INTRODUCTION: THE NEW CONSTITUTIONAL ORDER

The contemporary world appears unsettled, coming together and falling apart in a state of continual convulsion. The fall of the wall in 1989 and the subsequent collapse of the Soviet empire kicked into gear processes of seemingly interminable change. Events precipitated by 9/11 have hastened this changing global landscape. Distances contracted, time compressed, and world-interconnectedness ever widening are the characteristics often associated with the term "globalization." Much contemporary thinking about globalization is preoccupied with this sense of newness, heterogeneity, and fluidity. The mantra is that the "old word has fallen apart" (Ohmae 1995: 7) and it is being replaced by a newer and faster one where geography is immaterial, global actors improvise, and economic, political, and cultural forces are capable of being unleashed from the yoke of parochialism. Borders, Beck maintains, "have long since ceased to exist . . . they are zombie categories" (2005: xi). This has unleashed a world of possibilities, it is said. Robertson and Lechner argue that the global scene is "highly pluralistic" so that, rather than one version of globalization being predominant, there is "a proliferation of . . . competing definitions" of the global situation (1985: 111). In a similar vein, Albrow claims that there is "no axial principle underlying global institutions"; rather, there is a pluralism reflecting "no theory of the greater good, simply the historic accumulation and interplay of national experiences and expertise coming to terms with each other" (1997: 125).

This preoccupation with newness, mobility, and improvisation draws attention away from a transnational regime concerned with fixity and

security. There has emerged out of this convulsion an ensemble of laws and institutions that governs international economic relations in the realm of foreign investment. These are rules and structures ordinarily associated, though not exclusively, with the term "economic globalization." The emergence of a transnational regime for the protection and promotion of foreign investment challenges directly the proposition that global capital has no tangible, institutional fabric. This rules regime cumulatively attempts to fashion a global tapestry of economic policy, property rights, and constitutionalism that institutionalizes the political project called neo-liberalism. This project advances the idea that the state should recede from the market, restrict its economic functions, and limit its redistributionist capacity (Harvey 2005; Przeworski 1999). The paradox is that at a time when the institutions of democracy are being reproduced globally, democracy is not to be trusted in economic matters.

Neo-liberalism and its institutional partner, the investment rules regime, aim to institutionalize a model of constitutional government intended primarily to facilitate the free flow of goods, services, capital, and persons unimpeded across the borders of national states. This is a model long promoted by the leading countries of the Organization for Economic Cooperation and Development (OECD) and by affluent minorities within developing and less-developed countries. The model takes material shape by means of the instruments intended to promote and protect foreign direct investment, such as aspects of the Uruguay Round General Agreement on Tariffs and Trade (GATT) enforced by the World Trade Organization (WTO), the investment chapter of the North American Free Trade Agreement (NAFTA), and some 2,500 bilateral investment treaties (BITs) and numbers of bilateral free trade agreements. The model was promoted in the now-stalled talks leading toward a Free Trade Agreement of the Americas (FTAA) and the failed draft Multilateral Agreement on Investment (MAI). These bilateral, regional, and sought-after multilateral instruments are intended to generate an interlocking network of rules and rule-making structures – an "investment rules regime" – that place substantive limits on state capacity in matters related to markets.

The objective of this book is to explore the implications of this new institutional fabric for democratic self-government. It aims to map the role of law – constitutional law in particular – in the formation of the rules and structures associated with economic globalization. By elucidating the linkages between the investment rules regime and

constitutionalism – between the constitution-like regime for the protection of foreign investment and the projects pursued by national states – we will comprehend better some of the legal forms by which economic globalization is being made tangible.

WHY CONSTITUTIONALISM?

Constitutionalism is not ordinarily associated with the global diffusion of the forces of production and the compression of the time-space continuum, attributes usually associated with globalization. A constitutional lens is helpful analytically as the regime of investment rules can be understood as an emerging form of supraconstitution that can supersede domestic constitutional norms. From this external perspective, investment rules can be viewed as a set of binding constraints designed to insulate economic policy from majoritarian politics. The rules and values of the regime are also being internalized and made material within national constitutional regimes. This is being accomplished through constitutional reform and, oftentimes, judicial interpretation. From this internal perspective, the investment rules regime can be seen as disciplining and reshaping the constitutional law of various states across the globe. Constitutionalism, then, is a useful heuristic device with which to examine the structuration of economic globalization in the modern world (Giddens 1993) so as to contribute to an "understanding of how the global 'system' has been and continues to be *made*" (Robertson 1992: 53).

Likening aspects of economic globalization to constitutionalism might appear unsatisfactory to some readers. Constitutions, after all, are considered to be profound expressions of national commitment – they are about the "highest of all political stakes" (Wolin 1989: 3–4). Constitutional designs institutionalize metarules and procedures that standardize the enduring rules of game, those rules that lie above the fray of ordinary politics (Rawls 1993: 161). Constitutions are intended to serve certain and predictable functions – what Elster (1984) calls a form of "precommitment strategy"[1] – and should not be too easily modified. Liberal constitutional design traditionally has offered a variety of precommitment devices "to reduce the power of the people" (Elster 1992: 40) at national political levels so as to resolve the problem of their "weakness of the will" (Elster 1984: 37) and these have been anchored within national political systems. There are, then, problems of translation inherent in attempting this kind of "stretching"

of the state-centered model to the domain of the transnational (Schneiderman 2007; Walker 2001: 34, 2002: 342) – with its resulting "description of oranges with a botanical vocabulary developed for apples" (Weiler 1999: 268).

The investment rules regime is constitution-like, however, in many of these ways. It has as its object the placing of legal limits on the authority of government, isolating economic from political power, and assigning to investment interests the highest possible protection – characteristics that Polanyi more than fifty years ago associated with constitutionalism as a device for securing uniformity and homogeneity in state practices (1957: 205, 225). The ensemble of rules and institutions is a form of precommitment strategy that binds future generations, through the instrumentality of national states, to certain institutional forms and substantive norms through which politics is practiced. Like constitutions, they are difficult to amend, include binding enforcement mechanisms together with judicial review, and oftentimes are drawn from the language of national constitutions.

The linkages between constitutionalism and economic globalization have been obvious to others. Former US President Ronald Reagan in 1987, at the inception of NAFTA's predecessor, the US-Canada Free Trade Agreement, characterized that agreement as a "new economic constitution for North America" (Lamont 1988). Others have noted the constitution-like features of the new institutions of the European Union (Weiler 1996) and the WTO (Jackson 1997). Advocates of the emergent global trading and investment regime describe the institutions of economic globalization precisely in this way: as serving "constitutional functions." They protect and promote freedom, nondiscrimination, the rule of law, and the judicial protection of individual rights across national frontiers (Petersmann 1996–7: 405). This is in accord with the views of dominant economic actors, those whom Sklair designates the "transnational capitalist class" (Sklair 2001). Templeton investment-fund manager Mark Mobius, for instance, describes his work as crusading for "human rights," a fight for "transparency, fairness and equality before the law" (*Economist* 1999a: 67). As Mobius intimates, the language of rights and constitutional limitations permeates the promotional literature on economic globalization (Baxi 1998: 147, 2006: ch. 8). In the wake of the protest against the WTO at Seattle, editors at *The Economist* insisted, similarly, that protesters should be told that trade is "first and foremost a matter of freedom" and "liberty" (*Economist* 1999b: 17) – principles foundational to most

versions of liberal constitutionalism. Political and administrative operatives associated with departments of finance, trade, and treasury, which Bourdieu likened to the "right hand of the state" (1998: 2), also understand the foundational nature of these sorts of commitments. According to Egyptian finance minister, Yousef Boutros-Ghali, a free trade and investment deal with the United States would render irreversible the economic and political liberalization in his country: "if anybody in the future wants to go backwards, they cannot" (Alden 2005).

Drawing parallels between economic globalization and constitutionalism might appear dangerous to other readers. Equating the project of neoliberalism with those normative principles around which political communities are organized treacherously inflates the societal account of the former – premised upon the self-maximizing individual – while devaluing the moral significance of the latter. If everything is considered constitutional, then nothing is. Invoking the language of constitutionalism also might appear to establish economic globalization as an irreversible "fact," furnishing the convenient alibi to political and other global actors that there are no alternatives in sight (Hay and Watson 1999: 421). Yet there are appreciable benefits to scrutinizing economic globalization through the lens of constitutionalism. The discourse of constitutionalism is a powerful one and can equally rouse citizens into action as it can immobilize them. It has the advantage of assessing the new terrain of economic globalization from a perspective different from that in which it was conceived and so can engage critically with the dominant discourse of neoliberalism. A focus on the constitutional aspects of the investment rules regime positions politics and democracy in an institutional space that aims primarily to secure optimal economic returns for foreign investors. It furnishes a normative frame with which to then critique the current regime (in both its external and internal manifestations). Constitutionalism, in this way, performs a double role: both as descriptor and as normative guide to the current scene.

Nor is it anachronistic, in light of the events of 9/11, to underscore the centrality of the constitutional project of free trade and investment to developments worldwide. United States Trade Representative (USTR) Robert Zoellick signaled that, in the wake of 9/11, US leadership in the promotion of international economic architecture was now "vital." Congress, he wrote, "needs to send an unmistakable signal to the world that the United States is committed to global leadership of

openness and understands that the staying power of our new coalition depends on economic growth and hope" (Zoellick 2001). Alan Greenspan, then like-minded chairman of the Federal Reserve, announced that the terrorist attacks rendered successful trade negotiations at the WTO imperative (Wayne 2001). Congressional findings in 2002 were in accord that "[t]rade agreements today serve the same purpose that security pacts played during the Cold War" – that the "national security of the United States depends on its economic security" (National Security Council 2002: 17). When President George W. Bush secured trade promotion authority that year to expand NAFTA and to conclude free trade negotiations with Chile and others, it was wrapped up in the president's strategy of responding to the threat of international terrorism. Open markets were critical to broadening America's influence and softening hostility to the means by which the United States was advancing its "war on terror." To this end, the USTR has set its sights on completing bilateral trade and investment treaties with a number of states in the Middle East, beyond extant treaties with Israel and Jordan, including Bahrain, Oman, the United Arab Emirates, and Egypt (Alden 2005).

A series of setbacks in advancing the legal regime of economic globalization – the failure of the Doha round to open up agricultural markets, for instance, or the stalling of the FTAA – may suggest that this discussion may now be anachronistic. Together with the election of a series of governments in Latin America on a program of pushing back against economic globalization's strictures – as in President Evo Morales's Bolivia – it may be that the advocates and institutions of neoliberal globalism will begin to experience a crisis of confidence. The investment rules regime, however, is intended precisely to forestall reversal of the imperatives associated with economic globalization: the openness of markets and the irrelevance of borders for global entrepreneurs. The constitution-like constraints of the regime are designed to bind states far into the future, whatever political combinations develop at home to counteract it, by imposing punishing monetary disciplines that make resistance difficult to sustain, if not futile.

It would be useful at this stage to move to a fuller explanation of what we should understand constitutionalism to mean. Before doing so, one further observation should be made regarding the advantages of exploring economic globalization through constitutionalism, and this concerns containing the role of the national state.

Economic globalization is usually thought of as happening "out there," beyond the capacity of states to control. At the very same time the modern state is being "decentred," rendered "defective," or "hollowed out" (Strange 1994: 56–7), it is also deeply implicated in the process of its presumed marginalization by establishing, through law, the permissible bounds of state action. In this process, states are important agents in the structuration of economic globalization. Careful attention needs to be paid, then, to the role of globalizing actors, such as states, in the sociolegal outcomes we associate with economic globalization, such as the investment rules regime. Building on insights regarding politics and markets developed most famously in late nineteenth- and early twentieth-century political thought, a focus on constitutionalism brings states back into the picture. Figures such as Green (1881), Hobhouse (1911), Hale (1943), and Polanyi (1957) stressed at various times the ubiquitous role of the state in the construction of markets. According to Green, it was the business of the state to maintain the conditions, through social legislation, for individuals to contribute to the common good (1881: 202). Hobhouse argued that the growth of the industrial system "rests on conditions prescribed by the State" (1911: 87) while Hale observed that "absolute freedom in economic affairs" was out of the question (1943: 626). "We shall have governmental intervention anyway, even if unplanned," he wrote, "in the form of the enforcement of property rights assigned to different individuals according to legal rules laid down by the government" (1943: 628). Polanyi's contribution to economic history in *The Great Transformation* underscores the role of states in the seemingly spontaneous emancipation of markets. "The market," Polanyi wrote, "has been the outcome of a conscious and often violent intervention on the part of government which imposed the market organization on society for noneconomic ends" (1957: 250). This intellectual past understood the state as "deeply implicated" in the operation of the market (Przeworski 1999). With some exceptions (Beck 2005; Panitch 1996b; Santos 2002; Sassen 2006), this is an insight elided in much of the discussion of economic globalization and the investment rules regime. This absence is despite the fact that the current global scene is heavily managed and regulated by states and their transnational delegates. This is not to say that management of the international economy will forever be lodged in the interstate system or primarily in institutions such as the WTO. The book remains agnostic about the possibility of transnational regulation as a valid expression of self-legislation by an engaged

citizenry (Beck 2005; Held 1995). The difficulties of achieving the requisite cosmopolitan consciousness and then securing democratically legitimate transnational-legal forms for citizen participation cannot be understated, however (Maus 2006: 472).[2] In which case, it seems reasonable, at least in the medium term, to rely on those institutions that have the capacity of serving the interests of democracy promotion, namely, those associated with states – paradoxically, the very same institutional forms that have served the interests of those with powerful vested rights, including (despite the rhetoric of international investment lawyers) the interests of foreign investors.

States have made it their business to regulate the business of human activity, including its economic dimension. This relation between state and market remains one of the most significant objects of statecraft. Constitutional design concerns itself, in part, with identifying the bounds of the proper relationship between government and economic life (Hartz 1948). If constitutionalism is traditionally considered to be, "by definition," about limited government (McIlwain 1966: 21), it is also about distributing authority between public and private power (Anderson 2005). It is this balance between the public and the private, between democracy and markets, that needs readjustment within the constitution-like mechanisms of economic globalization.

WHAT CONSTITUTIONALISM?

Let me set out, then, the presuppositions about constitutionalism that animate this project. The argument here is that the proper bounds between state and market, between public and private, should not be rigid and fixed but should aspire to be fluid and pluralistic. State capacity with regard to most subject matters, in other words, should be kept open rather than constrained by constitutional or constitution-like arrangements. Rather than instituting a transnational system for uniform economic governance, any transnational regime should encourage innovation, experimentation, and the capacity to imagine alternative futures for managing the relationship between politics and markets (Dewey 1954; Dorf and Sabel 1998; Unger 1987).[3] In the modern era, these objectives have best been accomplished through constitutional design incorporating democratic institutions operating at national, subnational, and local levels. Democratic institutions provide key resources for people to shape – both to constrain and to enable – marketplace activities. The contemporary institutions of

representative democracy allow citizens to be the common authors of their own fate (de Tocqueville 2000: 9), a prerogative denied many people in their "private" work-a-day lives. The democratic institutions of public authority enable individuals to pursue collective projects, oftentimes with disappointing results, other times with surprising success. A constitution of democratic experimentalism – a constitution, as de Tocqueville would put it, of repairable mistakes (*fautes réparables*) (2000: 216) – perhaps best serves the grand object of improving both the political and the economic conditions of many people in the world. The constitutional design envisaged here would render the boundaries between majorities and markets uncertain (Przeworksi 1991: 13), confined to constitutive rules concerning such things as the political autonomy of subunits, free speech, and a pluralistic associational life. A constitutional design that promotes deliberative processes for the determination of what properly belongs within the sphere of the political I characterize as "democratizing constitutionalism." Before discussing this model further, I turn first to two complementary versions of constitutionalism, one constraining and the other enabling, both of which establish metarules that unreasonably limit the capacity of citizens to choose between continuity and change.

The constraining version

The desire to render national economies the subject of uniform trade and investment regulation submerges the capacity to experiment politically and reduces citizenship to a single, uniform conception organized around the values of the market. This is an account of politics familiar to public choice theory and the group of scholars working under the umbrella of "constitutional political economy" (Buchanan 1991). Exercises of public power are regarded as untrustworthy. Democracy, like markets, is the locus for competition in which self-interest is paramount (Downs 1957; Schumpeter 1947). At worst, democracy is perverted by particularistic interests exploiting government and extracting "rents" or benefits in the guise of favors, loans, concessions, and contracts. As the general public is too diffuse a force to countervail the power of well-organized interest groups (Olson 1965), the state is expected to recede from the market and limits placed on its redistributive capacity. The investment rules regime aims to secure these types of advantages over democratic rule by limiting, through constitution-like edict, the capacity of self-governing communities to intervene in the market.

Constitutional theory, of course, has long been preoccupied with the fear of legislative majorities. In the *Federalist Papers*, Publius expressed much anxiety about the threat of coerced economic leveling and so advocated an institutional design for the American polity that would check legislative passions (Hamilton et al. 1961: 79). Late nineteenth-century American legal thought exhibited similar anxieties. Scholars such as Thomas M. Cooley (1868), with the judiciary in lock step, looked to the principles of the common law in order to ground their jurisprudence of state "neutrality" vis-à-vis market ordering and the redistribution of wealth (Jones 1967). *Lochner*-era courts drew on this tradition so as to check what they characterized as "partial legislation" – attempts by "competing classes," namely labor and capital, to use public power "to gain unfair or unnatural advantages" (Gillman 1993: 60). The status quo was the standard measure for all government action and deviations from this baseline presumptively were constitutionally suspect (Sunstein 1993). This fixation with class rule in the late nineteenth century was not confined to constitutional law in the United States. Lawyers "on both sides of the Atlantic," observes David Sugarman, "were obsessed with the need for constitutional restraints on 'hasty and ill-conceived' change" (Sugarman 1983: 1991). This was exemplified in the work of Albert Venn Dicey, Oxford legal scholar and author of the influential *Introduction to the Study of the Law of the Constitution* (1885). Invoking common law rules and methods of judicial review, Dicey's conception of the "rule of law," it was hoped, would check democratic excesses in Britain (Schneiderman 1998). Late nineteenth-century constitutional thought was characterized, then, by a determined reluctance to incorporate oppositional protest and to imagine alternative paths to economic and political success. As we shall see, this normative nineteenth-century vision of constrained constitutionalism closely parallels the aims and objectives of the contemporary investment rules regime.

The enabling version

If public choice theory and constitutional political economy stress the economic model of citizenship, contemporary democratic theory – attentive to the problem of rent-seeking and collective action – endeavors to submerge the market role by generating public-regarding solutions to policy problems. The so-called republican revival (Rodgers 1992) solves the problem of the citizen-as-market actor by designing institutions that favor the cultivation of civic virtue