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Edited by Stephen Gill and A. Claire Cutler

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1 New constitutionalism and world order: general introduction

Stephen Gill and A. Claire Cutler

This introduction sketches some of the book's central considerations and relates them to the immediate historical backdrop of this study. It highlights transformations that constitute the *new constitutionalism of disciplinary neo-liberalism*. We also respond to key criticisms of the concept of new constitutionalism and address whether its theory and practices are under challenge in crisis conditions. We then provide an outline of the principal themes and questions that the volume addresses, including: hegemonic and supremacist projects of rule; the power of capital; law, legitimacy and legitimation; contradictions, political agency and contestation. A detailed overview of each chapter is subsequently provided in separate mini-introductions to each of the six parts of this book.¹

Aims and considerations

A central contention of this volume is that the new constitutionalism of disciplinary neo-liberalism can be conceptualized as a set of dominant political practices that, despite growing contradictions, are reconstituting political and civil society as well as the relations between humanity and the environment in fundamental ways. We believe that these developments mandate new forms of theoretical integration, for example between law and political economy, to better explain key aspects of the twenty-first-century world and some of its potentials for transformation. In that context our principal aim is to map out and explore a new terrain of enquiry in a synthesis of diverse forms of knowledge (law, politics, political economy, sociology and ecology) to seek to explain the reconstitution of power and governance in the emerging world order – one that is characterized by increasing crises, dislocations and political

¹ The editors are indebted to the anonymous reviewers, to participants at the York Workshop in May 2011, and especially to Isabella Bakker and Hironori Onuki for their painstaking and constructive comments on drafts of this introduction.

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contestation in ways that are reframing the very meaning of traditional constitutionalism.

The term ‘new constitutionalism’ is used in a variety of related but different ways in the disciplines of political science and law (see Fitzpatrick 2006). For some, new constitutional forms are emerging from the expansion of constitution-making throughout the world, the increasing juridification of international trade and investment laws, the articulation of an autonomous *lex mercatoria* and the emergence of global administrative laws that are knitting the world together under the promise of the global rule of law (Kingsbury *et al.* 2005; Stone Sweet 2006).² Others emphasize the growing power of judiciaries, administrators and the ‘new federalism’ developing through the reorganization of power and authority within states (Hirschl 2004b). Yet others identify new constitutionalism with the pragmatic search for effective, efficient and ‘good governance’ (Elkin and Soltan 1993). These views are informed by various theoretical traditions that emphasize the global proliferation of democratic models of governance, evolutionary and functional theories that posit constitutional devolution as a matter of system differentiation, or models that regard constitutional evolution as driven by the search for economic efficiency (Hirschl 2004a).

This volume adopts a rather different approach. While we recognize that there is scepticism about the devolution of political powers to judges and administrators (see Hilbink 2008), this volume is inspired by a rather different and more critical tradition. This tradition is connected to the view that theories are not neutral but serve particular purposes or projects. This perspective was reflected in the well-known distinction made by Robert Cox (1996 [1981]) between two broad sets of theories, respectively: ‘problem-solving’ theory and ‘critical’ theory. The former ‘takes the world as finds it, with the prevailing social and power relationships and the institutions ... as the given framework for action ... the general aim ... is to make [them] work smoothly by dealing effectively with particular sources of trouble’ (*ibid.*: 88). In contrast, ‘critical’ theory ‘stands apart from the prevailing order of the world and asks how that order came about ... [it] does not take institutions and social power relations for granted but calls them into question’ with a view to revealing the conditions for their radical transformation (*ibid.*). This volume therefore contends that a critical perspective is crucial to the analysis of the constitution and relations of power in the emerging world order of the early twenty-first century.

² Terms such as rule of law and *lex mercatoria* are discussed in the Glossary.

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The contributors to this volume differ in disciplinary origins and in the emphases and meanings they attach to constitutionalism. However, what unites them is an appreciation of the two types of theory noted above. Indeed, each reviews and critiques the problem-solving emphasis of those perspectives associated with extending or reinforcing new constitutionalism as a ‘project’ of governance of the global political economy (Schneiderman 2010). They develop their critiques to not only interrogate the structural changes in political economy, society and ecology that inform the new constitutionalism, but also to contribute to the transformation of those structures and practices. They seek to deconstruct how the project of new constitutionalism justifies the improvement of the currently dominant set of neo-liberal institutions and practices of global governance: in ways consistent with what the World Bank and the IMF refer to in more normative terms as ‘good governance’ (Esty 2006).

Thus a critical perspective, associated with the various arguments and approaches that unify this volume, brings ethics, power and political economy to the centre of its analysis. It seeks to reveal and question the purposes and interests served by new constitutionalism as a political and social project. It therefore asks: new constitutionalism of what and for whose benefit? It poses questions concerning law, legitimacy, human rights, political economy and world order. For example: how far and in what ways does the recent spread of rights discourse link to and help to extend the extension and deepening of capitalism by means of laws and regulations designed to remove barriers to the power and mobility of capital? Who benefits from such liberalization of trade and investment or more broadly from corporate expansion? A critical perspective not only seeks to identify the origins, lineages and form of the present world order and thus what is unique about the current period (what is ‘new’ about the new constitutionalism) but also its potentials for transformation and for alternative forms of constitutionalism to emerge. Constitutionalism as a ‘project’ more broadly has roots in earlier approaches to international law and organization that reflect the liberal belief in the perfectibility of the world through the development of international laws, institutions and regimes that are said to mute the effects of international anarchy (the absence of a world state or some overarching governing force in world order). In this context, several strands of legal theory are recording the global expansion of law. Domestic constitutional lawyers note the increasing number of states that are adopting domestic constitutional political orders, while domestic administrative lawyers and judges observe the global expansion of their fields (Kingsbury and Casini 2009). For some, this is a welcome movement toward a world governed by law

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and not by politics, while others applaud the functional efficiencies generated by disaggregated sovereignty, as experts and specialists become the centre of law-creation and enforcement (Slaughter 2004). Public international lawyers also record the global move to law, although some are sceptical of the resulting displacement of politics by managerial technocrats (Koskeniemi 2009). These various strains share faith in the law as the vehicle for the stabilization and legitimization of the existing order and the entrenchment of global ‘best practices’ in governance (Kennedy 2009). They stress the progressive values of legal process and procedures, many of which, however, are inspired by private, corporate actors and institutions (Dibadj 2008). Indeed, private transnational lawyers believe that their field has come into its own as a central pillar of the global legal architecture (Cutler 2003). The concepts of limited government as well as self-regulating business and finance are promoted as core principles in pro-market reforms and legal structures.

An initial task of a critical perspective is to highlight how new constitutionalism is not simply a set of neutral laws and mechanisms of regulation and governance associated with contemporary capitalism but also reflects a specific complex of dominant forms of political agency, as well as a set of actors, practices and forces in political and civil society – particularly large corporations. These practices have as a goal, at least in the terminology used by the World Bank (1997), the ‘locking in’ of neo-liberal frameworks of accumulation, with American geopolitical power as its ultimate guarantor.

A second task is to specify how such forms of political agency and the constitutional frameworks may constitute the juridical and political conditions for contestation over present and future development of alternatives, at least in the jurisdictions that have fully embraced market-enhancing, neo-liberal reforms. If so, what are the potentials for this situation to change? In responding to such questions this volume seeks to go well beyond those analyses of ‘new constitutionalism’ that have so far tended to focus on its *synchronic* dimensions – how it has become structurally entrenched in the global political economy – by systematically foregrounding its *diachronic* aspects, or their potentials for transformation (on this distinction see Braudel 1980 and Glossary). Therefore a key aim of this volume is to identify how the contradictions and contestations within the new constitutionalism of disciplinary neo-liberalism are calling forth new patterns of resistance and forms of insurgent power.

With such issues in mind, to give focus to this volume, we have developed three sets of related hypotheses for contributors to address.

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1. We are living in an era in which there is a neo-liberal redefinition of the political on a world scale, linked to the emergence of a de facto neo-liberal new constitutional structure that is serving to define present and future, local and global, policies.
2. Some of the principal mechanisms for this redefinition are both public and private, and are drawn from constitutional, administrative, international and transnational laws. These operate within and across jurisdictions, thus mandating detailed research on such multilevel and multifaceted domains.
3. Contradictions, dislocations and inequalities associated with the new constitutionalism of disciplinary neo-liberalism and global crises are producing contestations linked to new patterns of resistance and insurgent power.

The historical context for new constitutionalism

It is widely acknowledged that a central characteristic in the world order today is how it has been shaped by a ‘worldwide market revolution’ associated with globalization and neo-liberalism. This characteristic refers to processes of economic integration beyond state borders culminating in a global marketplace of commodities, ideas and identities. The increasing prominence of transnational corporations and the mobility of capital through foreign investment facilitate this integration, as do the networks of trade in goods and services that span the globe (Cutler 2009a, 2009b; Kobrin 2004).

The historical context for much of this transformation was the end of the Cold War, and the ideological triumphalism of the West associated with Francis Fukuyama’s eschatological claim that by the early 1990s we had arrived at the end of history, with liberalism as the only viable political alternative that would govern the future. This ideological moment was reflected in the famous dictum of Prime Minister Margaret Thatcher, vowing to destroy socialism in Britain, that henceforth ‘There is no alternative’ to conservatism and neo-liberalism. Thus the new constitutionalism can be traced back to not only the development of the world market and the particular responses of many ruling forces in the capitalist world to the crisis of profitability for capital in the 1970s and 1980s, but also to the geopolitical reconfiguration during that period. Then, the challenges of the Soviet bloc and the Third World to the dominance of the United States and its allies were firmly repelled; an era of neo-liberal supremacy, or what Stephen Gill (1995a) calls disciplinary neo-liberalism, began to emerge.

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However, even today, there is far less recognition that this market revolution – and indeed the emergence of a wider ‘market civilization’ has been accompanied by the ‘new constitutionalism’, i.e. the legal and political frameworks that are equally significant in facilitating neo-liberal forms of global economic integration and the extension of the world market.

In this context we should underline that new constitutionalism (as a concept as well as a mode of law and legal regulation) is analytically separable from disciplinary neo-liberalism (understood as a concept of political economy as well as a set of social practices). However, the two concepts reflect different faces of a single neo-liberal political project – intended to extend and deepen the power of capital and to extend capitalist market civilization (Gill 1995a). New constitutionalism forms the political-judicial counterpart to disciplinary neo-liberalism, where the latter refers primarily to the processes of intensifying and deepening the scope of market disciplines associated with the increasing power of capital in organizing social and world orders, and in so doing shaping the limits of the possible in people’s everyday lives.

In that context, we view new constitutionalism as involving many political-legal elements and regulatory mechanisms, encompassing hard and soft law that have developed unevenly across space and time (see particularly Chapter 3 by A. Claire Cutler). New constitutionalist pressures and constraints are not a uniform force field, nor a fully formed set of historical structures: they ‘vary according to the size, economic strength, form of state and civil society, prevailing national and regional institutional capabilities, and the degree of integration into global capital and money markets’ (Gill 2008: 142). This also means that constitutional forms are contingent: they vary to the degree to which they incorporate neo-liberal elements.³ Nevertheless, one could argue that the emergence of new constitutionalism is part of a more general, albeit uneven, shift or transformation in forms of state, toward the neo-liberal form away from state capitalism and ‘actually existing’ communism, in a world where the commodity form has been extended into new avenues of accumulation and geographical spaces.

³ Few countries in Latin America have gone as far as Mexico, which made 30 amendments to the nationalist revolutionary Mexican Constitution of 1917 – so that by 1994 it would be fully compatible with NAFTA’s requirements concerning free movement of goods and services, extended protections for private property and privatization of common lands. Another extreme example was in 2003, when, following the Iraq War, the US Occupation Authority imposed new constitutional measures that replaced the previous Iraqi statutes, including new protections for private property rights and free movement of capital and goods.

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Our definition of the new constitutionalism thus refers to a combination of various sets of processes:

1. The uneven emergence of a de facto constitutional governance structure for the world market (intended to operate regionally, nationally and globally) involving the interaction of public and private power, incorporating international organizations.
2. The neo-liberal reshaping of political subjects and restructuring of particular state forms, partly through constitutional and legal means, extending the orbit and interpellation of the commodity form and its legal codification, in order to extend capitalist markets and the sway of market forces in social and political life.
3. The specific locking-in mechanisms (laws, rules, regulations, procedures and institutions, such as independent central banks) associated with neo-liberal patterns of accumulation.
4. The ‘new informality’ involving proliferation of soft, self-regulatory and ‘flexible’ or ‘double’ legal standards.

In this volume, some of the contributors focus on the third and fourth of these processes in order to specify the operation of new constitutionalism in particular domains and activities. Others, such as Ran Hirschl, are concerned with the second set of these processes (relating to the constitutions of particular nations). Hirschl notes in Chapter 6 that over the last 30 years there has been a large-scale convergence toward constitutional supremacy worldwide, ‘accompanied by the rise of what may be termed “generic” constitutional law – a supposedly universal, Esperanto-like discourse of constitutional adjudication and reasoning’; as of 2010, there were approximately 160 countries that subscribed to one form or another of the US model of constitutional supremacy. Moreover, despite numerous variations, judicial review – one of the key neo-liberal locking-in mechanisms identified by the World Bank – has become a fundamental force in determining global and domestic affairs.

Not only has there been a shift toward constitutional supremacy, but also, as Chapter 7 by Saskia Sassen notes, there has also been a general increase in executive, administrative and judicial power relative to that of legislatures. This can be seen as relating to the process that Robert Cox (1987) referred to as the ‘internationalization of the state’, whereby key agencies of government associated with the executive branch gain in power and increasingly seek to regulate their domestic political economies with reference to the exigencies of the world market (see also Brand *et al.* 2008; Demirović 2011). They do so partly by subordinating those elements of the state formation concerned with domestic welfare and production to ministries of finance and central banks. This pattern is

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clear if we analyze governmental responses to the recent global financial meltdown in the dominant capitalist powers and the consequent increase in power accruing to heads of state and specialized administrative bodies (Gill 2012).

Therefore if we look at these issues from the perspective of power, production and social reproduction as opposed to the traditional vantage point of constitutional law, we would observe that a large majority of those 160 states have not only moved toward US-style constitutional supremacy, but also reforms within the political economy have been largely consistent with creating the key domestic policy underpinnings of disciplinary neo-liberalism on a world scale. To go one step further, a condition of existence of the legal and political economy system we are describing is the willingness of states to defend it, and in particular the most powerful state in the world, the United States, which has probably greater military supremacy relative to other states than any other state in history, with the possible exception of ancient Rome at the zenith of its power. Moreover the US executive branch and administrative agencies are intertwined with and at the heart of the governance of the principal institutions of the global political economy.

Criticisms of the new constitutional concept

In addressing such issues, some contributions stress the uneven depth and complexity of neo-liberal transformations – what Neil Brenner, Jamie Peck and Nik Theodore refer to in Chapter 8 as the variegated spread of neo-liberal forms of state and regulation across different scales and transformations of society. This conception seeks to expand upon Gill's earlier work. Brenner *et al.* illustrate how new constitutionalism takes on different shapes and results in a variety of neo-liberal state forms. Indeed, in new ways, the contributors explore both horizontal and vertical aspects of new constitutionalism. These involve not only its global, regional, national and local elements but also its political economy elements that are considered alongside the more deeply sociological aspects of new constitutionalism.

Together with Neil Brenner *et al.*, some of the other contributors to this volume, such as Saskia Sassen, Adam Harmes and David Schneiderman, all critically reflect upon the adequacy of earlier formulations of the concept, seeking to extend and develop it in innovative ways.

By contrast other critics have been more dismissive of the new constitutionalist concept. For example, some have argued that the concept is too *structuralist*, pessimistic and deterministic – thus understating the transformative potential of law (Parker 2008; Strange 2002, 2006, 2011).

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Others have argued almost the opposite – that it involves a reading of law that is too *instrumentalist* (Hartmann 2011). Other critics see the concept as ignoring soft-law and non-legal neo-liberal practices in ways that neglect opportunities for contesting and resisting neo-liberalism. We think such criticisms are somewhat misplaced and address them later in this section.

A second set of criticisms are more indirect and imply that the new constitutional concept may have been useful but it is likely to be of little relevance in analyzing current and future global transformations. Neo-liberalism (and with it implicitly new constitutionalism) is said to be under pressure as the ongoing financial crisis causes elites and ruling classes to reevaluate their policies. Indeed, some suggest the global financial and economic crises mark the ‘end’ of neo-liberalism (e.g. Krugman 2009; Nesvetailova and Palan 2010; Stiglitz 2010; Wallerstein 2008; Žižek 2009, 2010). We believe, however, that these economic crises form one part of a wider organic crisis; moreover we also think that like the announcement of Mark Twain’s death, these conclusions may be premature. They also beg the following key questions: exactly what is neo-liberalism, how do we define it and how do we know when it has come to an end? Many economists treat neo-liberalism as simply a set of economic doctrines and policy formulas (also Žižek treats it as a form of ideology), whereas we see neo-liberalism as a conscious political project that is connected to an identifiable set of social forces and practices. Put differently, disciplinary neo-liberalism fosters and consolidates a possessively individualist, marketized ‘common sense’ that militates against solidarity and social justice; however, it also is a normative project, one that is contested yet still dominant and supremacist (rather than hegemonic) or widely viewed as legitimate (Gill 2012).

Indeed, neo-liberalism as a form of social and economic development is full of contradictions, crises and contingent practices, not least of which is the way in which it has gone with immense increases in inequality and social dislocation, while at the same time wealth and power is being concentrated in the hands of a global plutocracy. And in the most recent wave of capitalist crises, while the risks of large investors and firms have been socialized, the costs have been transferred to the public in the form of fiscal and sovereign debt crises, with widespread austerity measures imposed to finance government activities in the global economic emergency. Indeed it is doubtful that new constitutionalism as a strategy can either institutionalize or stabilize the crisis of social reproduction within neo-liberalism – let alone the global crisis of accumulation (Gill 2002: 63–4, 2008: 176, 2012). This is despite the fact that as Chapter 2 by Gill illustrates, new constitutionalism involves crisis management

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mechanisms and practices to try to contain dislocations and co-opt political opposition to prevent a backlash against neo-liberalism. Gill also underlines how new constitutionalism has a contingent, pragmatic and contested character.

However, this does not mean that disciplinary neo-liberalism has ended, although it may be in crisis; and indeed there is much to play for. We therefore see the present situation as still in flux but pregnant with new political possibilities. For example, in 2012 the European Union made efforts to further extend new constitutionalist frameworks via various measures including the new Fiscal Compact as well as the policies of the so-called 'troika' (IMF, ECB and European Commission) applied in Greece, Portugal and potentially in Spain (the Compact requires balanced budget amendments to national constitutions and greater control over national fiscal policies to the unelected European Commission). These new measures have emerged in the context of financial, banking, fiscal and sovereign debt crises. However, the austerity that has been imposed is deeply controversial and may be provoking a general crisis of legitimacy for the European integration project. It is an open question as to whether the European Union will be forced to abandon some of these new constitutional measures or face disintegration as a result of these struggles.

Other more global elements of new constitutionalism, e.g. bilateral trade and investment treaties, are proliferating but are also subject to some modification because of the contradictions associated with the multiple economic crises (see Chapters 3, 10 and 11 by Cutler, Schneiderman and Sinclair). Key elements of new constitutionalism associated with international taxation and the question of capital mobility have continued to be extended, despite some acknowledgement of the need for capital controls to deal with problems generated by capital flows under crisis conditions (see Chapter 12 by Lesage *et al.*). While there has been some (temporary) resistance from countries in the global South to a key aspect of new constitutionalism, that is the free movement of capital, 'it seems that all emerging markets still seem to agree on the final goal of full international capital mobility and of gradually liberalizing capital accounts' (Dierckx 2013: 13). The form and purpose of resistance is also important and involves 'those ... who reject US dominance, without necessarily envisaging more democratic control of capital, neither in the authoritarian Chinese regime, nor in Brazilian or Indian liberal democracy' (*ibid.*).

Because of such evidence, we suggest that it is no longer possible to think of constitutional transformations simply from within the confines of a nation state – that is from the vantage point of what might be called methodological nationalism. Indeed many international agreements and