Harry Arthurs’s work on the development of English public law in the nineteenth century,⁶¹ for example, carefully documents the concerted efforts to centralise administrative law in the ordinary courts, and argues that this ‘attack on pluralism’ furthered lawyers’ professional and political interests, by promoting the idea that the administration should adhere to centralist precepts of the rule of law, for example by observing the rules of natural justice, as laid down by the ordinary courts. Santos links the reduction of law to state law to the 19th century project of embedding capitalism in western states.⁶² Thus the state appropriated law to itself, and fashioned it as a rational system of universal rules as a tool for imposing capitalist order on society. He argues that the key was to cast state private law—the essential lubricant for the functioning of capitalism—as not state law at all, and therefore ‘disengaged from any political or social content’.

Two important themes emerge from these studies: First, the centralisation of law as state law was not accidental, but the result of deliberate acts. Second, these acts of will were accompanied by strategies aimed at denying this contingency and thereby suppressing other understandings of law. Crucial to this was the equation of law with state law in analytical terms, and to take this method to a reasonable degree of sophistication (fluency in which would be a badge of ‘technical’ expertise). This strategy succeeded in putting legal pluralists in a double bind: given the exotic nature of their subject, they were perceived as engaging in anthropological, sociological or political, but not analytical, discourse, and; in order to engage with the dominant paradigm, they had to meet this on analytical terms (further masking the political basis of debates about law).⁶³ The primary significance of legal pluralism therefore lies in demonstrating how the ‘commonsensical’ acceptance that law is state law disguises that we are engaged here in a politics of definition of law.

The Analytical and Instrumental Objections in Context

The politics of definition place the two objections discussed above in context. First, viewing received definitions of law as the product of human agency reinforces accounts of the law-creating subject: ‘there is no *a priori* distinction between normative orders because these normative orders cannot exist outside the creative capacity of their subjects’.⁶⁴ This inability to materialise *any* purely analytical means of separating the legal from the non-legal displaces liberal legalism from its seemingly preordained position—rather ‘state’ becomes just one more qualifying adjective. Accordingly, we have to ask what are the consequences of making state law the central unit of analysis. Second, there is nothing in the label ‘law’ *per se*, which gives a norm any necessary positive value. Thus, labelling family relations ‘law’ may legitimate domestic violence only makes sense if our purpose is to valorise all non-state law. However, it could equally be to confront the problem of domestic violence, by casting it as an exercise of social power which must be addressed.⁶⁵ Divorced from the politics of definition, there is nothing in the claim that family relations should be regarded as law which has any

60 Tully notes that for Locke, in contrast with Aboriginals who were ‘commonly without any fixed property on the ground’, the European settlers (‘those who are counted the Civiliz’d part of Mankind’) ‘have multiplied positive laws to determine Property’, for ‘in governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions’ (*ibid.* at 72, quoting Locke (*ibid.*), ss. 27, 38, 30, 50).

61 H. W. Arthurs, 1985. *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England*. Toronto and Buffalo: University of Toronto Press.

62 Santos, 2002, *supra* n. 18, pp. 44-51.

63 *Ibid.*, p. 90.

64 Kleinhans and Macdonald, 1997, *supra* n. 46 at p. 40.

65 In so doing, we also highlight the agency and responsibility (see Kleinhans and Macdonald, *ibid.* at 38) of the perpetrators of domestic violence.

positive or negative connotation.⁶⁶ Thus, we cannot accord a legitimacy to any ‘law’ purely because of its provenance: this is a necessarily political question, which can only be answered in relation to the purposes served by attaching the label ‘law’ to some aspect of social life.

The latter point helps us understand the complex relationship between legal pluralism’s descriptive and prescriptive claims. While the fact of state or non-state law alone has no normative implications, how we present either of them in a descriptive mode can not only make clearer what prescriptive choices are available, but also reflects our view of how these choices should be made. Thus, the view of some legal pluralists that state law is not worthy of study can be attributed to their ‘anti-state stance’.⁶⁷ Others act from different motivations. Tamanaha, for example, contends that legal pluralism should take state law seriously, and that to do so will bring the benefits of clarifying the ways in which state law ‘actually *is* involved in maintaining the normative order of society’ or how it is used as ‘an instrument of power’⁶⁸ by elites. Tamanaha seems to imply his approach contrasts favourably with the ‘significant political impetus’ behind essentialist approaches to legal pluralism. However, his position may also confirm that all approaches to legal pluralism reflect some ‘political impetus’⁶⁹ and that Tamanaha shows us that this need not take the antistatist stance outlined above. Accordingly, the politics of definition shows the importance of making clear how these descriptive and prescriptive elements combine in an account of constitutional law.

The Politics of Definition of Constitutional Law

The implications of the politics of definition for constitutionalism are profound. They suggest that the latter’s counterhegemonic potential depends less on the outcome of internally focused doctrinal, or even structural, debates, but more on how constitutional knowledge’s role in ‘maintain[ing] and creat[ing] realities’,⁷⁰ contributes to the legitimation of power.⁷¹ In other words, constitutionalism’s significance is as a site of struggle, rather than as a direct agent for change (or conservation). On this account, the persistence of rights constitutionalism, despite its inability to deliver what it promises, is explained by its symbolic power. In this final section, I elaborate these points by asking what sorts of power relations are presumed, reinforced or disturbed, by different forms of constitutional knowledge. In that regard, I contrast classical liberal and ‘new’ conceptions of constitutionalism to see how they open up or close down the prospects for transformative politics with regard to the democratic control of private power.

The Politics of Definition of Constitutional Law I: The US Model of Classical Liberal Constitutionalism

The US Constitution is a useful starting point for unpacking the significance of the politics of definition for constitutional study, given its historical and contemporary relevance. The post-revolutionary settlement of the 1787 Constitution and 1791 Bill of Rights represents the birth of

66 For example, keeping with the example of domestic violence, retaining an exclusive legal focus on the state could be counterproductive in terms of addressing the issue at two levels: first, by suggesting that the issue is dealt with when the state acts (thereby downgrading the legal agency of the perpetrators of domestic violence), particularly if it has enacted a pristine set of criminal laws imposing severe penalties, and; second, by casting those instances of domestic violence not caught by state criminal law, being not illegal, as legal, with all the normative connotations involved.

67 Santos, 2002, *supra* n. 18, p. 94.

68 Tamanaha, 1993, *supra* n. 49 at pp. 210 and 211.

69 One could ask here why there is no political impetus in Tamanaha’s concern to make explicit how elites use state law to their own ends, or to look to the purposes served by the conventional usage of the term law (and which means, for him, that ‘we are [not] trapped in such accounts’: *supra* n. 48 at p. 315).

70 Kleinhans and Macdonald, 1997, *supra* n. 46 at p. 38.

71 See R. A. Macdonald, 1998. ‘Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism’, *Ariz.J.Int’l & Comp.L.*, 15, p. 69 at p. 78.

modern understandings of ‘constitution’,⁷² giving the term the more specific meaning accepted today as a codified document protecting individual rights. Moreover, this model of rights constitutionalism has been enormously influential beyond American shores, and has provided the basic template for the current round of constitutional globalisation.⁷³ An analysis of the US constitution from the perspective of the politics of definition brings two important insights. First, it locates the US Constitution in its historical context, and undermines claims that it embodies ‘the essence of constitutionalism’⁷⁴ showing that from the start, the meaning of constitutionalism was the focus of intense political struggle, and that the product of the Philadelphia Convention was the contingent victory of classical liberal political values. Second, it shows how a classical liberal conception of constitutionalism (remaining for now at the level of constitutional doctrine) directs the constitutional agenda in a particular political direction, framing constitutional questions in a manner conducive to the interests of private power.

Given the almost metaphysical status which the US Constitution has acquired, it is important to emphasise how the politics of definition were to the fore at the Philadelphia Convention. Jefferson, for example, argued that constitutions should be seen as living documents and so not entrenched to bind future generations,⁷⁵ whereas Madison saw constitutions as constraints on government by faction,⁷⁶ and so should necessarily be difficult to amend.⁷⁷ The events at Philadelphia should also be seen in light of the social climate at the time, with the revolutionary war having awakened a political movement for greater material equality, as manifested, for example in the Shays Rebellion of 1786.⁷⁸ In this connection, Russell Galloway has argued that ‘the debate over the Constitution [...] was essentially a debate between the defenders of property and defenders of the propertyless’.⁷⁹ Whether viewed in terms of high theory or class conflict, the historical context indicates how constitutions were, from the very beginning, sites of contestation between contending political outlooks.⁸⁰

The new constitutional settlement which emerged from this contest contained several key features which would prove influential in ‘essentialising’ constitutionalism as rights constitutionalism: first, the constitution was embodied in a single text; second, formally, this text had the status of higher law, binding ordinary law and requiring special amending procedures, and; third, substantively, the text should guarantee natural rights of life, liberty and property. These features combine to equate constitutions with limited government, the latter, in the context of globalisation, now increasingly portrayed as synonymous with democracy.⁸¹ However, at the time, they were decidedly *antidemocratic* in many respects, and designed to protect the propertied class, from what was then seen as the threat of

72 See R. C. van Caenegem, 1995. *An Historical Introduction to Western Constitutional Law*. Cambridge: Cambridge University Press, at pp. 150-151.

73 See S. M. Griffin, 1996. *American Constitutionalism: From Theory to Politics*. Princeton: Princeton University Press, at p. 9.

74 A. E. Dick Howard, 1991. ‘The Essence of Constitutionalism’, in: K. W. Thompson and R. R. Ludwokowski, (eds.), *Constitutionalism and Human Rights: America, Poland and France*. Lanham, MD: University Press of America, p. 3.

75 See S. Holmes, 1988. ‘Precommitment and the Paradox of Democracy’, in: J. Elster and R. Slagstad, (eds.), *Constitutionalism and Democracy*. Cambridge: Cambridge University Press, p. 195 at pp. 202-205.

76 See S. L. Elkin, 1996. ‘Madison and After: the American Model of Political Constitution’, *Pol.Studies*, 44, p. 592 at p. 593.

77 Griffin, 1996, supra n. 73 at pp. 29-30.

78 R. W. Galloway, 1991. *Justice for All? The Rich and Poor in Supreme Court History 1790-1990*. Durham, NC: Carolina Academic Press, at p. 12.

79 *Ibid.* at p. 14.

80 At times of US constitutional history, the politics of definition have been to the fore: for example, Bruce Ackerman identifies periods of heightened ‘higher lawmaking’, including the foundation of the republic, but also the Reconstruction and New Deal eras: see B. Ackerman, 1991. *We The People, Volume 1: Foundations*. Cambridge, Mass.: Harvard University Press, at pp. 40-56. My point of departure from Ackerman is that these periods are only remarkable in terms of the visibility of the politics of definition, which are present and continue throughout US constitutional history.

81 Jenson and Santos, 2000, supra n. 11 at p. 13.

democracy in the form of majority rule.⁸² Some of these protections took a specific form, whether in prohibiting states from passing laws ‘impairing the obligation of contracts’⁸³ or protecting property in slaves.⁸⁴ However, it is important to see how, more symbolically, hegemonic interests also succeeded in capturing the definition of constitutionalism to their ends: this occurs at two related levels.

First, substantive provisions of the US Constitution represent core elements of classical liberal discourse. It has at its root the idea that constitutions should limit government, reflecting the Lockean idea that the state is a necessary evil to protect the freedoms enjoyed by individuals in the state of nature. Furthermore, these freedoms are to be guaranteed to the fullest extent possible through the entrenchment of individual rights. This equates the guarantee of constitutional freedom with the protection of the individual’s private sphere, thus reinforcing the classical liberal separation of social life between the state and civil society, with the constitution’s role to insulate the latter from interference by the former. Together, these antistate and individualist elements chimed with the hegemonic interests of the time, and sought to entrench the idea, as Charles Beard put it, ‘that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities’.⁸⁵ Second, hegemonic interests were not only served by the substantive definition of constitutionalism, but also its *conceptual* definition, which emphasises its legal character. This is achieved primarily through the erection of a ‘sharp boundary [...] between the Constitution and politics’⁸⁶ which presented constitutional argument as a technical discourse, to be conducted by learned experts, i.e. lawyers and judges, and therefore not a political discourse.⁸⁷ Not only does this justify the practice of judicial review,⁸⁸ but it gives constitutional arguments advancing rights claims a special status, so that they did not require to be justified *de novo* in political terms.

Protecting Private Power through the Politics of Definition

A brief excursus into the historical record shows how the ongoing hold of classical liberal politics of definition, in three key areas of constitutional adjudication’s interface with private power, have shaped the form of constitutional argument to favour hegemonic interests. First, where corporations have claimed constitutional protection, the Supreme Court has asked whether the statutes under review infringed the area of constitutionally protected freedom.⁸⁹ As such, it has equated corporations with individuals⁹⁰ (rather than regarding them as major centres of economic power), locating both in the free realm of civil society, and so both should receive constitutional protection against its illegitimate incursion by the state. Second, where the constitutional *vires* of state legislation restricting the free operation of capital was questioned, the Court focused on whether the former offended the natural

82 Galloway, 1991, *supra* n. 78, at p. 13.

83 US Constitution, Art I, Section 10 (see Galloway, *ibid.*).

84 See M. Mandel, 1998. ‘A Brief History of the New Constitutionalism, or “How we changed everything so that everything would remain the same”’, *Isr.L.Rev.*, 32, p. 250 at p. 271.

85 Galloway, 1991, *supra* n. 78 at p. 12, quoting Charles Beard, 1913. *An Economic Analysis of the Constitution of the United States*, at pp. 324-325.

86 Griffin, 1996, *supra* n. 73 at p. 16.

87 *Ibid.* at p. 18: ‘[...] since constitutional disputes were seen first and foremost as legal disputes, constitutional law became a form of expert knowledge that required legal training. This tended to exclude the public from the development of constitutional meaning, reducing the democratic potential of the constitution’.

88 Although not expressly part of the original settlement, van Caenegem, (*supra* n.72 at 158) notes that judicial review ‘was widely advocated in the early years of the republic and some people thought it was implicit in the Constitution’. In any case, it had become a central part of constitutional practice by the late nineteenth century (see Griffin, 1996, *supra* n. 73 at pp. 90-99).

89 See generally, M. Tushnet, 1982. ‘Corporations and Free Speech’, in: David Kairys, (ed.), *The Politics of Law*. New York: Pantheon Books, p. 253.

90 See W. J. Samuels, 1987. ‘The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language’, in: W. J. Samuels and A. S. Miller, *Corporations and Society: Power and Responsibility*. New York: Greenwood Press, p. 113.

rights protected by the Constitution rather than its social necessity.⁹¹ Accordingly, it could hold that due process rights must have a substantive dimension protecting privity of contract.⁹² Third, where individuals sought to hold non-state bodies such as corporations to the standards of the Constitution, the Court has asked whether the actions of these bodies can be regarded as the actions of the state.⁹³ This reflects the notion that constitutionalism only limits state power, and reinforces the idea that corporations are private bodies, part of civil society, not centres of political power.

Approaching constitutional argument from a classical liberal politics of definition has served hegemonic interests relatively well over the years, in at least three ways. First, in terms of the direct outcome of adjudication: corporations have enjoyed rights under the First⁹⁴ and Fourteenth⁹⁵ Amendments, which they have employed to challenge state interference with their property; legislation protecting employees from hazardous working conditions has been struck down as interfering with freedom of contract,⁹⁶ and; non-state bodies have been generally immunised from subjection to the Constitution's requirements of due process and substantive justice.⁹⁷ Second, in limiting the possible adverse consequences for private power: for example, even where private action is deemed to be state action, this is seen as exceptional, particular to the facts of the case and resting in the private body's temporary nexus with the state. It does not amount to the idea that the private body represents any constitutional danger in its own right, thus reducing the potential for constitutional argument to be used as a sword against private power (while retaining private power's capacity to use such arguments as both a sword and shield). Third, in presenting this delineation of constitutional arguments in liberal legalist terms as the product of an internally ordered, autonomous discourse, rather than an as a political contingency. The result is that while there are any number of controversies within the constitutional framework, the framework itself is assumed to be non-problematic: constitutional argument is 'disembodied' from politics, as all protagonists seek to show how their preferred constitutional outcome 'is dictated by some neutral and apolitical principle'.⁹⁸ Thus, to the extent this framework remains captured by classical liberal values, those values are put further beyond the reach of their opponents.

The Politics of Definition of Constitutional Law II: 'New Constitutionalism'

Recently, a number of scholars have begun to challenge the idea, publicised abroad, that rights constitutionalism on the US model, is the prime, or only, form of constitutionalism. James Tully has argued that even within the US, the tendency to regard constitutionalism in singular terms is historically misinformed, and sits ill with how Jeffersonian ideas of a continuing constitution have continued to inform US political thought and action.⁹⁹ Others highlight constitutionalism's conceptual plurality—Jan-Erik Lane shows how the term 'constitutionalism' has been used to denote either a

91 See C. Sunstein, 1987. 'Lochner's Legacy', *Colum.L.Rev.*, 87, p. 873 at pp. 876-883.

92 See L. H. Tribe, 2000. *American Constitutional Law*, 3rd ed.. New York: Foundation Press, at pp. 1343-1346.

93 See L. Alexander and P. Horton, 1988. *Whom does the Constitution Command?*. Westport, CT: Greenwood.

94 *First National Bank v. Bellotti* (1978) 435 US 765.

95 *Santa Clara Co. v. Southern Pacific Railroad* (1886) 118 US 394.

96 *Lochner v. New York* (1905) 198 US 45.

97 See L. H. Tribe, 1988. *American Constitutional Law*, 2nd ed.. New York: Foundation Press, at Ch. 18.

98 L. M. Seidman and M. V. Tushnet, 1996. *Remnants of Belief: Contemporary Constitutional Issues*. New York: Oxford University Press, at p. 20.

99 Tully, 1995, *supra* n. 59 at p. 93. For Tully, the error in regarding US constitutionalism in terms of 'an undiverse sovereign people and uniform institutions [as] a universal norm' (at p. 91) is 'to accept a partial framework in which the [Jeffersonian] tradition and its two hundred years of demands for recognition—from the popular opposition of the 1780s to abolitionists, suffragettes, labourites, African Americans and the politics of cultural recognition today—cannot be given a fair hearing' (at p. 93).

codified written document or the general regime whereby power is exercised.¹⁰⁰ Dario Castiglione has developed this idea by sketching at least four general meanings which ‘constitution’ may have: positivist, normative, organic or functional.¹⁰¹ He identifies underneath these different meanings agreement on what a constitution does: ‘[i]n very broad terms, [it] *constitutes* a political entity, establishes its fundamental *structure*, and defines the *limits* within which power can be exercised politically’.¹⁰² For him, the error of modern times is to regard rights constitutionalism as the only means of constituting, structuring and limiting political society.

One alternative on offer is what has been styled, the ‘new constitutionalism’. Those writing under this rubric take as their central idea that the Washington consensus represents the ‘constitutionalisation’ of neoliberalism. In casting political-economic globalisation in these terms, they are pursuing a critical agenda which seeks to highlight issues of the democratic accountability of private power, which by implication, remain buried when we conceive of them in economic or technical, but not constitutional or political terms.¹⁰³ Stephen Gill, for example, identifies a ‘set of political and constitutional changes’ which are designed to ‘lock-in’ neoliberal reforms with respect to macroeconomic stability, protection of property rights and capital mobility’.¹⁰⁴ He argues that this involves three sets of processes: ‘measures to reconfigure state apparatuses’¹⁰⁵ as manifested in treaties such as NAFTA; ‘measures to construct and extend liberal capitalist markets’,¹⁰⁶ for example, incentives to investment, and; ‘measures for dealing with the dislocations and contradictions’¹⁰⁷ of global capitalism including ‘targeting the very poorest with real material concessions’.¹⁰⁸ For Gill, these measures should be seen in constitutional terms as they seek to attenuate, sometimes by coercion, sometimes by co-option, the potential democratic challenge to economic liberalisation.¹⁰⁹

David Schneiderman argues that we should conceive of some aspects of economic globalisation in constitutional terms.¹¹⁰ For him, this arises in two ways: first, in a functional approximation between constitutionalism and the transnational legal rules of the global economy,¹¹¹ for example, in precommitting future generations to a neoliberal institutional framework. Second, these transnational legal rules can operate as higher law on domestic constitutions, sometimes requiring the latter to amend their internal regime along neoliberal lines.¹¹² Underlying both these aspects is ‘the language of limits’, and Schneiderman here agrees with Gill that the effect of the new constitutionalism is to

100 See J-E. Lane, 1996. *Constitutions and Political Theory*. Manchester and New York: Manchester University Press, at pp. 5-13.

101 D. Castiglione, 1996. ‘The Political Theory of the Constitution’, *Pol.Studies*, 44, p. 417 at pp. 418-421.

102 *Ibid.* at pp. 421-422 (emphasis in original)

103 This position accordingly demonstrates the point made above, positing the critical legal pluralist point that allied to any descriptive positing of law is a political agenda, and that adverting to the fact of legal pluralism by itself does not have any intrinsic positive or negative normative connotations. Thus, here, referring to the neoliberal economic consensus in constitutional terms only finds concentrations of private power problematic when allied to a critical perspective. As David Schneiderman points out, this global constitutional perspective has also been put to hegemonic ends by theorists working under the rubric of ‘constitutional political economy’ whose goal is to ‘place limits on the capacity of governments to intervene in the so-called ‘private sphere’’: D. Schneiderman, 2000. ‘Constitutional Approaches to Privatization: An Inquiry into the Magnitude of neoliberal Constitutionalism’, *L. & Con.Probs.*, 63, p. 83 at p. 85.

104 S. Gill, 1999. ‘New Constitutionalism and the Reconstitution of Capital’, [Online], at p. 1. Available at: http://www.meijigakuin.ac.jp/~iism/pdf/nenpo_002/Gill.pdf

105 S. Gill, 2000. ‘The Constitution of Global Capitalism’, [Online], at pp. 11-12. Available at: www.theglobalsite.ac.uk.

106 *Ibid.* at pp. 13-15.

107 *Ibid.* at pp. 15-18.

108 *Ibid.* at p. 17.

109 *Ibid.* at p. 2.

110 D. Schneiderman, 2000. ‘Investment Rules and the New Constitutionalism’, *Law & Soc.Inq’y*, 25, p. 757 at pp. 762-767.

111 *Ibid.* at pp. 762-763.

112 *Ibid.* at pp. 764-767.

remove ‘some measure of control over the market’¹¹³ from political discourse. Harry Arthurs claims that neoliberal values have now acquired constitutional status in the sense that political positions which accord with the former have a special legitimacy on that count alone, and ‘not on the basis of their superior wisdom, equity or cost-effectiveness’.¹¹⁴ This is manifested, for example, in the tendency of governments around the world to identify their interests with the liberalisation of the global economy.¹¹⁵ What unites these positions is the idea that any viable alternatives to neoliberalism have been effectively removed from the policy agenda.

Problematising Private Power through the Politics of Definition

This view of the ‘new constitutionalism’—whether or not one accepts its underlying political analysis—causes some important shifts of focus in our view of the constitutional significance of private power.¹¹⁶ For example, corporations, given their role as the prime movers of the global economy, are now regarded not just as sources of law, but also as sources of constitutional law. This raises questions of their legitimacy directly, in contrast with the classical liberal account where such questions are only relevant in connection with the state. Thus, for example, under new constitutionalism, it is more difficult for corporations to receive the benefit of constitutional rights, as it is now implausible for them to masquerade as rights-bearing individuals in the free realm of civil society. As Santos observes, a pluralist concept of law implies an expanded concept of politics, one of the consequences of which is:

to uncover social relations of power beyond the limits drawn by conventional liberal theory and, accordingly, to uncover unsuspected sources of oppression or of emancipation through law, thereby enlarging the field and radicalizing the content of the democratic process.¹¹⁷

We can see this at work in our account of new constitutionalism, which, by emphasising the political consequences of neoliberalism in terms of social inequality and instability, seeks to reorient public discourse on corporate power according to the standards of social justice¹¹⁸ (in contrast with classical liberal constitutionalism which generally seeks to insulate private power from democratic scrutiny, and where its success can be judged in terms of criteria of market efficiency).

This attempt to reconnect economic power with the political control that the neoliberal economic consensus tries to push away, while central to new constitutionalism’s substantive agenda, also highlights a point of broader importance. There is important symbolic power in casting this issue in constitutional terms, both in arguing that processes of neoliberal constitutionalisation should be subjected to democratic scrutiny and approval before they are put beyond the reach of majoritarian politics, and also that even if such approval were forthcoming, their operation should be constantly subject to standards of democratic accountability. The contrast with classical liberal constitutionalism is instructive: whereas the latter seeks to put the constitutional framework out of the bounds of political debate, with the effect of further insulating its protection of private power, new

113 *Ibid.* at p. 764.

114 H. W. Arthurs, 1999. ‘Constitutionalizing Neo-Conservatism and Regional Economic Integration: TINA x 2’, in: Thomas J. Courchene, (ed.), *Room to Manoeuvre? Globalization and Policy Convergence*. Montreal and Kingston: McGill-Queen’s University Press, p. 17 at p. 27.

115 For example, in the developing world, attracting Foreign Direct Investment has become a central plank of states’ policies, both through identifying FDI with economic development and a fear of losing out to other states in the global economy. Accordingly, states have offered a raft of subsidies and inducements to MNCs in the hope of gaining investment, leading as Held *et al.* have noted, to the creation of ‘free trade zones in which normal domestic regulatory requirements do not apply’. (Held *et al.*, 1999, *supra* n. 1 at p. 259).

116 For example, as Gill, 2000, notes (*supra* n. 105 at p. 10), under ‘new constitutionalism’ the ‘dominant political subject’ is the investor (as opposed to the abstract rights-bearing individual of classical liberal constitutionalism).

117 Santos, 2002, *supra* n. 18, p. 98.

118 Gill, 2000, *supra* n. 105 at p. 11.

constitutionalism puts the framework itself in the spotlight with a view to engendering debate on the legitimacy of private power. In other words, new constitutionalism gives ‘constitution’ the political charge which classical liberal constitutionalism seeks to defuse.

The latter point is crucial, as it reminds us that the politics of definition are ever-present, even if some accounts try to cover them over. The obverse is that any account of law only takes meaning from its underlying politics of definition. Thus the liberal legalist emphasis on law as a formal discourse carried out by trained experts acquires hegemonic connotations when allied to the classical liberal politics of definition of the US Constitution, enabling the latter to obfuscate its political basis. The above analysis also returns us to the importance of viewing the politics of definition, not just in terms of how they prioritise certain worldviews, but also with regard to how they perform a broader legitimating role, with important implications for prevailing power relations.

The Politics of Definition and the ‘Provisional Sedimentations’ of Social Life

Elaborating the politics of definition advanced by the two conceptions of constitutionalism outlined above takes forward our inquiry in three important ways. First, it emphasises how the meaning of ‘constitution’ has been, and continues to be, subject to intense political struggle, putting into perspective the notion of constitutional ‘essences’. Second, it shows how, depending on which side prevails in the politics of definition has important consequences on how we approach the question of private power. Third, that the politics of definition do not just speak to how we frame issues in the abstract, but have concrete implications as to which political values can be successfully prosecuted in practice. Accordingly, a legal pluralist perspective provides us with a richer basis for assessing constitutionalism’s counterhegemonic potential than the normative method favoured by liberal legalism.

We can elaborate this by considering the relation between the politics of definition, and the theoretical bases of legal pluralism. Making this connection amplifies the symbolic importance of constitutions, by showing that the key issue is how the politics of definition take root in the political imagination. We can approach this by exploring some apparent tensions in the legal pluralist case. New constitutionalism seems, on the one hand, to take legal subjectivity seriously by emphasising the multiple interactions which make up individuals’ constitutional experiences.¹¹⁹ Yet, on the other hand, it also appears to insist that there is a reasonably coherent normative hierarchy which enables individuals to exercise their law-creating capacities only so long as this accords with the neoliberal consensus.¹²⁰ For that matter, the analysis of the US Constitution also appears to suggest that constitutional jurisprudence has been at various times determinate enough to enable corporations to make significant gains. How can these positions be reconciled?

First, it should be stated that while legal pluralism takes individuals’ law-creating capacities seriously, this does not reduce to complete subjectivity, such that legal experiences are solely the product of each individual’s imagination.¹²¹ Rather, legal subjectivity should be seen in relational terms: ‘[s]ubjects construct and are constructed by State, society and community through their relations with each other’.¹²² These relations can significantly constrain legal subjects, for example

119 For example, Arthurs, 1999, argues (supra n. 114 at pp. 28-29) that to comprehend the full range of constitutional relationships between institutions and individuals, we need to have regard not only to ‘formal, juridical arrangements, but also more broadly, [...] the shadow effects, social and cultural implications and symbolic significance of normative regimes which limit our ability to imagine, construct and execute alternative policies’.

120 For example, Schneiderman, 2000, argues (supra n. 110 at p. 83) that the claim that globalisation is marked by an ‘irreducible heterogeneity’ that ‘fails to account adequately for the determinate rules and structures associated with ‘economic globalisation’.

121 See Kleinhans and Macdonald, 1997, who argue (supra n. 46 at p. 42) that the focus on how legal subjects contribute to the construction of normative orders ‘does not necessarily entail the replacement of an objective inquiry by a subjective one.

122 Kleinhans and Macdonald, *ibid.* at p. 43.

when they take the form of '[d]ominant narratives', imposed 'either directly through the imposition of brute force dressed up in the guise of State officials, or indirectly through the ideology of legitimated state power', and which subjects then 'recognize and maintain'.¹²³ This leads to the second point of clarification, that highlighting the internal and external pluralism that attaches to all legal orders does not mean that subjects' experiences of law are hopelessly indeterminate. For example, a theorist such as Sampford, who argues that legal relations are by their nature asymmetrical (and hence work against the possibility of system in law), nonetheless can also hold that the overall legal regime in which individuals find themselves can be relatively stable. This is explained by showing how the disorganising influences which produce social conflict also serve to mute it, the result being 'a *social inertia* in which certain interests tend to become *entrenched* because of the inability of others to dislodge them'.¹²⁴ This social inertia can give a determinate framework to social life by embedding dominant interests against attack from their opponents.¹²⁵

It is helpful at this point to return to Santos's account of the structure-agency map of capitalist society. For Santos, it is the articulation between different forms of social power, law and knowledge which establish 'the horizon of determination, the outer structural limits of social life'.¹²⁶ How these articulations develop is the result of a complex relationship between structure and agency, which Santos captures through the metaphor that 'structures are solid moments or marks in the flowing currents of practice'.¹²⁷ Thus, the prevailing normative hierarchy which shapes individuals' legal experiences is both the work of human agency, but also a potential constraint on human agency, especially when it attains the status of commonsense.¹²⁸ When the latter situation prevails, Santos argues this should be seen in terms of 'provisional sedimentations of successfully reiterated courses of action', 'provisional' because they are 'the context within which determinations and contingencies, constraints and opportunities are played out'.¹²⁹ However, although provisional, the prevailing sedimentations have concrete implications in terms of setting the horizon of determination.¹³⁰ To connect this with our discussion of constitutionalism: if we seek to understand the 'successfully reiterated courses of action' that inform individuals' experiences of constitutional law, the above analysis confirms the need to look beyond the traditional focus on state constitutional law. Rather, constitutionalism is but one factor contributing to the current 'provisional sedimentations' that affect the exercise and distribution of political power: the focus now shifts to what sort of contribution it makes. The key here is the extent to which the contingent outcome of constitutional politics of definition contributes to the embedding of certain ideas as common sense in the popular and (perhaps more important) elite imagination. This inquiry focuses at two levels: first, what political arguments prevail in constitutional adjudication, and second, how these affect the political arguments that prevail at the broader level of the provisional sedimentations.

123 *Ibid.*

124 Sampford, 1991, *supra* n. 35 at p. 209 (emphasis in original). Sampford argues that given their control over the relations of production, the 'pre-eminent' class' will have 'greater success in the social melée than the class they 'exploit' and classes based on other modes of production. They are more likely to be able to set up, take over, hold and limit the actions of institutions so that their interests are furthered rather than challenged' (*ibid.* at p. 211).

125 For Sampford, whether entrenched interests can be successfully attacked depends on: 'the resources of the attacking/defending party, the resources of those on whose support it can call in such a conflict, the extent and speed of their mobilization, and the power relations in which they can be deployed' (*ibid.* at p. 209).

126 Santos, 2002, *supra* n. 18, p. 399.

127 *Ibid.* p. 354.

128 *Ibid.* p. 395.

129 *Ibid.* p. 354.

130 Santos gives as an example how the hold of 'free trade fundamentalism and hegemonic demands for structural adjustment, stabilization and foreign debt payment' in peripheral societies has the effect there of 'reorganizing all the other structural places, even though the range and the depth of the reorganization may change enormously across social fields'. (*ibid.* p.400).

We can gain some flavour of the analytical uses of such an approach by returning to the discussion of US constitutionalism. The state action doctrine, in placing a presumptive bar to the constitutional scrutiny of non-state bodies, has led to direct gains by private power in jurisprudential terms. However, the major symbolic importance of adjudication in this context lies in how it embeds classical liberal politics of definition as constitutional orthodoxy—both substantively, that constitutions are about limiting government, and conceptually, that they are legal discourses and so represent *ipso facto* the legitimate baselines for political action—and how the hold of these ideas at the level of adjudication plays out at the broader level of public discourse (Santos’s horizons of determination) to shape the possibilities of political action. In this regard, it is important to note how (state) constitutional law reflects, but also reinforces the provisional sedimentation of market values (particularly that corporations are not centres of political power to be subjected to direct democratic control), as the framework for American society.¹³¹

Conclusion

This juxtaposition of classical liberal and new constitutionalism emphasises how the definition of ‘constitution’ has been, and continues to be, a matter of intense political struggle, even if this is not always evident in mainstream constitutional discourse. Moreover, the key to understanding constitutionalism’s tendency to act (in Santos’s terms) in a more ‘boundary-setting’ or ‘path-breaking’ mode¹³² lies in which politics of definition take root in the popular and elite imagination. This point attains some urgency given the active spread of constitutionalism on the classical liberal model. If accepted, the argument advanced in this article has far-reaching consequences for constitutional thought and practice. First, it suggests that for those concerned with developing the transformative possibilities of constitutional discourse, both opening up, and challenging, the politics of definition may provide richer rewards than rehearsing normative arguments within the received definitions. Second, it places questions such as the relation between economic globalisation and constitutionalism,¹³³ or how we might rethink the politics of definition,¹³⁴ at the centre of future

131 See Elkin, 1996, *supra* n. 76 at p. 592. We can also now attempt a reconciliation between the arguments that constitutional doctrine is necessarily disordered, and that it is concrete enough to be an effective vehicle of legitimation. First, the above analysis confirms that constitutional adjudication is not autonomous, and that to the extent it gains meaning, this is the result of its relation with other discourses. Second, where it does have coherence this is at the macro level, by articulating with hegemonic forces in limiting the acceptable range of political argument on the democratisation of private power. Third, while this sets the broad parameters for constitutional argument, it necessarily cannot produce coherence to the extent envisaged by liberal legalism at the micro level of doctrine, as there will continue to be a number of political choices between these poles—resulting in practice in deep doctrinal contradiction. Accordingly, depending on the level at which we analyse doctrine, we can say that it is both relatively determinate and relatively incoherent—the answer depending on how it gains meaning from its broader situation.

132 Santos, 2002, *supra* n. 18, p. 399.

133 Santos, for example, has noted that those most volubly agitating for rule of law reforms (with a constitutional charter of rights as the centrepiece) have often been powerful agencies of the global economy (*ibid.*, pp. 326-335). It should be noted that it is not only opponents of neo-liberalism who make this point. In the World Bank’s *From Plan to Market* (World Bank, 1996. *World Development Report 1996—From Plan to Market*. Oxford: Oxford University Press), it was emphasised that the hallmarks of a ‘dynamic, changing economy’ are the creation and allocation of property rights and a constitutional structure which ensures that ‘the government will apply the law consistently and will itself abide by certain constraints’. It is instructive that in its account of these constraints, the World Bank relies on the classical liberal underpinnings of rights constitutionalism: ‘Formal constraints on arbitrary state power in established market economies derive partly from [constitutional law]. These bodies of law ensure that all legislation is consistent with the national constitutions [...] They delineate the rulemaking authority of various state bodies, lay out the procedures for enacting laws [...], and provide individuals recourse against unlawful or capricious state action (*ibid.* at 94)’.

134 As ever, outcomes rather than processes, are easier to specify. Santos gives the following account of how constitutionalism may be rethought: ‘In the perspective of participatory democracy, courts may have here a democratic contribution only if, rather than trivializing such disputes, they make the connection between the individual disputes and the underlying structural conflicts. This will involve a far-reaching post-liberal reform in substantive law as well as in

constitutional research agendas. Answering these, and related, questions is beyond the scope of this paper; my objective here has been to show how a legal pluralist perspective highlights the importance of asking them, and further, through the central idea of the politics of definition, provides us with the means of charting the way forward.

Gavin W. Anderson
School of Law
Stair Building
5-9 The Square
University of Glasgow
Glasgow G12 8QQ
UK

g.anderson@law.gla.ac.uk

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procedural law and court organization: class actions; broad standing; proactive judicial system; greater lay participation on the part of citizens and NGOs; radical politics of individual and collective rights; and progressive multiculturalism etc. None of this will be possible without a vast reform of legal education. In sum, in order to meet the criteria of participatory democracy the judicial system must see itself as part of a political coalition that takes democracy seriously and gives it precedence over markets and an individualist, possessive conception of property'. : Santos, 2000, supra n. 11, pp. 346-7.