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Modern Constitutional Democracy and Imperialism

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To what extent is the development of modern constitutional democracy as a state form in the West and its spread around the world implicated in western imperialism? This has been a leading question of legal scholarship over the last thirty years. James Tully draws on this scholarship to present a preliminary answer. Part I sets out seven central features of modern constitutional democracy and its corresponding international institutions of law and government. Part II sets out three major imperial roles that these legal and political institutions have played, and continue to play. And finally, Part III surveys ways in which the persisting imperial dimensions can be de-imperialized by being brought under the shared democratic authority of the people and peoples who are subject to them.

Dans quelle mesure peut-on dire que le développement de la démocratie constitutionnelle moderne en tant que forme étatique dans l'Occident et sa diffusion aux quatre coins du monde sont impliqués dans l'impérialisme occidental ? Ces trente dernières années, ceci a été une question prépondérante du savoir juridique. James Tully puise dans ce savoir pour présenter une réponse préliminaire. La Partie I expose sept attributs fondamentaux de la démocratie constitutionnelle moderne et ses institutions internationales correspondantes du droit et du gouvernement. La Partie II décrit trois grands rôles impériaux que ces institutions juridiques et politiques ont exercé et continuent à exercer. Enfin, la Partie III se penche sur les manières dont les dimensions impériales persistantes peuvent être

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« désimpérialisées » par le fait d'être mises sous l'autorité démocratique partagée de la population et des peuples qui y sont soumis.

I. WESTERN CONSTITUTIONAL DEMOCRACY: SEVEN FEATURES OF THE MODERN ARRANGEMENT OF CONSTITUENT POWERS AND CONSTITUTIONAL FORMS.....	465
II. THE IMPERIAL ROLES OF MODERN CONSTITUTIONAL DEMOCRACY.....	480
III. BEYOND IMPERIALISM: DEMOCRATIC CONSTITUTIONALISM IN PRACTICE.....	488

THIS ARTICLE IS A STUDY of the historical and contemporary relationships between modern constitutional representative democracy and western imperialism. It starts from a remarkable article in *The Economic History Review* in 1953 by two Cambridge historians of imperialism, Ronald Robinson and John Gallagher, entitled "The Imperialism of Free Trade."¹ The authors showed that the foreign policy of free trade by the imperial powers in the nineteenth and twentieth centuries was not anti-imperial but, rather, an alternative form of imperialism to colonial imperialism that gradually won out in the late twentieth century. The "great powers," with Great Britain in the lead, realized that they could induce and govern, by various informal means, the formation of legal and political regimes in non-European countries which would function to open their resources, labour, and markets to free trade dominated by economic competition among European powers, without the need for the expensive and increasingly unpopular old imperial system of formal colonies and monopoly trading companies. In a series of publications in the following decades Robinson, the German imperial historians Wolfgang J. Mommsen and Jürgen Osterhammel, and their many followers went on to document the long and complex history of free trade imperialism since the eighteenth century and to argue that decolonization and the Cold War comprised its triumph over colonial imperialism.

Decolonization and the Cold War, they argued, involved the dismantling of the remaining formal colonies, mandates, and trusteeships, and the transfer of limited powers of self-rule to the westernized elites of nominally sovereign, yet still dependent, local governments in a global network of free trade

1. John Gallagher & Ronald Robinson, "The Imperialism of Free Trade" (1953) 6 *Econ. History Rev.* 1.

imperialism. During and after decolonization, a new, non-colonial ensemble of global institutions came together to govern the persisting imperial network of relationships of dependency, inequality, and economic exploitation. It includes the post-World War II great powers (the “Great Eight” (G8), with the United States taking the military and economic lead from Great Britain); their transnational corporations; the Bretton Woods institutions of global governance and their successors (The World Bank (WB), the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT), and the World Trade Organization after 1995 (WTO) and its evolving transnational trade agreements such as TRIPS and GATS); supportive non-governmental and civil society organizations; the North Atlantic Treaty Organization (NATO); and the global military dominance of the United States. They called this complex transition period “the imperialism of decolonization” and “the end of empire and the continuity of imperialism.” Since the defeat of the Soviet Union and its third-world allies at the end of the Cold War in 1989, this complex form of governance has been extended over the planet.²

This hypothesis of the contemporary world order of global governance as the continuity of western imperialism by informal means is now widely used by scholars.³ It is variously termed “open door” and “free trade” imperialism, neo-colonialism, imperialism without colonies, “postcolonial” imperialism, and the “new” imperialism. However, for two defining reasons it is now usually

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2. *Ibid.*; Wolfgang J. Mommsen, “The End of Empire and the Continuity of Imperialism” in Wolfgang J. Mommsen & Jürgen Osterhammel, eds., *Imperialism and After: Continuities and Discontinuities* (London: Allen & Unwin, 1986). The importance of the “informal imperialism theory” advanced by Gallagher & Robinson is discussed by Mommsen, who argues that it is the most important theory of imperialism in the modern period. See Wolfgang J. Mommsen, *Theories of Imperialism*, trans. by P.S. Falla (Chicago: University of Chicago Press, 1977) [Mommsen, *Theories of Imperialism*]. I discuss this theory of contemporary imperialism and several others that were developed in the same period in James Tully, “On Law, Democracy and Imperialism” in Emiliios Christodoulidis & Stephen Tierney, eds., *Public Law and Politics: The Scope and Limits of Constitutionalism* (Aldershot: Ashgate, 2008) [Tully, “On Law, Democracy and Imperialism”].
 3. See e.g. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) [Anghie, *Imperialism*]; David Harvey, *The New Imperialism* (Oxford: Oxford University Press, 2003); Stephen Howe, *Empire: A Very Short Introduction* (Oxford: Oxford University Press, 2002) [Howe, *Empire*]; Daniel H. Hexon & Thomas Wright, “What’s at Stake in the American Empire Debate?” (2007) 101 *Am. Pol. Sc. Rev.* 253; and Mommsen, *Theories of Imperialism, ibid.*

called “informal and interactive” imperialism. First, it is a complex form of rule that governs imperialized peoples by means other than formal colonies (that is, by a combination of informal and indirect means). Second, the hegemonic great powers and their accompanying institutions recognize the imperialized or subalternized peoples as self-governing constitutional states and they interact with them on this basis, yet within the deeply unequal hegemon-subaltern relations of economic, political, legal, educational, and military power laid down over centuries of western expansion (that is, an interactive mode of governance among unequal sovereigns rather than the unilateral domination of formal colonialism).⁴

Gallagher, Robinson, and Mommsen stressed the importance of imperially imposed legal and political institutions in dispossessing non-European peoples of popular sovereignty over their resources, labour, and markets and opening them to the informal paramountcy of the great powers and their trading companies. However, they did not treat this aspect in detail, concentrating instead on economic, administrative, military, and educational means of informal dependency and rule. The objective of this article is to describe the imperial roles that the spread of modern constitutional forms and constituent powers have played in this interpretation of global governance. Part I sets out seven main features or aspects of the modern, western module of constituent powers and constitutional forms that is commonly called constitutional democracy and democratization today. Part II goes on to show the many ways that legal and political prototypes of constitutional democracy have been extended around the world by formal and informal imperial means to subalternize non-European peoples. The third and final Part examines democratic efforts to de-imperialize the imperial dimensions of modern constitutional democracy, that is, to bring them under the shared democratic authority of the peoples who are subject to them. I call these de-imperializing attempts “democratic constitutionalism” (in contrast to “constitutional democracy”).⁵

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4. See Tarak Barkawi & Mark Laffey, “Retrieving the Imperial: Empire and International Relations” (2002) 31 *Millennium* 109; Howe, *Empire, ibid.*; and Gerry J. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004) [Simpson, *Great Powers and Outlaw States*].
 5. I have discussed democratic constitutionalism as an alternative to the imperialism of modern constitutional democracy in James Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) [Tully, *Strange Multiplicity*]; James

I. WESTERN CONSTITUTIONAL DEMOCRACY: SEVEN FEATURES OF THE MODERN ARRANGEMENT OF CONSTITUENT POWERS AND CONSTITUTIONAL FORMS

In their perspicuous introduction to the European University Institute seminar, Loughlin and Walker describe the central tension of the modern arrangement of constituent powers and constitutional forms as follows:

The paradox [of constituent power and constitutional form] is the expression of the fact that modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the “consent of the people,” and that, to be sustained and effective, governmental power must be divided, constrained and exercised through distinctive institutional forms. Although each of the imperatives is expressed in early-modern formulations of legitimate governmental power, it is only with the emergence of the modern sense of a constitution that this tension between constituent power (the power of “the people” to make—and break—the constituted authority of the state) and constitutional form (the formal framework of rule erected as a bargain or contract, or evolved in their absence) becomes more acute.⁶

I start from their description and analysis to set out seven salient features of this paradoxical modern configuration of constituent powers and constitutional forms. I follow common usage in calling this conjunction of modern western-style constitutions and representative governments constitutional democracy (without scare quotes) yet bearing in mind that this elegant phrase hides its historical particularity and makes it appear universal (which is precisely its rhetorical function). I call it constitutional democracy in the narrow sense when I contrast it with constitutional democracy in the broad sense, which includes non-western customary legal and political orders of constitutional forms and constituent powers.⁷

Tully, “The Unfreedom of the Moderns in relation to their ideals of Constitutionalism and Democracy” (2002) 65 Mod. L. Rev. 204 [Tully, “The Unfreedom of the Moderns”].

6. Martin Loughlin & Neil Walker, “Introduction” (Presented at the Seminar on Constituent Power and Constitutional Form, Florence, 24-25 March 2006) reproduced in Martin Loughlin & Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 1 at 1-2.
7. That is, “constitutional democracy” appears to refer to any legal and political order that has some kind of constitution and democracy, and so appears to include pluralism (constitutional democracy in the broad sense). Yet, this term is standardly used to refer exclusively to (1) a particular type of modern constitutional representative government in the

First, I take a modern “constitutional form” to be a structure of law that has a degree of separation or disembeddedness from the activities of those who are subject to it and has the compliance capacity to structure or even constitute the field of recognition and interaction of the people subject to it. If it did not have this degree of autonomy or formality there would not be the “paradoxical” relationship between the rule of law and constituent powers at its centre. Like most historians of western constitutionalism, Loughlin and Walker see this disembeddedness to be distinctive of the modern phase of constitutionalism, perhaps no earlier than the building of absolute and constitutionally limited, centralized states in the seventeenth and eighteenth centuries. In my opinion, historians and anthropologists are correct to say that many non-western civilizations do not have indigenous constitutional forms of this specifically modern disembedded kind. This difference is usually indicated by calling western legal orders mostly formal and non-western mostly customary, and ranking modern western law as superior and more “advanced” for this reason (among others). This is not to say that non-modern legal orders do not have a constitution, since any persisting legal order *is* a constitution in the Aristotelian or ancient sense, whether customary or formal. But in the influential debates over the American and French constitutions (and the constitutional debates that have followed down to today in Afghanistan and Iraq), an embedded (customary) constitution was defined as ancient in contrast to a modern (formal) constitution, and thus said not to be a constitution at all. This elision was then applied to virtually all non-European legal orders by the nineteenth-century authors of modern international law.⁸

Let us call this first aspect of modern constitutionalism the formality or autonomy condition. That is, there are laws that are not immanent norms within the activities they regulate and which change as subjects interact with them in day-to-day rule following (as with customary laws), but are external to the activities. They thus constitute or legislate the field of practice, and subjects

West, and (2) particular legal and political orders in the non-West that are similar in some respects and thus are said to be on the historical path to “developed” constitutional democracy in the western sense (constitutional democracy in the narrow sense). This slippage is intrinsic to the standard usage of the term “constitutional democracy.” The seeming inclusiveness of the broad sense comes to be predicated only on instances of the narrow sense in the course of its use.

8. See Tully, *Strange Multiplicity*, *supra* note 5 and Part II below.

comply. If people wish to change the laws they must go to a separate institutionalized procedure such as a court, a legislature, a formal amending procedure, or judicial review. Kant's imposition theory of law is the classic modern theory of law in this formal sense, yet it goes back to Samuel Pufendorf's theory of modern law in 1672, the first theoretical reflection on the post-Westphalian order.⁹

There are two classes of modern (formal) constitutional forms that develop together in the West: the constitutions of modern states and the constitutions of systems of law beyond the state. The second class today includes not only what is called international law (the basic laws among modern constitutional states) but also subsystems of other suprastate bodies of law that have at least some of the properties of a modern constitutional form: the basic laws of the European Union (EU), the North American Free Trade Agreement, the United Nations (UN) *Charter* of an international society of states, basic international human rights law, and the vast array of transnational trade agreements from the GATT (1947) to those under the WTO. In addition, these post-decolonization constitutional forms were built on the basis of much older bodies of transnational law that were developed along with the European constitutional states when they were formal empires. These are the bodies of imperial law and colonial law of the European imperial states, and of the old law of nations, *ius commercium* and *lex mercatoria* that were designed to regulate inter-imperial competition. Subsystems of these vast systems of law constituted the respective European empires and their colonies. They were gradually transformed into the world system of constitutional states and transnational and international laws in the twentieth century.¹⁰

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9. Of course, this formality aspect is a feature of much of a modern legal system and not just the constitution in the narrow sense. As Walker points out, a modern constitution is closely connected to the legal system it constitutes and thus some properties of constitutional law will also be properties of some non-constitutional laws. Formality or autonomy is one such shared property. See Neil Walker, "European Constitutionalism in the State Constitutional Tradition" in Jane Holder & Colm O'Conneidi, eds., *Current Legal Problems*, vol. 59 (Oxford: Oxford University Press, 2006) 51. I am greatly indebted to Walker's work on constitutionalism and to Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) for my formulation of the seven features under Part I. For Pufendorf, see "Editor's Introduction" in James Tully, ed., *Pufendorf: On the Duty of Man and Citizen* (Cambridge: Cambridge University Press, 1991) xiv.
10. For an excellent introduction to transnational law since World War II, see Peer Zumbansen,

It is thus misleading historically to picture constitutional states developing first and then beginning to experiment with transnational and international constitutional forms in the twentieth century, as legal and political theorists have done since decolonization. European constitutional states, as state empires, developed *within* global systems of imperial and colonial law from the beginning, and this whole intertwined complex of two classes of constitutional forms is the historical basis of the very recent, post-decolonization global legal order. Indeed, like most nineteenth-century theorists and legal historians, both Marx and Weber argued that the modern European constitutional state form was dependent for its peculiar historical formation on the legal incorporation and exploitation of its colonies, just as the legal historians of informal imperialism today argue that the current constitutional form of the great power states is equally dependent on the post-colonial legal incorporation and exploitation of the former colonies by means of the new systems of international and transnational law.¹¹ Hence, it is impossible to understand the relationship between modern constitutional forms and constituent powers unless the imperial and post-imperial supra-state constitutional forms are seen as internally related to the state constitutional forms.¹²

Second, I take “constituent powers” to be the powers of humans (individually and collectively) to govern themselves. Constituent powers refers to these powers in abstraction or separation from any specific form they take in order to be exercised. They take different forms in different constitutional forms (since the constitutional form *is* the form that the constituent powers take): for example, the people, the nation, representative democracy, modern citizenship, federalism, self-determination, participatory democracy, revolution, and so on. Even the concept of constituent power as popular sovereignty

“Transnational Law” in Jan M. Smits, ed., *Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006) 738. For its origins in *lex mercatoria* (merchant law) and *ius commercium* of the age of empires, see Boaventura de Sousa Santos, *Toward a New Legal Common Sense*, 2d ed. (Cambridge: Cambridge University Press, 2004) at 208-36. The systems of transnational law, especially trade law, function as constitutions in the sense that they subordinate national constitutions, *i.e.*, treat national constitutions as legal regimes under their jurisdiction (Hart’s first-order rules) and open them to free trade. See Steven Shrybman, *The World Trade Organization: A Citizen’s Guide* (Toronto: James Lorimer, 2001).

11. See Part II below.

12. This internal relation between constitutional state formation and imperialism has always been commonplace in theories of imperialism. See Mommsen, *Theories of Imperialism*, *supra* note 2.

already recognizes these powers under a concept and thus presupposes a form and is one step away from the distinctly modern idea of constituent power as a capacity or potentiality, prior to taking on a concrete form. This modern concept of unformed constituent power is, of course, the condition of possibility of the modern idea of popular sovereignty and, more radically, the multitude: the idea that the people or the multitude could stand back from any constitutional form of organization of themselves as a specific people and bring their form of constitutional organization into being in some founding moment or process of deliberation (the procedures of which would themselves have to be brought into being by the deliberators, and so on). Perhaps Rousseau was among the first to explore this paradoxical idea, and Hardt and Negri among the most recent.¹³

If we did not have this concept of a constituent power that exists prior to its actual forms in conjunction with the concept of a disembedded constitutional form, then we would not have the paradoxical relationship between them that Loughlin and Walker describe (above), and which is constitutive of the contingent historical ensemble of *nomos* and *demos* we call constitutional democracy. Indigenous peoples have a different idea of constituent power. For them the constituent powers of humans (and non-humans) are always already immanent in the specific forms of transposable *habitus* they take in the countless normative relationships of interaction (non-formal customary laws) that humans and non-humans both bear and transform *en passant*.¹⁴ And if the twentieth-century philosophers of practice from Heidegger to Pierre Bourdieu,

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13. Michael Hardt & Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (New York: Penguin, 2004). For a genealogy of the constituent powers of citizens within states—to which I am deeply indebted—see Quentin Skinner, “States and the freedom of citizens” in Quentin Skinner & Bo Strath, eds., *States and Citizens: History, Theory, Prospects* (Cambridge: Cambridge University Press, 2003) 11. For the incorporation of constituent powers into the form of rights, see Annabel S. Brett, “The development of the idea of citizens’ rights” in Skinner & Strath 97.
14. For this account of indigenous customary constitutionalism and constituent power internally related to the law, see the important work of two indigenous legal scholars: John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); John Borrows, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006) [Borrows, *Indigenous Legal Traditions*]; and Val Napoleon, “Law as Governance: Thinking about Indigenous legal orders and law” (Paper presented at the National Centre for First Nations Governance, Vancouver, July 2006) [unpublished].

Charles Taylor, and Fuller are correct, the modern systems of formal law and abstract constituent power, which modern theorists take as their starting point, are actually grounded in everyday practices of custom and transposable *habitus* that go without saying, which indigenous philosophers take as their starting point.¹⁵

The constituent powers of the people are constituted into two main political formations by the two classes of constitutional forms (the state and suprastate forms of feature one). The first is representative democracy (or constitutional democracy), with its various forms of modern citizenship, representation, and institutionalization of various constituent powers (legislative, judicial, federative, military, administrative, *et cetera*) within a constitutional state. The forms of oppositional constituent powers intrinsic to constitutional representative democracy are extra-parliamentary opposition, the general strike, direct action, revolution, and so on. The second comprises the mostly non-representative (or distantly representative) forms of organization of constituent powers characteristic of suprastate constitutional forms. These include the governing institutions of the old imperial systems, the European congresses and conferences of the nineteenth century (which never included colonial peoples), the League of Nations, the UN, the Bretton Woods institutions and WTO, meetings of the G8, and the (more representative) institutions of the EU.¹⁶ And, in democratic opposition, the great decolonization movements of the twentieth century, internationalist movements, alternative

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15. See the classic formulation in Charles Taylor, *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) at 165-81 ("To Follow a Rule"). Like Taylor, I see the best treatment of the internal relationships between a formal system of rules and the transposable dispositions of the agents who act in/with/against it, which is at the heart of this article, as that given by Ludwig Wittgenstein, *Philosophical Investigations*, trans. by G.E.M. Anscombe (Oxford: Blackwell, 1953). For an introduction, see James Tully, "Wittgenstein and Political Philosophy" in Cressida J. Heyes, ed., *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003) 17. For the application of this view of rule-following to the law, see Jutta Brunnée & Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 *Colum. J. Transnat'l L.* 19; Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 *Osgoode Hall L. J.* 168.
16. The World Trade Organization describes itself as an institution of global governance. For its ascension to this role, see Amrita Narlikar, *The World Trade Organization* (Oxford: Oxford University Press, 2005).

non-governmental organizations (NGOs), the World Social Forum, and global civil society claim to manifest or represent the constituent powers of the people and struggle to democratize these suprastate constitutional form and constituent power complexes.

Third, it is not possible to understand the field of interactive relationships between constitutional forms and constituent powers without seeing a third actor internally related to these first two features. As Loughlin and Walker point out, modern constitutionalism did not derive historically from the exercise of constituent powers of sovereign peoples or multitudes alone. If it had, we would not have an antagonistic relationship between the forms and the powers. Rather, as Quentin Skinner has shown, modern constitutions are also the product of the sovereign in the traditional sense of the ruler: the monarch, emperor, Crown, aristocracy, ruling class, elite or, more commonly, the sovereign state, in an agonistic relationship with the people. This is the form of constitutive power that is traditionally said to constitute the legal and political order in the West since Roman law. Constituent power in the sense of popular sovereignty arose in opposition to sovereignty in this Hobbesian sense and continues to be in a gaming relationship with it (over the form of the constitution itself, popular freedoms and constitutional limitations). Even when the sovereign in this sense can plausibly be said to derive its powers from the consent of the governed, it is still able to separate itself from dependency on them and to exercise sovereignty over them and the constitution that is supposed to limit its power, especially in the great game of foreign power with other sovereigns, as the realist tradition from Bodin to Morgenthau has always argued.¹⁷

This doctrine of state sovereignty gives rise to yet another kind of separation: the relative autonomy of the state (or executive) from both the people and the constitution. It is integral to modern constitutionalism. A modern constitution, Kant famously argued, does not arise from the spontaneous interaction of the pre-civil people. Rather, it requires some kind of master or legislator to impose law on the crooked timber of the people and to act without their consent and independent of law in exceptional circumstances until they are “civilized” by

17. Quentin Skinner, *The Foundations of Modern Political Thought*, vol. 2: *The Age of Reformation* (Cambridge: Cambridge University Press, 1978). See also Ian Hunter, *Rival Enlightenments* (Cambridge: Cambridge University Press, 2004); Martin Loughlin, “Ten Tenets of Sovereignty” in Neil Walker, ed., *Sovereignty in Transition* (Oxford: Hart, 2003) 55.

centuries of subjection to civil law. As Machiavelli and Chomsky add, these constitutive powers are supplemented with the powers of “manufacturing the consent” of the people and making non-constitutional actions appear constitutional in order to gain legitimacy. Far from disappearing, some contemporary theorists argue, like Hobbes, that sovereignty in this sense structures the constitutional form and the form that constituent powers take within it. That is, the field of “constitutional form and constituent power” is really a game between the constitutive sovereign and the constituent people within and over the constitutional form (the contract between them)—a game that, according to the realists, the sovereign dominates.¹⁸

As with constitutional forms and constituent powers (features one and two), there are two corresponding classes of constitutive sovereignty: state sovereignty in its various forms and the candidates for sovereignty over the various global constitutional forms listed above. The global sovereigns range from the competing imperial powers in the colonial age to the informal sovereigns today, such as a single superpower (the United States since 1989), the G8 or G20, a coalition or balance of civilized, advanced or democratic states, the Bretton Woods institutions and the WTO, the transnational corporations empowered by trade agreements under the WTO, an empowered UN, or some combination of these contenders.

Fourth, I have been writing as if constituent powers (feature two) consist only of political powers, that is, powers of self-government that are said to be delegated or alienated to representative institutions and also exercised directly in public spheres. But this is too narrow. As Locke, Marx, and Weber insisted, the constituent powers of the people that are institutionalized by a modern constitutional system of laws consist of three distinct types of powers: political power or the powers of self-government (feature two); labour or productive powers; and the powers to protect oneself and others, or military and police power. Modern constitutions differentially distribute these three types of constituent powers into three distinct sets of legal institutions of modern societies: political, economic, and police and military.¹⁹

18. See James Tully, “Diverse Enlightenments” (2003) 32 *Econ. & Soc’y* 485.

19. See James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1992) at 9-70 (“An Introduction to Locke’s Philosophy”) [Tully, *An Approach to Political Philosophy*]; Martin van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 1999).

The second type of constituent power, labour power, is exercised by selling it for a wage on the market to competing national or multinational corporations that manage its exercise and extract a profit. These capitalist forms of constituent labour power and private property in the means of production and contractual relations are stipulated by the constitutional forms of state and international legal regimes and enforced by the corresponding sovereigns. This form of organization of productive power is distinctive to modern constitutionalism. Humans have been dispossessed of their access to the land and independent means of production: first, with the enclosures within Europe and then, with the dispossession of the non-European peoples of their indigenous legal and political control over their resources and labour during the spread of western imperialism and its legal orders, as Marx and Hobson concurred.²⁰ Just as one can think of political powers being either delegated or alienated to the representative institutions, so too can one think of economic powers being either delegated or alienated to the capitalist corporations, as Weber neatly demonstrated. Productive powers are also conceptualized in the same abstract way as political powers: that is, as capacities capable of being shaped and exercised in a multiplicity of forms within the corporatized division of labour.²¹

The third type of constituent power, the powers of self-and-other defence, is alienated to the police and the military-industrial complex in modern constitutional formations. Although rebellions were fought in the name of no standing armies in the seventeenth century, by the early nineteenth century every modern state had a constitutionally protected permanent military complex.²² These complexes are standardly connected to the most advanced research and development institutions, the largest commercial firms, a secure tax base, a permanent supply of recruits through the *levée en masse*, the draft, and, more recently, the state's purchase of private armies on the market, a

20. John A. Hobson, *Imperialism: A Study* (New York: Cosimo Classics, 2005) [first published in 1902] [Hobson, *Imperialism*]; Karl Marx, *Capital* (London: Penguin, 1990) at 873-942. For a recent history of the legal dispossession of colonized peoples see John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal: McGill-Queen's University Press, 2003).

21. Tully, *An Approach to Political Philosophy*, *supra* note 19 at 242-61 ("Rights in Abilities").

22. Volker R. Berghahn, *Militarism: The history of an international debate* (Cambridge: Cambridge University Press, 1981); William H. McNeil, *The Pursuit of Power* (Chicago: University of Chicago Press, 1982).

separate class of influential military-political leaders, naval and army bases throughout the old European empires, and the paramount global military system of the United States that claims to exercise full spectrum dominance of the planet today. As Montesquieu foresaw in 1748, this peculiar formation of protective powers is caught in an ever-escalating arms race with other constitutional states. And, since decolonization in the twentieth century, it has developed into an expanding arms-sales industry to dependent and indebted former colonies and proxy states. As Locke warned in 1675, the resulting power imbalance between the permanently-armed sovereign state and the legally disarmed people undermines the rough equality between the people and their representatives that was the guarantee of a free and constitutionally bound polity, thereby opening the people to abuse by their own government and to unlimited military adventures abroad, without an effective counter-balance. Yet, because the people always desire to be free of oppression, the system is a recipe for inevitable wars and revolts.²³

Just as constituent political powers are organized in different governance institutions within constitutional states and suprastate organizations (second feature), so too are economic and military constituent powers. The Bretton Woods institutions, the G8, and the most powerful transnational corporations govern economic power through the suprastate systems of trade and finance law.²⁴ The United States now claims to exercise full spectrum military dominance over the world's forms of constituent military power to protect democracy and free trade, multilaterally and in accord with international law and the Security Council if possible (juridical dominance), but unilaterally and without the law if necessary (executive dominance).²⁵

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23. This line of argument was put forward in an anonymous pamphlet believed to be by Locke, *A Letter from a Person of Quality to a Friend in the Country* (1675) and is repeated in the *Two Treatises of Government* (1690). See Tully, *An Approach to Political Philosophy*, *supra* note 19 at 37-47. For Montesquieu on the arms race, see Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone, eds., *Montesquieu: The Spirit of the Laws* [1748] (Cambridge: Cambridge University Press, 1989) at 224 (Bk. 13, c.17).
24. The trade agreements under the WTO are seen as global constitutions and charters of rights of transnational corporations. See Shrybman, *World Trade Organization*, *supra* note 10 at 1-18.
25. See U.S., National Security Council, *The National Security Strategy of the United States* (2002), online: <<http://www.whitehouse.gov/nsc/nss.pdf>>. The new National Security Strategy of March 2006 is similar. *The National Security Strategy of the United States* (2006), online: <<http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>>.

I would like to suggest that we cannot understand the dynamics and paradoxes of the relationship between modern constitutional forms and constituent powers unless we include in the field of interaction these two types of constituent powers: economic and defence. The monopolization of economic constituent power by networked multinationals and international legal regimes, and the monopolization of powers of self and other defence by huge networked military complexes are considered beyond question in the dominant democratic and constitutional theories today, except for a few notable exceptions. Nevertheless, the social democratic, socialist, and anarchist movements of the last two hundred years, the non-aligned movements of the Third and Fourth Worlds, and the massive peace and disarmament movements of the twentieth century have all been constituent power movements in opposition to the present constitutional form of economic and military power.²⁶ Moreover, the global popular protests from decolonization to the movements against the current imperial wars in the Middle East and against the neo-liberal form of free trade imperialism are over precisely the present concentration and exercise of these two forms of constitutionalized constituent powers and the inability of the available forms of political power to make any significant difference whatsoever. This is not surprising, for the low-intensity representative democratic institutions and modern constitutional formations have been powerfully shaped and formed by the parallel de-politicization and concentration of these other two forms of constituent power. Indeed, for many social scientists today, these two concentrations of economic and military power have not only disempowered the people but have usurped the de facto role of the sovereign within state and global formations.²⁷ Therefore, an analysis of constitutional form and constituent power would be out of touch with the populist global constituent discomfort with the existing order if these two aspects of constituent power were left unexamined.²⁸

26. See Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New York: The New Press, 2007) for the non-aligned (or "acting otherwise") movements and Peter Ackerman & Jack DuVall, *A Force More Powerful: A Century of Non-Violent Conflict* (New York: St. Martin's Press, 2000) for the abolition of the use of violence.

27. See e.g. Harvey, *The New Imperialism*, *supra* note 3.

28. See the similar argument of Boaventura de Sousa Santos, *The World Social Forum: A User's Manual* (2004), online: Centro de Estudos Sociais <http://www.ces.uc.pt/bss/documentos/fsm_eng.pdf>. For a survey of populist global resistance movements against

Fifth, all three types of constituent powers of individuals and collectivities are guided and habituated into their various constituent forms of subjectivity by the vast repertoires of modern techniques of *governmentalité*. We know from Weber, Foucault, Loughlin, and the governmentality school that these techniques of modern subjectification can neither be reduced to, nor derived from the sovereign state, the constitution, the rule of law, representative government and citizenship regimes, or the self-fashioning practices the people apply to themselves. The historical development of dispersed regimes of governmentality within modern and advanced liberal constitutional states has been well researched. The parallel history of regimes of formal colonial governmentality and the more recent postcolonial governmentality, by various informal means of global governance and NGOs, has not received as much attention.²⁹

Sixth, the dynamic relationship between constitutional forms and constituent powers is a function of the complex interactions among the actors within and against the constitutional formations. To summarize, I outlined the following: two classes of constitutional forms under which constituent powers are configured into constitutional actors (the state and transnational classes of feature one); and constituent political powers, constitutive sovereign authorities, constituent productive and defensive powers, and regimes of governmentality. Loughlin and Walker summarize the four main types of interaction of constituent-power actors with their corresponding constitutional forms: juridical containment, co-originality and mutual articulation, radical sovereignty, and irresolution.

In the first type of interaction where the actors all exercise their political, economic, and protective powers more or less routinely in accord with the two constitutional formations and their corresponding institutions of constituent

these two forms of power, see Louise Amoore, ed., *The Global Resistance Reader* (London: Routledge, 2005).

29. For contemporary, informal imperial governmentality, see Alison J. Ayers, "Demystifying democratisation: the global constitution of (neo)liberal polities in Africa" (2006) 27 *Third World Quarterly* 321; Alison J. Ayers, "Imperial Liberties: Democratisation and Governance in the New Imperial Order" (2008) *Political Studies* [forthcoming]. For colonial governmentality, see Peter Pels, "The Anthropology of Colonialism: Culture, History and the Emergence of Western Governmentality" (1997) 26 *Ann. Rev. Anthropology* 163. For a review of the limits, compromises, and failures of colonial *governmentalité* see Anna Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002) and Part III below.

powers, the interaction approximates what is called the “juridical containment thesis.” That is, the constitution founds and structures the exercise of constituent powers, as in modern liberal theories of constitutional democracy. The second general type of interaction is when the people seek to change the particular constitutional forms and the corresponding ways their constituent powers are contained by exercising their popular sovereignty within a modern, constitutional, and democratic order (and within its traditions of interpretation), either by constitutional reform or democratic revolution. In this type of case, the whole interaction is called the “co-originality and mutual articulation thesis.” That is, the constituent powers of democratic self-rule and the constitutional form of the rule of law are equiprimordial (equally basic) and worked up together, as in agonistic theories of democratic constitutionalism.³⁰ Third, the people subject to a constitutional form see themselves as a multitude (an as yet unorganized and unrecognized potential agent) behind the whole constitutional-constituent formation and they strive to exercise all three constituent powers together, overthrow the regime, and bring into being a new kind of constitutional formation, which in turn must be subject to ongoing constituent transformation (so the multitude remains sovereign over the constitutional form to which it subjects itself). This type of interaction accords with the radical sovereignty or self-creation thesis, as in radical democratic theories.³¹

The fourth type of interaction occurs when diverse individuals and groups exercise their constituent powers in countless ways within and against the constitutionalized forms of constituent powers to which they are subject, in the hopes of modifying or transforming them agonistically *en passant*, or if they invent new forms of constituent organizations (such as networks) yet are unable to transform the hegemony of the prevailing sovereigns and constitutional forms. This type of interaction is called the irresolution thesis. It is “irresolvable” because the subaltern citizens are able to modify but not to transform the unequal relations in which they act.³² It is often seen as a more realistic version of the co-articulation thesis, given the enormous inequalities among the actors. The irresolution thesis characterizes fairly accurately the way subalternized

30. For this thesis, see Tully, “The Unfreedom of the Moderns,” *supra* note 5.

31. Michael Hardt & Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000).

32. Emiliios Christodoulidis, “Constitutional Irresolution: Law and the Framing of Civil Society” (2004) 9 *Eur. L.J.* 401.

states and non-state actors are constrained to interact in the current informal imperial order, as we saw in the introduction to this article.³³ While this list leaves out a crucially important fifth form of interaction which I highlight in Part III (“acting otherwise”), it nevertheless encapsulates fairly well the major forms of interaction characteristic of modern constitutional democracy.

Of course, at the same time, the respective constitutive sovereigns of modern constitutional states and of global constitutional formations have a repertoire of constitutional and extra-constitutional ways of re-naming and responding to the irruptions of popular sovereignty, radical sovereignty, and agonistic irresolution domestically and internationally, and of bringing them in line with the containment thesis or a manageable form of the mutual articulation thesis. Indeed, we can think of the five types of interactive games between constituent powers and constitutive sovereigns within and over constitutional forms as co-extensive with, and the driving force of, the reign of modern constitutional democracy.

Seventh, as we have seen, this complex of constitutional forms and constituent powers has a dynamic history. This history is portrayed as a dynamic set of world historical processes that coordinate the previous six features: respectively, constitutionalization, representative democratization, centralization of sovereignty, economic and military modernization, governmentalization, and citizenization in the state sphere and the transnational and international spheres. These so-called processes with their purported necessary logics of development bear a number of descriptive-evaluative names that serve to legitimate them and put them beyond question: civilization, development, modernization, decolonization, globalization, democratization, opening to free trade, and so on. They have their origins in Europe but they sweep up the rest of humanity, which is portrayed as being at lower stages of historical development and in need of western imperial aid, and gradually make the world over in accord with constitutional democracy (in its various iterations over time).³⁴ This *telos* is

33. But see Part III below for my reformulation of this thesis in tandem with the co-articulation thesis. For a more optimistic version of the irresolution thesis, see Brunnée & Toope, *supra* note 15 at 19-74.

34. Of course these six features were not called “constitutional democracy” until recently, after decolonization and the emergence of a world of formally equal nation states. However, the present usage of this phrase makes it appear that the contingent histories of the six features make up aspects of underlying processes that necessarily lead to constitutional democracy as

defined in different ways by writers such as Vattel, Smith, Kant, Hegel, Marx, Mill, Lauterpacht, Westlake, Hartmann, Wheaton, Wilson, Rostow, Fukuyama, Friedman, Hardt and Negri, and Habermas; yet, as Herder objected to Kant's model, it is always posited as a universal and cosmopolitan endpoint for one and all.³⁵ These legitimating meta-narratives are woven into the horizons of modern humanities and social and legal sciences, and into the day-to-day administration of all aspects of constitutional democracies, so deeply that even critics often accept them as the bounds of reasonable argument. Like the other six features, these world-process discursive formations have been predicated on both modernizing constitutional states and their imperializing projects simultaneously since the early modern period.³⁶ Again, I would like to suggest that one cannot adequately analyze the dynamics of an ensemble of constitutional forms and constituent powers without taking into account the discursive formations employed in its operations.

the end point. And the contingent histories can be arranged so they appear to illustrate the stages of their development and demonstrate that, at the highest stage, we can see into constitutional democracy's essential features. As I mentioned in the introduction, this is the rhetorical function of the phrase in its narrow sense. But it is also important to remember that we can arrange descriptions of customary legal and political associations so they appear as natural extensions of constitutional democracy (by showing, for example, that they perform similar functions). Modern constitutional democracy can, therefore, be seen as a particular instance of a much broader class of constitutional and democratic association, rather than as the universal end point. The resulting legal and political pluralism is what I call "common constitutionalism" in *Strange Multiplicity*, *supra* note 5.

35. For critical analyses of these legitimating discourses of imperialism see James Tully, "The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives" in Anthony Pagden, ed., *The Idea of Europe* (Cambridge: Cambridge University Press, 2002) 331; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001) at 179ff. (c. 3) & 266ff. (c. 4) [Koskenniemi, *Gentle Civilizer*]; Dipesh Chakrabarty, *Provincializing Europe* (Princeton: Princeton University Press, 2001); and Bill Ashcroft, *Post-Colonial Transformations* (London: Routledge, 2001).
36. See Anthony Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c.1500-c.1800* (New Haven: Yale University Press, 1995) [Pagden, *Lords of all the World*]; Walter D. Mingolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton: Princeton University Press, 2000). For the influence of these meta-narratives of modernization in decolonization and state-building movements in the former colonies see Robert J.C. Young, *Postcolonialism: An Historical Introduction* (Oxford: Wiley-Blackwell, 2001).

II. THE IMPERIAL ROLES OF MODERN CONSTITUTIONAL DEMOCRACY

Part I set out seven features of the modern arrangement of constituent powers and constitutional forms commonly called constitutional democracy. I suggested that it cannot be adequately understood by focusing exclusively on its histories within western states. It also should be set in the broader context of its global spread by means of western imperialism in its formal (colonial) and informal (free trade) phases, which was briefly summarized in the introduction. I brought this broader imperial context into the history of state formation by distinguishing between two classes of constitutional forms: constitutions within states and constitutions beyond the state in empire-building and international law (feature one). Then, I indicated how the following five features of modern constitutional democracy also developed simultaneously within states and beyond states, in the imperial realm. The seventh feature showed how these features are integrated in the grand discursive formations (or meta-narratives) of constitutional democratic modernization in theory and practice. I will now turn to a very brief historical synopsis of how these features of modern constitutional democracy have been spread by means of western imperialism. In Part III, I indicate diverse forms of responses to their imposition and the types of interaction they generate.

Eighth, since the early modern period, European states have asserted a crucial eighth feature of modern constitutional democracy. This is the right of European states and their companies to trade freely in non-European societies and the duty to civilize non-European peoples, together with the duty of hospitality of non-European peoples to open themselves to trade and civilization. If indigenous peoples resist and defend their own constitutional forms and constituent powers and civilizations, and thus violate the international duty of hospitality, the imperial powers have the right and duty to impose coercively the conditions of trade, hospitality and civilization: namely, the appropriate features of modern constitutional forms and constituent powers. The right and two duties—in their many formulations from Francisco de Vitoria through Locke and Kant to the GATT/WTO and the restructuring policies of the World Bank, and the norm of democratization under international law—serve to legitimate the coercive imposition and protection of the legal and political conditions of western imperialization on the non-West. I will call the right and two duties the “imperial right.”³⁷

37. For an introduction to the complex history of the imperial right see Anghie, *Imperialism*,

The imperial right has been exercised in three major ways over the last half millennium: colonization, indirect rule (including protectorates), and informal rule.³⁸ The first is the implantation of European settler colonies in the Americas, Australia, and New Zealand. In these cases of replication imperialism the rudimentary colonial structures of modern constitutional forms and constituent powers were imposed over the legal and political systems of the Indigenous peoples, dispossessing them of their territories and usurping their governments, by force or dishonoured treaties. Approximately 80 per cent of the indigenous population, which was larger than Europe's in 1492, was exterminated by 1900.³⁹ The remaining indigenous peoples were subjected to forced assimilation or removed to tiny reserves with limited powers of local self-government, and ruled despotically by ministries of indigenous affairs. When the colonies freed themselves from the British, Spanish, and Portuguese empires, they retained the legal structures of the colonial period and continued to exert and extend imperial sovereignty over indigenous peoples and their territories throughout the four continents.⁴⁰

supra note 3; Tully, *Strange Multiplicity*, *supra* note 5; Koskenniemi, *Gentle Civilizer*, *supra* note 35; and Pagden, *Lords of all the World*, *ibid.* For a critical analysis of the norm of democratization under international law today see Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford: Oxford University Press, 2000). A well-known and illustrative example of the duty of hospitality of non-Europeans to open themselves to European trade or face punishment under international law prior to nineteenth-century international law is Kant's cosmopolitan right and duty of hospitality, the third definitive article of *Perpetual Peace*. There is a long history of this cosmopolitan right and correlative duty of openness, referred to as *ius commercium*, in the earlier law of nature and drawn upon by Kant. For the right of western powers to impose a structure of law over non-western societies that do not have a formal system of law (feature one), see Immanuel Kant, "Perpetual Peace: A Philosophical Sketch" in H.S. Reiss, ed., *Kant: Political Writings* (Cambridge: Cambridge University Press, 2001) 93 at 99, the note to the first paragraph. See also the commentary in Anghie, *Imperialism*, *supra* note 3 at 295-97.

38. For an analysis of these forms of imperialism, see Michael Doyle, *Empires* (Ithaca: Cornell University Press, 1986) at 30-50 [Doyle, *Empires*]. For a synopsis of the history of western imperialism, see David Abernethy, *Global Dominance: European Empire 1415-1980* (New Haven: Yale University Press, 2000).
39. See Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2007).
40. Paul Havemann, ed., *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999).

The second method of constitutional imperialization is indirect colonial rule. The imperial powers establish a small colonial administration or trading company to rule over a much larger indigenous population indirectly, by establishing a formal infrastructure of imperial law and *lex mercatoria* while also preserving and modifying the existing indigenous customary constitutions and constituent powers so that resources and labour are privatized and opened to trade, labour discipline, and investments and contract law dominated by the European trading companies. Once this legal system is in place, resistance is illegal under their own laws. As Hobson explained in *Imperialism* in 1902, the various means include recognizing local rulers as quasi-sovereigns and making unequal treaties with them, civilizing or westernizing local elites and making them dependent on imperial economic and military power and bribes, dividing and conquering opposition, training the indigenous armies to protect the imperial system of property and trade law and to fight proxy wars for them, inciting resistance so the trading companies can claim compensation for damages and lost profits (as in Iraq after 2003), and so on. This is the major way the imperial right was exercised in India, Ceylon, and Africa prior to its violent recolonization after 1885, and in the Middle East in the twentieth century.⁴¹

The third way—informal or free trade imperialism—can be seen as one step beyond indirect rule. The imperial power permits the self-rule and eventual self-determination of indigenous peoples within a protectorate or sphere of influence while exercising informal paramountcy (hegemony) to induce them to open their resources, labour, and markets to free trade by establishing the appropriate legal and political forms, thereby combining empire and liberty, the oldest rallying cry of British and US imperialism.⁴² The informal ways and means include the recognition of quasi-sovereignty and unequal treaties; economic, military, and aid dependency; bribes; sanctions; the “civilization of the natives” by voluntary and religious organizations and by western legal, political, economic, and military experts; and threats of military intervention and actual military intervention if all else fails. These diverse means of open

41. Hobson, *Imperialism*, *supra* note 20. For the Middle East see Robert Fisk, *The Great War for Civilization: The Conquest of the Middle East* (New York: Harper/Collins, 2006) [Fisk, *The Great War*] and Doyle, *Empires*, *supra* note 38 for a comprehensive survey.

42. See David Armitage, “Empire and Liberty: A Republican Dilemma” in Martin van Gelderen & Quentin Skinner, eds., *Republicanism: A Shared European Heritage*, vol. 2: *The Values of Republicanism in Early Modern Europe* (Cambridge: Cambridge University Press, 2002) 29.

door or intervention imperialism, as it is also called, replace and often supersede historically earlier formal colonization or indirect rule (which laid the groundwork). The ultimate guarantee is the establishment of small yet overwhelming naval and military bases (originally coaling stations) established throughout the imperialized world, such as Guantanamo Bay (1901) that can threaten or actually intervene on a moment's notice if subaltern peoples threaten to take control of their own resources or foreign companies. The British Empire and the United States illustrated the superiority of informal imperialism over the expensive old colonial system during the nineteenth century in their competitive free-trade paramountcy over the independent former colonies of Latin America (with frequent interventions). As I mentioned in the introduction, it has grown to become the dominant form of imperialism since decolonization, and the United States now has over 725 military bases strategically located around the world.⁴³

The different formulations of the imperial right were brought together in an authoritative form in the European and US construction of modern international law in the nineteenth century. As Gerrit Gong, Martti Koskenniemi, Edward Keene, and Antony Anghie have shown in their remarkable studies of the creation of modern international law, the centrepiece of this project is the standard of civilization. Civilization refers to both a set of world historical processes and an end point: namely, the seven features of constitutional democracy of the previous section. (After decolonization and the criticism of the imperial uses of civilization by the new third-world states at the UN, the term civilization was replaced by modernization and democratization, although civilization has come back in use.)⁴⁴

The modern constitutional state with its seven features was defined as the uniquely "civilized" and universal legal and political order. Only European states (and the United States in 1895) met the standard and were thus recognized

43. For the rise of US-led informal imperialism see Andrew J. Bacevich, *American Empire: Realities and Consequences of US Diplomacy* (Cambridge: Harvard University Press, 2002); Chalmers Johnson, *Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (New York: Owl Books, 2004).

44. Gerrit W. Gong, *The Standard of Civilization in International Society* (Oxford: Oxford University Press, 1984); Edward Keene, *Beyond the Anarchical Society* (Cambridge: Cambridge University Press, 2002); Koskenniemi, *Gentle Civilizer*, *supra* note 35; and Anghie, *Imperialism*, *supra* note 3.

as sovereign under international law. The complex and overlapping legal and political associations of the non-western peoples who had been colonized over the previous four hundred years were defined in contrast as customary and uncivilized. Hence they were not recognized under international law but were subject to the imperial law of the respective sovereign powers. In Kant's influential formulation, the very fact that the so-called uncivilized peoples lacked a modern constitutional form was asserted to be a threat to civilized states. This threat gave them the right to impose western law, by treaty or by removing them from their traditional territories if possible, or, if they failed to submit, to employ coercion.⁴⁵ Since openness to free trade, acceptance of corresponding domestic and international legal orders, and a western territorial state form were defining aspects of a civilized society, if an indigenous society resisted and tried to retain customary jurisdiction and sovereignty over its own constitutional association, it was considered uncivilized and a civilized legal order was imposed in one of the three ways described above.⁴⁶ The few non-western civilizations that were too strong to be bullied in this way were brought into or alongside the club of great powers and restructured accordingly (as with China and Japan).

The right of the self-proclaimed civilized imperial powers to extend colonial and international modern constitutional regimes around the world correlated with a "sacred duty to civilize" the indigenous peoples under their rule. Non-western civilizations, many of which are older and more complex than the aggressive western states, were scientifically classified at various stages of historical backwardness or underdevelopment relative to the "civilized" imperial states, and subjected to calibrated techniques of civilization and modernization. The civilizing duty involved, first and foremost, imposing the civilizing western laws over indigenous legal order; dispossessing, marginalizing, or transforming their customary forms of cooperative ownership, work, and governance; and introducing capitalist corporations, foreign investment, labour discipline, modern contractual relationships, and a territorially-based colonial

45. Kant, *Perpetual Peace*, *supra* note 37 at 98; Anghie, *Imperialism*, *supra* note 3 at 295-97.

46. Gong, *supra* note 44 at 14-15, summarizes the features of the "standard of civilization." The openness to trade and subordination to western free trade laws is the first feature. This fundamental feature is repeated in the latest trade agreements under the WTO, in the Most Favoured Nation Rule, which derives from the GATT (1947): *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Art. 1 ("General Most-Favoured-Nation Treatment").

political order. The second dimension of the duty to govern the uncivilized was to apply colonial *governmentalité* in detail to shape and form their forms of subjectivity so they would assume civilized forms of self-government in stages and acquire the competitive individualism of a modern, foreign-controlled capitalist economy in a global system led by the developed states.⁴⁷

International law was powerless to enforce this civilizing duty on the imperial states in the nineteenth century. Although it was clearly in the long-term interest of a stable, juridical imperial system, the competing imperial states reverted to the short-term executive strategy of war, pillage, slavery, hyper-exploitation, genocide, and destruction in Africa, and the tropics more generally, after the Berlin Conference of 1885 (similar to the atrocities in Afghanistan, Iraq, and Lebanon 118 years later).⁴⁸ This unbridled imperial competition culminated in World War I, the “great war for civilization.”⁴⁹ In 1919 the great powers realized that they could not continue the mutually destructive “great game” of competing militarily over the domination and exploitation of the non-western world. They tried to set up a League of Nations and an international legal order that would, first, force the great powers into a more cooperative and law-based form of imperialism, and second, establish a shared, international project of civilizing the natives and guiding them to self-rule. The first project, which Hobson and Kautsky feared as the coming cooperative hyper-imperialism, was not achieved until after World War II, the establishment of the UN, decolonization, and the Cold War triumph of the western powers over the socialist states. The second project took the form of the Mandate System under the League of Nations. The colonized peoples were classified into three main uncivilized types and techniques of modernization were applied (irregularly) by the respective mandatory imperial states as they increased resource exploitation, especially in the oil-rich Middle East. These policies of governmentality to prepare colonial peoples for western-style self-government continued during the Trustee System of the UN. After formal

47. In addition to the excellent treatment of the sacred duty of civilization by Gong, Keene, Koskenniemi, and Anghie, see the classic critique of it in Marx, *Capital*, *supra* note 20 at 931-42, and Hobson, *Imperialism*, *supra* note 20 at 113-327.

48. See Koskenniemi, *Gentle Civilizer*, *supra* note 35 at 98-166 for the “new imperialism” of the 1890s. And see Derek Gregory, *The Colonial Present: Afghanistan, Iraq, Palestine* (Oxford: Blackwell, 2005) for the “new imperialism” of the 2000s.

49. John H. Morrow Jr., *The Great War: An Imperial History* (London: Routledge, 2005).

independence, the duty to civilize took the form of the trade agreements of the WTO, the imposition of neo-liberal structural adjustment and privatization programmes of the WB and IMF, the norm of democratization under international law, and the mobilization of thousands of aid agencies, NGOs and Civil Society Organizations (CSOs) creating civil societies and neo-liberal modes of subjectivity throughout the 120 former colonies.⁵⁰

The great decolonization movements of the mid-century temporarily disrupted these two projects. The former colonies tried to free themselves from both formal and informal imperialism, to form a Third World not aligned with western or Soviet imperialism, and to continue to develop their own distinctive constitutional forms, constituent powers, and civilizations (as both Fanon and Gandhi hoped). However, the former colonies were constrained by the informal means available to the great powers to exercise their constituent powers of self-determination in accord with modern constitutional forms and constituent powers, open themselves to free trade dominated by the great powers, and submit to international legal regimes that denied them permanent sovereignty over their own resources, or otherwise face military intervention and regime change. This modernization and dependency project was often carried through by the third-world westernized elites, corrupted by massive economic and military dependency, against the resistance of the majority of their own people, who dreamed of creating their own democracies, rather than the “low intensity” nationalist democracies they were forced to accept.⁵¹ The resulting resource rich petro-tyrannies, sweatshop

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50. See Anghie, *Imperialism*, *supra* note 3 at 115-272; Koskenniemi, *Gentle Civilizer*, *supra* note 35 at 465-509; and Shrybman, *supra* note 10. For the mandate system see Michael D. Callahan, *Mandates and Empires: The League of Nations and Africa 1914-1931* (Sussex: Academic Press, 1999); Michael D. Callahan, *A Sacred Trust: The League of Nations and Africa 1919-1946* (Sussex: Academic Press, 2004). For neo-liberal forms of governmentality of many NGOs and CSOs, see the two articles by Ayers, *supra* note 29.
51. See Prasenjit Duara, ed., *Decolonization: Perspectives from Now and Then* (London: Routledge, 2004). This history explains why “indigenous peoples” and “indigenous laws” are used in broad and narrow senses. In the broad sense, indigenous peoples refers to all non-European peoples who have been subject to western imperialism. As western-style formal legal systems were imposed and decolonization carried out, the peoples who acquired statehood (and were thus considered “civilized”) ceased to be called indigenous. “Indigenous peoples” came to be used narrowly to refer to those peoples who are subject to the continuing internal colonization of the original settler states and the new post-decolonization states: that is, the “Fourth World” of 250 million people today.

dictatorships, and strategically important regional dependencies remain unstable “failed states” as a direct result of their continuing subjection to informal imperial manipulation: the dependent elites are constrained by their dependency to suppress the popular aspirations of their people to control their own resources and work conditions; the people are driven to violence in self-defence; this is called failure and terrorism; and—as Locke predicted⁵²—intervention follows.⁵³

This synopsis brings us up to the global network of informal imperialism I set out in the introduction, now with the roles of the institutions of constitutional democracy added to it. The result is that the low intensity constitutional democratization of the former colonies, and the quasi-constitutional transnational and international legal regimes that override them if necessary, now provide the legal and political basis of a new phase of western imperialism. With the international power of the great powers concentrated in the Security Council, the institutions of global governance, NATO, and US full-spectrum dominance, these “unequal sovereigns” are able to exercise “legalized hegemony” over the nominally sovereign yet substantively subalternized former colonies.⁵⁴ The resulting inequalities, extreme poverty, dispossession, irresponsible foreign control, and destructiveness are greater under post-colonial imperialism than under colonialism.⁵⁵ Yet the only official debate in the West is whether global rule will be primarily executive-based and unilateral (the current policy of the United States and United Kingdom) or primarily law-based and multilateral (the European alternative).⁵⁶ The shared historical foundation of these two historically intertwined strategies (warfare and lawfare) in the imperialism of constitutional democracy we have surveyed goes without saying.⁵⁷

52. *Supra* note 19.

53. Barry Gills, Joel Rocamora & Richard Wilson, eds., *Low Intensity Democracy: Political Power in the New World Order* (London: Pluto, 1993); Alexander Wendt & Michael Barnett, “Dependent State Formation and Third World Militarization” (1993) 19 *Rev. Int’l Stud.* 321. For more recent surveys see Noam Chomsky, *Failed States: The Abuse of Power and the Assault on Democracy* (New York: Metropolitan Books, 2006); Gregory, *supra* note 48; James F. Petras & Henry Veltmeyer, *Globalization Unmasked: Imperialism in the 21st Century* (London: Zed Books, 2004); and Fisk, *The Great War*, *supra* note 41.

54. Simpson, *Great Powers and Outlaw States*, *supra* note 4.

55. Jeremy Seabrook, *The No-Nonsense Guide to World Poverty* (London: Verso, 2003).

56. Peter Swan, “American Empire or Empires? Alternative Juridifications of the New World Order” in Amy Bartholomew, ed., *Empire’s Law* (London: Pluto Press, 2006).

57. It is worth noting that these two strategies or wings within the shared meta-narratives and

III. BEYOND IMPERIALISM: DEMOCRATIC CONSTITUTIONALISM IN PRACTICE

In summary, constitutional democracy, consisting of the eight features of the last two sections, plays three main roles in western imperialism: (1) low intensity constitutional democratization has been imposed on non-western peoples without their consent or democratic participation; (2) these colonies and post-colonial replicas are subject and subordinate to a cluster of regimes of transnational and international laws over which they have no or little say; and (3) these regimes in turn are governed by the most powerful constitutive sovereign states through global institutions and military networks in which the governed have no or little say, even though they are the vast majority of the world's population. All three roles are imperial and abhorrent in their inequalities and injustices, yet each is composed of features of constitutional democracy in its dominant narrow sense.

How can these three deeply entrenched roles of constitutional democracy be de-imperialized? A democratic answer is to work to bring the basic constitutional and constituent structures that are employed in these three roles under the shared participatory authority of those who are subject to them. This is the basic idea of democratic freedom and democratic constitutionalism: the laws must always be open to the criticism, negotiation, and modification of those who are the subjects of them. As we saw in feature two of Part I, this participatory and reflexive freedom of negotiating the norms to which we are subject *en passant* is at the heart of non-modern, customary constitutional forms and immanent constituent powers. The formalization and disembedding of modern constitutionalism and constituent powers displaced this freedom to representative institutions.⁵⁸ The imposition of proto-constitutional democracy under imperialism has attenuated this representative freedom even further in the low intensity democratization of colonial and post-colonial regimes. And, finally, the transnational and international legal regimes reduce the participatory freedom of the governed to the vanishing point. Yet, as we also

institutions of constitutional democracy have been a feature of western imperialism for over a century. The debate over the new imperialism today is very similar to the debate over the new imperialism at the beginning of the twentieth century.

58. For this history, see James Tully, "Democracy and Globalization" in Ronald Beiner & Wayne Norman, eds., *Canadian Political Philosophy* (Toronto: Oxford University Press, 2000) 36.

saw, even formal systems of law are grounded in everyday customary practices underlying the formal institutions of law-making, law-following, law-enforcing, law-interpreting, and law-adjudicating in which the laws are negotiated within limits in the course of interaction. So the project of democratic constitutionalism is not primarily one of bringing even more cumbersome representative institutions to bear from the outside. It is to exploit and expand the existing yet severely limited field of possibilities of direct participatory freedom (the exercise of constituent powers) within and against the constitutional forms to which the governed are now subject, directly or indirectly, at the very sites where these unjustly constrain their ability to exercise shared authority over the conditions of their activities. This is not the freedom either to protest against imperialism or to confront it directly in a revolution aimed at overthrowing it, as important as these freedoms are. The co-optation of decolonization revolutions and the sidelining of protests by informal imperial means have caused anti-imperialists to turn to these concrete practices of democratic constitutionalism. These practices are of two main types: (1) organizing non-imperial to contest, negotiate, modify, and perhaps transform the imperial dimensions of modern constitutional democracy from within, and (2) turning to alternative legal and political associations (“acting otherwise” or legal and political pluralism). The diverse global trends of legal and political interactionism and pluralism can be seen as either a more realistic reformulation of the co-articulation thesis under real world conditions of hegemon-subaltern relationships or an optimistic reformulation of the situated freedom depicted in the irresolution thesis (of feature six of Part I).⁵⁹

As we know from the history of imperialism, such practical attempts to democratize constitutional democracy will be met with official opposition and force.⁶⁰ However, this response further exposes the false and anti-democratic

59. This turn to concrete constituent practices of freedom within, and against, imperial relations of power was introduced after decolonization by Frantz Fanon, Partha Chatterjee, Edward Said, and Michel Foucault. For a fuller theoretical account, see Michael Simpson, *The Creative Insurgence of Subjugated Practices: Non-Capitalist Practices and the Interstices of Capitalist Modernity* (MA Dissertation, University of Victoria, 2006); Tully, “On Law, Democracy and Imperialism,” *supra* note 2.

60. See e.g. Michel Chossudovsky, *The Globalization of Poverty and the New World Order*, 2d ed. (Toronto: Global Outlook, 2003); Noam Chomsky, *Hegemony or Survival: America's quest for global dominance* (New York: Metropolitan Books, 2003).

premise of imperial constitutional democracy. In my discussion of the imperial right in Part II we saw that the premise has always been that the non-western “other” is uncivil and untrustworthy because it is not already subject to a structure of civil law and the civilizing effects of subjection. Therefore, before democratic dialogue and negotiation over legal and political arrangements can begin a structure of western law has to be imposed. Constitutionalism precedes democracy. This is the juridical containment thesis (of feature six). But this premise is false and the cause of endless imperial wars.

Non-western peoples have always been subject to their own *nomoi* and *demoi* and have been civilized by them in their different ways. There is thus no reason why democratic dialogue and negotiation cannot precede and ground the negotiation of shared constitutionalism. The willingness to enter into dialogue with others in this disarmed, open, and trusting way generates trust, as Gandhi and Hans-Georg Gadamer have shown in practice and theory, whereas the coercive imposition of the law of one over the other, backed up by the ever-present threat of more military intervention, destroys trust and generates *ressentiment*, as the young Nietzsche saw.⁶¹ It is rather the imperial powers that do not respect the others’ laws and ways but misrecognize and delegitimize them—as mere customs, uncivilized, savage, the lawless state of nature, *terra nullius*, the Wild West, terrorist regimes, or rogue states—and then intervene and subvert them. This has been the structure of argument and practice of the imperial right since the sixteenth century.⁶²

What can be done? Despite the destructiveness of imperialism, non-western customary legal and political normative orders have not been completely destroyed or superseded, as the western meta-narratives confidently continue to predict. Western expansion has not been as total as its defenders and critics assume. In

61. For Gandhi and his immense influence on twentieth-century decolonization, disarmament, and non-violent movements, see Thomas Weber, *Gandhi as Disciple and Mentor* (Cambridge: Cambridge University Press, 2004) [Weber, *Gandhi*]; Jonathan Schell, *The Unconquerable World: Power, Non-violence, and the Will of the People* (New York: Metropolitan Books, 2003); and Ackerman & DuVall, *A Force more Powerful*, *supra* note 26. For Gadamer’s argument that this is the only genuine (non-imperial) form of dialogue, see Hans-Georg Gadamer, *Truth and Method*, trans. by J. Weinsheimer & D.G. Marshall (New York: Crossroad, 1999) 341. For Nietzsche, see Friedrich Nietzsche, “The Means to Real Peace” in *Human all too Human*, trans. by R.J. Hollingdale (Cambridge: Cambridge University Press, 1986) 380.

62. Anghie, *Imperialism*, *supra* note 3 at 13-31.

Part II it was noted that imperial rule is always parasitic on the persistence of non-western customary legal and political practices for its daily operation because it has to rely on the indirect and informal collaboration of the subaltern peoples, that is, the majority of the world's population. The practical room to maneuver within indirect and informal power relations has enabled the diverse peoples of the world to "act otherwise" to some limited extent: that is, to live creatively in accord with their own ever-changing customary constitutional forms and constituent powers within the interstices of imperial constitutional formations to vastly varying degrees.⁶³ Even the most relentlessly imperialized people—the Indigenous peoples of the Americas—have preserved their normative legal and political and civilizational practices and are now enacting a renaissance or resurgence of them within and against continuing internal colonization.⁶⁴ Hence, as legal pluralists show, there are subjugated and overlooked "alternative worlds" or "alternative modernities" of law and governance that exist in the day-to-day practices of millions of people, despite the overarching hegemony and seeming inescapability of the particular western form of constitutional democracy.⁶⁵ As Boaventura de Sousa Santos argues, existing legal and political pluralism is neither to be rejected as uncivilized nor accepted uncritically, but brought into critical and comparative dialogues with western traditions of organizing democratic authority non-imperially, both locally and globally.⁶⁶

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63. The extreme case is where a colonized people have been so totally assimilated that they take on the customary practices, *habitus*, and forms of subjectivity that undergird formal constitutional democracy in the western world. This is much less common than is supposed by modernization theories, and the space for living alternative civilizations within it, which often go unnoticed by western observers, is much greater than is supposed. Even within the West, culturally diverse peoples act in culturally different ways to a very large extent within shared legal and political orders, and constantly negotiate the boundaries. See Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2008) on diversity of rule-negotiating in the EU. See also James Tully, "Introduction" in Alain-G. Gagnon and James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001) 1.
64. See Borrow, *Indigenous Legal Traditions*, *supra* note 14; Napoleon, "Law as Governance," *supra* note 14 for references to the resurgence of legal and political pluralism among indigenous peoples.
65. Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2001); Santos, *Toward a New Legal Common Sense*, *supra* note 10 at 85-154.
66. Boaventura de Sousa Santos & César A. Rodríguez-Garavito, eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

And these experiments are the growing bases of non-imperial forms of global networking that seek to provide a “living democracy” alternative to the current constitutional forms of the WB, IMF, and WTO.⁶⁷ Many see the World Social Forum as a meeting place for practitioners of non-imperial and anti-imperial globalization from below.⁶⁸

Analogous spaces of democratic freedom exist in western countries. Millions of westerners refuse to support the imperial dimensions of constitutional democracy and strive to create non-imperial legal and political ways of interacting with partners in the rest of the world, gradually de-imperializing constitutional democracy from within.⁶⁹ Following the examples of Gandhi, Vandana Shiva, Johan Galtung, Fritz Schumacher, Arne Naess, Kofi Annan, Thich Nhat Hanh, and countless other mentors, they are building networks of globalization in which the constitutional form of the network is based on the ongoing democratic and non-violent exercise of the constituent powers of the partners who subject themselves to it.⁷⁰ These experiments in democratic constitutionalism include democratic cooperatives rather than private corporations; fair trade rather than free trade; local democracy and non-violent dispute resolution rather than the recourse to arms; deep ecology and mutual aid rather than aid tied to privatization, economic competition, and military bases; and dialogues among the civilizations involved.⁷¹

67. Jerry Mander & Victoria Tauli-Corpuz, eds., *Paradigm Wars: Indigenous Peoples' Resistance to Economic Globalization* (San Francisco: International Forum on Globalization, 2005).

68. See e.g. Boaventura de Sousa Santos, *The Rise of a Global Left: The World Social Forum and Beyond* (London: Zed Books, 2006).

69. James Tully, “A New Kind of Europe?: Democratic integration in the European Union” (2007) 10 Crit. Rev. Int’l Soc. Pol. Phil. 71.

70. For Gandhi’s influence on these scholars and activists, see Weber, *Gandhi*, *supra* note 61. Thich Nhat Hanh, *Keeping the Peace: Mindfulness and Public Service* (Berkeley: Parallax Press, 2005) describes the non-violent dialogical way to peace in contrast to the imperial way of war and force: “When the Israelis and Palestinians have listened to each other and communicated in Plum Village [a non-violent retreat in France], they return to the Middle East and establish communities of practice, and invite other people to join. We are able to make change on a small scale. But it has proven to be effective. If our governments apply the techniques, creating an atmosphere of peace, helping people to calm down, helping them to sit down and listen to each other, that is a much better way to remove terrorism and war than the way of war and force. In 2004, the United States spent about four billion dollars a month in Iraq. Organizing a retreat costs much less” (at 84).

71. See e.g. John Cavanagh, ed., *Alternatives to Economic Globalization: A report of the international forum on globalization* (San Francisco: Barrett-Koehler, 2002).

Despite the horrors of present-day imperialism, and perhaps partly because of them, there are arguably more activities of creating non-imperial customary normative orders and of modifying the more formal imperial normative orders from the inside than at any other time in the long history of non-imperial and anti-imperial movements.⁷²

The growing movement for democratic constitutionalism and global justice in western legal and political research centres can play an important partnership role in the growth of democratic constitutionalism in practice. The diverse practical examples of democratizing representative democracy and of legal and political pluralism strive to manifest, in concrete forms, the pluralistic and egalitarian ideal of genuinely democratic constitutionalization that critical scholars—such as Edward Said, Iris Marion Young, Thomas Pogge, and Boaventura de Sousa Santos—are trying to articulate.⁷³ Such a relationship of reciprocal elucidation between de-imperializing practices of democratic constitutionalism and critical theoretical and empirical research may help in time to make the irresolution thesis less pessimistic and the co-articulation thesis more plausible than they are at the moment.⁷⁴

72. This is the argument of Paul Hawken, *Blessed Unrest: How the Largest Movement in the World Came into Being and Why No One Saw It Coming* (New York: Viking, 2007).

73. See e.g. Iris Marion Young, *Global Challenges: War, Self-Determination and Responsibility for Justice* (Cambridge: Polity Press, 2007).

74. I would like to thank Andrée Boisselle, Jutta Brunée, Stephen Toope, Neil Walker, and Jeremy Webber for helping me to see the de-imperializing role of practices of democratic constitutionalism. In memory of Iris Marion Young, whose spectacular work and personality inspired us and kept our spirits aloft in these dark times. It is up to us to carry on under the gentle sway of her example.

