

11-1-2016

The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders

Larry Cata Backer

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>



Part of the [Transnational Law Commons](#)

Recommended Citation

Larry Cata Backer, *The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders*, 31 BYU J. Pub. L. 1 (2016).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol31/iss1/10>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders

*Larry Catá Backer**

ABSTRACT

Globalization has produced a wealth of writing that seeks to theorize the emerging relationships between states, non-state actors (especially multinational corporations), and international organizations. For lawyers, the relationship among these actors through law is especially meaningful. What has been emerging in recent years with greater clarity is that while the formal structures of the organization of law and its relationship to the state system remains substantially unchanged, the realities on the ground have moved substantially away from these formal structures. The traditional premises that have been used to justify and explain the relationships among states, non-state actors, international organizations, law and governance no longer adequately either explain or justify the actual behaviors and outlooks of these actors. This essay considers the tension between the traditional premises of organizing governance (within and through states) and the emerging transnational legal order. The focus of examination is the corporation, which is where this tension is most evident. The analysis starts with the ideology of the state order, which disguises alternative governance orders and the governments through which they are operationalized. It is with the effects of the ideology of the state order that the analytical limitations of analysis become clearer, the object of Section II. Sections III and IV explore the power of ideology in framing analysis in the conception of the reality of self-constitutionalizing organization outside the state and in the theorizing of transnational law as method. Both suggest the ways in which the ideologies of framing analysis can color both the way in which relationships are understood and the objectives of analysis are formed. Section V then posits an alternative analysis, normatively autonomous (though not entirely free) of the orbit of the state, a vision possible only when the ideological presumptions of the state are suspended.

I. INTRODUCTION

Our conceptions of the state—and of the character of the legitimacy of law as a product of domestic legal orders—have a profound effect on the way in which theorists, politicians, and lawyers are able to approach the identification of “problem” and offer “solutions.”¹ The constitution of the state is often memorialized through documents or understanding of higher law that serves as a barrier between the state and others and between the higher order commands of that order and everything else that might constitute rules of behavior or authority to command. Gunther Frankenburg spoke of these constitutions as embedded in and creating the space within which law, politics, economics and culture may function in a coherent and self-referencing space.²

* W. Richard and Mary Eshelman Faculty Scholar & Professor of Law, Professor of International Affairs, Pennsylvania State University, and is the incoming chair of the Pennsylvania State University Faculty Senate. The author may be contacted at lcb911@gmail.com. The essay was originated in a Global Governance Debate of the Robert Schuman Centre’s Global Governance Programme (European University Institute) with Professor Peer Zumbansen (Osgoode Hall, York University, Toronto, Canada) on the topic “Tension Between Public and Private Governance in the Emerging Transnational Legal Order,” Florence, Italy, April 16, 2012. My thanks to my research assistants Robert Marriott (PSU Law 2013) and Angelo Mancini (PSU Law expected 2017) for their usual excellent contributions.

1. There is an orthodoxy in matters of both the idea of the constitutional state and the structures for the expression of state power and control through law that is socialized especially in lawyers and those who perform services within and for government. “Never before has there been such demand from courts, lawyers and constitution-makers in a wide range of countries for comparative legal analysis. And never before has the field been so institutionalized . . .” ROSALIND DIXON & TOM GINSBERG, *Introduction, in* COMPARATIVE CONSTITUTIONAL LAW 1–17 (Tom Ginsberg & Rosalind Dixon eds., 2011). This orthodoxy extends to international law as well, especially as it intertwines with orthodox consensus on the premises of the constitutional systems of domestic legal orders. “Proceeding from the concept of higher law, comparison has to deal with the related prescriptive aspects of constitutions as an instrument of *governance* and *government* allocating, balancing, and controlling political power, as well as a *charter* laying down the ground rules for social conflicts.” Gunter Frankenberg, *Constitution as Law, Instrument and Culture, in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 171, 172 (Mauro Bussani & Ugo Mattei eds., 2012). And it is also a foundation for the self-conceptions of international law and order. *See, e.g.*, ERNST B. HAAS, *BEYOND THE NATION STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* (1964); J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, INT’L ORG., Winter 1994, at 107, 107–30 (1994). Its pedigree is long and quite selectively privileged to support the core notions that lend themselves to an understanding of the organization of power at the apex of which is the state, which expresses its most authoritative commands through law, including the law creating the administrative mechanisms that regulate the daily lives of legal objects. *See, e.g.*, MICHAEL KEATING, *PLURINATIONAL DEMOCRACY: STATELESS NATIONS IN A POST-SOVEREIGNTY ERA* (2004).

2. He explains:

In tracing and mapping the development of modern constitutions, and with some additional modeling, one may come up with four models defined by a distinct basic structure: constitution as contract (including social contract), manifesto, program, and

1] *The Emerging Normative Structures of Transnational Law*

Michael Walzer³ speaks of the moral standing of states and of the moral presumptions from out of which the political order is founded.

The state is constituted by the union of people and government, and it is the state that claims against all other states the twin rights of territorial integrity and political sovereignty. . . . It is, or it ought to be, determined instead by a morally necessary presumption: that there exists a certain “fit” between the community and its government and that the state is “legitimate.” . . . So long as it stands, however, the boundaries of international society stand with it.⁴

These structures of construction, in turn, serve as a proxy for a complex and deeply embedded ideology of politics—bound to blood and territory—that serves as the foundation of political, economic, social and cultural theory. That is, in fact, how “we” have been acculturated to “see” and “abstract” the reality around “us” in the social space in which we interact.

Yet, “‘constitution’ – like ‘nation,’ ‘state,’ ‘democracy’ and ‘sovereignty,’ – appears as one of the central icons and also one of the most ambiguous ideological structures in the pool of cultural representations of modernity.”⁵ These conceptions are at base the product of applied ideology.⁶ States often evidence their ruling ideologies in their core documents—constitutions, germinal judicial opinion, and the like.⁷ In the social sciences, including the academic study of law,⁸ the

law. . . . One should not place too much weight, however, on this analogy, as these archetypes rather than elucidating a “constitutional unconscious” merely capture and shape the transnational flow of constitutional imagination and the practice it informs. Thus, the archetypes qualify as specimen for copies and variations.

Gunter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, INT’L J. CONST. L., July 2006, at 439, 451–59.

3. Michael Walzer, *The Moral Standing of States*, PHIL. & PUB. AFF., Spring 1980, at 209, 209–29.

4. *Id.* at 212.

5. Frankenberg, *supra* note 1, at 171.

6. See LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 85–126 (Ben Brewster trans., 2001); ROBERT PAUL RESCH, *ALTHUSSER AND THE RENEWAL OF MARXIST SOCIAL THEORY passim* (1992); Louis Althusser, *Idéologie et appareils idéologiques d’État (Notes pour une recherche)*, LA PENSÉE 151 (1970).

7. In China, see, for example, Constitution of the Chinese Communist Party (中国共产党章程) (1969) (China), and State Constitution of 1982, as amended (中华人民共和国宪法) (1982) (China). In the United States, the U.S. Constitution and, for example, *Marbury v. Madison*, 5 U.S. 137 (1803). In the U.K., among others, Magna Carta (1215) (England), the Bill of Rights of 1688 ch. 2, 1 Will. and Mar. Sess. 2 (1689), and the Act of Settlement, 12 & 13, Will. 3 c. 2 (1701).

8. For a germinal discussion, still relevant, see generally, LON L. FULLER, *THE MORALITY OF LAW* (New Haven: Yale University Press, 1964); N.S. Timasheff, *What is ‘Sociology of Law’?*, 43 AM. J. SOC. 225 (1937). See also Pierre Bourdieu, *The Force of Law: Toward*

role of ideology⁹—its deployment in the service of autonomous “fact” deeply camouflaged within the ideological presumptions of the systems in whose service they are deployed¹⁰—helps manage the framework within which the conception of “what is possible/what is right”¹¹ is constrained.¹²

This effect is particularly evident in the way in which it may be applied, without much thought for the effect of underlying ideology, to frame the very question for consideration in this essay. That question will focus on the consequences of an emerging “tension” for settled notions of connection between law systems and the state. This fundamental “tension” arose as the ideological premises on which the state system is organized are challenged by non-state actors. On one side stand a cluster of principles that tie the authenticity and legitimacy of law to its connection to the state, and that presume an identity between state and law. On the other side stand a growing number of non-state actors that are developing increasingly robust functional legal orders through which they operate that appear to destabilize the conceptual order on which the law-state relationship is maintained. That challenge arrays the premises and ideology of the state and the state system against two alternatives. The first is an emerging ideology of a non-state system whose organization, at its limits, might parallel that of the state system, but which exists beyond it.¹³ The second presents as against those two titans, that is of the state and the non-state actor as organizational centers of law systems, a novel edifice: an emerging recognition of self-constituting transnational legal orders.¹⁴

a Sociology of the Juridical Field, 38 HASTINGS L.J. 805 (Richard Terdiman trans., 1987).

9. Cf. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

10. See generally JÜRGEN HABERMAS, *KNOWLEDGE & HUMAN INTERESTS* (Jeremy J. Shapiro trans., 1971). Cf. FLORIAN MENZ, *Manipulating Strategies in Newspapers: A Program for Critical Linguistics*, in LANGUAGE, POWER AND IDEOLOGY: STUDIES IN POLITICAL DISCOURSE 227–50 (Ruth Wodak ed., 1989).

11. Brian Leiter provides an intriguing effort around ideology that itself, through its proffer of legal positivism, tends to expose the underlying ideology of the search for a non-ideological concept of law. See Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 VIR. L. REV. 1179 (2015). Cf. Friedrich Nietzsche, *The Four Great Errors*, in TWILIGHT OF THE IDOLS, OR, HOW TO PHILOSOPHIZE WITH A HAMMER (Duncan Large trans., 2009).

12. See, e.g., GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Blackwell 1993).

13. See, e.g., GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* (Martin Loughlin, John P. McCormick & Neil Walker eds., 2012).

14. There has been a substantial amount of writing on this idea of regulatory systems beyond the traditional law-state nexus. See, e.g., PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (2012); GERALF-PETER CALLES

1] *The Emerging Normative Structures of Transnational Law*

This conflict, and its contradictions, are having a profound effect on law—in concept and application.¹⁵

Yet, currently, this very construction is possible only within the confines of the core presumptions of state ideology.¹⁶ These ideological blinders perversely make it difficult to see fundamental shifts except within the premises and analytical constraints of that ideology. In this case it produces irony—the need to reshape reality to suit the ideological predilections of a system increasingly real only in the past tense, producing a tendency toward false causation¹⁷ and conceptual confusion.¹⁸ These presumptions bend the emerging realities into the structural presumptions of a global system grounded in the state as the highest form of coercive (and therefore political) power, legitimated by a set of presumptions about its use.¹⁹ It assumes the legitimacy of the hierarchy of power in which organizational and governance capacity proceeds out from the state, delivered in appropriate form (law undertaken within global *Rechtsstaat* principles)²⁰ and exercised under the supervision of instrumentalities of the political or administrative

& PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010); *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Shaffer eds., 2016); Lawrence Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 *STAN. J. INT'L L.* 65 (1996).

15. “The nonchalance with which the emergence of the private supply of law has been endorsed is surprising. This is probably because, in the process of determining what constitutes law, excessive attention has been traditionally devoted to the recipients of a given rule, while scant attention has been paid to its suppliers.” Arianna Pretto-Saakmann, *Private Suppliers of Law: Diversity for Lawmakers*, 30 *VT. L. REV.* 921, 936 (2006). See Marc Amstutz, *Métissage: On the Form of Law in World Society*, in *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT* 336–60 (2013).

16. See, e.g., Immanuel Wallerstein, *The Inter-State Structure of the Modern World System*, in *INTERNATIONAL THEORY: POSITIVISM AND BEYOND* 87–107 (Ken Booth et al. eds., 1996); Yale H. Ferguson & Richard W. Mansbach, *Political Space and Westphalian States in a World of Politics: Beyond Inside/Outside*, 2 *GLOBAL GOVERNANCE* 261, 261–87 (1996).

17. Cf. Nietzsche, *supra* note 11.

18. See, e.g., Nils Jansen & Ralf Michaels, *Private Law Beyond the State?: Europeanization, Globalization, Privatization*, 54 *AM. J. COMP. L.* 843, 843–90 (2006).

19. See Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 *PENN ST. L. REV.* 671, 671–732 (2009).

20. Sometimes *Rechtsstaat* notions are more myth than reality, gesture than substance, especially in the modern administrative state, where the connection between the polity and the sources of rules is tenuous at best. See Daniel R. Ernst, *Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932*, 23 *STUD. AM. POL. DEV.* 171, 171–88 (2009). Europeans understand this at the level of European Union law-politics as the democratic deficit. See, e.g., Kevin Featherstone, *Jean Monnet and the ‘Democratic Deficit’ in the European Union*, *J. COMMON MKT. STUD.*, June 1994, at 149, 149–70.

branches of the state apparatus,²¹ or those of communities of states organized in international bureaucracies.²²

Such power can be ceded upward (to institutional creatures that aggregate collections of states international organizations)²³ or downward (into corporations or aggregations of civil society actors, religious organizations and the like that are understood to exist as a subordinate incarnation of the state).²⁴ It is exercised through methods (contract, custom, and the like) that are, by their very definition, inferior in status, form and effect to the forms (i.e. law, regulation, etc.) reserved to the state and exercisable only under the supervision of and vindicated through the judicial apparatus of the state.²⁵ Indeed, in some cases, the state system finds intolerable the idea of assertions of governance power in aggregated form outside of the body of the corporate organization of the state itself.²⁶ Consequently, all power falling outside of this framework can be suppressed as illegitimate and as a threat to the global social order. In a way that reflects the scientific development of “harmonious society” principles of Chinese political organization,²⁷

21. Criticized in NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010).

22. See, e.g., JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2006); Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, L. & CONTEMP. PROBS., Summer/Autumn 2005, at 15.

23. See, e.g., Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in *INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE* 3, 3–33 (Armin von Bogdandy & Ingo Venzke eds., 2012); Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42(1) J. CONFLICT RESOL. 3, 3–32 (1998).

24. See, e.g., HARVEY FEIGENBAUM, CHRIS HAMNETT & JEFFREY R. HENIG, *SHRINKING THE STATE: THE POLITICAL UNDERPINNINGS OF PRIVATIZATION* 5–34 (1998); Saskia Sassen, *The State and Globalization*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 91–112 (Rodney Bruce Hall et al. eds., Cambridge 2002). For a criticism from the perspective of the protections of public law, see, for example, James M. Cooper, *The Rise of Private Actors Along the U.S.-Mexico Border*, 33 WIS. L.J. 470, 474–88, 502–10 (2015); Robert Koulish, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462, 466–76 (2008); Tally Kritzman-Amir, *Privatization and Delegation of State Authority in Asylum Systems*, 5 L. & ETHICS OF HUM. RTS. 194, 194–215 (2011); Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 PUB. ADMIN. REV. 461, 461–67 (1987).

25. See, e.g., Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSAJ. INT’L & COMP. 499, 499–523 (2008).

26. See COOPERATIVAS Y SOCIALISMO: UNA MIRADA DESDE CUBA (Camila Piñeiro Harnecker, ed., Editorial Caminos 2011).

27. Harmonious Society, Seventeenth National Congress of the Communist Party of China, (Sept. 29, 2007), <http://english.people.com.cn/90002/92169/92211/6274603.html>; Larry Catá Backer, *Studying the “Higher Law” of Scientific Development (科学发展观) in Chinese State-Party Constitutionalism*, Law at the End of the Day (July 5, 2010), <http://lbacker-blog.blogspot.com/2010/07/studying-higher-law-of-scientific.html>.

1] *The Emerging Normative Structures of Transnational Law*

the ideological presumptions of the state system permit the construction of a space for outlaw enterprises whose organization, methods and norms fall outside the law; that is, they fall outside the organizational parameters of hierarchy and control centered in the state.²⁸

It is in this constructing sense that much of the debate about the rise of governance orders outside of the state is framed. Its object is either to recognize the rise of such orders but then tame them within the hierarchical ordering systems of the state, or to identify their methods of governance and then seek to transform them, or vouch for them as law. Much like efforts to include marriage between people of the same sex within traditional marriage systems, the transnational governance debate at times seems singularly focused on proving that such systems are either just like or compatible with the state system (something, for example, at the heart of recent efforts to incorporate rules for sovereign wealth funds)²⁹ or that they can be made so by either broadening the current understanding of important terms—like law— or characterizing these systems as somehow still attached to the state.

The “tension,” then, which is usually identified as the heart of the conflicts both between state and private actors and among the two and the emerging “transnational system” (understood perhaps best in its methodological context),³⁰ is grounded in the need to domesticate governance rules outside the state, or to bring their methods more conventionally within the methodological hierarchies of rulemaking. In either case, the state remains the supreme legitimating organization, and the law remains the most legitimate expression of binding authority. At the heart of the tension is the issue of self-constitution.³¹ Within the presumptions of state ideology, self-constitution is impossible, except as a political and perhaps religious act.³² All tension disappears

28. Larry Catá Backer, *The Drama Of Corporate Law: Narrator Between Policy And Law*, 2009 MICH. ST. L. REV. 1111, 1146–64 (2009) (reviewing DAVID A. WESTBROOK, *BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION* (2007)).

29. *Generally Accepted Principles and Practices: “Santiago Principles,”* INTERNATIONAL WORKING GROUP OF SOVEREIGN WEALTH FUNDS (Oct. 2008), <http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf>.

30. Cf. Peer Zumbansen, *Why Global Law is Transnational: Remarks on the Symposium Around William Twining’s Montesquieu Lecture*, 4 TRANSNAT’L LEGAL THEORY 463, 463–475 (2013).

31. Gunther Teubner, *Fragmented Foundations: Societal Constitutionalism Beyond the Nation State*, in *THE TWILIGHT OF CONSTITUTIONAL LAW: DEMISE OR TRANSMUTATIONISM?* (Petra Dobner & Martin Loughlin eds., Oxford Univ. Press 2010).

32. Though even here, the autonomy of religion as against political acts remains in doubt. Consider in this context the furious effort to avoid recognition of some strains of Islam as too

when private and transnational systems bend their knee to the state, even as the state might be required to bend a bit, like the feudal French monarchs, in acknowledgment of the now ceded (and thus regularized) authority of its vassals.

This essay considers the tension between public and private governance in the emerging transnational legal order. The focus of examination is the corporation, where this tension is most evident. The analysis starts with the greatest structural impediment to the consideration of the tension between public and private in the transnational ordering of the corporation—the ideology of the state order, which disguises alternative governance orders and the governments through which they are operationalized. It is with the effects of the ideology of the state order that the analytical limitations of analysis become clearer, which is the object of Section II. More importantly, the exposure of the ideology of the state reveals the extent to which it can bend the objectives of analysis from one that follows reality on the ground to one that takes and bends that reality around the state. That bending can produce substantial effects on the structure of debate and the possibilities for understanding institutional changes in behavior that quite directly challenge the normative presumptions of the privileged ideology. This effect can be exaggerated when changes appear to threaten the hierarchies built into governing ideologies.

Sections III and IV explore the power of ideology in framing analysis in Gunther Teubner's conception of the reality of self-constituting organization outside the state and in Peer Zumbansen's excellent theorizing of transnational law as a method. Both suggest the ways in which the ideologies of framing analysis can color both the way in which relationships are understood and the objectives of analysis are formed. Section V posits an alternative analysis, freer (though not entirely free) of the orbit of the state, a vision possible only when the ideological presumptions of the state are suspended. It serves as a foundation for a manifesto of law beyond nation and law.³³

violent or intolerant to be recognized as “legitimate” expressions of religious will. These ideological blinders were much in evidence as changes in religious expressions were conflated with Western political expression to change its complexion from religious to political expression. *See, e.g.,* Peter W. Rodman, *Policy Brief: Co-opt or Confront Fundamentalist Islam?*, MIDDLE E. Q. (1994), <http://www.meforum.org/201/policy-brief-co-opt-or-confront-fundamentalist>.

33. *See* Larry Catá Backer, *Remarks made at the Launch Symposium of the Dickson Poon Transnational Law Institute, Transnational Law: What's in a Name?*, BEYOND NATION AND LAW: A MANIFESTO: BACKER-IN-LAW, <http://www.backerinlaw.com/Site/wp-content/uploads/2016/05/BeyondNationLawManifesto.pdf>.

1] *The Emerging Normative Structures of Transnational Law*II. THE IDEOLOGY OF THE STATE AND THE PROBLEM OF
NON-STATE GOVERNANCE

Gunther Teubner once asked: “after deconstruction, what is left of law as a hierarchy of rules, founded on a political constitution, endowed with an institutional identity, based on the distinction between legislation and adjudication and legitimated through democratic representation and constitutional rights?”³⁴ He suggested that “should we search for it in the direction of a ‘polycontextual’ law that would not be hierarchical, but heterarchical, a law with multiple sources, a law without a unifying perspective, a law that is produced by different mutually exclusive discourses in society?”³⁵ Yet that poly-contextualism remains hidden under the veils of the presumptions of the ideologies that support the state system of political organization. But more important than the presumptions of state ideology are the methodological techniques used to support them in a way that hides both their presence and the organizational priorities they represent. One of the great perversions of the 21st century is the merger of ideology and social scientism.³⁶ This perversion arises in the way in which each hides its effects on the other, and that they together seek to present something that is both neutral and natural.³⁷

Ideology provides the cluster of basic assumptions and parameters that define the scope of reality—that is, they define the boundaries within which any sort of investigation, including social scientific investigations, may be organized. More importantly, it suggests the boundaries within which analysis of the data produced through the application of social scientism can be understood, explained, and applied. Social scientism, much in vogue in most universities and among the social scientific disciplines, combines a mania for empiricism with an underlying absolute belief in the neutrality and unassailability of numbers. If some matter can be reduced to an equation—that is, to a set of

34. Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31(4) L. & SOC'Y REV. 763, 763 (1997).

35. Id. at 777. See also Gotthard Günther, *Life as Poly-Contextuality*, in *Beiträge zur Grundlegung einer operationsfähigen Dialektik I.* (Gotthard Günther ed., Harnburg: Meiner 1976); Jacques Derrida, *Force of Law: The 'Mystical Foundation of Authority'*, 11 *Cardozo L. Rev.* 920, 920–1046 (1990).

36. There is a parallel discussion in the natural sciences as well. See, e.g., Austin L. Hughes, *The Folly of Scientism*, *THE NEW ATLANTIS* (Fall 2002), <http://www.thenewatlantis.com/publications/the-folly-of-scientism>.

37. For the germinal critique, see FRIEDRICH A. VON HAYEK, *THE COUNTER-REVOLUTION OF SCIENCE: STUDIES ON THE ABUSE OF REASON* (Liberty Fund 1980) (1952).

mathematically arranged relationships—and if those relationships can then be illuminated through the substitution of numbers (serving as a proxy for reality) into the symbolic representation of relationships represented by the formula, then the resulting product must, in the social “scientist’s” mind, necessarily be reality. Combined, ideology and social scientism provide first the palette of assumption from which one can construct numerical relationships and then the numerical relationships themselves that seem to prove the underlying ideological assumptions on the basis of which the numerical relationships were produced in the first place. The inevitable tautology that is the product of this inherently powerful but circular reasoning tends to be hidden because the premises of social scientism in the service of ideology are never transparent. Assumptions in the construction of numerical relationships are crafted as second order propositions. Each is itself the inevitable choice that follows from the ideological framework from which an empirical study arises. As a consequence, it seems, social scientism is built on the proposition that the thing can prove itself, with science providing merely a legitimating technique.

This tautology and its ideology-enhancing character might be illustrated with a small but telling example. The ideology of the state is currently pervasive. It posits that the state (and those multi-state entities, created by and which serve the interests of, states) is the highest expression of political will, and holds a monopoly of power over individuals and things. Though it may be constrained in the deployment of that power, such constraints merely emphasize the all-encompassing nature of state power. State power is evidenced by law that is itself both an object that can only be created by states and that cannot exist apart from the state. Law is accorded a singularly important place in the ordering and control of human and institutional behavior and is itself legitimated both from its relationship to the state and from the conformity of its creation to those rules which states have agreed serve as a marker of legitimate production (rule of law ideals). Yet states are not the only entities that create rules that bind people and other groups, and the state is not the only enterprise that produces rules that are obeyed. Even the absence of a state does not necessarily produce chaos or anarchy; that absence is measured against the ideal of the state.³⁸ Indeed, the ideology of the state requires that those rules be denominated by another name—both to distinguish them from the products

38. Ken Menkhaus, *Governance Without Government in Somalia: Spoilers, State Building and the Politics of Coping*, INT’L SEC., Winter 2006/2007, at 74, 74–106.

1] *The Emerging Normative Structures of Transnational Law*

of states and to situate them within a hierarchy of obedience that is meant to be somewhere below that of state produced “law.” Where there was a complete identity between territory and rulemaking, it was possible to maintain a working allegiance to this ideology without creating tension between ideology and reality. But in the face of globalization, there are now spaces where the only rules that bind are those produced by groups and entities that are neither states nor other organs of collective state power.³⁹ Yet the ideology of the state produces in the social scientists, and the lawyer, a blindness to the consequences, where that blindness is necessary to preserve the power of the ideology to order reality. And so, in the service of the state, for example, social scientism may be called in to survey the paucity of law with respect to a particular governance area—grounding that survey on the distinctions between the rule-products of states and other rules. The result will necessarily show both the paucity of law and the need to extend law to those governance areas where it is absent. But that conclusion must necessarily follow from the presumptions of state ideology that posit both the necessity of law and the basis for regulation and the rule of the state in the production of law.

More importantly, perhaps, the ideology of the state also serves as a powerful force in the construction of taxonomies of rules that, in turn, serve to reinforce the ideological consequences of state supremacy.⁴⁰ The techniques of illegitimacy, devolution, management, mimicry and hybridity are usually deployed to contain or absorb behaviors that may be contrary to, or threaten, state ideology. Rules, other than those produced by states as law are, of necessity, incapable of serving their intended purpose and must be illegitimate.⁴¹ Their illegitimacy

39. See, e.g., A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003) (“Today, forces of globalization and privatization are relocating the boundary between private and public authority in international commercial relations and creating new opportunities for private, corporate actors to exercise power and influence.” *Id.*, at 1). This is recognized even by international organizations, though in that case, efforts are made to keep these non-state zones quite constrained. See Larry Catá Backer, *Corporate Social Responsibility in Weak Governance Zones*, 14 SANTA CLARA J. INT’L L. 297 (2016). See also, Nicola Dalla Guarda, *Governing the Ungovernable: International Relations, Transnational Cybercrime Law, and the Post-Westphalian Regulatory State*, 6 TRANSNAT’L LEGAL THEORY 211, 211–49 (2015).

40. J.P. Nettl, *The State as a Conceptual Vehicle*, in THE STATE: CRITICAL CONCEPTS VOLUME 1, 9–36 (John A. Hall ed., Routledge 1994). See also Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

41. Pierrick Le Goff, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 IND. J. GLOBAL LEGAL STUD. 119, 127–31 (2007).

derives, in part, from their failure to conform to the ideological requisites for legitimate lawmaking. Alternatively, these rules are understood as being devolved from the state—that is, they are a species of law precisely because the state permitted their operationalization within their respective territories through law.⁴² In another variation, rules are understood to be a necessary tool of the state in the management of its operation.⁴³ In this sense, rulemaking is not merely devolved (and as such serves as a species of law), but is also managed for the particular ends to which states may find useful. Markets are the best example of this form of ideological re-framing. Management also suggests yet another alternative technique of absorption into state ideology—the notion of mimicry.⁴⁴ Anything outside the framing assumptions of state ideology are understood as legitimate, and measured by their conformity to the forms and practices of state-based law. Rule systems are constituted, rules are produced under rule of law frameworks, and—most importantly—rule systems constructed as legitimate under the characterization of mimicry extend legitimacy to non-state systems to the extent of that mimicry. Mimicry itself can be understood as a process—it serves as a means of transition from outside to inside the ideology of the state. There is an element of the transitory in some governance literature, guided, to some extent, by the notion that private governance is a step towards the absorption of private governance within the state system at the national or international level. Most positive views of soft law, for example, are premised on the assumption that they serve as a way station to the construction of traditional and legitimate hard law, incorporated within the traditionally understood domestic legal orders of states.

Lastly, and most hopefully, state ideology in its arguably most sophisticated form suggests that rule making outside the state forms an expressive component of a more complex hybrid system in which law is made from the interaction of rulemaking systems inside and outside the state.⁴⁵ One form of this approach suggests hybridity through the

42. See Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 619–26 (2007).

43. See IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 101–31 (1992) (putting forward the concept of enforced self-regulation in a complex interplay between the state as regulatory manager and industry).

44. See Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1, 1–29 (2003).

45. See CALLIESS & ZUMBANSEN, *supra* note 14.

1] *The Emerging Normative Structures of Transnational Law*

construction of public-private networks, where functionally differentiated groups of actors with governance power informally organize themselves and then manage vertically oriented national governance through horizontal transnational networks.⁴⁶ Sometimes these hybrid systems have an institutional component, focusing on the use of public-private partnerships on an inter-governmental model of organization and rule making.⁴⁷ This provides a tentative step forward—the definition of law is expanded. But it also keeps one foot very much within the traditional ideological framework. The purpose of hybridity is to buttress “law” and to reinforce its hegemony.⁴⁸ But law’s hegemony also serves to reinforce hegemony of the state—it brings governance into law and therefore into the state.⁴⁹ Yet there is a subversive element here as well—for just as a project to expand the definition of law into hybrid contexts can serve to discipline non-state rule making within the ideology of the state, so might it also serve to move beyond that ideology by detaching law from its firm anchorage within the state. If law can be hybridized, then it also might be applied to those organs of rulemaking that are not the state, and in so doing may attach law to non-state governments—like multi-national corporations.⁵⁰

Taxonomies are important not merely for producing an organization of “things” that makes the world and the relationship among such “things” easier to order and understand. They also, by doing precisely what they were meant to do, produce the structures through which ideology can be applied and reified within the fact-producing universe of social scientism. Yet in doing so, they also expose the contingency of social science’s “facts.” And thus, the ultimate power of facts, in the form of relationships derived from data generation and proven by the reduction of behaviors to the accumulation of relational record keeping, is not merely to reinforce ideology by masquerading as something

46. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 131–52 (2004).

47. Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18(2) *IND. J. GLOBAL LEGAL STUD.* 751, 751–802 (2011).

48. See Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. INT’L L.* 999, 1017–45 (2004).

49. *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* (A. Claire Cutler et al. eds., St. U. of N.Y. Press, 1999).

50. Larry Catá Backer, *Governance Without Government: An Overview and Application of Interactions Between Law-State and Governance-Corporate Systems*, in *BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION* 87 (Gunther Handl et al. eds., Martinus Nijhoff Publishers 2012).

they are not—facts existing beyond the context of the knowledge structures through which they are produced—but in managing those who are the recipients of this information (politicians, lawyers, the public, technocrats, etc.). And that, of course, is the ultimate purpose not of data-driven social scientism, but of the ideology in the service of which such scientism is necessarily deployed.⁵¹

Thus, consider the problem of the “fact” of the corporation. Something that is on its surface easy to discern becomes impossibly problematic once conflicting ideological structures are brought to bear on the question. If one were to adhere strictly to the ideology of the state, the corporation could not exist except as a reflection of the state. This is certainly the fundamental understanding in Stalinist and Maoist Marxist Leninism. The Cuban Marxists understand the corporation as the state in its form, but detached for use in particular purposes.⁵² In the West, this notion heavily influences the idea that corporations are no more than the receptacle of privileges given by the state in whose service they are to be used. This “fact” produces significant consequences—from the judgment that corporations may have only such constitutional privileges as derived from constitutional rights-bearing beings (the idea commonly held in European human rights jurisprudence), or that such rights are limited to the protection of the property of such being held in corporate form (once an important measure in the United States), or that the corporation cannot be more than property in the hands of its shareholders (a view still widely held in the United States). The ideological structure influences the focus of vision. So focused, social scientism can be deployed, for example in the form of so-called “Chicago School” or “Law and Economics” empiricism,⁵³ producing facts driven by and in the service of the ideological presumptions from which they derive. The same, of course, applies to the institutional ideologies of globalization that have recently provided a challenge to the state-based ideology of corporate organization.⁵⁴

51. Larry Catá Backer, *Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes*, 15 IND. J. GLOBAL LEGAL STUD. 101, 114–22 (2008).

52. VI Congreso del Partido Cominiosta de Cuba, *Lineamientos de la política económica y social del partido y la Revolución* (April 18, 2011), <https://www.scribd.com/doc/55084818/Folieto-Lineamientos-VI-Congreso-Partido-Comunista-de-Cuba>.

53. See Robert P. Murphy, *The Chicago School versus the Austrian School*, MISES INSTITUTE (June 20, 2011), <https://mises.org/library/chicago-school-versus-austrian-school>. For a history, see, for example, Robin I. Mordfin & Marsha Ferziger Nagorsky, *Chicago and Law and Economics: A History*, THE RECORD: U. CHICAGO ALUMNI MAGAZINE (Fall 2011), <http://www.law.uchicago.edu/alumni/magazine/fall11/lawandecon-history>.

54. JAN BROEKMAN & LARRY CATÁ BACKER, LAWYERS MAKING MEANING: THE

1] *The Emerging Normative Structures of Transnational Law*

This is not to suggest that technique or methodology in social sciences plays no useful role or that the equation-and-data driven relationships developed through empirical modeling are necessarily unreliable—or worse, *inevitably* misleading. Rather, it serves to emphasize the instrumental character of data-driven analysis, an instrumental character that is inevitable and inevitably tied to the presumptions of the ideology that data serves. If one starts from the assumption that states are the legitimate center of political power organized most legitimately as Western style participatory republics, then all data driven analysis will be driven by these premises—in the conceptualization of data that is relevant or significant, in the construction of posited relationships, and in the interpretation of the data that is recognized and then harvested. More importantly, it also serves as a reminder of the instrumental character of qualitative analysis of social science research. This is especially the case where one frames the question for analysis. Back, then, to the tautology tying norm and technique: ideology ensures that one frames the question in the appropriate way. Producing the right question is more important than extracting an answer from the wrong question. Where issues of governance and law are central—framing the question to comport with ideological presumptions, that is, framing the discourse in a way in which the state remains at the center—it is difficult to escape the orbit of the state, even when the subject is the possibility of decentering the state itself.

The connection between norm and technique serves to remind us of the need for caution in the use of these techniques and of their inherent limits. Empiricism produces knowledge of fact-as-fact; it provides a basis for understanding the character of a thing as “fact” in relation to that to which it relates and from which it can be distinguished to some end (e.g., wheat-corn; red-white, flower-leaf, etc.). But facts are meaningless out of this relational context—that is, they cannot be identified usefully and are unknowable as “fact.” But usefulness is a matter of the ideological structures around which facts are developed (are two things ever identical? Two snowflakes versus two flakes of commercially produced cereal). Something does not rise to the conscious level of fact unless it is understood as such, and that understanding is only possible within the reality-framing assumptions of ideology. To speak about “law” and the “state,” then, is to understand these

terms within an ideological structure that situates and privileges certain constructions and not others; data-driven analysis that accepts the ideological premises of the state will necessarily not merely reproduce it, but will inevitably serve to strengthen its premises by the very application of those premises in the service of data generation and interpretation. While this is useful to answer questions such as whether the ideology remains useful, serves its ends, has deviated from its position and purpose, it serves less well to either identify or relate to facts and ideas outside of the ideological construct from which it arises.

III. FROM GOVERNANCE BEYOND GOVERNMENT TO GOVERNMENT WITHOUT THE STATE

Globalization has provided a governance framework environment marked by a fracturing and diffusing of power beyond political actors. Though the state remains very much alive and continues to be powerful within the ambit of its authority, its claim to a monopoly of governance power—either directly or through public organs at the supra- or infra- national levels—is no longer plausible. This environment nurtures functionally differentiated communities of actors who together form closed self-regulating and autonomous governing systems that are not centered on any state, though perhaps are ultimately connected to states. These are governance systems at the heart of what Gunther Teubner describes as polycentric globalization.⁵⁵ This is not merely the sum of the privatization of governmental functions, common in assessments of polycentricity within the European Union governance framework,⁵⁶ but the substitution and/or supplementation of state authority by private organs, self-contained and self-referential, in which the state plays an incidental role. Prominent among these have

55. Gunther Teubner, *The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination*, in CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION 203 (Rainer Nickel ed., Hart, Oxford 2009).

56. Thus, it is not uncommon to “conceptualise the emerging field of European spatial policy discourse as an attempt to produce a new framework of spatialities—of regions within member states, transnational mega-regions, and the EU as a spatial entity—which disrupts the traditional territorial order, and destabilises spatialities within European member states. The new transnational orientation creates new territories of control, expressed through the new transnational spatial vision of polycentricity and mobility.” OLE B. JENSEN & TIM RICHARDSON, MAKING EUROPEAN SPACE: MOBILITY, POWER AND TERRITORIAL IDENTITY 44 (2004).

1] *The Emerging Normative Structures of Transnational Law*

been the rise of internally complete systems of operations of multinational corporations and their suppliers.⁵⁷ In an advanced form, they may even merge public and private actors within a system that is neither, in which an intimate and sustained interaction as equals produces something altogether different.⁵⁸ Within this framework, even non-state actors acquire recognition as entities burdened with public obligations—for example, to observe international human right norms.⁵⁹ Significant in this respect are the current United Nations–sponsored efforts to “operational[ize]” a regulatory framework imposing a direct obligation on multinational corporations to respect human rights.⁶⁰ Governance authority has indeed leaked past the confines of the authority of public organs and, now reconfigured, includes actors other than states.

But has this nascent *Umwertung aller Werte* (“reevaluation of all values”)⁶¹ of state power also produced a space within which governance is possible without government and, directly or indirectly, the state? Is it possible to point to systems of government that have achieved escape velocity from the state (and law systems) or even its proxies at the international level? Despite all of the great announcements of the end of the state or of law as the basic organizing principle of power within a defined territory, the state remains at the center of most discussion of governance. Even if no longer necessarily the only source of authority, the state is not absent from even the most polycentric or state rejecting system advocated as an overcoming of that enterprise.⁶² In a simpler time (about a generation ago) the fictional divisions into which social, cultural and legal life were segmented were both simple and powerful methods for the organization of communal

57. See Backer, *supra* note 25.

58. Sovereign wealth funds provide a good example, the Norwegian Pension Fund Global, in particular. See Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 AM. U. INT’L L. REV. 1, 1–122 (2013).

59. See Joint Statement to the UN Human Rights Council, *World Bank and Other International Financial Institutions Must Uphold Human Rights in all Activities They Support*, GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Sept. 9, 2013), <http://globalinitiative-escr.org/the-world-bank-and-other-international-financial-institutions-must-uphold-human-rights-in-all-activities-they-support/>.

60. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

61. Friedrich Nietzsche, *The Antichrist*, in *THE PORTABLE NIETZSCHE* (Walter Kaufmann trans., Viking Press 1968) (1888).

62. Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 41–65 (Christian Joerges et al. eds., Hart Publishing 2004).

life. Demarcation was especially straightforward with respect to the construction and control of fictional persons, especially fictional actors organized for conducting economic activity.

Like Athena, born fully formed from out of the head of Zeus, these juridical persons were said to be given form by the state, under whose rules these entities were “organized.” While some might argue that these corporate or entity charters gave these fictive entities life, it might be more useful to think of state charters as granting economic entities certain rights and obligations in the public sphere. These entities exist in the form of their internal organization and connections among their principle stakeholders, but can claim the public rights of natural persons only to the extent that the public authorities permit it. In the absence of those permissions, these entities exist only as private arrangements (through contract) rather than as public juridical persons (through law).

As the state served as the source of the public character of the entity, only that law could be said to impose *general* obligations on the stakeholders intimately connected with the governance of the organization. *Specific* obligations, of course, remained a vital part of private law through contract. But these specific obligations gave no rights as against the entity to others. Nor was the corporation obligated to comply with behavior norms with respect to its conduct or governance beyond those mandated by the state through law. All of this was in accord with the core of *rechtsstaat* notions and substantive constitutional law principles that flared out like a sort of legal supernova at the conclusion of the last World War in 1945. Moral obligations were consigned to marketing departments. Just as states had no obligation and little incentive to comply with hortatory international declarations, corporations and other juridical persons had little incentive to comply with norms that were not imposed by law, nor to acknowledge the power of purported stakeholders with no legal connection to the entity. *Governance, in effect, was firmly grounded in government.*

But this simple notion of state, law, and juridical persons, of governance and government, has been undergoing substantial changes over the last quarter century.⁶³ Governance is no longer purely the

63. See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 308–27 (2005).

1] *The Emerging Normative Structures of Transnational Law*

province of government, though it has not abandoned the state entirely. Contract, moral obligations, and communal consensus expressed in otherwise non-binding instruments have begun to assert a regulatory power far in excess of the extent of their formal effect in law within a system in which only legitimately enacted state measures are vested with a power to demand conformity and which may be enforced through the instrumentalities of the state. But this is a complicated process, messy and not clearly headed toward “success” in the conventional sense.⁶⁴ The regulation of the internet has been a well-known example, both in the context of national⁶⁵ and transnational⁶⁶ regulation. The proliferation of private standard setting bodies is another.⁶⁷

Gunther Teubner recently reminded us of the complexity and tentative nature of the process.⁶⁸ Professor Teubner starts with a contradiction: the defeat of labor in its bid for formal and significant status as a corporate governance stakeholder through the German co-determination law by notions of corporate governance has not directed power back to shareholders or directors, but rather, in the form of corporate codes, might have pushed power elsewhere “with a potential that is hard to gauge.”⁶⁹ Teubner lays the blame for this contradiction on the dynamics of globalization. “A strategy in which the pressure amassed by worldwide social conflicts, protest movements, domestic courts, non-governmental and international organisations, coerces multinationals into adopting codes of conduct in which they assume an obligation to uphold social standards, is more likely to succeed.”⁷⁰

Yet this is an odd statement, for these codes have no legal effect,

64. See, e.g., Larry Catá Backer, *A Lex Mercatoria for Corporate Social Responsibility Codes Without the State?: On the Regulatory Character of Private Corporate Codes*, 23 IND. J. GLOBAL LEGAL STUD. 1, ___ (2016).

65. On national context, see, for example, Viktor Mayer-Schönberger & Malte Ziewitz, *Jefferson Rebuffed: The United States And The Future of Internet Governance*, 8 COLUM. SCI. & TECH. L. REV. 188, 188–228 (2007). For the contemporary debate, encryption provides an example.

66. On transnational context, see LAURA DENARDIS, *THE GLOBAL WAR FOR INTERNET GOVERNANCE* (2014); JOHN MATHIASON, *INTERNET GOVERNANCE: THE NEW FRONTIER OF GLOBAL INSTITUTIONS* (2009); MILTON L. MUELLER, *NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE* (2010).

67. See, e.g., Harm Schepel, *Constituting Private Governance Regimes: Standards Bodies in American Law*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 161–88 (Christian Joerges et al. eds., Hart Pub. 2004).

68. Teubner, *supra* note 55.

69. *Id.* at 1.

70. *Id.*

except perhaps as contract (and in many places and under most circumstances even the contract model is a stretch).

Legal aspects of the codes of conduct appear only at the periphery; that is to say, these codes occupy a juridical “no-man’s land”. As soft law, they are not enforceable; instead, they *morally* oblige companies. Everything depends on political relationships, namely, the pressure exerted by the leading actors and the mobilisation of the public.⁷¹

Still, the contradictions of “soft law” that exhibit critical characteristics of “hard” law require examination. And thus, Teubner proposes a thesis: “that corporate codes are emergent legal phenomena in the constitutionalisation of private governance regimes. Unlike when they were first spawned, they are no longer mere public relations strategies; instead, they have matured into genuine civil constitutions – in the fashion of constitutional pluralism.”⁷² Teubner advances five factors contributing to the evolution of soft law regimes, of governance without government. These include what he calls, “(I) Juridification; (II) Constitutionalisation; (III) Judicialisation; (IV) Hybridisation; and (V) Intermeshing.”⁷³ What is not clear is whether these factors have produced governance without government—that is, the rise of fictive governance that supports fictive entities beyond the control of the state (itself a fiction but one with quite a sting)—or whether it has produced a method for the rise of intergovernmental governance—that is, of public governance through private actors.

Juridification suggests, for Teubner, the quite correct insight that the notion of soft law is itself no longer useful as either descriptor or concept. The notion essentially “beg[s] the same question as *lex mercatoria*, internet law and other global regimes in which private actors make rules, the binding nature of which is not guaranteed by state power, yet which display a high normative efficacy.”⁷⁴ And here one comes to the great conundrum of transitions in law and the assumptions of legal regimes: global political systems worked so hard through two centuries from the time of the French Revolution to the destruction of the Nazi Regime in Germany, to cement the notion (in both higher law and statute) that under the rule of law, grounded in legitimate state power, law assumes a central place as a legitimate expression of popular will, and popular will is the critical foundation for legitimate

71. *Id.* at 2.

72. *Id.*

73. *Id.*

74. *Id.* at 3.

1] *The Emerging Normative Structures of Transnational Law*

action. But at the moment of its global triumph, this system of law appears upended by the *semblance* of law without the foundations in legitimacy. In short form—when academics and politicians, confronted with the realities of governance through instruments like corporate codes, ask what tends to be the standard question “is this law?,” they are signaling in shorthand a very different question: is this a legitimate expression of governance or merely a private arrangement of no interest *as law*?

Teubner thus looks for another basis of legitimation, one “which self-perpetuates by recycling symbolic global (not national) validity. The first criterion, binary code, distinguishes global law from economic and other social processes. The second criterion, global validity, differentiates between national and international legal phenomena.”⁷⁵ Still, Teubner concedes, not every code, or every expression of aspiration, is worthy of the moniker law. He draws on Martin Herberg’s formalist construction (if it mimics law it may be law) approach.⁷⁶ Formalism, it seems, leads to functional effect, or at least to comfort, but not enough without a certain level of institutionalization. Law must not merely be complete, it must exist within a differentiated sphere in which its own autonomy is grounded in its own will. In other words, the juridical personality must assume the autonomy of that ultimate autonomous personality, the state, if it is to make law beyond that state.

A ‘global law without a state’ should not yet be assumed upon the basis that non-state institutions judge behaviour pursuant to the normative code, but, rather, that it may be acknowledged only when processes which observe these judicial functions under the binary legal code have been institutionalised. Only then do corporate codes satisfy the structural pre-requisites of a transnational law outside of state law.⁷⁷

This requires juridification—a self-reflexive mechanism for enforcement and elaboration.

This reflexive process requires certain institutional precautions, in particular, the development of actors or instances, who or which are responsible for the establishment, modification, interpretation and

75. *Id.*

76. *Id.* at 3–4 (citing Martin Herberg, *Private Authority, Global Governance and the Law: The Case of Environmental Self-Regulation*, in *MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY AND THE LAW* 146 (Gerd Winter ed., Cambridge U. Press 2006)).

77. Teubner, *supra* note 55, at 5.

implementation of the primary norm formation. Fundamental to this is the growth of the central level of internal control and implementation organs, which mediates between the two other normative levels, thusly grounding the legal character of the corporate code.⁷⁸

Thus, the *form* of law may be contract—the essence of soft law in the 21st century⁷⁹—but the *function* is regulatory within a contractually elaborated governance *system*.⁸⁰ But juridification requires a higher law that can serve as framework both for regulation and as the process basis for a legitimate application of process rule of law. In other words, as Teubner elaborates, juridification requires *constitutionalization*.⁸¹ However, for Teubner, “this occurs only when the reflexive processes in the organisations are appended to reflexive legal processes—in other words, when inter-systemic linking institutions tie together secondary rule-making in the law with fundamental, rational principles of the organisation.”⁸² This idea of auto-constitutionalization suggests that the “will to organization” of states, memorialized in constitutions, can migrate, and legitimately so, to non-state entities.

This is based upon a constitutional concept which is not limited to nation states constitutions, but which, instead requires that, under particular historical conditions, even non-state civic orders give birth to autonomous constitutionalisation. The positivisation of constitutional norms moves from the global political level to various social sectors, which, in parallel to political constitutions, produce their own constitutions of civil society.⁸³

The idea, increasingly accepted among international actors, is that constitutions of states are not too unique to states. Instead, any juridical person might also acquire a certain legitimacy as a regulatory entity by mimicking states. “We can observe the typical components of a constitution: regulations about the establishment and functioning of decision-making processes (organisational and procedural rules), and the

78. *Id.*

79. Backer, *supra* note 25, at 499.

80. See Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1774–83 (2007).

81. But not the other way around. This is well reasoned in GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* 102–03 (Oxford, 2012) (and generally chapter 4–5).

82. Teubner, *supra* note 55, at 5–6.

83. *Id.*

1] *The Emerging Normative Structures of Transnational Law*

codification of the boundaries of the organisation in relation to individual freedoms and civil liberties (basic rights).”⁸⁴

But neither juridification nor constitutionalization are enough for more than “independent law-formation.”⁸⁵ If this was all there was to the corporate codes of multinational entities, then the academic debate would center on whether these entities constitute new forms of states. That is an anachronistic position—suggesting a return to the age of the Hudson’s Bay Company and antique mercantilism, rather than to grasp the subtleties of the current movement. Teubner, though, suggests the necessity of structural coupling⁸⁶ with national systems. Multinational codes may be autonomous, but they exist in a networked community of law and power. States still control territory, and multinational corporations manifest their activity within territories.

For the implementation success of codes of conduct, their judicialization in the national legal order will be one of the most important pre-requisites. At the same time, it should be clear that their reception in national law is not a condition of the legal character or binding effect of the codes.⁸⁷

For Teubner, the key still lies in globalization, but here understood as *international judicialization*. He explains: “The corporate codes are neither prescribed by national legislation, nor adopted, nor integrated. More pertinent is the notion of conflict of laws: the autonomous legal orders of the multinationals collide with national and international laws. In this collision between autonomous legal orders, both undergo a deep process of change.”⁸⁸ What is described is not merely a process of communication, but of a pattern of exchange that is necessarily grounded on the autonomy of the actors. The coupling of these autonomous systems, their communication, is structural, that is built into their structures of autonomy and that structures the way in which they respond to the actions of other systems.

Structural coupling is not merely communicative, or interactive, it is also dynamic: “there is a reciprocal reconstruction of the state law in the corporate code and *vice versa*.”⁸⁹ When it rebounds, it changes all

84. *Id.* at 7.

85. *Id.* at 8.

86. On structural coupling, see, for example, Anders Esmark, *The Functional Differentiation of Governance: Public Governance Beyond Hierarchy, Market and Networks*, 87 PUB. ADMIN. 351, 351–70 (2009).

87. Teubner, *surpa* note 55, at 8.

88. *Id.* at 8.

89. *Id.*

meta-system participants. But, of course, there is more to this. Teubner suggests within this notion a further layering of *judicialization*. This time, not in the service of the construction of an autonomous system, but instead as a meta-nexus point where structural coupling or systemic interactions may be bureaucratized within a legitimacy-producing institution:

Here, we are concerned with regime-transcending legal conflicts, with effects in both legal orders. The only escape route in such a case of inter-regime conflict would be for the tribunal concerned to develop its own substantive norms. Mindful of the “domestic” and the “foreign” legal order, and with one eye on the third order, trans-institutional substantive norms, following the fashion of an asymmetrical law-mélange, could be formed.⁹⁰

This is certainly the framework that has emerged as the form of bureaucratization, par excellence, for legitimacy producing communication among systems above the state. In the West, the judge has again assumed the role as both Hebrew prophet and Greek oracle.⁹¹ “Thus, the most pressing task might be the organisation of mutual awareness and reciprocal acknowledgment between decentralised tribunals.”⁹²

Teubner has now moved us from the creation of a law-state conventionally understood as derived from the state as the supreme legal person, to the possibility of the creation of governance-communities that are not states, but nevertheless acquire a legitimate form through constitutionalist organization and which exist autonomous of the state. But can the corporation, in the context of its great codification projects, pull away from the orbit of the state and its traditional *law* to become its own autonomous governance unit? There is always a danger, Teubner relates, that such codes will become little more than the privatized expression of public law.⁹³ Already there is a great tendency among Western states to engage in privatized lawmaking.⁹⁴ The boundaries of the public and private sphere are sometimes blurred, not

90. *Id.* at 9.

91. See Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291, 315–38 (2000); Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 11 WM. & MARY BILL RTS. J. 117, 132–44 (2003).

92. Teubner, *supra* note 55, at 9.

93. *Id.* at 9–10.

94. On this point, see, GRALF-PETER CALLIENS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE*, *supra* note 14, at 153–247. See also David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 378–402 (2003); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 324–30 (2002).

1] *The Emerging Normative Structures of Transnational Law*

at the insistence of power-seeking private juridical persons, but at the insistence of states that seek to privatize their governmental responsibilities.⁹⁵ These present a more discrete method of governance.⁹⁶

Instead, the hybridisation of the corporate codes is a developmental trend, in which the autonomy of the codes is preserved, but in which state agencies and international organisations are involved to the extent that they contribute to the delineation of the borders of the private code and to its implementation and regulation.⁹⁷

Ironically, the success of this strategy might well serve as a barometer of state power vis-a-vis their corporate regulatory competitors.

Teubner, however, is not altogether optimistic about the ability of corporate code projects to reach escape velocity and detach from the orbital control of the states in which they operate. Or, more precisely, to reach that escape velocity in a way capable of being seen as legitimate by competing governance organs. To work around this tension, Teubner suggests an approach grounded in what he calls “intermeshing.”⁹⁸ Intermeshing involves the Europeanization of multinational regulatory enterprises. Just as the Member States of the European Union together might create broader and more powerfully effective cross-state norms, so too might multinational “states” do the same within cooperative regulatory communities. Thus, Teubner notes “the emergence of inter-company networks as an extension of the corporate code onto an entire production network. Global commodity chains have developed, which constitute neither market relationships nor integrated multinationals.”⁹⁹ These are “networks of independent companies, which have generated their own governance structures.”¹⁰⁰ Here is the model of the European Union in a privatized variant form!

Despite the audacious scope of his newly asserted path to legitimation, Teubner ultimately remains tied to the state and its forms. Indeed, one can see in the notion of intermeshing a three dimensional

95. Cf. PAUL R. VERKUIL, *Outsourcing the Duty to Govern*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 310–34 (Jody Freeman & Martha Minnow eds., Harvard Univ. Press 2009); Alfred C. Aman, Jr., *Privatization, Prisons, Democracy and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511 (2011); Fenner L. Stewart, *The Corporation, New Governance, and the Power of the Publicization Narrative*, 21(2) IND. J. GLOBAL LEGAL STUD. 513–51 (2014).

96. See Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 410–27 (2004).

97. Teubner, *supra* note 55 at 9.

98. *Id.* at 2, 9–10.

99. *Id.* at 9.

100. *Id.* at 10.

model in which intermeshed inter-company networks align with intermeshed national regulatory structures.¹⁰¹ In so doing, he avoids the more interesting question of the possibility of communities of corporations (and other non-state actors), like the community of states, coming together for the elaboration of governance frameworks that can exist autonomously. Yet Teubner's argument can also be read to suggest something novel in his concept of intermeshing: the intermeshing of networks of multinationals may create an autonomous framework of networked communities which themselves might communicate with autonomous networks of states. The networks themselves would give rise to governance frameworks that at some level suggest that of international organizations within the modern internationalized state system.¹⁰²

The model of the state and the multinational as the basic and default binary foundation of analysis may no longer be as relevant as it once might have been. Just as multinationals have congregated within networks, so too have states. It is those functionally differentiated networks of states—either formally or informally constituted—that might best serve the interests of helping corporate codes reach escape velocity. Such a result is not the product of altruism, but instead might flow naturally from the value to groups of states of a consolidated and autonomous community with which it might negotiate for more efficient global relationships. Here, globalization is a crucial factor. This consequence suggests the construction of polycentric governance frameworks in which the corporation might owe duties to states in which they operate (and within the political system of which they assume a subordinate role), and also simultaneously assume obligations under social norm systems generated by and generally applicable to the global community of corporations. We move then from Teubner's state privileging universe—a universe in which the habits and forms of law-state systems are replicated—to a governance universe in which actors may acquire obligations and privileges grounded in the social-norm frameworks of non-state regulatory communities, legitimated on

101. The notion echoes the move toward regulatory governance but in a more complex setting. See, e.g., Udaibir S. Das et al., *Does Regulatory Governance Matter for Financial System Stability? An Empirical Analysis*, INTERNATIONAL MONETARY FUND (May 2004) at 1, 4–43 (IMF Working Paper, WP/04/89).

102. Consider the related notions of networked horizontal global governance groups, the structures of which have been elaborated by Anne Marie Slaughter. SLAUGHTER, A NEW WORLD ORDER, *supra* note 46; Candace Jones et al., *A General Theory of Network Governance: Exchange Conditions and Social Mechanisms*, 22 ACAD. MGMT. REV. 911, 911–45 (1997).

1] *The Emerging Normative Structures of Transnational Law*

their own terms. These new actors take a variety of forms, from internally self-constituted multinational enterprise governance systems¹⁰³ to social norm systems grounded in the public obligations of private actors in international social norm systems.¹⁰⁴ Li-Wen Lin has recently argued that these private transnational law systems might well leak into the law of host and home states as well, and as such, ought to be an object of comparative law study.¹⁰⁵

An excellent example of this was the work of the Business Leaders Initiative on Human Rights (BLIHR) through 2009.¹⁰⁶ Initially, BLIHR developed a “tool box” consisting of several guides for businesses on human rights.¹⁰⁷ These eventually were merged into a comprehensive guide developed in conjunction with the United Nations.¹⁰⁸ In addition, BLIHR promoted the human rights global governance of businesses by participating in the processes and submitting reports to the UN Special Representative on Business and Human Rights¹⁰⁹ in the effort that produced the U.N. Guiding Principles for Business and

103. See Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L. REV. 541, 561–70 (2006). See also Backer, *supra* note 80.

104. See, e.g., John Ruggie (Special Representative on Human Rights), *Promotion of all Human Rights, Civil, Political, Economic, Social & Cultural Rights, Including the Right to Development*, U.N. G.A. A/HRC/11/13 (April 22, 2009).

105. See Li-Wen Lin, *Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57(3) AM. J. COMP. L. 711 (2009).

106. *Legacy-Opening Memo*, BUSINESS LEADERS INITIATIVES ON HUMAN RIGHTS, <https://web.archive.org/web/20091020081739/http://www.blihr.org/> (last visited Sep. 13, 2016) (“In 2003, we set out to find practical ways of implementing the Universal Declaration of Human Rights in a business context. . . . The Business Leaders Initiative on Human Rights has been a business-led organization involving 16 of the world’s major brands during this period.”). BLIHR ceased work in 2009. See Business and Human Rights Resource Centre, BLIJR, <https://www.business-humanrights.org/company-policysteps/other/business-leaders-initiative-on-human-rights-blihr> (last visited Oct. 10, 2016).

107. See *Home Page*, THE HUMAN RIGHTS MATRIX (June 24, 2010), <http://www.humanrights-matrix.net/> (last visited Oct. 10, 2016). It was developed in conjunction with John F. Sherman & Chip Pitts, *Human Rights Corporate Accountability Guide: From Law to Norms to Values* (Dec. 2008), http://www.humanrights-matrix.net/assets/Accountability_Guide_2008.pdf, and BLIHR, *About The Guide*, BUS. LEADERS INITIATIVE ON HUMAN RIGHTS <http://www.integrating-humanrights.org/home>.

108. *The Guide for Integrating Human Rights into Business Management*, BUS. LEADERS INITIATIVE ON HUMAN RIGHTS, <http://www.integrating-humanrights.org/home> (in conjunction with the U.N. Global Compact and the Office of the High Commissioner for Human Rights), <http://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf>.

109. John G. Ruggie, a professor at the JF Kennedy School of Government at Harvard. For the details of the collaborative work of Professor Ruggie as SRSG leading to the UNGP, see *Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx>.

Human Rights.¹¹⁰ The organization bridged governance regimes through its appointment of individuals with substantial influence in multiple public and private governance sectors. Thus, Mary Robinson, former United Nations High Commissioner for Human Rights and President of Ireland, served as BLIHR honorary chair.¹¹¹ In this complex intermeshing, one can discern the development of consolidated norms within networked aggregations of privately constituted autonomous groups, negotiating for a harmonized set of regulatory standards at a supranational level. Indeed, BLIHR produced a set of toolkits and assessment tools that themselves complemented those that were specified in the United Nations Guiding Principles themselves. Together each constituted a set of soft law norms that could be taken up and hardened within the operations of enterprises that embraced them—and they suggested, the societal obligations of the enterprises to do so in any case. At this level, the public law versus private law distinction falls away as well. Sally Engle Merry has examined the way in which the mechanics of soft law systems—principally the toolkit and assessment tools of organizations like BLIHR—solidify and harden soft law, at least within the enterprise.¹¹² Such tools, she argued, increase the enforceability of soft law.¹¹³ Rule and technique merge in a context in which international norms are adopted as binding within the governance universe of corporate operations; soft law becomes hard within the internal governance frameworks of the enterprise and, thus internalized, the techniques of corporate management—contract, standards, internal policy, monitoring, and discipline—become central to

110. See *Guiding Principles on Business and Human Rights for Implementing the UN “Protect, Respect and Remedy” Framework* (UN HR/PUB/11/04, 2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, endorsed A/HRC/RES/17/4 (June 16, 2011), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>. The BLIHR were also instrumental in and by organizing international events, including the December 2008 International Seminar on Business and Human Rights held in Paris, France.

111. See *The Business Leaders Initiative on Human Rights (BLIHR)*, http://www.euro-parl.europa.eu/meetdocs/2004_2009/documents/dv/blibr/_blibr_en.pdf. The interconnection among the individual actors thus married the institutional interconnections through which these projects were advanced.

112. Sally Engle Merry, *Firming Up Soft Law: The Impact of Indicators on Transnational Human Rights Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS*, 373–74 (Terence Halliday & Gregory Shaffer eds., New York: Cambridge Univ. Press, 2015).

113. *Id.* at 376 (but such measures also reduce the power of soft law “to articulate a broad vision of a just society.”).

1] *The Emerging Normative Structures of Transnational Law*

the construction of rule systems derived from their constituting normative basis in international “soft law.”¹¹⁴

Still, Teubner has suggested the skeleton of the constitution of governance without government and its elaboration in the form of corporate codes. But that skeleton suggests more the methodology of the constitution of non-state states than it suggests the growing irrelevance of the traditional soft law, hard law binary distinction.¹¹⁵ In effect, the “harder” the regulatory institutionalization, the “harder” the governance produced, whatever its form.¹¹⁶ It is the *constitution of government without a state*, rather than the deepening of governance without government, that is the real object of these constructions.¹¹⁷

These temptations of governing ideology have a strong pull. It is especially powerful in unpacking the realities of autonomous governance outside the state within functionally differentiated organizations, like corporations (which legislate through contract and enforceable policy within its supply or value chain),¹¹⁸ and the meaning and effect of their self-constitution. That push and pull between the universes of state and of corporate governance is felt most acutely in some of the most path breaking work on the characteristics and objectives of transnational law, an interrogation of which suggests another layer of tension between public and private in transnationalism, one that seeks to deploy transnational law as either method or norm that might be used in the service of existing parameters of political organization favoring states and public organizations and disciplining non-state actors within that construct.

114. *Policy Report 4*, BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, <http://www.kajembren.com/wp-content/uploads/2013/12/BLIHR-4-Final-report1.pdf>, (last visited Sep. 13, 2016) (“An important aspect of our work, especially over the last three years, has been to focus on the effective and productive integration of human rights into business management systems: i.e. the ‘how’ as opposed to the ‘why’ or the ‘what’ of business and human rights.”).

115. See, e.g., Gregory Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706, 765–98 (2010); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54(3) INT’L ORG. 421 (2000).

116. See, e.g., Birgitte Egelund Olsen & Karsten Engsig Sørensen, *Strengthening the Enforcement of CSR Guidelines: Finding a New Balance Between Hard Law and Soft Law*, 41(1) LEGAL ISSUES OF ECON. INTEGRATION. 1, 9–35 (2014). There is a public law dimension as well. See, e.g., Andrew T. Guzman & Timothy Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT’L L. 515, 528–31 (2009).

117. At its normative limit, see, for example, David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97(4) AM. J. INT’L L. 901, 912–20 (2003).

118. See Backer, *supra* note 80.

IV. NEW FRONTIERS OF STRONGER BARRIERS AGAINST CHANGE—THE PROMISE OF TRANSNATIONAL LAW

That same tension, and the strength of the pull of the state, appears in Peer Zumbansen's excellent theorizing about the nature of the emerging transnational law system. It is not uncommon to distinguish among foreign, international, and comparative law. Most distinctions posit that the first is the study of the law of domestic legal systems not one's own, the second focuses on the development of a legal order among states and other international actors that arises outside of domestic legal orders (though interacting with and projecting power within it), and the third is the method by which the first, too, can be understood to engage in interactions with other systems.

Comparative law, then, suggests the manner in which academics work through issues of structural coupling among any set of systems they are willing to couple and de-couple; for example, private law, constitutional law, the regulation of enterprises, and the like. Comparative law is sometimes, then, understood as something in between—it has a function, to get from some point to another, but is not a field. Consider the emphasis of the *Oxford Handbook of Comparative Law*,¹¹⁹ the second part of which¹²⁰ is devoted to a functional study of this busyness: the eighteen approaches covered speak to a broad range of functionality, but seem to avoid substance.¹²¹

This approach has produced a certain amount of frustration. Ralf Michaels's contribution suggests both complexities of the issue of method and the structuring of knowledge fields:

The functional method has become both the mantra and the *bête noire* of comparative law. For its proponents it is the most, perhaps the only, fruitful method; to its opponents it represents everything bad about mainstream comparative law. The debate over the functional method is indeed much more than a methodological dispute. It is the focal point of almost all discussions about the field of comparative law as a whole—centres versus peripheries of scholarly pro-

119. THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., Oxford Univ. Press 2006).

120. *Id.* at 305–869.

121. *Id.* at Part II. (These functions without a field include comparative disciplines, functionality, similarities and differences, legal families and comparative legal traditions, transplantation and reception, mixed legal systems, influence on national legal systems, Europeanization of private law, globalization, Islamic legal culture, African customary law, language, legal culture, religion, legal history, socio-legal studies, critical legal studies, and economic analysis of the law).

1] *The Emerging Normative Structures of Transnational Law*

jects and interests, mainstream versus avant-garde, convergence versus pluralism, instrumentalism versus hermeneutics, technocracy versus culture, and so on.¹²²

What is missing for Michaels is greater methodological coherence.

We should look at the functions and dysfunctions of the concept of function, including its latent functions, in the production of comparative law knowledge. We should look at whether it is functional or dysfunctional, and we should see whether alternative proposals could serve as functional equivalents. This should enable us at the same time to start reconstructing the functional method as a constructive, interpretative, rather than positive enterprise, as a way of making sense of legal systems—constructing them as meaningful, instead of merely measuring them.¹²³

This may well produce useful movement toward the construction of a system¹²⁴ that might in part serve as a framework for evaluating the law compared,¹²⁵ and perhaps, for some, to invoke comparison in the service of legal unification.¹²⁶ “Functionalist comparative law has not yet made sufficient use of the benefits of functionalism. This study can only hint at the possibilities, but its findings suggest that a more methodologically aware functionalism will provide us with better insights into the functioning of law.”¹²⁷

This foundational issue of disciplinary self-conception has moved from comparative law to the emerging field of transnational law.¹²⁸ In an excellent essay, Peer Zumbansen makes a strong case that transnational law, like comparative law, is better understood as a methodology of law.¹²⁹

On the one hand, [transnational law] emerges as a series of contemplations about the form of legal regulation with regard to border-crossing transactions and fact patterns transgressing jurisdictional

122. Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 340 (Mathias Reimann & Reinhard Zimmermann eds., Oxford Univ. Press 2006).

123. *Id.* at 363 (citations omitted).

124. *Id.* at 372–73.

125. *Id.* at 373–76.

126. *Id.* at 376–78.

127. *Id.* at 381.

128. PHILIP C. JESSUP, TRANSNATIONAL LAW 1–16 (1956).

129. Peer Zumbansen, *Transnational Law, Evolving*, in ENCYCLOPEDIA OF COMPARATIVE LAW 899 (Jan Smits ed., 2006), reprinted in KING’S COLLEGE LONDON DICKSON POON SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER SERIES: PAPER NO. 2014–29 (2012).

boundaries that involve a mixture of public and private actors and norms. On the other hand, transnational law continues to evolve as a thought experiment in legal methodology and legal theory.¹³⁰

What follows, for Zumbansen, is “the recognition that transnational law presents an important opportunity to reflect on law and its connections to ongoing investigations into local and global forms, institutions and processes of governance.”¹³¹ From this flows the critical contention that transnational law “invites a fundamental reflection on what is to be considered *law*.”¹³² As a consequence, transnational law, itself, sits in between—not law in the classical sense, nor the product of the domestic legal orders of states, nor the system of relations among traditional subjects of international law. But does this reduce the transnational to method?

Zumbansen starts with transnational law’s origins in the middle of the last century. He notes its expansion as the global legal and economic order changed in the aftermath of the construction by the victorious Allies of the post-1945 global framework.¹³³ The maturing of these investigations suggests two directions for transnational law. On the one hand, and like comparative law, it assumes a parasitical role—“to spread out into different legal fields, in scholarship as well as in legal education.”¹³⁴ On the other, transnational law has “matured in their conscious thematizing of the underlying methodological and conceptual challenges that arise from law’s embeddedness in a comprehensive, multi- and interdisciplinary discourse.”¹³⁵ Enter globalization. In the context of the opening up of governance in the wake of movements toward global freer movements of goods, capital, services, and to a lesser extent, labor, transnational law finds a space to evolve. Yet there is a sense that for transnational law to emerge as a field, some sort of unifying theory is necessary, one tied both to the forms of law and to its effectuation through the apparatus of government irremovably tied to the state.¹³⁶ In the absence of this conservative activity, transnational law, like its cousin comparative law, remains fit for method—and function—but not necessarily as a field apart from the

130. *Id.* at 2.

131. *Id.* at 3.

132. *Id.*

133. *Id.* at 1–3.

134. *Id.* at 5.

135. *Id.*

136. *See id.* at 6–7.

1] *The Emerging Normative Structures of Transnational Law*

fields of law, it either displaces or transforms.¹³⁷ It is to those fields that Zumbansen then turns. Here is Zumbansen at his best; his discussion of the transnational element within these old fields might better suggest not so much method as the construction of the field with its own methodology. To that end, Zumbansen examines *lex mercatoria*,¹³⁸ corporations,¹³⁹ human rights and transnational anthropology,¹⁴⁰ comparative constitutional law and transnational constitutionalism,¹⁴¹ administrative law,¹⁴² and transnational human rights litigation.¹⁴³

Zumbansen ends with an examination of transnational legal history, societal memory,¹⁴⁴ and transnational legal education.¹⁴⁵ Of these, the last section on legal education is particularly insightful. Issues of field or methodology become most important when one is trying to organize knowledge for the purpose of teaching this to others, and of developing a vocabulary and reality framework that makes concepts understandable and useful. De-territorialization of legal education, at least within elite schools, has produced a dialectical process in which national traditions continue to shape education the content of which is increasingly unbounded by those very traditions.¹⁴⁶ This is not merely a problem for shaping the relationship between teacher and student—it is equally important for the shaping of academic communities and markets for knowledge.

I suggest that Zumbansen sees the unifying methodological strands of the fields that retain their independence from each other even as they lose connection to states, the contours of which he masterfully examines. I wonder, though, if it is possible to see beyond the methodology and over the barriers that separate traditional fields a set of substantive unifying elements that might illuminate the contours of the constitution of substance of transnational law as a field. Zumbansen deftly posits the form of the field. Yet it may be possible to define a field itself beyond a focus on utility. To move beyond field, as useful

137. For a quite different perspective but along the same lines, see, for example, Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397, 401–09 (2003).

138. Zumbansen, *supra* note 129, at 7–8.

139. *Id.*

140. *Id.* at 8–10.

141. *Id.* at 10–11.

142. *Id.* at 11–13.

143. *Id.* at 13–14.

144. *Id.* at 14–15.

145. *Id.* at 15–16.

146. *Id.* at 17.

structure construction could serve as a means of making coherent the integrity of traditional fields by limiting them to their traditional borders, making room for other fields when the reality of action bursts out from the borders of the domestic legal orders the territorial limits of which used to supply field coherence.

Zumbansen's discussion of the transnational element in comparative corporate law is instructive.¹⁴⁷ Corporate governance is deeply embedded at once in the domestic legal order of states and operates within a complex mix of transnational standards, guidelines, external and internal standards of conduct, monitoring, and transparency that center the corporation within polycentric governance frameworks that are at once public and private. This "de-territorialized production of norms is the radical challenge these processes pose for the way in which we distinguish between law proper and non-legal 'norms'."¹⁴⁸

But that is precisely the problem that the ideology of the state would posit—for inherent in this challenge is the presumption that the distinction between law and norm is important, and that the quality of obedience to law and norm within corporate governance is of a different quality. And thus, the way this "feeds into a broader research inquiry"¹⁴⁹ can be bent to the service of the state by posing question and answer in the context of rule of law based on law-state primacy (though it need not). For Zumbansen, though, this complex cocktail of public and private, of law and norm, of state and private government producing multiple simultaneously applicable rule structures that are harmonized within the internal operation of the enterprise,¹⁵⁰ serves to illustrate the borders of the ideology within which the law-state operates and as well, "the way in which we begin to understand this emerging transnational regulatory framework as an illustration of contemporary rule-making, the long-standing legal pluralist contention of formal and informal legal orders comes to be seen in a new light."¹⁵¹ Indeed, the construction of this seeming complexity still requires and

147. Peer Zumbansen, *Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance*, in *THEORY AND PRACTICE OF COMPARATIVE LAW* 193 (Maurice Adams & Jacco Bomhoff eds., 2012) ("What makes corporate governance such a promising example for the study of the prospects of comparative law, is the field's enormous regulatory dynamism, which oscillates between national historical idiosyncrasies on the one hand and the extremely volatile impulses that it receives on a global scale, on the other.")

148. *Id.* at 194.

149. *Id.*

150. *Id.* For a similar perspective, see Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 *WIS. INT'L L. J.* 477, 485–91, 497–503 (2005).

151. Zumbansen, *supra* note 147, at 194.

1] *The Emerging Normative Structures of Transnational Law*

relies upon the preservation of the sphere of law as separate and separately legitimate, bound up in the distinction between “law and other spheres of culture.”¹⁵²

The object, then, is to bring governance outside the state within the normative universe of the ideological framework of the state—the method is through the expansion of the spectrum with a view to legal pluralism that “might help better understand the distinctly transnational emergence of regulatory regimes.”¹⁵³ This permits “us to study such regimes not as being entirely detached from national political and legal orders, but as both emerging *from* them and reaching *beyond* them.”¹⁵⁴ But this produces recognition only of semi-autonomy of such systems—the pull of the state is strong. And it is in this semi-autonomy that the tension in public and private governance in emerging transnational orders arises in the form of method, not norm—“represented in the tension between a ‘formal’ law and policy-making apparatus on the one hand and spontaneously evolving ‘informal’ norms in particular social contexts on the other.”¹⁵⁵

I have roughed out the possible contours of how a normatively coherent field of transnational law might be understood.¹⁵⁶ It may contribute another strand to what Zumbansen correctly describes as a history of a term, the variances of which “can be attributed mostly to the different doctrinal and theoretical backgrounds of those employing it.”¹⁵⁷ That suggests both the value of the methodological approach well theorized by Zumbansen, but also the normative framework within which methodology can be liberated from an unnecessary service to state ideology.

152. *Id.* at 194 (citing EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 486–508 (Walter L. Moll trans., Russell & Russell 1913) (1962)).

153. Zumbansen, *supra* note 147, at 195.

154. *Id.*

155. *Id.* at 195 (citing Sally Falk Moore, *Law and Social Change: The Semi-autonomous Field as an Appropriate Subject of Study*, 7 L. & SOC’Y REV. 719 (1973)); Julia Black & David Rouch, *The Development of Global Markets as Rule-makers: Engagement and Legitimacy*, L. & FIN. MKTS. REV. 218 (2008).

156. Larry Catá Backer, *Principles of Transnational Law: The Foundations of an Emerging Field*, LAW AT THE END OF THE DAY (March 9, 2007), <http://lbackerblog.blogspot.com/2007/03/principles-of-transnational-law.html>.

157. Zumbansen, *supra* note 129, at 6.

V. TOWARDS SELF-CONSTITUTING POLYCENTRIC GLOBAL ORDERS WITHOUT APOLOGY

Zumbansen and Teubner have brought notions of governance without government a long way. They have pointed the way to conceptualizations that detach governance from the state and de-center the state from webs of command that are regulatory but not conventionally “law.” Yet neither author has suggested a thoroughgoing escape from the orbit of the state. For both the state remains the touchstone, whether in form or in function. The state retains a strong power as the ideal against which other governance organizations must be measured, and sometimes around or with which a non-state system must orbit to obtain that measure of legitimacy that would vest a governance minded non-state organization with the modicum of the authority with which the state is vested.

What started as a recognition of a changing reality—that states no longer entirely control the rule systems for the interactions among their citizens or residents¹⁵⁸—has itself appeared to be moving toward organization with systemic qualities in its own right. Transnational law represents a new and independent legal order, the concepts and contours of which remain highly contested.¹⁵⁹ Already, some of its practices have suggested its transformative potential for the most fundamental ordering principles of the construction of the state and its basis in law.¹⁶⁰ It points to the reconstitution of a global law that is

158. See generally PHILIP C. JESSUP, *TRANSNATIONAL LAW* (Yale University Press, 1956).

159. See, e.g., Craig Scott, ‘*Transnational Law*’ as a Proto-Concept: Three Conceptions, 10 *GER. L.J.* 859, 876 (2009).

160. A number of scholars have begun to explore these possibilities from different perspectives. See generally PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* (Cambridge Univ. Press, 2012) (overlapping regulatory authority producing hybridity); NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (Oxford 2011) (blurring of distinctions between national and international); GRALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (Hart, 2010) (transnational rule systems in and through private law); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 *IND. J. GLOB. L. STUD.* 447 (2007) (private law as system beyond the state).

1] *The Emerging Normative Structures of Transnational Law*

neither global nor ordered,¹⁶¹ and that breaks down the barriers between public and private in rule making and enforcement¹⁶² and between national judiciaries and processes.¹⁶³ Is it possible, though, to flesh out the beginnings of a theory of transnational law that might provide a framework for escaping the orbit of the state, and the constraints of a process centered ideology?¹⁶⁴ That requires a reconsideration of the premises about the nature and institutional operation of law, an area of inquiry still very much beyond consensus.¹⁶⁵ “If a useful model of transnational law could be devised—a working notion of what might link together social phenomena under this conceptual label—perhaps the possibilities of relating together studies of transnational legal developments in seemingly disparate areas could be enhanced.”¹⁶⁶ In that light, consider the following version of a preliminary model:

One starts with a fundamental premise: *transnational law can be defined as the organizational law of non-state governance systems*. These are the rules that make transnational rules and the institutional systems through which it is derived, and applied, authoritative, predictable and certain. They are the rules to define non-state governance systems and that can be enforced against them. It serves as the operational shell of institutionalized systems of rules. The definition suggests both commonalities and differences between “transnational law” as a distinct legal field and conventional legal fields derived from

161. See generally Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 TILBURG L. REV. 177–199 (2012).

162. On the privatization of lawmaking, see, e.g., Paul B. Stephen, *Privatizing International Law*, 97 VA. L. REV. 1573, 1593–1617 (2011); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U.J. INT’L L. & POL. 1, 29–59 (2006). There is an interesting wrinkle here as well—the subcontracting of lawmaking from administrative agencies to private parties. See Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 619–645 (2016). On the difference with privatization of function, see, e.g., HERBERT WULF, *INTERNATIONALIZING AND PRIVATIZING WAR AND PEACE* 36–64 (Palgrave, 2005); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 1–56 (2007) (critical of the movement toward privatization and outsourcing).

163. See generally Maya Steinitz, *Transnational Legal Process Theories*, in THE OXFORD HANDBOOK OF INT’L ADJUDICATION (Cesare P. R. Romano, Karen J. Alter, & Chrsanthi Avgerou Oxford, 2014).

164. See Roger Cotterrell, *What is Transnational Law?* 37 L. & SOC. INQUIRY 500, 502–04 (2012); Carrie Menkel-Meadow, *Why and How to Study ‘Transnational Law’*, 1 U.C. IRVINE L. REV. 97, 109–11 (2011).

165. See, e.g., Scott, *supra* note 159, at 876.

166. Cotterrell, *supra* note 164, at 503.

the legal orders of nation-states. Like domestic law fields, transnational law includes a constitutional element (a basic set of presumptive and supreme organizing principles and rules),¹⁶⁷ a substantive element (implementing the constituted system),¹⁶⁸ and a process element (rules for the development of substantive rules and dispute resolution).¹⁶⁹ Unlike domestic legal orders, which are exercised through one specific institution (the state) transnational law covers a wide number of distinct governance communities existing simultaneously and organized beyond the rule-imposing power of states. Moreover, these governance communities are not necessarily organized in the same way as states—with a population and a defined geographic territory and an institutional framework exercising plenary authority. Rather, transnational law communities may be understood as functionally differentiated communities organized for mutual benefit within specific objectives.¹⁷⁰ They can include groups, institutions, and networks. They can include religion as a governance institution in its own right as well.

In one sense, then, transnational law can be understood as the study of the system of principles and rules applied either in lieu of or in addition to the domestically germane law of a state, or community of states, or to the relationships among persons and institutions—public and private, natural and legal. It focuses on methodology and interconnectivity, on networks and intermeshing of systems in constant communication. Yet that does not provide much substance that is not

167. Thus, for example, if one considered the International Monetary Fund as a transnational governance order, one might look to the Articles of Agreement of the International Monetary Fund to serve as its constituting document. See *Articles of Agreement*, INT'L MONETARY FUND, <https://www.imf.org/external/pubs/ft/aa/index.htm> (last visited Sept. 26, 2016) (adopted at the United Nations Monetary and Financial Conference on July 22, 1944).

168. One might understand the IMF's policy determinations and the implementation of its obligations as the substantive element of its organization. See, e.g., *Selected Decisions and Selected Documents of the IMF*, INTERNATIONAL MONETARY FUND, <https://www.imf.org/external/pubs/ft/sd/index.asp> (last updated Dec. 31, 2013).

169. One might consider the bylaws of the International Monetary Fund as its procedural architecture. See INTERNATIONAL MONETARY FUND, BY-LAWS RULES AND REGULATIONS (2016), <https://www.imf.org/external/pubs/ft/bl/blcon.htm>.

170. On functional differentiation, see, e.g., Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3, 13–15 (Christian Joerges et al. eds., 2004); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1425–29 (1991). On the democratic deficiencies of such communal law producing groupings, see, Gráinne De Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 221227–256 (2008); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25, 42–52 (2003).

1] *The Emerging Normative Structures of Transnational Law*

itself derivative or reflective of the state system and of law, conventionally conceived. It also suggests the danger that the definition of transnational law is so broad that it must embrace everyone and everything. In a better sense, then, transnational law might be understood as a law for the constitution of normative systems with binding effect or the constitutionalization of the societal sphere. From this constitutionalization it is possible to consider the extent and nature of specific subsystems that may spring from it. “The question is now whether the integrative function of a constitution is of the same nature as the normative.”¹⁷¹

Transnational law is tied neither to a state nor a single jurisdiction. No single person or entity controls the creation and regulation of transnational law.¹⁷² No one person or entity and no single institution controls transnational lawmaking, it might be understood as the emergence of societies “organized by appetite.”¹⁷³ Transnational law is not dependent on a single lawgiver or regulator; it can be understood as a layering of law and rule systems the authority of which extends to objects subject to multiple regulatory regimes.¹⁷⁴ Transnational law is thus the study of law that does not belong to or can be controlled by any single system of domestic or international law, as both have been

171. DIETER GRIMM, INTEGRATION BY CONSTITUTION, 3 I-CON 192, 195 (2005); *see also id.* at 198–203 (preconditions for constitutional integration).

172. *See, e.g.*, GERALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010); *Cf.*, Sigrid Quack, *Legal Professionals and Transnational Law Making: A Case of Distributed Agency*, 14 ORG. 643, 643–66 (2007).

173. DAVID A. WESTBROOK, CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF DISCONTENT 21, 38 (2004) (“Economic integration was intended to break the identity of geography, government, economics, culture, and emotion that too often engendered violent nationalism, and to create instead a new cosmopolitan situation, in which geography, government, economics, culture and emotion are polymorphously linked rather than conterminously arrayed.”).

174. Its foundational essence, then, is essentially polycentric in a context in which every regulatory jurisdiction is limited and incapable in reaching to every aspect of a regulated object. John Ruggie understood this as a necessary consequence of the governance gaps at the heart of the challenge of regulating Transnational Corporations: “The overriding lesson I drew . . . was that a new regulatory dynamic was required under which public and private governance systems—corporate as well as civil—each come to add distinct value, compensate for one another’s weaknesses, and play mutually reinforcing roles International relations scholars call this “polycentric governance.”

JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 78 (2013). This layered governance and its reworking of the nature of state sovereignty in the international system of states is not unknown in public law. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 112–35 (1995).

traditionally constituted.¹⁷⁵ Diffusion of regulatory authority is one key to understanding the structure of transnational lawmaking. Another key is functional differentiation of authority among a wide variety of political and nonpolitical communities.¹⁷⁶ And it may also extend to the diffusion of the concepts on which law systems themselves are built—for example, concepts like the rule of law itself,¹⁷⁷ which may constitute “a meta text for all transnational normative orders that speak to law, justice, or ‘regulation.’”¹⁷⁸ The system of hierarchical and vertically integrated regulatory systems grounded on the state as the pinnacle of lawmaking and on the community of states as the disciplinary mechanism for relations among states has been augmented by regulatory systems covering matters beyond the reach of any single state.¹⁷⁹ Transnational law starts from the premise that law and lawmaking are no longer the exclusive preserve of political states, or of the community of states.¹⁸⁰ Transnational law posits that political communities no longer hold a monopoly on law making—that law systems are no longer grounded on an identity between law (or regulatory authority) and the state (and the community of states).¹⁸¹ Autonomous supranational actors, private global actors, and communities grouped by function or affinity can, to some extent, produce regulatory systems understood to be transnational—even those that threaten the foundations of the state order.¹⁸²

The transnational in law requires a reconsideration of law and its relationship to the state.¹⁸³ Transnational law is neither a single or unitary system of laws, rules and principles, nor necessarily systems that

175. Menkel-Meadow, *supra* note 164, at 102–05.

176. On functional differentiation of authority within systems, see, for example, Luhmann, *supra* note 170, at 1419.

177. Jothie Rajah, ‘Rule of Law’ as Transnational Legal Order, in TRANSNATIONAL LEGAL ORDERS, 340–373 (Terence Halliday & Gregory Shaffer eds., New York: Cambridge University Press, 2015).

178. *Id.* at 369.

179. This produces substantial repercussions on conventional assumptions about the hierarchy of law and its legitimation premises. See, e.g., Marie-Laure Djelica, *From the Rule of Law to the Law of Rules*, INT’L STUD. OF MGMT. AND ORG., Spring 2011, at 35, 35–61 (2011).

180. See generally H. Patrick Glenn, *A Transnational Concept of Law*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 839–862 (Mark Tushnet & Peter Cane eds., Oxford, 2012).

181. For an earlier intuition, see generally Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 732, 732–92 (1970).

182. See, e.g., Upendra Baxi, *The Globalization of Fatwas Amidst the Terror Wars*, in THE POWER OF LAW IN A TRANSNATIONAL WORLD: ANTHROPOLOGICAL ENQUIRIES 96–114 (Franz von Benda-Beckmann et al. eds., Berghahn Books, 2009).

183. See generally Roger Cotterrell, *Transnational Communities and the Concept of Law*,

1] *The Emerging Normative Structures of Transnational Law*

mimic those of the state. Transnational law is not a unitary system of laws and rules analogous to the legal structure of a state, or the treaty and custom structure of the law of nations; it has no pretense to a singular global law that amalgamates the power of states for its own.¹⁸⁴ Transnational law is an amalgam of rule systems, of hard and soft law, that are limited in scope, but effective within the scope of the authority of the rulemaking community, both autonomous and reflexive.¹⁸⁵ The key characteristic of transnational sub-systems is their functional limits.¹⁸⁶ Like classical federal systems, all transnational sub-systems are based on grants of limited and specific authority. These limits are defined sometimes by function (commercial law, investment, human rights) and sometimes by other factors (shared belief, citizenship in particular political communities and the like). The aggregation of sub-systems constitutes the field of transnational law. However, transnational law as a whole ought to be grounded in certain principles and rules that form the basic focus of any study of this field. Its foundational premise rests on acceptance of the existence of a system of non-national, supra-national or multi-national principles and rules applicable, in accordance with its own terms and logic, to public and private actors, and natural and juridical persons. This system exists independent of the control or authority of any one state or of the community of states as a whole.

Transnational law is structured in accordance with its own logic, quite apart from that which organizes the state.¹⁸⁷ There are four characteristics that form the basis of the study of the grounding rules and principles of transnational law and law-making: (1) scope of authority,

21 RATIO JURIS 1, 1–18 (2008).

184. See generally Bryan H. Druzin, *Anarchy, Order, and Trade: A Structuralist Account of why a global Commercial Legal Order is emerging*, 47 VAND. J. TRANSNAT'L L. 1049 (2014) (analyzing the structural constraints on development of transnational governance orders beyond commercial law).

185. See generally Galf-Peter Calliess, *Reflexive Transnational Law: The Privatization of Civil Law and the Civilization of Private Law*, 23 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 185, 188–194 (2002).

186. See Poul F. Kjeaar, *The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law, and the Political in the Transnational Space*, 2010 WIS. L. REV. 489, 494–510 (2010). Cf. JESWALD W. SALACUSE, MAKING GLOBAL DEALS: NEGOTIATING IN THE INTERNATIONAL MARKETPLACE (1991).

187. But see Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism*, 21 TRANSNAT'L. L. & CONTEMP. PROBS. 305, 305 (2012).

(2) institutional autonomy, (3) regulatory authority, and (4) effectiveness of power to settle disputes. These have a constitutional element¹⁸⁸ as the organizing principles that give the regulatory community form and set its organizational boundaries. Such principles include the constitution of a government apparatus and the rules for the operation of the governance power vested in this organization. They also have substantive and process elements. They include the rules, laws, and other norms that are produced or administered by the community and the process rules, through which they are applied, enforced, constructed and interpreted. Thus the substantive rules of transnational law systems ought to be distinguished from the “constituting” rules of a transnational system itself. The former has been the object of increasing study. The latter has not. Yet it is the latter that is crucial for the emergence of the transnational as a “field” of “law” in its own right. “What—in the domestic context—would, for example, justify a strict separation between labor law on the one hand and corporate law, on the other? We should know and did already know for a long time . . . , that the justification of distinguishing between these two legal fields, despite its ‘functional’ persuasiveness . . . , is at its core *political*[:]; similar justificatory moves occur in both emerging and maturing transnational legal fields.”¹⁸⁹

At the heart of self-constituting communities is an independence born of consent to join together for certain purposes.¹⁹⁰ Functional differentiation rather than territorial differentiation marks the borders of the stateless government and governance beyond law. Autonomy presupposes an ability to distinguish the community from others, that

188. On this possibility, from a variety of perspectives, some of them critical, see, for example the approaches of Colin Scott et al., *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 J.L. & SOC'Y 1, 1–19 (2011); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004); Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65 (1996).

189. Peer Zumbansen, *Law & Society and the Politics of Relevance: Facts and Field Boundaries in 'Transnational Legal Theory in Context'*, 11 NOFO (INTERDISCIPLINARY JOURNAL OF LAW AND JUSTICE) 1, 4–5 (2014), <http://www.helsinki.fi/nofo/NoFo11Zumbansen.html>. See also Kaarlo Tuori, *Transnational Law: On legal Hybrids and Perspectivism*, in TRANSNATIONAL LAW: RETHINKING EUROPEAN LAW AND LEGAL THINKING 11, 52 (Miguel Maduro, Kaarlo Tuori, and Suvi Sankari, eds., 2014) (“This is a major reason for legal hybridization at the level of fields of law; the emergence of new putative fields of law that confuse the time honored systematization.”).

190. These autonomous orders occupy a variety of fields. For example, consider the emerging arbitral legal order discussed in EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 38–46 (Martinus Nijhoff, 2010).

1] *The Emerging Normative Structures of Transnational Law*

is, to define the characteristics that mark the community as distinct in the sense of permitting the regulation of its members. System autonomy permits the constitution of communities as self-referencing; these communities look to their own constituting norms as the source of the rules under which the community operates within the scope of its purpose. The state does not serve this purpose. The authority to “legislate” additional rules from the organizing or constituting rules of the community, like the authority of legislatures to enact statutes constitutionally permissible, suggests a regulatory authority that when combined with autonomy creates the space for the governmentalization of non-state rule systems that operate outside of the territorial competences of states.¹⁹¹ An institutionalized system for making rules, developed from the framework adopted by a group, unified as a community and bounded by defined purposes, maintains its integrity through systems for the enforcement of its community and the rules developed for its management—as it does for the classical state through its bureaucracies.¹⁹² Transnational systems include methods for settling disputes among members and to maintain communal discipline. These techniques can range from expulsion from the group¹⁹³ to more elaborate systems of monitoring and disciplining based on quasi-judicial processes maintained within the system or arising from out of it.¹⁹⁴

All transnational law systems share certain characteristics. Transnational law is not bound to the jurisdiction of any state. It is based on systems of partial and contingent regulatory authority; each regulatory system is dependent on others, to some extent, and yet is complete within the scope of its authority. Transnational legal systems are both horizontally and vertically integrated to some extent with each other and with domestic and international systems. The self-regulating cor-

191. On the possibility of shifting locations for authority, even authority relating to “legality,” see, generally, for example, the discussion in A. Claire Cutler, *Locating “Authority” in the Global Political Economy*, 43 INT’L STUD. Q. 59–81 (1999).

192. See, e.g., Pierre Bourdieu, *Rethinking the State: Genesis and Structure of the Bureaucratic World*, SOC. THEORY, March 1994, at 1, 1–18 (Loic J. D. Wacquant & Samar Farage trans., 1994).

193. See, e.g., *The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Sept. 26, 2016).

194. Larry Catá Backer, *Apple, Inc, the FLA and the Governance of Supplier Labor Standards Beyond the State*, LAW AT THE END OF THE DAY (Jan. 17, 2012), <http://lbackerblog.blogspot.com/2012/01/apple-inc-fla-and-governance-of.html>.

poration evidences nicely the contours of governance without government, or government without the state.¹⁹⁵ It is also illustrative of the tensions of public and private governance in emerging transnational systems understood as a tension in the application of ideology in its legitimating function. We have seen that one of the greatest strengths of ideology is the way in which it can fade into the background, into the functioning apparatus of the state.¹⁹⁶ What appears neutral may be little more than the expression of presumptions that constitute an ideological framework for understanding and managing reality.¹⁹⁷ Those presumptions then are unacknowledged as they operate in the background, as long as they are uncontested.¹⁹⁸ Unremarkably, these presumptions create the background against which everything else is developed.¹⁹⁹ Law, especially the science of law, is particularly susceptible to such management. Lawyers tend to be the servant of the law and legal systems. The lawyer's craft is grounded in large part on the ability to absorb the governing ideology of a legal system and then deploy it in two ways: first, to preserve the integrity of the system in which the lawyer operates, and second, to use the rules of that system, consistent with its normative ideology, to serve the needs of those for whom the lawyer works.²⁰⁰

Corporate law is no stranger to this phenomenon.²⁰¹ Corporate law, more than other fields, seems strongly attached to the ideology of

195. See Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L. REV. 541, 561–70 (2006).

196. FRANK BURTON & PAT CARLEN, OFFICIAL DISCOURSE: ON DISCOURSE ANALYSIS, GOVERNMENT PUBLICATIONS, IDEOLOGY AND THE STATE (1979).

197. This is particularly acute in the long running American argument over the societal and legal framework for managing its inter-racial relations. See, e.g., ANDREW KULL, THE COLOR BLIND CONSTITUTION 1–22 (1992) (race neutrality and anti-discrimination principles); contra Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1, 62–69 (1991).

198. But even when exposed, they might be subsumed within the ideological contests that then protect the system from the revelations of its structural basis. Consider in that light the exposure of the agendas of power elites within a highly networked elite in the United States. C. WRIGHT MILLS, THE POWER ELITE (Galaxy Books, 1959).

199. This was nicely developed in the case of European anti-Semitism in DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 27–79 (1996); HUMAN RIGHTS WATCH, GERMANY: DISCRIMINATION IN THE NAME OF NEUTRALITY: HEADSCARF BANS FOR TEACHERS AND CIVIL SERVANTS IN GERMANY 1–33 (2009).

200. Cf. JAN M. BROEKMAN, & LARRY CATÁ BACKER, LAWYERS MAKING MEANING: THE SEMIOTICS OF LAW IN LEGAL EDUCATION II (2013).

201. See, e.g., MICHAEL J. WHINCOP, AN ECONOMIC AND JURISPRUDENTIAL GENEALOGY OF CORPORATE LAW 196–220 (2001).

1] *The Emerging Normative Structures of Transnational Law*

the state and state power.²⁰² Though one might think that corporate law would be an odd site for the promotion of state and state-system ideology, a little thought suggests the strength of the tie between the normative foundations of corporate law and the normative basis of the state. That tie was brought home recently.²⁰³ The authors have found that European firms use the *Societas Europea* (SE) form to avoid mandatory co-determination rules, but not necessarily to shop for the most favorable national corporate law to fill in gaps in SE regulation. The analysis is solid and the conclusions are strong. But what drew my attention was the characterization of the behavior to be studied—what is commonly called legal arbitrage. In their review of the literature, the authors noted:

Legal arbitrage can be defined as taking advantage of differences between legal regimes governing the same economic activities (or close substitutes). In the case of company law, legal arbitrage may occur especially when firms can choose to incorporate in different jurisdictions without having to relocate their business activities. Corporate law arbitrage is a demand side precondition for charter competition among jurisdictions: if firms do not react to differences in company law, there is no point for jurisdictions in competing for incorporation. Legal arbitrage, therefore bears on the longstanding academic debate on charter competition.²⁰⁴

The authors cite the greatly influential American authorities for the idea of competition between public regulators for corporate charter business and the ensuing “race for the bottom” when states suffer the indignity of exposing their legislation to a market where exit is possible.²⁰⁵

202. One acquires a sense of this as the essence of the corporate law is transposed—the essential connection between the management of capital aggregations, macro-economic concerns and the overarching authority of the state and its constitutive obligations are written into law. See generally Berhard Black & Reinier Kraakman, *A Self-Reinforcing Model of Corporate Law*, 109 HARV. L. REV. 1911–82 (1996).

203. See generally Horst Eidenmüller, Andreas Engert & Lars Hornuf, *Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage*, 10 EUR. BUS. ORG. REV. 1, 1–33 (2009).

204. *Id.* at 3.

205. See principally, William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666, 696–700 (1974). Yet the direction of the movement may go to the top rather than the bottom. See, generally Ralph K. Winter Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–62 (1977). Its direction may also be indeterminate. See, generally, William Bratton, *Corporate Law’s Race to Nowhere in Particular*, 44 U. TORONTO L.J. 401, 402–03, 418–25 (1994). At least in the American context, it might be argued that this approach enhances shareholder value. See ROBERTA ROMANO, THE

The description is accurate, but it also veils a set of ideological presumptions that it embraces and advances through its analytical framework.²⁰⁶ The first is that corporations must be governed by a single statutory framework. The second is that there is an optimal statutory framework that is (usually) connected in some way to the site of an entity's center of operations. The third is that statutory competition (arbitrage) reduces the power of the state to assert policy objectives. These assumptions are in turn based on a more fundamental assumption—that states stand at the center of the regulatory project as the privileged entity, whose authority and autonomy (especially regulatory autonomy to impose its will on all of its subjects) ought to be protected against incursions from non political actors operating within the territory of a given state. The focus of legal arbitrage is the state and its needs, rather than the corporation. The object of the study of corporate behavior is to ascertain whether they are behaving in ways that preserve the regulatory privilege of the state within a rule system, where states have some measure of responsibility for providing a basis for permitting the enhancement of shareholder value. But this ideology is challenged by the reality on the ground in enterprise operations across borders—a reality that produces overall order within a set of shifting legal parameters that are themselves influenced by international regulatory regimes.²⁰⁷ And it has produced the sort of governance gaps that have made international and private interventions necessary.²⁰⁸

However, if one assumes away the privileged position of the state, it is possible to think about what is called legal arbitrage in a substantially different way.²⁰⁹ Globalization makes this possible in ways that would have been more difficult to conceive even a decade ago. In a world in which capital may be freely moved virtually everywhere, the

GENIUS OF AMERICAN CORPORATE LAW 14–32, 37–44 (1993).

206. Aspects of which are considered in SCOTT R. BOWMAN, *THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY* 125–84, 237–85 (1996).

207. See, e.g., Franco Furger, *Global Markets, New Games, New Rules: The Challenge of International Private Governance*, in *RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS* 201, 240 (Richard P. Appelbaum et al. eds., Hart, 2001) (private governance is “theoretically challenging because they suggest the possibility that constellations of private actors can under certain conditions provide a variety of public goods and sustain rules, norms and standards without or with minimal intervention by nation-states”).

208. See, e.g., RUGGIE, *supra* note 174.

209. See, e.g., Robert C. Bird, *Pathways of Legal Strategy*, 14 *STAN. J. L. BUS. & FIN.* 1, 4–9 (2008).

1] *The Emerging Normative Structures of Transnational Law*

state becomes a means for the production of capital, or, a cost to its production. Those means and costs focus on the ability of the state to facilitate capital production through investment (its regulatory structures and its police powers to produce stability in its territory), and the costs include the price the state charges for its services (tax and regulatory costs). From yet a different perspective, states produce regulation that is then consumed by economic enterprises who must choose among these “rule commodities” in arranging their own operations to maximize their use in producing wealth. But laws are different in different states. Beside the cultural element, and perhaps the preference of its electorate,²¹⁰ this reflects both that states are not equal in power and influence (even within their own territories),²¹¹ and that states may be subject to coercion from above—the consensus of international organizations to internationalize domestic law to different degrees,²¹² or from the consumers of regulation themselves.²¹³ Corporations consume regulation like they consume labor, capital and other items necessary for their operation. Within this conceptual universe, regulatory markets can be understood to operate like other markets (labor, capital, consumer, etc.) though subject to their own peculiarities. The traditional object of lawyers and of jurisprudence has been to center a search for legal harmonization around the optimum set of conditions and structures that would move law from an object of consumption to a foundation for production.²¹⁴ Legal arbitrage becomes something

210. This is not an insignificant caveat. One can note that some states have used this notion of national characteristics as the central element of their lawmaking enterprise and their willingness to resist internationalization, legalization, and judicialization of the international sphere with effects on their national territory. See RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 55–124 (Cambridge 2002).

211. See, e.g., STEPHAN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 184–219 (1999).

212. See, e.g., Claire Cutler, *Human Rights Promotion through Transnational Investment Regimes: An International Political Economy Approach*, 1(1) *POLITICS AND GOVERNANCE* 16, 28–29 (2013); Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order*, 18(2) *IND. J. GLOB. L. STUD.* 751, 782–800 (2011).

213. See Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 *HARV. INT'L L.J.* 47, 59–60 (1993) (“When a state self-consciously engages in regulatory competition, it recognizes that it is an economic institution that must compete in an open economic setting—that it must sacrifice or compromise domestic policy in order to achieve international economic policy goals.” *Id.* at 59). In the context of globalization, see also, RICHARD FALK, *PREDATORY GLOBALIZATION: A CRITIQUE* 39–46 (1999); KENICHI OHMAE, *THE END OF THE NATION-STATE: THE RISE OF REGIONAL ECONOMIES* 117–40 (1996).

214. For an excellent example, see CURTIS J. MILHAUPT & KATHERINA PISTOR, *LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* 27 et seq. (2008).

less odd, focused on the corporation rather than the state and on international standards rather than law.²¹⁵ And its transnational element permits arbitration not merely of law but of private standards as well.²¹⁶ Ideological lenses, especially those fixated on the superiority of the state system and its territorial principle (and presumption that for every entity there is a singular public regulatory home), can cause people to see the same thing in substantially different ways. In the case of legal arbitration or self-regulating corporations, the difference in vision is a function of the assumptions about the role of states and the state system in their relation to corporations. The “problem” of legal arbitration is important where the preservation of a law hierarchy grounded in the state system is implicitly embraced. The opportunity presented by the self-regulating corporation is important where the state is subsumed within a transnational regulatory space.

From this ideological perspective, what might appear as soft law under the presumptions of state ideology takes on the characteristics of binding obligation. The inevitability of institutionalized inter-governmentalism—the EU approach to dealing with extra-territorial governance²¹⁷—necessary under the logic of state ideology²¹⁸ has had to make room for a different approach. This distinct approach is one grounded in the contractual and economic relationship of actors

215. Hiram E. Chodosh & James R. Lisher II, *International Arbitration of Controversial Medical Technologies: An Introduction*, 35 CASE W. RES. J. INT'L L. 363, 364–65 (2003) (“Legal arbitration is a variant of the economic practice. . . . Theoretically, arbitration decisions may be made on the substantive law (or lack thereof) or the strength (or weakness) of the institutions responsible for enforcing it.”). See generally the discussion in Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis To Comparative Law*, 48 INT'L & COMP. L. Q. 405, 405–18 (1999); Neal D. Woods, *Interstate Competition and Environmental Regulation: A Test of the Race-to-the-Bottom Thesis*, 87 SOC. SCI. Q. 174 *passim* (2006).

216. That has become the subject of certain legal regimes, for example food production, discussed in PRIVATE FOOD LAW: GOVERNING FOOD CHAINS THROUGH CONTRACT LAW, SELF-REGULATION, PRIVATE STANDARDS, AUDITS AND CERTIFICATION SCHEMES (Bernd van der Meulen ed., Wageningen Academic Publishers 2011). See generally Khalid Nadvi, *Global Standards, Global Governance and the Organization of Global Value Chains*, 8 J. OF ECON. GEOGRAPHY 323, 323–43 (2008) (esp. Section 2); Benjamin Cashore, Graeme Auld & Deana Newsom, *The United States' Race to Certify Sustainable Forestry: Non-State Environmental Governance and the Competition for Policy-Making Authority*, 5 BUS. & POL. 219 *passim* (2003)(forestry).

217. NEIL NUGENT, *THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION* 103–276 (Palgrave Macmillan 6th ed., 2006); Uwe Puetter, *Europe's Deliberative Intergovernmentalism: The Role of the Council and the European Council in EU Economic Governance*, 19 J. EUR. PUB. POL'Y 161, 161–78 (2012).

218. Backer, *supra* note 80. The self-regulating corporation provides an example of the way in which ideology affects analysis and the assessment of the possibility of legitimately constituted governments outside the state.

1] The Emerging Normative Structures of Transnational Law

bound in sometimes complex systems, the rules for which increasingly arise in contract, in standards developed by transnational civil society actors and enforced through decisions of consumers and investors as much as arbitrators and communal actors serving in a decision-making capacity.²¹⁹ But even intergovernmentalism has acquired a dimension in law beyond the law structures of domestic and international legal orders.²²⁰ This is not so much a new governance that focuses on the *means* of government and the expression of *legality*²²¹ as it is a reframing of government systemicity in which the state and its identity with law is de-centered.²²²

Thus, just as lawmaking might have become unmoored from the state, the state has itself become unmoored.²²³ That unmooring suggests more than the reconstitution of states within a more generalized public law based system, but also reconstitutes law beyond the state—it becomes trans-national.²²⁴ It is in this context that the matter of corporate citizenship²²⁵ serves as a proxy for the equally important converse issue—that of the private rights of states as participants in global

219. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21(1) J. LEGAL STUD. 115, 130–48 (1992) (esp. Section IV). For the classic study of the use of social norm systems to develop order within a self reflexive community, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 123–267 (1991).

220. See, e.g., Backer, *supra* note 47.

221. See generally R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652–67 (1996). For the conversation about the “new governance” in its current form, see, for example, Orley Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004).

222. See generally GRALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE*, *supra* note 14, at 96–152; Ken Conca, *Old States in New Bottles?: The Hybridization of Authority in Global Environmental Governance*, in *THE STATE AND THE GLOBAL ECOLOGICAL CRISIS* 181 (John Barry & Robyn Eckersley eds., 2005).

223. See, e.g., DENNIS PATTERSON & ARI AFIALO, *THE NEW GLOBAL TRADING ORDER: THE EVOLVING STATE AND THE FUTURE OF TRADE* 11–40 (2008).

224. This suggests a more robust autonomy than the concept of separateness, of derivative character of law and governance less attached to the state, might otherwise suggest. See, e.g., PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 36–67 (2002). For other consideration of law autonomy from the state in a number of variations, see, for example, ROBERT MCCORQUODALE, *INTERNATIONAL LAW BEYOND THE STATE: ESSAYS ON SOVEREIGNTY, NON-STATE ACTORS AND HUMAN RIGHTS* (2011) (Part II essays); PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 23–60 (2012); *GLOBAL ADMINISTRATIVE LAW AND EU ADMINISTRATIVE LAW: RELATIONSHIPS, LEGAL ISSUES AND COMPARISON* (Edoardo Chiti & Bernardo Giorgio Mattarella eds., Springer 2011) (esp. Part III essays).

225. See, e.g., GRAHAME E. THOMPSON, *THE CONSTITUTIONALIZATION OF THE GLOBAL CORPORATE SPHERE?* 53–98 (2012); Teubner, *supra* note 13, at 156.

markets.²²⁶ At the international level, states and other collectives might well have to meet more as equals, even as they interact within vertical hierarchies in particular contexts.²²⁷ But even those localized hierarchies are now unstable. Corporations negotiate “agreements” with states in organizing their production chains,²²⁸ non-state actors develop standards to regulate global production,²²⁹ and nations negotiate treaties that export their internal governance.²³⁰ Large corporations can coerce small states in ways that mimic the ways in which larger states can do the same to smaller and more vulnerable ones. States and corporations are now capable of deploying forces in the field—sometimes states hire corporations that serve as mercenary armies²³¹ that protect its own operations as well as those of the institutions of the state from sub-national and supra-state threats.²³² The clear lines of

226. See generally Hao Liang, Bing Ren, & Sunny Li Sun, *An anatomy of state control in the globalization of state-owned enterprises*, 46 J. INT’L BUS. STUD. 223, 223–40 (2015); Larry Catá Backer, *Globalization and the Socialist Multinational: Cuba at the Intersection of Business and Human Rights*, in A HANDBOOK OF CONTEMPORARY CUBA: ECONOMY, POLITICS, CIVIL SOCIETY, AND GLOBALIZATION 287–99 (Mauricio A. Font & Carlos Riobó eds., Routledge 2013).

227. See, e.g., Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 3–22 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002); Susan K. Sell, *Structures, Agents and Institutions: Private Corporate Power and the Globalization of Intellectual Property Rights*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM 91–106 (Richard A. Higgott, Geoffrey RE.D. Underhill, & Andreas Bieler eds., 2000). But see Jeffrey Dunhoff, *Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17(3) EUR. J. INT’L L. 675 (2006).

228. See generally JOHN H. DUNNING & SARIANNA M. LUNDAN, *MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY* 665–705 (2d ed. 2008).

229. See Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in THE POLITICS OF GLOBAL REGULATION 44–72 (Walter Mattli & Ngaire Woods eds., 2009).

230. See, e.g., Jiangfeng Li, *Equal or Unequal: Seeking a New Paradigm for the Misused Theory of ‘Unequal Treaties’ in Contemporary International Law*, 38 HOUS. J. INT’L L. 465, 493–98 (2016); Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT’L REV. L. & ECON. 107, 118–22 (2005); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 672–73 (1998).

231. See, e.g., Roni A. Elias, *The Rise of the Private Military Form in International Conflicts: A Problem of Legal Authority and Extraterritorial Jurisdiction*, 31 CONN. J. INT’L L. 93, 97–104 (2015); Daphné Richemond-Barak, *Rethinking Private Warfare*, 5 LAW & ETHICS HUM. RTS. 159, 169–74 (2011); FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., Oxford 2007) (see especially the introduction to these essays at 1–10).

232. See generally Jose L. Gómez del Prado, *A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors*, NOTRE DAME J. INT’L, COMP. & H.R. L. 1, 4–23 (2011); Lawrence W. Serewicz, *Globalization, Sovereignty and the Military Revolution: From Mercenaries to Private International Security Companies*, 39 INT’L POL. 75 *passim*

 1] *The Emerging Normative Structures of Transnational Law*

public and private authority, and even the once clear lines of its Marxist-Leninist opposite, have become blurred.²³³ In that context, constitutionalism and the constitutionalization of governance have become more complex concepts.²³⁴ More importantly, the range and capacity of players has substantially increased as well.

It is in this context that it is possible to conceive of the transnational as a normative construct. That is, to see the transnational as something more than a process for filling governance gap, or an invitation to multilateralism or a methodological trope—and in this later construction one with all of the ambiguous eddies of comparative law.²³⁵ It is that reality that is emerging from a better view of changes on the ground in this century that no longer conform comfortably to the ideologies on which our systems were constructed in the last century. And it is that reality that may drive scholars, and the elites who order the world, toward a new understanding that the governance systems they are operating are transnational in both a normative and a process sense.

VI. CONCLUSION

In 1927, the American philosopher John Dewey considered the problem of the state.²³⁶ He suggested, well before world warfare and globalization changed the realities of the state within the web of power relationships that mark the 21st century, that “[t]here is no more an

(2002).

233. Chinese socialist modernization, a core element of the Basic Line of the Chinese Communist Party Constitution, has been criticized for its deviation from Soviet Marxist Leninism and an aberrational conflation of Marxism and markets. See, e.g., Hu Yaobang, *Create a New Situation in All Fields of Socialist Modernization*, BEIJING REV., http://www.bjreview.com.cn/90th/2011-07/01/content_373428_2.htm (last updated July 1, 2011). Cf. ALAN R. KLUWER, *LEGITIMATING THE CHINESE ECONOMIC REFORMS: A RHETORIC OF MYTH AND ORTHODOXY* 61–70 (1996).

234. See, e.g., Larry Catá Backer, *The Concept of Constitutionalization and the Multi-Corporate Enterprise in the 21st Century: From Body Corporate to Sovereign Enterprise*, in *MULTINATIONALS AND THE CONSTITUTIONALIZATION OF THE WORLD POWER SYSTEM* 170, 179–188 (Jean-Philippe Robé et al. eds., Routledge 2014).

235. I refer here generally to earlier readings of Roscoe Pound, *The Revival of Comparative Law*, 5 TUL. L. REV. 1 (1930); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1–27 (1974); UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1998); *OXFORD HANDBOOK OF COMPARATIVE LAW* (Reinhard Zimmermann & Mathias Reimann eds., Oxford 2006). These I read as suggesting both the intractability and complexity of seeking to understand the value and objects of comparative law as methodology, as ideology, and as a means of harmonization of communication in a world in which legal systems may not need to align but must avoid inhibiting transactions between them.

236. JOHN DEWEY, *THE GLOBAL PUBLIC AND ITS PROBLEMS* (1927).

inherent sanctity in a church, trade union, business corporation, or family institution than there is in the State. Their value is also to be measured by their consequences. The consequences vary with concrete conditions. . . .²³⁷ Globalization has made possible the realization of this insight in ways that Dewey could never have predicted. We have been moving from the recognition of the possibility of governance without government, to that of the reality of government without the state. Part of the difficulty of that recognition has been the ideological blinders created by a continuing adherence to state ideology as an ordering structure of reality for purposes of analysis. But another part is made up of both habit and nostalgia for the idea of the state (as the only possible legitimate foundation for human political organization) that manages, in turn, economic, social and cultural life. The resulting tension between public and private governance in the emerging transnational legal order, then, is best understood as the consequence of the emergence of a peculiar governance system. That system, though networked with and operating in the same spaces as the state, has not necessarily embedded in either the normative ordering framework of the state system or the state ideology that provides authority for that assertion of power.²³⁸ But reality is not in tension with itself. What ultimately emerges as the engine of tension are those mediating explanatory structures that have yet to catch up with the realities emerging in real space.

237. John Dewey, *Discovery of the State*, in *LEVIATHAN IN CRISIS: AN INTERNATIONAL SYMPOSIUM ON THE STATE, ITS PAST, PRESENT AND FUTURE, BY FIFTY-FOUR TWENTIETH CENTURY WRITERS* 3, 13 (Waldo R. Browne ed., Viking Press 1946).

238. Indeed, one can understand the state as preserving its authority only as a state of exception to itself—that is, the normative aspect of the state as an apex authority is contradicted by the facts on the ground which it still asserts is bound up within the law-state system itself. Consider by analogy the undermining of law within the state system through the invocation of a state of exception to law required by the shifting facts on the ground that is the unending crisis of terrorism. Cf. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 87 (Kevin Attell, trans., U. Chicago Press 2005) (“The normative aspect of law can thus be obliterated and contradicted within impunity by a governmental violence that—while ignoring international law externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law.”).