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Law's Fading Co-Ordinates

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**Out of Place and Out of Time: Law's Fading Co-ordinates**

Neil Walker



**OUT OF PLACE AND OUT OF TIME:  
LAW'S FADING CO-ORDINATES**

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**Abstract:** Modern jurisprudence has been dominated by questions of authority and questions of meaning. The present paper addresses what it calls the third question of jurisprudence - namely the question of how law situates itself in space and time. This is a question to be addressed at various levels, the most important of which concerns the overall legitimacy of law as a normative enterprise which claims to come *from* somewhere and 'somewhen' and to be directed *to* somewhere and 'somewhen'. In the Westphalian tradition in which the dominant forms of law have been constitutional law and international law, this question of self-situation has tended to be answered either in highly universalistic terms (a law that transcended place and time) or in highly particularistic terms (a law that was peculiar to a particular place and perpetual in its ambition) . Both universalistic and particularistic narratives, despite their superficial contrast, emphasize the holistic and magisterial properties of law – as a form of authority that is both comprehensive and self-contained and sovereign within its situation. Today, with the fading of the Westphalian paradigm and the growth of myriad new forms of transnational law, various forms of new regulation – pluri-constitutive, interstitial, non-constitutive and global general law – lack the background co-ordinates either of universalism or of a comprehensive particularism and the associated systemic qualities of holism and magisterialism. What do these new forms of 'uncharted law' suggest more generally about the future of the legal form and of the ways in which law may legitimate itself?

**Keywords:** universalism, particularism, jurisprudence, constituent, time, place, international, constitutional



## Out of Place and Out of Time: Law's Fading Co-ordinates\*

### A. INTRODUCTION

The inaugural lecture knows many formats, though some are more suited to particular occasions than others. In the case of such a venerable and intellectually resonant institution as the Regius Chair of Public Law and the Law of Nature and Nations at the University of Edinburgh, a biographical portrait of the Chair itself might seem to offer a particularly appropriate and profitable inaugural topic. In fact I feel relieved of any obligation to attempt such a task. This is due to the happy circumstance that as recently as last year, on the occasion of the 300<sup>th</sup> anniversary of the Chair, my predecessor Neil MacCormick and my colleague John Cairns each made original and sterling contributions to our understanding of the Chair's origins and evolution<sup>1</sup> – contributions from which I have learned much but to which I can hardly add. I will, however, have something to say about the Chair's title in passing later on, since the idea of modern law that I seek to capture finds some backing in the intellectual and political sensibility that made such a designation possible three centuries ago and which sustains it today as more than a historical curiosity.

An alternative and more familiar project for an inaugural lecture is to supply a broad overview of the academic field pertinent to the Chair, and of which the lecturer professes knowledge. Another option is for the lecture to recall a particular argument or intellectual orientation for which the lecturer is known, Or, finally, the lecture can map out an agenda - a research prospectus

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\* This is a revised version of my inaugural lecture, delivered at Edinburgh on 18<sup>th</sup> November 2008. The text will appear in a future issue of the *Edinburgh Law Review*

<sup>1</sup> See N MacCormick, "On Public Law and the Law of Nature and Nations" (2007) 11 *EdinLR* 149-161; J W Cairns, "The Origins of the Edinburgh Law School: The Union of 1707 and the Regius Chair" (2007) 11 *EdinLR* 300-348.



appropriate to the Chair. On the present occasion I hope to do a modest amount in pursuit of each of the last three approaches. I want to say something about the field of legal theory – of jurisprudence most broadly conceived<sup>2</sup> – which, certainly by the distinguished practice of recent chairholders,<sup>3</sup> if less obviously by title or founder’s intent, provides the Chair’s centre of gravity. I also want to locate the place for my own most developed and abiding concerns within the field of legal theory. And, in addition, I want to signal some of the questions arising out of these abiding concerns that will provide at least one part of my agenda for research in the years to come.

## **B. THE THIRD QUESTION OF JURISPRUDENCE**

My basic focus of inquiry, one that allows me to develop all three orientations, is a simple but ambitious one. It concerns certain of the conditions that make law possible and distinctive as a social practice. And it concerns how changes in these conditions are leading to the transformation, and perhaps even the endangerment of law as a social practice, at least sometimes and in some places.

To talk about the conditions that make law possible as a social practice is immediately to take us to the central, the most venerable and the most perennially contested questions of legal theory - of jurisprudence broadly conceived. Two questions in particular – or, more accurately, two clusters of questions - stand out. The first concerns the authority of law. Law is not law in any recognizable sense unless it operates with a law-like authority; that is to say, unless it exercises normative force, its precepts acknowledged as valid and actually prevailing in circumstances where they seek

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<sup>2</sup> On broad and narrow definitions of jurisprudence, see W Twining, “General Jurisprudence” in M Escamilla and M Savedra (eds.) *Law and Justice in A Global Society* (2005) pp. 563-650

<sup>3</sup> In particular, Neil MacCormick, but also his immediate predecessor Archie Campbell, to whom MacCormick pays generous tribute (n1).

to intervene in social life and to influence individual and collective behaviour. The authority or normative force of law in turn depends upon external and internal factors – upon both its generative criteria and its method of self-organisation. For law to be authoritative it must, first, have come about in a way that lends it authority; and it must, secondly, develop internal systemic criteria sufficient to enable the effective articulation and exercise of that authority.

As regards external, generative criteria, we need to ask what conditions have to be fulfilled for something to count as law rather than non-law – whether by non-law we mean some pretence or failed attempt at law or whether we mean some other species of normative order such as custom. Is the test of basic legal validity satisfied, as the legal positivists would hold, where a legal rule has the proper social pedigree - where it derives from a duly socially recognized and accredited source? And if so, who gets to perform the due accreditation – the sovereign in person, the key officials of the legal system, or the people in general - and how generous and how inclusive are the accreditation criteria they might use? That is to say, what counts as an object of due accreditation by the accrediting subject? Are the relevant objects located only at the fulcrum of the legal order – the secondary rules of law-making, law-interpretation and law-amendment<sup>4</sup> – or do they also directly include first order rules of behaviour and the social conventions pertaining to these first order rules?<sup>5</sup> And if we part company with the positivists and decide that pedigree and convention are irrelevant or at least insufficient, what kind of moral or pragmatic standards should we use to replace or supplement pedigree and convention as a test of the validity and authority of legal rules?<sup>6</sup>

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<sup>4</sup> H L A Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994) ch.5.

<sup>5</sup> See, for example, J L Coleman and B Leiter, “Legal Positivism” in D Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (1996) ch 15.

<sup>6</sup> On the dual challenge to positivism, from both morality-based and pragmatic, outcome-based theories of law, see J Waldron, “How Judges Should Judge” (2006) 23(13) *New York Review of Books* 54-59.

To move to the other side of the coin of legal authority - its internal arrangement rather than its external generation - how does the law, however externally validated, organize, accomplish, adapt, sustain and justify itself as a legal order, as system of interconnected rules? Of the many telling contributions that my predecessor Neil MacCormick has made to jurisprudence, perhaps his most marked and his most sustained lies precisely in this area;<sup>7</sup> in the way that law impresses itself as “institutional normative order”,<sup>8</sup> as a set of legal agencies, arrangements and things or objects<sup>9</sup> which, considered as an interconnected and dynamic whole, makes a continuous series of authoritative interventions in the world.

A second key question as to the possibility of law concerns its meaning. For law to be law we not only need some test of its validity and self-organization - of what counts as law rather than non-law and of how law makes itself count - but also of its signification. The very depth and scope of law’s authority claim speaks to the unrivalled scale of its social ambition to provide a form of practical reason purporting to tell us prospectively what to do, or at least what is permitted or what is prohibited, as well as retrospectively whether what we have done is required, permitted or prohibited. But in order to fulfil its audacious conduct-shaping and conduct-appraising purpose, law has to communicate effectively what it means. What are the ingredients of legal meaning? How do we construe legal provisions - typically general common law maxims or abstract statutory provisions or weighty but non-categorical constitutional principles - such that they ‘fill out’ the necessary semantic space and ‘fill in’ the necessary decisional space as operational legal conclusions? How do we distinguish the right meaning of law from its wrong meaning - or if we

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<sup>7</sup> This was the subject of his own inaugural lecture, subsequently published as “Law as Institutional Fact” (1974) 90 LQR 102-29. It is also the subject of the third of his four volume series on ‘Law, State and Practical Reason’; *Institutions of Law: An Essay in Legal Theory* (2007).

<sup>8</sup> *Institutions of Law* (n7) 1.

<sup>9</sup> Or, as he terms them, “institution-agencies, institution-arrangements and institution-things”. *Institutions of Law* (n7) 36.

find the idea of 'right' meaning epistemologically overstated – how do we get from the ineffective or incomplete meaning of law-in-the-abstract to its effective and complete meaning of law-in-application? Again answers differ depending upon how much, in a positivist spirit, we want our methods of interpretation to stick to the duly accredited sources and already deposited materials of the law, however broadly these may be defined, and how much we feel it necessary or desirable to go beyond these accredited sources and deposited materials, whether in terms of morally informed evaluation and refinement,<sup>10</sup> or the invocation of some pragmatic notion of output benefit or efficiency,<sup>11</sup> or even a realist recognition of who possesses social power – judges, lawyers, administrators, influential “repeat player” private parties<sup>12</sup> - sufficient to make *their* meaning the decisive meaning.

In the present inquiry, however, I do not want to focus on either of these questions and the constitutive criteria of law to which they refer. I address directly neither authority nor meaning, but another, if intimately related, aspect and constitutive condition of the ‘lawness’ of law which has preoccupied me over a number of years and which continues to preoccupy me, namely law’s situated quality. Just as law, in order to meet the conditions of being law, must both authorize *qua* law and signify *qua* law, so too, and even more basically, it must situate itself *qua* law in space and in time. This question of situation, or ‘situatedness’, if we find the term ‘situation’ too bland and overexposed, we might call the third question of jurisprudence – one that until relatively recently had been somewhat neglected in many circles.<sup>13</sup> And it is precisely the

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<sup>10</sup> See, for example, R Dworkin, *Justice in Robes* (2006).

<sup>11</sup> See, for example, R Posner, *Law, Pragmatism and Democracy* (2003)

<sup>12</sup> M Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change”, (1974) 9 *Law & Soc’y Rev* 95.

<sup>13</sup> William Twining, himself an influential early figure in the investigation of this third question, has written perceptively on the reasons for its comparative neglect in the Western legal academy. See “General Jurisprudence” (n2); see also his *Globalisation and Legal Theory* (2000). From the standpoint of his institutional brand of legal

situated quality of law - its location in space and time – which supplies the co-ordinates to which my title refers.

My argument proceeds in a number of stages. First, at the basic philosophical level, I want to explain why and in what ways the situated quality of law is as much a necessary and defining condition of law as are the qualities of authority and meaning, and this despite the fact – indeed partly because of the fact - that situatedness tends in many quarters, both practical and academic, to be taken for granted. I also want to suggest, however, that, for all its taken-for-granted character, law's effective self-situating remains both a constraining and a fragile accomplishment. Secondly, I want to indicate how the situatedness of law in space and time has followed a certain pattern in the modern age, and in the age of the modern state in particular. More specifically, when we seek to discover what is most distinctive to law in the age of the modern state, we shall see that a large part of our answer, including some obvious and well-remarked things but also some rather less obvious and less well-remarked things, derive from the situatedness of state law and its relationship to otherwise situated law types. Indeed, an examination of the background pattern of law's situating co-ordinates tells us not just about the particularity and the finite quality of a dominant state law, but also, crucially, about the peculiar and peculiarly supportive relationship we find across the modern legal constellation more generally between the particular and the universal, and indeed between the finite and the infinite. Thirdly and finally, I want to say something about how the shift away from the centrality of state law that we are witnessing today under conditions of globalization also calls into question many of the qualities associated with the

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positivism, Neil MacCormick has also contributed much to the widening of appreciation of the diversity of legal sites and the complexity of their inter-relationship, with particular reference to the legal constellations of both the United Kingdom and the European Union; see his *Questioning Sovereignty* (1999). The literature of legal pluralism, as typified by the *Journal of Legal Pluralism and Unofficial Law*, has provided a more general exception to the tendency to neglect the diversely situated quality of law, though even here the emphasis has been more on the cultural, political and normative consequences of the situational diversity of law rather than on the deep structure of that diversity.

spatio-temporal co-ordinates of state law, and in so doing vividly exposes the always precarious quality of law's efforts to situate itself. A law less centred on the state will forfeit a range of features or tendencies based upon the coordinates of a state-centred configuration. And as the old co-ordinates fade, new problems emerge in the (re)situating of law, but also new opportunities.

### C. SITUATING LAW

Let us start with the philosophical foundations. As Hans Lindahl nicely puts it, any legal innovation – any statement or restatement of a legal norm – is in an important sense both “a-topic’ and “a-chronic”.<sup>14</sup> Considered as a happening - as an empirical event, the making and taking of a legal initiative by definition occurs in space and time. Considered as a normative act, however, any legal initiative necessarily seeks to frame space and time in its own terms. And in order so to do, that legal initiative must first abstract from – take itself outside of - the topological extension of space and the chronological flow of time that provided its context of origin as an empirical event. This, indeed, is the first significance of my main title; the normative universe in which law becomes self-coded *as* law sets itself ‘out of place and out of time’. To put it another way, the emergence of law may in sociological terms be spatio-temporally context-*dependent*, but in normative terms that emergent law instead becomes “context-*productive*”.<sup>15</sup> All legal propositions explicitly, or more often implicitly, (re)insert themselves in space and time from their privileged “nowhere” and “nowhen”<sup>16</sup> of normative self-construction. And in so (re)inserting themselves, they claim or

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<sup>14</sup> H Lindahl, “Immigration, Political Indexicality and a Politics of Indexicality” 2007 *Teoria e Critica della Regolazione Sociale* 16. This single reference hardly begins to acknowledge my debt to Lindahl's innovative work on the ways in which legal order comes to be represented as such.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

assume themselves to emanate *from* and represent somewhere and also to refer in their normative reach *to* somewhere, just as they claim to emanate *from* and represent some time and also to refer in their normative reach *to* some time. That is to say, they make claims or assumptions both about the 'where' and the 'when' of jurisdictional source – the 'coming from', and about the 'where' and the 'when' of jurisdictional destination – the 'going to'. What is more, to revert briefly to the first two questions of jurisprudence, both authority and meaning are closely tied up with these situational claims and representations. Both the force of the normative claim of legal rules and their sense are dependent, in ways to be considered below, first, upon the place from which they are claimed to come – to represent, and by how they distribute jurisdictional space between a legally relevant 'here' and a legally irrelevant 'there'; and, secondly, upon the direction from which and the point at which they represent themselves as interrupting time and ordering a new three-way distinction between past, present and future.<sup>17</sup>

For many, as already intimated, these features may seem unremarkable and will generally go unremarked. This testifies to how we often tend to take the situated quality of law for granted, to pass over it as something so familiar as to be of little interest. But of course, as Wittgenstein said, it is often precisely "the aspects of things that are most important for us [that] are hidden because of their simplicity and familiarity."<sup>18</sup> The familiar always bears a second look, and what we should look for in taking that second look is both how the familiar successfully concocts and presents itself as familiar, and the massive social power that such familiarity secures and announces.

So how does law carry out its work of self-situating? How, in addition, does it do so in such a fashion that we typically experience its accomplishment as familiar, as commonplace? How, then,

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<sup>17</sup> Ibid See J. Priban, *Legal Symbolism: On Law, Time and European identity* (2007)

<sup>18</sup> L Wittgenstein, *Philosophical Investigations* (3<sup>rd</sup> ed 1955) para. 129.

on the one hand, does that work of self-situating contribute to the social power of law? And how, on the other hand, does it serve as a limiting influence upon law and as one that underscores the fragility of law's achievement? The answer to this complex of questions comes in various parts. The self-situating of law is partly about the deep and, in this respect, largely tacit structure of legal texts. Partly, too, it is about the intra-systemic recursiveness of law. And partly, and perhaps most importantly, it is about law's symbolically self-corroborating tendencies. Each dimension, the structural, the systemic and the symbolic, make its own independent contribution to securing law's co-ordinates, but there are also important connections between and continuities across the three dimensions. Let us discuss the contribution of each in turn, and then explain why the securing of law's co-ordinates nevertheless remains both a constraining and a precarious accomplishment.

**(a) Deep structure; text, context and sub-text.**

Legal texts invariably contain embedded assumptions about their relationship to place and time. Aspects of that relationship are typically left implicit, the subject of default presumptions. To take an elementary example which is replicated in many national contexts, it is a default presumption or rule of interpretation of a statute emanating from the UK Parliament that it should apply to each of the territories of the UK and not beyond,<sup>19</sup> and, just as importantly, that it should apply in equal terms across the territory of the UK.<sup>20</sup> Of course, there can be and there are many explicit exceptions to this, but the taken for granted rule is one that speaks both to territorial symmetry or correspondence (the place of jurisdiction also defines the scope of jurisdiction – the 'coming from' is the same place as the 'going to') and to territorial uniformity (the law is the same and is applied

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<sup>19</sup> See F. Bennion, *Statutory Interpretation* (1984) 456-59..

<sup>20</sup> *Ibid.* 461-64.



evenly throughout the place of jurisdiction). Symmetry and uniformity are large and important things to take for granted.

Equally, as regards time, much is taken for granted. Under Section 4(b) of the Interpretation Act 1978, an Act of the UK Parliament, unless otherwise specified, comes into effect on the day that it is passed. Again this operates as a strong presumption, on this occasion backed up by statute, even if rather more than half of UK acts in any year may specify a different commencement date or the need for a special commencement order.<sup>21</sup> But there are also other strong time-based assumptions that hedge in the discretion to overturn the strong presumption of timeousness. For example, there is the strong presumption against retrospectivity - *lex prospicit non respicit*.<sup>22</sup> Again we find a large, and largely unremarked, premise deeply lodged here; that it is current law duly understood and ascertained as the latest law, either from the established record of judicial pronouncement in common law or from the acknowledged procedures of statutory promulgation (and the rules and conventions of dating associated with these pronouncements and promulgations), that should govern current activities, and indeed (until later and otherwise specified) future activities. This we might call an assumption of temporal symmetry to match that of spatial symmetry

It is worth stressing, moreover, that insofar as much of the power of legal texts in fixing the relevant co-ordinates of place and time lies in their implicit, taken-for-granted character, that implicitness is due not just to the socially embedded quality of received legal practice and longstanding convention, and so to the unstated power of established routine. Underscoring the

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<sup>21</sup> Ibid. 409-410.

<sup>22</sup> In some legal systems, this is explicitly provided for in the Constitution. See, for example, US Constitution Art. 1 s9(3).

silence of legal convention, there is a deeper silence of indexical reference built into the structure of all language. Indexical terms like 'I', 'he', 'she' and 'that', but also, more pertinently, 'here' and 'now', are linguistically peculiar, and, indeed, exceptional, in that they constitute singular terms<sup>23</sup> whose referent objects, unlike those of other singular terms, vary according to the context of utterance.<sup>24</sup> It follows that in the particular case of legal imperatives, where the relevant context of utterance is that of the legal authority or command-giver, the boundaries of application will vary depending upon the background circumstances of the legal authority's location in place and time, just as the framing of any painting or photograph depends on the invisible (in the painting or photograph) aspect of the painter or photographer.<sup>25</sup>

There is, therefore, a kind of doubly tacit quality to legal texts in their co-ordination of space and time. Not only are the base-line *signifying* ideas of symmetry, uniformity etc. that provide indicators of how in general legal texts should situate their authority left largely to background presumption. In addition, as is typically the case with indexicals, what is specifically referred to or *signified* – the 'where' is 'here' and the 'when' is 'now' of legal imperatives - is itself entirely variable and largely unstated. The situated quality of legal texts, in other words, is highly dependent upon both subtext (to elaborate the terms, or signifiers, of the relevant rules and assumptions) and context (to discover what is signified by their application).

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<sup>23</sup> I.e. terms whose function in a language is to pick out or indicate a particular thing.

<sup>24</sup> See, for example, D Braun, "Indexicals", *Stanford Encyclopaedia of Philosophy* (2007) <http://plato.stanford.edu/entries/indexicals/>

<sup>25</sup> On the application of perspective theory to understand the use of indexicals in law, see B Van Roermund, "The law and 'We'", (2006) 13 *Ethical Perspectives: Journal of the European Ethics Network* 525-553.

### **(b) Systemic recursiveness**

Let us add to this picture of the power of the familiar by considering, secondly, the intra-systemic recursiveness of law. Much of the mooring required of law's self-situating in a certain place with a certain jurisdictional reach and in a certain time with certain sense of its past and of its future is achieved through its association with a pre-existing legal system. When, for instance, a judge rules 'in accordance with the common law', or in line with 'established canons of statutory interpretation', or consistent with 'basic principles of the constitutional order,' that judge is always assuming one stream of common law rather than another, one matrix or scheme of statute law rather than another, one order of constitution rather than another. So a lot of the everyday work of self-situating is derivative, parasitic on already-established location within a system of law. But, of course, that does not end this aspect of our inquiry, but simply relocates it at one remove, since our very notions of legal system are themselves profoundly place- and time-dependent. They are based upon deeper assumptions we make about what makes a legal system 'systemic', and these assumptions themselves imply a certain understanding of place and time.

Martin Krygier's insights into the nature of legal tradition are of value here.<sup>26</sup> For Krygier, all claims to authority as a generic attribute of a legal system have an inescapably traditional quality inasmuch as they are bound to involve, first, a contemplation of past legal processes and events, secondly, a selective specification of that past as an authoritative present, and, thirdly, a recognized mode of transmission whereby the authorization of the past is carried out explicitly and with a sense of self-conscious continuity – a passing on and linking that necessarily connects and binds over both space and time.<sup>27</sup> Crucially, Krygier suggests to us that what we may term the

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<sup>26</sup> "Law as Tradition" (1986) 5 Law and Philosophy 237-262.

<sup>27</sup> Ibid. 240-51.

quality of *traditionality* supplied by these three features and so inherent in the very idea of a legal system is not the same as *traditionalism*,<sup>28</sup> even if the former quality does provide a congenial context for the development of the latter. Traditionalism, on the one hand, may be understood as a contingent attribute, an ideological current running through certain streams of law. It speaks to an explicit preference for or reflex cleaving to how things have been - a celebration or loyalty to the legal past just because it is the accomplished past, as in Weber's sense of traditional authority.<sup>29</sup> Traditionality, on the other hand, speaks to a methodological scheme for the employment of the past because the past is vital, indeed indispensable, to the systemic quality of law more generally. In other words, it is a tribute to the unavoidable fact that law's capacity to realize itself as a consistent and continuous system is a capacity to do so diachronically, to do so over time and in a stably configured space.<sup>30</sup>

### **(c) Symbolic self-corroboration**

Thirdly, and most importantly, there is also a more active symbolic and so ideological component in the way that law situates itself in space and time, and in the way that it presents that situation as taken for granted, as beyond challenge. The first two dimensions, the structural and the systemic, are basically about how the situatedness of law is woven into its quotidian efficacy – its everyday capacity to operate on the basis of its co-ordinates. For its part, the manner in which law symbolically sponsors and corroborates its own situation plays a powerful role in a wider process of law's social legitimation. It is a role whose successful performance is necessary to the sustenance of everyday capacity at the structural and systemic levels. Yet, reciprocally, in order to be successful that symbolic performance must remain in broad harmony with the often tacit terms of that everyday capacity.

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<sup>28</sup> Krygier supplies the distinction that I seek to convey by these terms rather than the terms themselves.

<sup>29</sup> See M Weber "Politics as a Vocation" in J. Dreijmanis (ed) *Max Weber's Complete Writings on Academic and Political Vocations* (2008)

<sup>30</sup> See, for example, N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (2005) ch. 11; J Raz, *The Concept of a Legal System* (1970) ch.8.

Law typically achieves this ideological feat of self-legitimation in space and time by somehow naturalizing the very ‘sense of situation’ that it sponsors, and this involves a two-pronged strategy. Law sponsors and justifies its self-location, first, through the general attractiveness of the terms in which it represents itself as inserting itself in space and time – the story it tells of the where and when of jurisdictional coming and going; and, secondly, through its self-fulfilling invocation of the evidence of coming and going that its very own record of operation has produced as corroboration of the plausibility and attractiveness of this situating narrative.

Whereas the other two levels of law’s self-situation speak to certain basic qualities held in common across different legal forms and orders, the operation of this third level, in contrast, reflects and emphasizes difference and versatility. Let us look briefly in turn at four key types of modern law - constitutional law, legislation, common law and international law – to illustrate the diverse ways in which the process of symbolic self-corroboration unfolds.

If we start with constitutional law – as we shall see,<sup>31</sup> *the* framing law of the modern age – we may observe that it typically seeks to sponsor the spatial dimension of its situatedness by presenting itself, in a manner that harmonizes with the deep structural principle of spatial symmetry, as the authoritative voice of the people of a particular place over that same particular place. It sponsors, in short, the idea of the constituent power of the popular sovereign – the collective demos - that aspires to rule over itself in all matters, subject only to self-limitation.<sup>32</sup> And, adding the temporal dimension to the spatial dimension, it claims to do so in perpetuity. In an extended – and

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<sup>31</sup> Part D below.

<sup>32</sup> See, for example, A. Kalyvas, “Popular Sovereignty, Democracy and the Constituent Power” (2005) 12 *Constellations* 223-44

entangled - chain of self-authorization, the present rule of constitutional law is justified by the projected and perpetual future – the telos of the demos, which telos in turn is justified by the constituent act of the past. With regard to that constituent act, in a manner often captured in the constitutional preamble itself, constitutional law seeks to sacralize its conditions of origin. It presents and documents the constituent event as a “constitutional moment”<sup>33</sup> of self-realization of ‘we the people’, involving a consolidation of collective memory and a garnering of collective purpose informed and inspired by that memory. And, pursuing the ideological traces of constitutional law’s self-situating somewhat further, we may note the many ways in which that perpetual future can be bound to the founding constitutional moment within constitutional doctrine; for example, by means of the powerful and resilient endorsement given to notions such as framer’s intent and original meaning, or through a commitment to textualism in matters of interpretation, or through resort to eternity clauses or other strong forms of entrenchment of the original design.<sup>34</sup>

In this way, constitutional law tells a story about a people and its common purpose that not only resonates with more general and powerful myths of peoplehood<sup>35</sup> but which is partly vindicated by the historical record that constitutional law itself creates. The very pattern of historical progression which constitutional law helps to institutionalize and to shape - its framing of the people as a people in sharp distinction to aliens or to other ‘peoples’, its attribution to them of a perpetual common destiny since their moment of self-constitution, its provision of binding procedures and resilient structures for doing things in common and its hostility or indifference towards any procedures and structures for doing things in common outside its own self-contained

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<sup>33</sup> B. Ackerman, *We The People. Volume One; Foundations* (1993)

<sup>34</sup> See, for example, J. Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (2001)

<sup>35</sup> See, for example, M. Canovan, *The People* (2005) ch.6.

box - is used to corroborate the narrative of how the history of political collectivities *should* unfold that constitutional law assumes and depends on for its social legitimation.<sup>36</sup>

For its part, the story of legislation, which is also predominantly a modern story,<sup>37</sup> tends to nest itself in the wider story of the constitution. Legislation seeks to sponsor its situation as the project of the people of a particular place and a particular time who want to commit to some particular project indefinitely as part and parcel of their (constitutional) desire to commit to all of their common projects together in perpetuity. As with constitutional law, the projected future of a particular past act is used to justify the particular present. And again, there is a general corroboration to be found in the way that the law itself has shaped the relevant history of collective action. In this case, those involved in the justification of legislation do so by invoking, in a manner perhaps first fully expounded by Bentham,<sup>38</sup> a sense of the rational and enduring purpose or telos of collective, normatively-coded projects of social engineering, the plausibility and value of which the very familiarity of the practice of legislation as a social technology reinforces.

If constitutional law and legislation are inherently “futuristic”,<sup>39</sup> the opposite is true of common law. Common law typically seeks to sponsor its situation as the accumulation of the past knowledge, wisdom and practical morality of just whoever holds or should hold that knowledge, wisdom and practice *in* common. The sense of who holds what in common may coincide with a

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<sup>36</sup> See, for example, R. Cotterrell, “Some Aspects of the Communication of Constitutional Authority” in D. Nelken (ed.) *Law as Communication* (1995) 129.

<sup>37</sup> See, for example, N. Luhmann, *Law as a Social System* (trans K A Ziegert) (2004) 363-4. Legislation, like democracy, does of course have pre-modern roots. See, for example, Aristitotle, *The Politics* (S. Everson ed., 1988) Book III ch.11; for discussion, see J. Waldron *The Dignity of Legislation* (1999).

<sup>38</sup> J Bentham, *An Introduction to the Principles of Morals and Legislation* (J. Burns and H L A Hart eds, 1996)

<sup>39</sup> Priban , *Legal Symbolism* (n 17) 55

specific people, but as the tradition of *ius commune* tell us, it can also claim to range much more widely. As Patrick Glenn argues in his brilliant book, *On Common Laws*,<sup>40</sup> the common law is always claimed to be common ‘in relation to’ and in engagement with law that, in contrast, is particular (*ius proprium*, whether, Constitution, code, canon law, customary law or local statute). The key idea of ‘in relation to’ covers many possibilities. These range from the nurturing or supplementation of the particular law by the common law within the domain of the particular law, to attempts through common law to generalize and extend beyond the domain of the particular law, and also to efforts through the common law to qualify or to challenge the domain or content of the particular law. Indeed, as Glenn points out, because the particular law asserts its priority within its particular domain, often the common law does not even function as a discretely ascertainable positive law, but rather flows in the background in support of or as a countercurrent to the particular and positive law.<sup>41</sup> Even where the common law is positivized, as in the English case, it must still coexist with – relate to - some particular law or laws.<sup>42</sup> And just because, negatively, the common law lacks the definitive domain of the particular law and, positively, it brings an inherent flexibility and aspirational edge to the question of who does and who ought to hold what things in common, the relationship between here and there is more blurred and more fluid in the case of common law than it is in the case of constitutional law or legislation.

But if the spatial co-ordinates of common law make somewhat different reading from those of constitutional law or legislation, the temporal co-ordinates - the relationship between past, present and future – that we find in the common law are more radically distinctive. Here the past is flattened and immemorialized as the repository of tested, honed and accumulated knowledge

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<sup>40</sup> H P Glenn, *On Common Laws* (2005).

<sup>41</sup> *Ibid.* ch.1.

<sup>42</sup> *Ibid.* 25-35.



and wisdom rather than treated, as with constitutional law and legislation, as the mere mobilizing point for present and future law. Under the common law, then, the present is justified by the past rather than by the future, and indeed the future does not come into the picture except as the indistinct and 'unprojected' time of the inevitable continuity of the past-in-the-present. The narrative of justification, therefore, is one very much of *traditionalism* in the sense introduced earlier. Depending upon how it stands 'in relation to' a particular law, the common law may announce its fidelity towards the wisdom and experience of a distinctive community, or it may invoke some more broadly corroborated notion of the intelligence of the past, perhaps based on some idea of natural law;<sup>43</sup> or, anticipating our discussion below,<sup>44</sup> it may involve some combination of the two. Whichever variation is chosen, however, even more obviously than in the case of constitutional law and of legislation, the influence exercised by the common law on the wider socio-historical environment plays a part in supplying the evidence for its own justification. The sense of continuity - of uninterrupted unfolding or at least of unbroken integrity - that the common law ensures, or at least presents itself as ensuring in the stories it tells about itself,<sup>45</sup> can then be independently cited as testimony to the tenacious virtue of the common past.

What, finally, of international law? It presents a more sharply conflicted case than the others.<sup>46</sup> On the one hand, international law may be sponsored as a deracinated and derivative law *between* particular constitutional sovereigns with little self-standing legitimacy, as has been the case for

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<sup>43</sup> As in the early Roman conception of *Ius Gentium*, which Glenn treats as an early variant of, or at least a precursor to, the common law, *Ibid.* 2-7. See also J. Waldron, "Foreign law and the Modern *Ius Gentium* " (2005) 119 *Harvard Law Review* 129.

<sup>44</sup> Part D below.

<sup>45</sup> See, for example, MacCormick, *Rhetoric and the Rule of Law* (n30) ch.11.

<sup>46</sup> For an excellent discussion of the historical development of this internal opposition, see Emmanuelle Jouannet. "Universalism and Imperialism: The True-False Paradox of International Law?" (2007) 18 *The European Journal of International Law* 379-407.

much of its modern history from the late 18<sup>th</sup> century onwards.<sup>47</sup> On the other hand, international law may be sponsored as a kind of self-standing *ius gentium* – a law of peoples trading under the banner of a broader transnational morality and tending towards the assertion of a natural law pedigree or, increasingly in more recent times,<sup>48</sup> some other species of universalism (in a manner that recalls and, indeed, significantly overlaps with the more ambitiously generalizing movements under the rubric of common law).<sup>49</sup> Certainly, in its classical phase of early modernity, with the likes of Grotius,<sup>50</sup> Pufendorf<sup>51</sup> and Vattel<sup>52</sup> to the fore, international law did indeed appeal strongly to a humanist tradition of universal natural law. Precisely because there was no international sovereign, no particular privileged place from which international law could rule and no particular privileged point in time from which its rule could be deemed to start, the classical canon was drawn to the claim that international law should apply everywhere and every ‘when’. Its reign was styled as a universal one, flowing from higher laws located in or rationally deduced from the inherent design and pattern of human nature, with greater or less attention to divine providence as the source of that design and pattern. Again the self-situating story that international law in its classical phase, and more unevenly thereafter,<sup>53</sup> tells us about place and time is also a self-serving

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<sup>47</sup> Ibid. 381

<sup>48</sup> Ibid 385-6; See also Waldron, “*Ius Gentium: A Defence of Gentili’s Equation of the law of Nations and the Law of Nature* (2008) NYU Public Law and Legal Theory Research Paper Series No 08-34, where he argues, by reference to the work of Alberici Gentili (1552-1608) amongst others, that the division between natural law and positivist conceptions of international law has often been less clear than many contemporary stylized accounts would suggest. In particular, in the development of international law thinking in the early modern period, the same kind of humanist morality that typically arises from natural law foundations continued to be drawn upon by the emerging positivist schools just as they were detaching themselves from these very foundations. Thus the universalist strain in international law gradually found the means to survive, and sometimes prosper, on a more secular footing than in the natural law tradition of Aquinas.

<sup>49</sup> See, for example, Glenn On Common Laws (n40) Waldron, “Foreign Law” (n 43; see also his 2007 Storr Lectures *Partly Laws Common to all Mankind* (Yale, September 2007). <http://www.law.yale.edu/news/5408.htm>

<sup>50</sup> H Grotius *Law of War and of Peace* (1625)

<sup>51</sup> S von Pufendorf *Of the Law of Nature and Nations* (De iure Naturae e Gentium) (1672).

<sup>52</sup> E de Vattel, *The Law of Nations, or Principles of the Law of nature applied to the Conduct and Affairs of Nations and Sovereigns* (1758)

<sup>53</sup> Jouannet, “Universalism and Imperialism” (n 46) 382-86, where she makes specific reference to the resurgence of the universalist strain of international law in the contemporary period in response to a number of defining geopolitical moments; first, the end of the Second World War; secondly, decolonization in the 1960s; and, thirdly, the end of the Cold War.

one. It is, moreover, a story that informs the naming of the Edinburgh Regius Chair in 1707, during the high period of the classical age. The intimate juxtaposition of the law of Nature and Nations (without even the modest distancing that an additional prepositional 'of' before Nations would have achieved) precisely echoes the title of Pufendorf's great work. In so doing it demonstrates just how appropriate it seemed, there and then, to position the law of Nature immediately before the Law of Nations, as its inspiration and necessary support.<sup>54</sup>

#### **(d) Situational constraints**

However diversely and how however creatively the law may fashion its own situation, there are also important limits to and constraints upon what is possible in ideological terms; and since the more embedded systemic and structural features of law's self-situating in the final analysis both depend and contribute to the attraction and plausibility of the ideological narrative, such limits and constraints also affect these deeper spatio-temporal co-ordinates. For law, as we mentioned earlier, is not just context-producing. Law is also hemmed in by context, or context-produced. It must first of all extract itself from place and time before it can impose its own sense of place and time, but in so doing it is influenced or constrained, and in so being is rendered vulnerable, in at least four ways.

Law's self-situating narrative is influenced and constrained, first and most obviously, by the prior 'facts of the situation; by the social and political forces at work at its point of origin - at the places and times at which law seeks to abstract from its originating context and (re)impose itself

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<sup>54</sup> See MacCormick, "On Public Law" (n1) esp. 150-53, where he also notes in the Scottish debate of this period the growing counter-influence of an anti-natural law approach associated with the thought of David Hume and Adam Smith. As MacCormick further remarks, however, (154-55), the connection between Nature and Nations was later vigorously re-asserted by the most distinguished 19<sup>th</sup> century incumbent of the chair, James Lorimer (1862-90), notably in *The Institutes of the Law of Nations: a treatise of the jural relations of separate political communities* (1884).

normatively upon space and time. These empirical forces shape and limit what legal initiatives are even sought and what associated situating narratives are even attempted, as well as providing some kind of plausibility check on such initiatives as are taken. For example, a bid to secure a new constitutional founding, or an appeal to the immemorial tradition of the common law, must, in the one case, tell a story about the presence – and pregnant possibilities - of the social precursors of common political identity, and in the other case, record the long-term resilience of a body of law in such a way as manages some kind of credible fit with the ‘facts on the ground.’

A second influence and constraint is internal to the narrative style and form associated with the type of law in question. A good story about the situation of a particular constitution, or of a piece of legislation, or of a particular stream of common law, or of an aspect of international law, must resonate with other good stories within the relevant type and genre, and indeed must fit with the more tacit systemic and structural situating characteristics associated with that type. And where there are quite different story forms appropriate to the genre – different accounts of where and when that type of law comes from and where and when it is going to - as is most obviously the case with international law, then it may be more difficult to avoid a sense of ideological dissonance in the telling of any particular story.<sup>55</sup>

A third influence and constraint is also about narrative coherence, but in a broader relational sense. Given the palpable diversity of law types and of situating narratives associated with these law types, these different situating narratives must find ways of co-existing. Each law type must be capable of maintaining its narrative integrity – its basic sense of its own plausibility and legitimacy - in the face of the situating narratives associated with the other law types. That is to say, from its

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<sup>55</sup> See Jouannet, “Universalism and Imperialism” (n46).

own perspective each situating narrative must be capable either of reconciling itself with the situating narrative of other types of law or of rebuffing or overcoming the challenge posed by them. This relational aspect, as we have seen, is a central – indeed defining- feature of the common law. As we shall see, however, it also stands as a limiting test of the plausibility of the situating narratives of the other law types.

Fourthly and finally, there are those constraining influences associated with certain more basic requirements of law in general in a particular historical phase – or, rather, of the overall configuration of legal relations. The self-situating of any legal act must not only fit with the empirical context of its emergence and sustenance and with the situating narratives appropriate to its type of law, and must not only be adequate to the challenge posed by the situating narratives associated with other types of law. In ways to be considered below, the self-situating of any legal act must meet not only these local or relational standards of coherence, but also certain absolute standards associated with the domain of law at any particular geo-historical moment. That is to say, the self-situating of any legal act must also support those features that are vital to the legal constellation in general, whether by itself embracing these features, or by not precluding their emergence in other legal situations, or, finally, by stretching or modifying our very sense of what is vital to the legal constellation and what situations or combination of situations might plausibly be considered to be jurisgenerative.

#### D. SITUATING LAW IN THE MODERN STATE SYSTEM

With these four types of constraining influence in mind, let us now move to consider the way in which the co-ordinates of space and time are typically addressed within the specific juridical context of the modern, so-called Westphalian system of states.

The dominant types of law within the modern state system have been constitutional law and international law. On the one hand, we have intra-state law framed by constitutional law (and by public law more generally), tied to a series of mutually exclusive particular places, populations and institutional complexes.<sup>56</sup> Each of these state units has its own superordinate and perpetual constitutional project, and each has its own indefinite statutory projects nested within that superordinate and perpetual constitutional project. This body of enacted law typically stands in a complex relationship to common law and other local laws, all of which must in the final analysis defer as a matter of positive law to the superordinate and perpetual constitutional project. On the other hand, we have international law, which runs between these mutually exclusive places, populations and institutional complexes.

Consideration of the first two types of constraining influence set out above - empirical fit and internal narrative coherence - push state constitutional law and international law alike towards certain standard situational justifications. If constitutional law emerges within discrete locales, presents itself as mutually exclusive to these locales, and claims to be comprehensive and perpetual within these mutually exclusive locales, then it must resonate with some idea of the

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<sup>56</sup> See, for example, N. Walker "Late Sovereignty in the European Union" in N. Walker (ed.) *Sovereignty in Transition* (2003) 3-30. On the deep historical roots of the particularity of public law considered as a more general category, see M Loughlin, *The Idea of Public Law* (2003)

shared good and “common ideology”<sup>57</sup> of those associated with its exclusive place and perpetual time. As for international law, it has already been noted the absence of a single sovereign leads to a bifurcation. Either we have the attenuated contractualism of a law between sovereigns, with all the contingency and impermanence that implies, or international law becomes the domain of a universal law – a law of all places and all times.

In turn, consideration of the third type of constraint specified above – external narrative coherence – requires us to ask how the two dominant narratives of constitutional law and international law relate to one another from their respective situated perspectives. One influential understanding of this key relationship within the Westphalian configuration starts from the assumption of an apparent sharp opposition and misalignment between the mutually exclusive and perpetual<sup>58</sup> particularism of state constitutional law on the one hand, and the pervasive and infinite universalism of the thicker version of internationalism on the other. On the basis of the misalignment diagnosis, external narrative coherence is achieved from a state-centred perspective through a combination of moves.

In the first place, the technique of compartmentalization is much evident. From the perspective of state sovereignty, the boundaries of the state order are so clearly framed and defined and so closely guarded in their own constitutional terms that the relationship with the international ‘outside’, however much potential for discordance exists, may be precisely and manageably delineated. Again the parsing of the title of the Regius Chair offers an important clue. On the one hand, ‘Public Law’, which in the Edinburgh of 1707 (as indeed still of 2008) referred first and

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<sup>57</sup> J Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries” in L Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 152-193, 154

<sup>58</sup> See, for example, Priban, *Legal Symbolism* (n17) 55-57.

foremost<sup>59</sup> to the ‘exclusive particular’ of that part of domestic law concerning the relationship between the people and government of the brand new postnational state of the United Kingdom, was allowed to rest in easy proximity to ‘the Law of Nature and Nations’. On the other hand, however, the break in syntax is clear, with the close coupling of ‘Nature and Nations’ dramatizing not just their intimacy *inter se* but also the distinction between both and the domestic Public Law.<sup>60</sup> The wider point of this vignette is a simple but important one. So immediate and all-embracing in their particular domain were the claims of state public law, and its constitutional frame, and so hermetically were these claims sealed off from other claims, either of other state sovereigns or from the international sphere, that state public law would be little troubled or perturbed as a matter of the dominance of its positive claim by the claim of any other law, including international law. As co-existence between the inside and the outside carried no threat to the state, such co-existence was possible and sustainable. Public Law could, therefore, with equanimity be practiced, and indeed professed, alongside the Law of Nature and Nations.

Yet, clearly, such a compartmentalized treatment of the relationship between state constitutional law and international law would offer even greater security to state sovereignty if the universal dimension of international law were in any case marginalized. This suggests a second leg to the state-centred treatment of the spectre of misalignment – one with which we are already familiar.

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<sup>59</sup> See McCormick, “On Public Law” (n1) 154.

<sup>60</sup> As Cairns persuasively demonstrates, however, for all that the reference to ‘Public Law’ in the title of the Chair may be understood as a direct allusion to the terms of the Treaty of Union of the same year, and to the emphatically positivist understanding of Public Law contained in the Treaty (Art XVIII distinguishing between ‘public Right’, which could without impediment be made the same throughout the United Kingdom by Act of the new United Kingdom Parliament, and ‘private Right’, which could not be altered except for ‘evident utility of the Subjects within Scotland’), the contemporary climate of debate was also affected by a significant undercurrent of natural law thinking. In particular, the Dutch theorist Ulrik Huber had in 1670 developed an idea of *ius publicum universale* that drew on natural law thinking to argue for the universal necessity of government (and its legal constitution), and his work quickly became influential in Scotland. See Cairns “The Origins” (n1) 313-326.

This secondary reading, in showing the openness of domestic constitutional law and of public law more generally to a universalistic understanding, lends additional support to the alternative conception of relationship between domestic law and international law (based upon complementarity) developed in the text below.



Friction between state law and international law is minimized to the extent that the latter is considered first and foremost in its thin delegated mode, as simply law 'between' sovereigns rather than as a universal law of nature.

But the misalignment diagnosis, and the treatments it suggests, however influential it has been on the modern legal imagination of the global constellation, is by no means hegemonic. For it fails to reckon with a deeper connection between the constitutional state conceived of as the exclusive particular and the international realm conceived of as a natural law-based or otherwise universal jurisdiction. To access this deeper connection, we may usefully look to the notion of "nested oppositions"<sup>61</sup> familiar to deconstructive analysis. A nested opposition is an opposition whose governing distinction also speaks to a commonality or a similarity. We can think of many obvious cases. The black/white distinction betrays a shared preoccupation with and investment in colour, just as the Scottish/English distinction suggests a shared preoccupation with and investment in nationality. What of the particular/universal distinction, and the contrast in situational backgrounds it reflects, that lies at the heart of the present case?

For all the sharpness of the divide between the exclusive and inclusive approaches to the source and jurisdiction of law that they respectively represent, what is common to the particularism of the state constitutional narrative and the universalism of the thicker international law narrative is an investment in a deep attitude to law that is both *holistic* and *magisterial*. The law of the sovereign state, and its framing constitutional law in particular, may conceive of itself in finite terms, as limited in space and marked by a beginning (if not an end) in time, yet it recognizes no space within the place of its jurisdiction and no time within the perpetual prospect of its

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<sup>61</sup> See, for example, J Balkin, "Nested Oppositions" (1989) 99 Yale Law Journal 1669.

jurisdiction where the activities of those located within that expanse of space and time can escape its jurisdiction. The law of the sovereign state, then, pertains, potentially at least, to the whole of law and to the whole of life under the law for all who fall under its perpetual jurisdiction. It cannot on its own terms, therefore, be concerned with anything less than the general good of each and the common good of all under its jurisdiction – a general and common good conceived of in all its fullness, complex interconnectedness and unlimited cross-generational duration. It follows that the law's approach to its remit must be a holistic one, with the authority and meaning of its various parts dependent on the integrity of the whole – an integrity that must be sustained both synchronically, covering the entire range of its jurisdiction, and diachronically, stretching into an indeterminate future. Equally, such a comprehensive, self-contained and resilient legal regime as this implies cannot on its own terms permit itself to be frustrated by any higher or competing jurisdiction of the good. That further requirement demands not just a sense of sovereign command, but more deeply, an epistemological and ethical self-assurance – a claim to possess a guiding knowledge and over the collective affairs of those under its jurisdiction - that is finally magisterial.

These very same attributes of holism and magisterial authority are also implied by the idea of universal normative order. Such attributes will certainly be claimed by any type of law, including international law in its thicker, classically-rooted, self-understanding, which asserts a natural law pedigree. Unlike the framing constitutional law of the state, an international law asserting a natural law pedigree, just because it claims to be in accordance with the universal dictates of nature, must reject as unnatural any boundaries of space or time and the limits they bring. Like the framing constitutional law of the state, however, an international law asserting a natural law pedigree must understand its internal relation holistically, since to do otherwise would be to be

unfaithful to the necessary integrity and holism of the idea of nature that it seeks to reflect. Furthermore, international law in its naturalistic mode, because it cannot countenance its unnatural violation, has to understand itself as magisterial, as knowing no higher or competing jurisdiction of the right and the good. And to the extent that such a universalistic strain as persists in modern international law is no longer so clearly rooted in the natural law tradition, its logic of aspiration nevertheless continues to demand an unbounded spatio-temporal realm of application.<sup>62</sup>

This deeper common sense of law as both holistic and magisterial opens up a very different pattern of relations between state constitutional law conceived of in particular terms and international law conceived of in universal terms.<sup>63</sup> The key theme on this alternative reading of the history of the Westphalian legal configuration is not compartmentalization but complementarity. That complementarity displays itself in a number of ways, and these often overlap or shade into one another. Sometimes and in some regards the holistic and magisterial particular of the constitutional state presents itself as a refinement or exemplification of the holistic and magisterial ideal of a universal law. For example, even at the very origins of modern popular constitutionalism, in the discourse of the revolutionary settlement of the first French republic, the ‘rights of (universal) man’ precede the rights of Frenchmen.<sup>64</sup> Similarly, the ‘self-evident’ equality of the independent Americans of the 1776 Declaration of Independence is reduced to the unstated minor premise of a syllogism whose major premise holds that that ‘all

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<sup>62</sup> See Jouannet “Universalism and Imperialism” (n46) 388 et seq.

<sup>63</sup> Although his concern is primarily with domestic law rather than with the relationship between domestic and international law, Brian Tamanaha has offered a somewhat similar argument about the affinity of particularism and universalism. He proposes that, historically, ideas of law associated with the common good on the one hand, and with a universalistic higher authority on the other, have tended to work in support of one another. In my view, however, he overstates the extent to which both of these ideas of law, and so also the supportive relationship between them, deteriorated over the course of the modern age. Brian Z Tamanaha *Law as a Means to an End: Threat to the Rule of Law* (2006) esp. chs 12 and 13.

<sup>64</sup> As famously celebrated by Tom Paine in his pamphlet, *Rights of Man*, first published in 1791.

men are created equal.<sup>65</sup> And still today, even if the natural law dimension is often less prominent, the justification of national constitutional order often involves reference to universal values, as in the generic if highly abstract values of freedom and equality that are said to underpin the ‘universally particularist’ project of “constitutional patriotism.”<sup>66</sup> Sometimes, too, more often indeed in a state-centred world, the influence is claimed to flow the other way, from the national particular to the international universal. For many of the civilisations of the West, their particular constitutional or more general juridical version of the common good, whether liberal or communist, republican or monarchist, has often been understood and presented as the source of inspiration or encapsulation of a universal law, or at least as a key element in the corroboration of such a universal law.<sup>67</sup> Hand in hand with this epistemological self-assertiveness – this claim to privileged local access to or insight into the condition of the universal in all its holistic complexity – the national particular has often been presented as a key building-block in the authorization and positivization of the universal component of international law. We see this in the dependence of customary international law and *jus cogens* on state practice,<sup>68</sup> or in the grand global or regional multilateral alliances that forged the modern generation of international human rights treaties in the immediate post-war high watermark of the modern state. And, of course, for a large part of the history of the modern state, we also see the darker side of this process of the magisterial

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<sup>65</sup> For background and texts, and a particularly acute reading of its intended and actual symbolic impact on the world beyond the emerging American polity, see D. Armitage *The Declaration of Independence: A Global History* (2007).

<sup>66</sup> On the importance of the universalistic strain in the ideas of constitutional patriotism promoted by Jurgen Habermas and others, and on the unavoidable tensions between this strain and more particularistic dimensions of attachment to a place and its law, see J W Mueller, “A General Theory of Constitutional Patriotism” 2008 6 *International Journal of Constitutional Law* 72-95.

<sup>67</sup> If one studies the preambles and opening clauses of many modern constitutional texts, for example, particular and universal claims are often so intimately linked that it is difficult if not impossible to infer that one has primacy over the other. A recent prominent example of complex and intimate linking of the universal and the particular, where the particularistic strain became less evident in later drafts but where the idea of the home territory and its environment as the historical source of universal values remains emphatic, is offered by the European Constitution of 2004 (which was never fully ratified, and was subsequently abandoned) For discussion of the symbolic links between the particular and the universal in the emerging text, see A Von Bogdandy, “The European Constitution and European Identity: test and Subtext of the Treaty establishing a Constitution for Europe” (2005) 3 *International Journal of Constitutional Law* 295-315. See further, text at ns 83-85.

<sup>68</sup> See, for example, V Lowe *International Law* (2007) 34-63.

universalisation of the authority of the national particular at work in the unilateral form of imperialism.<sup>69</sup>

If, however, this pattern points to a more positive – even symbiotic - connection between the particular and universal poles of the Westphalian legal order, and to an approach through which constraints of the third type - of external narrative coherence - may be eased or overcome, it also raises new questions. It does so by confronting us head-on with the fourth type of constraint attendant upon law's situating narratives, namely that associated with certain more general properties or limiting requirements of the global legal constellation. For the qualities that emerge as key to the successful situating of state law, at its constitutional apex in particular, as well as to the successful situating of more naturalistic understandings of international law, point to a constant and arguably indispensable dimension of legal modernity. Whichever of the two dominant relational perspectives on the nature of the Westphalian legal constellation is adopted – whether the approach that compartmentalizes and marginalizes international law as a deferential adjunct to the law of the sovereign state, or the approach that stresses the continuity and complementarity of the national and the international, each finds a central role for a law that is both holistic and magisterial. On a narrower view, holistic and magisterial qualities underscore the dominant position of state law, while on a broader view, these same qualities provide a wider platform underpinning the symbiotic pairing of state and international law. On either view, a key design principle of the global juridical constellation, for all its species diversity, is of a governing tier of law that treats its internal relations as a comprehensive and seamless whole (regardless of whether it conceives itself as bounded, as in state constitutional law, or as unbounded, as in the

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<sup>69</sup> See, for example, J Tully, "The Imperialism of Modern Constitutional Democracy" in M Loughlin and N Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007) 315-338

naturalistic variant of international law) and defers to no rival internal or external epistemic or moral authority.

Yet if the idea that the legal constellation should possess a key holistic and magisterial component does no more than mark the threshold condition of legal modernity, then it is not immediately clear that this imposes any significant constraint upon law's situating narratives at all. After all, one tempting reading of the above analysis is that the holistic and magisterial features of the legal constellation are better understood, not as a limit upon, but *as a product of* the ways in which law situates itself in the Westphalian, state-centred age. However, it would be too simple to install the situational background as *the* controlling variable in accounting for modern law. Our understanding of the context of modern law should run deeper than this and connect with other defining features of modernity. In particular, it must also refer to what Charles Taylor calls modernity's distinguishing sense of "moral order";<sup>70</sup> namely, a progressive order in which political society is increasingly understood as established for the benefit of those who establish it – as an artifice which, unlike pre-modern societies which were primarily understood as exhibits of a higher order of things – individuals make and 'make over' for their own ends.<sup>71</sup> On this view, the central role of legal holism and magisterialism becomes more than simply a function of the growing situational pre-eminence of the sovereign state. Rather, that growing state pre-eminence is itself in part an outgrowth, as well as a reinforcing condition, of the distinctively ambitious idea of

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<sup>70</sup> C Taylor, *Modern Social Imaginaries* (2004) ch.1.

<sup>71</sup> Ibid. The idea of modern society as self-authoring points to a deep tension between it and the very natural law tradition which, we have argued, lies at the roots of international law's universalistic contribution to modernity's legal constellation. Taylor, for one, is acutely aware of this tension, and in particular of the way in which society's embedding in the sacralized "higher time"(158) of the proper order of things in the perspective of the premodern social imaginary – a perspective with which ideas of natural law can comfortably fit, is quite different from the sense of society operating over a progressive "secular time" in the perspective of the modern social imaginary (see also ch.4). The resolution of that tension depends on just that process of gradual detachment of universalism from its naturalistic roots discussed above; see Waldron, "ius gentium" (n48); see also Jouannet, "Universalism and Imperialism" (n46)

societal self-steering and self-transformation associated with the background moral order, and indeed overall “social imaginary”<sup>72</sup> of the modern age. The channels of causality, then, would seem to run in both directions. The two elements – the situational division of the legal world into the national and the international domains on the one hand and the emphasis upon holism, magisterialism and societal self-steering on the other, became tightly intertwined over the long course of modern history and modern legal history - locked in a mutually reinforcing and so mutually supportive relationship.

But, if we take an even longer-term perspective, it is precisely the closeness of the affinity between modern law’s situational background and its holistic and magisterial qualities that indicates the contingency and, in the final analysis, the fragility of the connection between law’s co-ordinates and the quality of its accomplishment. For what if the situating co-ordinates of law in its Westphalian phase, and the narratives associated with these, begin to lose their hold? What if the dominant legal narratives of modernity become inadequate to the facts on the ground on a more regular and systematic basis, or become less capable of telling stories that are coherent with past stories within the relevant genre, or with the stories associated with other law types? And if law is then compelled to find new situating narratives, will these new situating narratives be capable of generating a legal constellation that retains holistic and magisterial qualities? And if and to the extent that they are not, how might we understand and characterize any ‘postmodern’ regulatory constellation that might emerge in its place? In what ways, if indeed at all, would it even remain a recognizably ‘legal’ constellation?

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<sup>72</sup> C Taylor, *Modern Social Imaginaries* (n70) esp. ch2. For another excellent overview, see A Giddens, *The Consequences of Modernity* (1990).

## E. UNCHARTED LAW

Let us conclude by putting just this question of the situation of law beyond the modern age to the test. It is beyond the scope of the present study to defend the proposition in any depth, but it is nevertheless beyond serious challenge that the last half-century has brought a range of changes that have decentred the significance of the state in economic, political, cultural and, most pertinently, legal relations, and have increased the importance of transnational circuits of influence in all of these registers.<sup>73</sup> These changes are typically captured under the portmanteau term 'globalization', and it is noteworthy that the more incisive definitions and accounts of globalization give special mention to the changing co-ordinates of space and time. To take just one example, Roger Cotterrell talks of how, under the sign of globalization, "the increasing intensity and scale of certain relations, movements and processes" - from transnational economic circuits to population flows, from new cultural influences and bonds to new global communication media - has given rise to a "*sense of the compression of global time and space, so that the effects of distant events, situations and actions arise more quickly, directly and powerfully than in the past (emphasis added).*"<sup>74</sup>

In this increasingly cramped and compressed post-Westphalian world, the black box of mutually exclusive state sovereignty is well and truly breached. Legal globalization figures as both effect and reinforcing cause of the spatio-temporal compression of globalization more generally. State law, including the frame of state constitutional law, is increasingly rivaled by law otherwise spatially extended, including sub-state law, regional supranational law, transnational domain-

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<sup>73</sup> See, for example, Twining, *Globalization* (n 13)

<sup>74</sup> R Cotterrell, "Transnational Communities and the Concept of Law" (2008) 21 *Ratio Juris* 1-18.



specific private ordering, hybrid public-private ordering and, increasingly, new forms of global legal regime that neither claim universality nor obviously emanate from nor respect the aggregative sovereign will.<sup>75</sup> Intriguingly, a body of law that still frequently assumes the title of international law is both empowered and jeopardized by this process.<sup>76</sup> Conceived of in its broadest terms of reference, international law extends to and is enhanced by all new forms of law that traverse national boundaries, and more specifically, by the normative output of many new global institutions, even if, as we shall shortly illustrate, the modes of law thereby produced look quite different than older sources of international law with their emphasis either on ‘thin’ bilateral and multilateral treaties or on ‘thick’ general principles or custom.<sup>77</sup> Yet the increasing diversity of the transnational landscape challenges the idea of international law as much as it supplements it. It is acknowledged by many international lawyers,<sup>78</sup> and feared by some,<sup>79</sup> that the centrifugal tendency of the many new policy-dedicated special, transnational regimes in areas such as trade, health, climate change and crime will lead to fragmentation and the loss of the integrity, or holistic quality, of international law as a whole. New forms of private and hybrid ordering, too, even if some of these forms understand or portray themselves as newly intensified and extended streams of common law,<sup>80</sup> tend for many to undermine the idea of a shared ‘public’ concern joining the various elements of international law.<sup>81</sup>

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<sup>75</sup> See, for example, Walker “Late Sovereignty” (n56).

<sup>76</sup> See, for example, M Koskenniemi, “The Fate of International Law: between technique and politics” (2007) 70 *Modern Law Review* 1-30.

<sup>77</sup> See Statute of the International Court of Justice, Art 38.

<sup>78</sup> See, for example, Koskenniemi, “The Fate of International Law” (n76)

<sup>79</sup> See, for example, P-M Dupuy *L’Unité de l’Ordre Juridique International* (2000) 297 *Recueil des Cours*

<sup>80</sup> As in the case of the *Lex Mercatoria*. See, for example, Alec Stone Sweet, “The New Lex Mercatoria and Transnational Governance” (2006) 13 *Journal of European Public Policy* 627-646; G Teubner, “Economic Globalization and the Emergence of Lex Mercatoria” (2002) 5 *European Journal of Social Theory* 199-217.

<sup>81</sup> See, for example, B. Kingsbury, “Weighing Global Regulatory Rules and Decisions in National Courts” (2009) *Acta Juridica* (forthcoming).

Arguably, therefore, the basic co-ordinates that sustained the two pillars of the Westphalian juridical order are fading, or are at least becoming blurred. This is most apparent at the ideological level, but since law's everyday spatio-temporal co-ordination at the systemic and structural levels is ultimately dependent on the legitimacy fostered at the ideological level, the reverberations are felt at these deeper levels too. Both internal and external forms of narrative coherence are challenged. The plausibility of the narrative of common perpetual purpose magisterially conceived and holistically sustained that has served as the ideological lodestar of the exclusive state constitutional order becomes harder to maintain. So, too, do the two relational models through which the broader coherence of the modern legal constellation was achieved from that state-centred starting point. On the one hand, the relationship of compartmentalized accommodation and principal-agent delegation between the sovereign state and the 'thin' aggregative version of international law is upset, and this on account both of the greater intrusiveness of transnational legal relations into domestic legal orders – and the increasing porosity of domestic legal orders in the face of these intrusions - and of the decreasing capacity of states even in combination to impose their sovereign 'will'. On the other hand, the relationship of complementarity between the sovereign state and the 'thick' version of international law as a natural or otherwise universal law for all places and times is undermined by the fact that, in the new environment of internal fragmentation and external contestation that affects the situation of both, neither can any longer plausibly assert the holistic or magisterial qualities that was the basis of their symbiosis.

With the fading of the model of a dominant tier of law conceived of in holistic and magisterial terms, moreover, we are faced not just with a loss of relational coherence between different law types, but, also with just that undermining of one of the very defining condition of legal modernity that was contemplated in the previous section. And so the question arises: absent the spatio-

temporal co-ordinates necessary to sustain the key design principle of the modern legal constellation and the key relational mechanisms between the dominant types of law, what will take their place?

That inquiry is best addressed by shifting our focus away from those sites within the global constellation – state constitutional law and international law traditionally conceived – whose declining (if still significant) influence and increasing vulnerability encapsulates the fragility of legal modernity. Instead, we need to focus on the sites that have emerged in response to that declining influence and increasing vulnerability – and indeed, may have reinforced that decline. In particular, let us look briefly at certain increasingly prominent sites of jurisgenerative activity that seem most evocative of a break with the situational logic of the legal constellation of modernity – so much so, indeed, that from the latter perspective they may seem to be quite lacking in the basic co-ordinates necessary for law to survive at all.

These are the sites of what, extending the cartographical metaphor, we may term *uncharted law*. On the one hand, law that is *uncharted* is law that not only does not yet figure on the dominant maps through which we imagine the global legal constellation, but which is of a type for which we do not know if there exists even the appropriate key to permit its location on these maps.<sup>82</sup> On the other hand, that something uncharted may still be thought of as law signals that it is more than mere aspiration. Rather, it denotes a law-like practice that already exists in inchoate form in some

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<sup>82</sup> How we map law, of course, is a matter on which there are many different views, which in turn depend upon different underlying conceptions of the nature of law and of the range of legal phenomena. This means that there can neither be one definitive mapping of the law nor a kind of governing meta-map which somehow accommodates all the different mappings. See, for example, G Woodman, “Why there can be no map of law” in R Pradham (ed.) *Legal Pluralism and Unofficial Law in Social, Economic and Political Development* (2003). However, this does not mean there is no *dominant* map, complete with its own privileged keys (and uncharted places), the influence of whose depiction of the juridical world both reflects and reinforces the power of established understandings.

as yet uncharted place, or is at least under serious consideration; an actual or proposed practice, therefore, that must either be somehow imagined, recognized, embraced and refined as law, even if we do not yet have the key for doing so, or if rejected as a legal practice, only if we have some other and better solution by way of filling, or cordoning off, the space the practice seeks to occupy and fulfilling or rejecting the function it seeks to meet.

As a first of various examples of uncharted law (which I have had occasion to examine in other work), let us take the case of *pluri-constitutive* law. The prospect of pluri-constitutive law has recently been vividly raised in the protracted debate over whether the growing influence of European Union law should be recognized, systematized and legitimated through a European documentary Constitution.<sup>83</sup> Can we resituate law as a supranational but still territorially delimited constitutional particular with its own non-exclusive constituent power? That is to say, can we give constitutional acknowledgment to a constituent power that embraces but does not absorb or exhaust other professedly sovereign territorially delimited constitutional particulars at the national state level, each with their own constituent power? Or is this simply politically and juridically incoherent, involving the self-contradiction and superannuated ambition of a ‘partially holistic’ and ‘partially magisterial’ combination of increasingly ‘partially holistic’ and ‘partially magisterial’ national constitutional orders? The range, force and volatility of the debate on the question of a European Constitution, especially during the period of the Convention on the Future of Europe, and culminating in the failure of the referendums in France and The Netherlands in 2005,<sup>84</sup> had to do with the lurking insistence of this matter. It had to do with the fact that, compared to ‘normal’ constitutional innovation and contestation, two questions rather than one

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<sup>83</sup> For one of many treatments, see the Special Issue, “Symposium on the proposed European Constitution” in 2005 3 (nos 2&3), *International Journal of Constitutional Law*. For notable treatments of the earlier debates, see MacCormick “Questioning Sovereignty” (n13); J H H Weiler *The Constitution of Europe* (1999).

<sup>84</sup> See, for example, N Walker “A Constitutional Reckoning” (2006) 13 *Constellations* 40-150.

were at issue. For discussion was concerned not only with the usual first-order question of what in the way of institutions, procedures and substantive rules should be included under the category of the supranational Constitution, but also with the second-order question of whether such a necessarily plural and derivative category of constitutional, and so constitutive law, could and should be meaningfully pursued at all.<sup>85</sup>

Arguably, too, if on a scale that is smaller yet more familiar, just as our Union state enters its fourth century, we are confronting a similar uncharted possibility of pluri-constitutive authority and pluri-constitutionalism in the relationship between Scotland and the UK. As also increasingly appears to be the case of other plurinational states such as Belgium, Spain and Canada,<sup>86</sup> the constitutional options no longer lie between a zero-sum distribution and differentiation of holistic and magisterial units in the one hand, or a finally deferential and nested form of internal devolution or federalism within a singular holistic and magisterial unit on the other. I would defy anyone to read without prejudice *Choosing Scotland's Future*<sup>87</sup> - the constitutional overture of the first nationalist government of Scotland's decade-old devolved Parliament, with its repeated reference to and warm embrace of the larger structures of which an 'independent' Scotland would remain part - including the UN, the WTO, the EU, the Crown and the Joint Ministerial Committee of a residual United Kingdom - and conclude anything other than that a new pluri-constitutive and pluri-constitutional middle is beginning to edge out the fading holistic and

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<sup>85</sup> See, for example, N Walker 'EU Constitutionalism in the State Constitutional Tradition (2006) Current Legal Problems 51-90.

<sup>86</sup> See, for example, S Tierney, *Constitutional law and National Pluralism* (2005); M Keating, *Plurinational Democracy: Stateless Nations in a Post Sovereignty Era* (2001).

<sup>87</sup> *Choosing Scotland's Future: A National Conversation*, 14<sup>th</sup> August 2007, <http://cci.scot.nhs.uk/Publications/2007/08/13103747/12>

magisterial certainties of independence and unionism, even if the rhetorical appeal of the latter, with its strong oppositions and clear-cut choices, remains strong.<sup>88</sup>

Let us turn, secondly, to the case of *interstitial* law. Again the European Union provides a key setting, but this time far away from the constitutional high road in the form of the so-called Open Method of Co-ordination (OMC). OMC refers to the most innovative of a number of “new governance” methods that have developed in the supranational polity in recent years.<sup>89</sup> Originating in the areas of economic policy co-ordination and employment strategy, given the seal of European Council approval as part of the Lisbon Agenda of 2000, and subsequently extended to other policy areas such as social exclusion, pensions, health-care, research, education and the information society, OMC involves a decision-making structure between EU member states in areas of common concerns that is based upon flexible standards, iterative benchmarking, voluntary national compliance and mutual learning rather than the familiar legal staples of preordained norms, settled application, singular authority and centralized command and control. Apart from their heterarchical and negotiated character, what the various forms of OMC have in common, and what in significant measure accounts for the novelty of their methodology, is that they tend to emerge at the often disputed and so juridically underpowered margins between the EU and the states.<sup>90</sup> Here we find many “decision-making gaps”<sup>91</sup> that are in the interests of the representatives of both national and supranational authorities not to leave unfilled but in the unilateral power of neither to fill. The OMC, and similar mechanism in the EU and elsewhere,

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<sup>88</sup> See, for example, N Walker, “Beyond the Unitary Conception of the British Constitution?” (2000) Public Law 384-404.

<sup>89</sup> See, for example, G de Burca and J Scott (eds) *Law and New Governance in the EU and the US* (2006)

<sup>90</sup> See for example, J Scott and D Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union (2002) 8 ELJ 1; C Sabel and J Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the European Union” European Governance Working Papers EUROGOV No C-07-02.

<sup>91</sup> F W Scharpf, “Problem Solving Effectiveness and Democratic Accountability in the EU” Max Planck Institute for the Study of Societies Working Paper 03/01, February 2003.

then, are interstitial in the sense that they tend to fall between different established legal sites of authority, and in so doing they lack the telos of common and indefinite or perpetual purpose that we associate with these source authorities. Their difficulty, in a sense, is opposite to that confronted at the pluri-constitutional sites. Rather than seeking to occupy overcrowded constitutional territory, they inhabit a constitutional ‘no man’s land.’ But, for all the possibilities this raises of a more responsive framework of regulation, something important may be lost when we seek to generate public authority at the margins and in the gaps between different public authorities.<sup>92</sup> Are OMC and their like in danger of becoming just an exercise in inter-authority elitism? And, whatever their short-term capacity to break decision-making deadlock, without any sense of their being located in an overarching common design in what direction and with what, if any, effective side-disciplines, including minimum standards of rights protection, are such open-ended projects to be steered in the longer term?

Let us take, next, the case of *non-constitutive* or consequential law. Many examples of this can be drawn from the new field of so-called Global Administrative Law (GAL).<sup>93</sup> GAL is a label whose popularity announces the increasing propensity for the administration of collective goods, and in particular administrative rule-making, to take place on a transnational basis in the absence of direct authority from either national constitutional sources or international treaty sources. GAL covers a wide range of processes from informal public transnational networks such as the Basel Committee consisting of the heads of central banks, and hybrid public/private transnational forms such as the industry-sponsored but increasingly government-populated Internet Corporation for Assigned Names and Numbers (ICANN), to purely private bodies such as the International

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<sup>92</sup> See N Walker and G de Burca, “Reconceiving Law and New Governance” (2007) 13 CJEL 519.

<sup>93</sup> For an early manifesto, anticipating what is by now a vast literature, see B Kingsbury, N Krisch and R Stewart “The Emergence of Global Administrative Law” (2005) 68 Law and Contemporary Problems 15-61.

Standards Organisation, concerned with matters of product harmonization, or the World Anti-Doping Agency, devoted to sports ethics. What these diverse bodies have in common is that to the extent that they develop a law-like quality, they do so after-the-fact - consequential upon the administrative tasks in which they are engaged. They develop substantive rules of conduct, and also procedural rules for decision-making and decision-accounting, but they lack any constitutive co-ordinates to underpin these substantive and procedural rules.<sup>94</sup> In other words, they are non-autochthonous - unrooted in any state or other stable site of public authority or even at the contested boundaries between different sites of public authority, and instead generate such authority as they have purely out of the regulatory purposes that they pursue and practices that they develop. But can this kind of self-regulation, however sensitive to special purpose and however faithful to generally accepted standards of procedural fairness, ever ensure its responsibility and responsiveness towards a broader conception of the public interest and a fuller matrix of legal relations among citizens in a manner similar to a corpus of domestic administrative law traditionally embedded in the holistic legal frame of the constitutional state?

As a final type of uncharted law, let us consider the emerging phenomenon of *global general law*. A prominent and topical case in point is the developing regime of "international security law."<sup>95</sup> Under the United Nations mandate, the Security Council is empowered to deal with threats to global peace and security by measures up to and including armed intervention. Until the events of 9/11, the Security Council's interventions short of armed force tended to take the form either of coercive measures against an individual state under the Security Council's Title VII jurisdiction or

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<sup>94</sup> For the distinction between constitutive, substantive and procedural administrative law, and its application to the case of GAL, see D Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law" (2009) *Acta Juridica* (forthcoming).

<sup>95</sup> See K L Scheppele, "The Migration of Anti-Constitutional Ideas; the post 9/11 globalization of public law and the international state of emergency" in S Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 347-73 350; see also A Boyle and C Chinkin, *The Making of International Law* (2007) ch.1



of more general but non-coercive measures, such as recommendations, under its optional Chapter VI jurisdiction. With the passing of Resolution 1373 requiring member states to take special measure to monitor and intercept international mechanisms for financing terrorist attacks (including the criminalization of the collection of funds to aid terrorist attacks, the freezing of all assets of those involved in terrorism and the prohibition on third parties' making funds available to anyone involved in terrorism), the Security Council moved into the new territory of a form of normativity under Chapter VII that is the functional equivalent of generally binding legislation.<sup>96</sup>

From our perspective, what is remarkable about Resolution 1373, and about the raft of supplementary measures that reinforces its significant encroachment upon a traditional sphere of state sovereignty and upon the freedom of state citizens,<sup>97</sup> is that in terms of its situating coordinates it so patently sets aside the symmetrical logic of both particularism and universalism. It is not the self-legislation of any particular local community – whether national or even supranational - where the 'coming from' is matched to the 'going to'. Neither is it the 'thin' aggregative and delegated self-legislation of particular international combinations of states joining together from particular purposes under international treaty. Furthermore, in the absence of any developed sense of a global society or a global constitution, it struggles to speak in the name of a new singular, global particular - a putative global community and global public good.<sup>98</sup> Equally, however, this species of security law struggles to justify itself in universal terms. The object may be unlimited – all who can pose a threat to stability, but it is universal neither in its justification nor in its manifest source. In its commitment to stand against geographically uneven and ideologically motivated and contested threats to security this new species of security legislation

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<sup>96</sup> Scheppele "The Migration of Anti-Constitutional Ideas" (n95) 352-55

<sup>97</sup> Ibid 355-59

<sup>98</sup> See, for example, I Loader and N Walker, *Civilizing Security* (2007) ch.9.

does not with conviction speak in the name of timeless universal values. And in its emanation not from the unspecified 'everywhere' of the custom of nations or general principles but from a quasi-legislative organ of very restricted representative scope, its pedigree, too, seems to be limited.<sup>99</sup>

To the extent that they reflect, or anticipate, a general pattern, these various forms of uncharted law with their unfamiliar co-ordinates reinforce the sense of a movement away from the defining characteristics of legal modernity. The transformative potential of these pluri-constitutive, interstitial, non-constitutive and global general norms lies both in the novel ways in which they configure themselves and in how their functioning contributes to the further erosion of the Westphalian pillars. They suggest that we are seeing a gradual shift from the holistic and magisterial particular and the holistic and magisterial universal to the non-holistic and non-magisterial special and general. On the one hand, we are moving to laws that emanate from constituencies that are either functionally specific, or if broader, no longer comprehensive and exclusive in their remit, and that no longer speak, or at least not directly, to any holistic or magisterial conception of the public good. On the other hand, we are also moving to laws that are global in their repercussions without being either yet persuasively particular to a global community or clearly committed to an ideal of universal values.

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<sup>99</sup> The ambitious scope of the jurisdictional claim of Security Council legislation together with its highly contested legitimacy has led to significant 'turf-wars' between the UN and other transnational regimes, in particular the EU. One prominent site of this turf war has been judicial. See, in particular, the landmark decision of the ECJ, overturning the Court of First Instance and refusing to recognize the primacy of the UN Security Council resolution, in *Kadi and Al Barakat v European Council* Joined Cases C-402/05 P and C-415/05 P, 3 September 2008; for comment, see G De Burca "The EU, the European Court of Justice and the International Legal Order after Kadi" (December 28, 2008). Available at SSRN: <http://ssrn.com/abstract=1321313>

To a second meaning of our title, and the query it raises, we can now finally return. Does the fact that much of this new uncharted law seems at least in some respects out of place with our received understanding of law means that law as we know it in that received understanding is running out of time? And to the extent that it is, the unavoidable but impossible question with which we must end is whether this is a good or a bad thing. It is unavoidable because we have to ask hard questions of the world. It is impossible because the shifts in the co-ordinates of law we are witnessing are just too large and too pervasive to allow of categorical or even tendential answers. All we can say is that there are both dangers and opportunities. On the one hand, the decline of holism and magisterialism in either its particular or universalistic variant unsettles much of what we imagine the moral and cognitive high ground of law to be. On the other hand, the decline of holism and magisterialism challenges many of the imperialist or absolutist projects that were promoted on the basis of law's situationally corroborated ambition and certainty.<sup>100</sup> Wherever it is to be found, the situation, if not the scope, of the new uncharted law is more likely to be modest and precarious, and more likely to be subject to interrogation and challenge. There is certainly more scope, therefore, for countervailing power operating as a moderating influence between the increasingly overlapping regimes of a world of compressed space-time, although this is too serendipitous and context-dependent an outcome to offer much general comfort.<sup>101</sup>

More importantly, in all cases of uncharted law, just because they are not yet securely charted, there is also at work and intensely reflexive legal politics of charting, which is also a politics of definition, and indeed a politics of inquiry into the very limits of our imagination of law as a useful form of practical reasoning. We see this in the debate about a European Constitution, which is in

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<sup>100</sup> See, for example, N Walker, "The Idea of Constitutional Pluralism" (2002) 65 MLR 317-359; N Krisch, "The Pluralism of Global Administrative Law" (2006) 17 European Journal of International Law 247.

<sup>101</sup> See Walker, 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders' (2008) 6 International Journal of Constitutional Law 373-396 391.

part a debate about the very idea and very possibility of a pluri-constitutive and pluri-constitutional space: Or in the debate about the legality of OMC as an emblem of the very possibility of interstitial law rather than just a new form of elite-directed governance and managerialism: Or in the debate over whether non-constituent global administrative law involves the generation of new forums of law-like authorization rather than simply an apology or compensation for unprecedented forms of fugitive power: Or in the debate about whether global security law coming from the UN Security Council or like organs deserve the title 'legislation' by dint of its registering a commitment to a genuinely global public good - a new 'universal particular', rather than just a centralized form of coercion by influential powers – a coalition of the willing and able. In all cases, alongside but inextricable from the immediate political struggle at the new site, what we have is a threshold debate about the very possibility of law adapting its co-ordinates to that new site and remaining something we want to dignify with the name law on the grounds that we deem it capable and deserving of providing an authoritative frame for that political struggle. It is a threshold debate, moreover, in which the activity of legal map-making by politicians and academics alike is of necessity more fluid and open-ended than under the fixed Westphalian categories, and so capable of being more directly constitutive and transformative of the world being mapped than previously.<sup>102</sup>

Many interesting and pioneering investigations are invited, therefore, by the third question of jurisprudence in this ever more complexly co-ordinated age. And out of these investigations will arise many matters of consequence for Public Law, for the Law of Nature and Nations, and certainly for the law of as yet uncharted locations. These are matters, however, if not for another place, for another time.

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<sup>102</sup> Ibid 395-6.