Societal Constitutionalism: Nine Variations on a Theme by David Sciulli*
Gunther Teubner, Frankfurt

(in: Paul Blokker and Chris Thornhill, Sociological Constitutionalism. Cambridge, Cambridge University Press 2016)

Exposition: Constitutional sociology as a critique of traditional constitutionalism

'Constitutional sociology is the new kid on the block.'[1] One reason why this line of research disturbs the peaceful quarters of constitutional theorists is that it subjects constitutions, usually seen as the domain of constitutional lawyers, political scientists and political philosophers, to the exacting methods of historical-empirical social research (Thornhill 2011), or it exposes them to the harsh light of grand social theories (Luhmann 1965; 1990; Verschraegen 2013). The most provocative aspect of constitutional sociology, however, is the claim that it is simply anachronistic to restrict the range of phenomena which we see as essentially *constitutional* to the constitutions of nation states, as widely remains the case amongst mainstream proponents of constitutional research.[2] Instead of this, constitutional sociology makes the claim: *Ubi societas, ibi constitutio* – wherever in society certain social formations develop – be these function systems, formal organizations, or transnational regimes – these formations give rise to their own constitutions, which challenge the claim of state constitutions to assume a monopoly of all constitutionality. Thornhill (2011a: 212) describes this tendency of constitutional sociology in the following terms:

> As counter-thesis to the doctrine of the constitution which claims that the constitution must categorically be related to the state, this doctrine sets out a theory of transnational constitutional pluralism. From this perspective, all communication systems are de-coupled from legal/political centres of control, and they produce, more or less spontaneously, an internally self-regulatory micro-structure, reaching beyond geographical borders. Regional borders or the borders of nation states are replaced by functional borders as points of reference for constitutional foundation and constitutional validity.

Transnational constitutional pluralism, accordingly, forms a core dimension in constitutional sociology. Transnational constitutional pluralism is based in a three-level critique of traditional constitutional reflection (Febbrajo 2016). First, it criticizes the centristic legal constructions of traditional thinking, which reduces constitutions to simple higher-order legal norms. In contrast to this, it asserts the priority of societal self-constitutionalization (Kjaer 2014: 122 ff.). Second, it turns against the state-centrism of traditional analysis, which only identifies constitutions in the 'public' sector. It claims that sectorial constitutions can equally be found, and in fact assume increasing significance, in economic enterprises, in markets, in private universities, foundations, media companies, intermediaries in the internet, and other ‚private‘ institutions (Vesting 2015: 99 ff., 114 ff.). In its critique of methodological nationalism, finally, it gives a clear view of processes of global constitutionalization, and it

---

[1] This is claimed by Grahame Thompson (2015) in a lengthy discussion of the most recent relevant monographs.
[2] The exclusive focus on state constitutions is emphatically defended, in constitutional law, by Loughlin (2010: 64 f.); Grimm (2005); and, in political science, by Neves (2013).

identifies constitutional phenomena in transnational regimes, both in the public and in the private sector (Viellechner 2012: 612 ff).

Why is classical constitutionalism blind towards constitutions beyond the state? Constitutional sociology could in fact explain this deficiency on historical grounds. After the decline of feudalism, intermediary institutions were considered to lack legitimacy, and the constitution was established exclusively in the relation between citizens and the state, while the private realm was seen as a sphere of individual activities, which needed to be protected by human rights, but not to be constitutionalized in its own terms. Private law covering horizontal relations between individual actors was sufficient. However, historical-sociological analyses show how inadequate this perception was. The organizational revolution and the increasing functional differentiation of modern societies, which both resulted in the growth of large-scale autonomous non-state institutions – the new intermediary institutions –, have raised distinctive constitutional problems of their own, which cannot be captured through analysis of state constitutions (Kjaer 2015; 2014 17 ff.; Femia 2011). Moreover, recent trends towards transnationalization have aggravated constitutional problems within different sectors of society. Because of this, constitutionalization now clearly needs to be examined as a process that occurs beyond the state, and *transnational societal constitutionalization* needs to be seen as defining phenomenon in contemporary society. While traditional constitutionalism has remained limited to nation states, transnational organizations and regimes have been established as juridico-political institutions in their own right. For instance, the World Trade Organization, the governance of the internet ICANN, hybrid transnational regimes, e.g. global health, the *lex mercatoria* illustrate in striking manner how transnational regimes have begun to develop constitutional structures of their own (Cass 2005; Renner 2011; Ellis 2013; Wielsch 2013; Krajewska 2013).

Constitutionalization beyond the nation state can be observed as an evolutionary process that leads in two quite different directions: (1) constitutions evolve in transnational political processes outside the nation state; (2) simultaneously, constitutions evolve outside international politics in global society's 'private' sectors. When sociology addresses these problems, it needs to distance itself from the narrow perspectives of constitutional law and political science, which previously confined constitutional phenomena to the nation state, and it needs to focus on the various sub-constitutions that exist in modern society. This confronts constitutional sociology with three different challenges: (1) to analyse empirically ongoing processes of constitutionalization beyond the nation state; (2) to develop a theory of *transnational societal constitutionalism*; (3) to identify constitutional problems within different social sectors and to open up alternatives for structural solutions which then allow constitutional law to reconstruct these problems in its own language and to develop constitutional norms and principles (Teubner 2012; 2013).

What, however, is the *specifically societal* element in societal constitutionalism? In what ways are constitutions created by distinctively *societal* forces? How do constitutions construct normative order for generically *societal* processes? These questions are currently the object of a controversy, to which many people contribute, and which has given rise to great uncertainty regarding the subjects of non-state constitutions, their origin, their legitimization, their scope, and their internal structures. Instead of taking sides in this controversy, it might be more fruitful to interpret this controversy, not as a conflict between incompatible positions, but as a theme with a

number of variations. Approached in this way, we can observe the different positions in the controversy as detailed attempts to disclose the potential of the ‚theme‘, in its fruitful and less fruitful 'developments'. In the following, I will pose the following key questions to the numerous variations on the basic theme:

1. What is the distinctive 'compositional principle' in each particular variation?
2. Which problems become evident in its 'development'?
3. What are its most valuable 'motifs'?

In this manner, I will first of all briefly present the theme of societal constitutionalism, originally composed by David Sciulli. Then I will present six variations on Sciulli in two separate series of variations. In the first of these series, constitutionalization is perceived as the expansion of a single rationality into all spheres of society. In the second, the motif of the unity of the constitution can still be heard, despite the essential pluralism of societal constitutionalism. In the final movement, three further variations will then reprise and develop further the most important motifs, in a resumption of the original theme.

Theme: David Sciulli
The achievement of having proposed societal constitutionalism as a research topic belongs to the American sociologist, David Sciulli (1988; 1992; 2001). To be sure, there were certain precursors for this approach – these include, for example, the conceptions of the economic constitution proposed by Hugo Sinzheimer (1976 [1927]) and Franz Böhm (1966); the theory of private government proposed by Philip Selznick (1969); Reinhart Koselleck's (2006) concept of the social constitution. Yet, Sciulli was the first to develop a refined theory of societal constitutionalism. Proceeding from Max Weber's account of the dilemma of rationalization in modern society, he tried to identify the existing forces that could counteract the large-scale evolutionary drift, which, he thought, was promoting increased authoritarianism in society. On Sciulli's account, the only social dynamic, which had effectively counteracted this drift in the past and which might be able to obstruct it in the future, was to be found in the institutions of 'societal constitutionalism'. In developing this idea, he accorded decisive importance to the social institutionalization of 'collegial formations', which could be observed in the forms of organization specific to professions and other norm-producing deliberative institutions.

First series of variations: Extensions
Variation I: The long arm of the state constitution
Some theories attempt to interpret constitutions of various social sectors as expansions of the constitution of the state, and they bracket together the norms in the state constitution relating to these social sectors as free-standing legal institutions. These theories are located very clearly in the framework of traditional constitutional law. For example, Rupert Scholz (1971; 1978) argued that the West German constitution, most particularly the section on Basic Rights and the provisions regulating legislative competences, contained elements of an economic constitution, elements of a cultural constitution, a constitution of media, a constitution of the military, and an environmental constitution, which imposed a normative order, defined by the state, on the existing basic structure of these sub-spheres of society. Seen in this way, the basic rights guaranteed by the state acted as objective legal principles, which 'organized' different sub-spheres of society. On this account, accordingly, constitutional law is responsible for elaborating these elements into a

coherent systematic order of societal sub-constitutions, organized by the state, and to deduce further constitutional norms from this order.

Some theories reach further when they attempt to extend the constitution of the state beyond politics, and to re-interpret this constitution as the constitution of society in its entirety. For instance, Karl-Heinz Ladeur (2009) claims that, even during the era of early constitutionalism, the political constitution was also a constitution of society as a whole. Ulrich Preuss makes similar, although rather more cautious, claims. For Preuss, the principles of the political constitution, especially the Basic Rights, are not only formulated to regulate the process of political will formation. On the contrary, he claims that 'they embody normative principles, by which society itself is obligated, and which are supposed to pervade all relationships in society' (Preuss 2012: 234).

Other authors who try to identify the origin of societal constitutions, which emerge in the transnational domain, in the constitutions of states encounter greater problems. Some authors try to explain the undeniable existence of transnational constitutionality by observing this as an *expansion of state constitutions beyond national boundaries*. These authors suggest that, where constitutional problems appear outside nation states – for example, basic rights in the internet or the rule of law in transnational private arbitration – they can be resolved through the 'expansion' of legal principles embedded in nation states into transnational spaces (see for example Ladeur and Viellechner 2008). Similar arguments have been developed by Marcelo Neves (2013), in his proposed concept of 'transconstitutionalism'. He concedes, on one hand, that constitutional problems do appear in the transnational space. Yet, on the other hand, he insists that solutions for these problems are provided, not by the constitutions of transnational institutions, but by the, constitutions of nation states, which, he presumes, are 'interwoven' with transnational bodies.[3]

All the different versions of such constitutional statism, which is extended to include societal constitutions, are guilty of systematically undervaluing the self-constitutionalizing capacity of societal institutions. Their auto-constitutionalization can be explained theoretically through the fact that the functional differentiation of society cannot be traced to a basic political decision. On the contrary, it is a complicated evolutionary process, in which fundamental leading distinctions between different systems gradually become visible and specialized institutions are formed by their own inner logic. In this process, function systems 'constitute' themselves, as they determine their own identity via elaborate semantics of self-explanation, reflection and autonomy (Luhmann 2012: chap. 4, VIII). Similar processes of differentiation occur in formal organizations and transnational regimes.

There is, however, one aspect of the statist variation on societal constitutionalism which has enduring value. State constitutions present the main historical model for other processes of constitutionalization. State constitutions have produced a rich reservoir of constitutional institutions – notably, the separation of powers, the legal state, democracy and basic rights – on which other partial societal constitutions can

---

[3] It remains unclear in both versions how precisely this rather mysterious expansion is supposed to occur, and especially which institutions make the decision about this expansion, which of course is normally not the expansion of one constitutional principle but a selection amongst a series of alternatives. If this decision is made, not only by the constitutional courts of nation states, but also by international courts and arbitration tribunals, both versions will have to concede that transnational constitutional law evolves independently of nation states.

rely through the course of their generalization and respecification (Prandini 2010: 311 ff.). State constitutions serve as a model, most particularly, because of a paradoxical achievement: they have been successful in effectively limiting the totalizations of political power, which are immanent components of power processes, by means of political power itself. The use of human rights as protections against the power of the state is the classical example of this. The question whether such self-limitation can also occur in other societal partial systems, which also display similar totalizing tendencies, is one of the most pressing questions of societal constitutionalism (Lindahl 2013: 725 ff.).

Variation II. The expansion of the political
There are some sociological analyses which identify the separation between the state and societal constitutions in empirical manner. These analyses abandon the dubious attempt to rescue the state's monopoly of the constitution by interpreting societal constitutional phenomena as a more or less mysterious 'expansion' of the constitution of the state. Instead, they explain the appearance of societal constitutions by dissociating clearly politics and the state: by claiming, namely, that through the process of globalization the political system has expanded, beyond the realm of the state, both into the domain of international politics and into other spheres of world society. Accordingly, Kjaer (2014: 83 ff., 97) observes the formation of a 'specific transnational type of the political which, in its orientation, self-understanding and institutional set-up, is substantially different from the form of the political which tends to dominate in national contexts.' According to Thornhill (2010; 2016: 103 ff.) it is possible empirically to identify micro-constitutions in the pluralistic structure of world society, which formalize power processes within society, and which, in reality, are not constitutions of states, but constitutions of political power in society. These constitutions increase the receptivity of different spheres of society for inclusion in political power (cf. also Pribán 2015: 47 ff.). Thornhill's ideas in this regard can be expressed in the pithy formula: *Ubi potestas, ibi constitutio.* Where communication does not occur in the medium of power, society does not need a constitution. Where communication occurs in the medium of power, society invariably needs a constitution.

The problem with this, however, is that it leads to a reductive position, in which societal constitutions are only identified in political power processes. It is a matter of debate whether, like Thornhill, we should interpret the politicization of society, which is certainly evident in processes of globalization, as an extension of the political system, in which power processes are released from their close relation to the state and to institutionalized politics and are conducted in many locations in world society, including in society's partial systems. It might be more accurate to maintain a sharply defined concept of the political system as a system that constructs political power for the production of collectively binding decisions, not only in nation states, but also in international politics (Luhmann 1998: 375 ff.). Alongside this, 'political' processes, with both an institutionally and functionally distinctive character, also take place in other partial systems, which for their part are subject to a separate process of constitutionalization. Such constitutionalization, however, does not only produce norms for power processes. On the contrary, it also creates norms for the system-specific communication within partial systems. The discord about politicization should be seen as more than a question of terminology. We need not, as Thornhill does, postulate that the expanding political system has found a new unity, in which communication occurs through power. Instead, we can identify many varied, free-

standing forms of reflexive politics in different contexts, which require separate constitutionalization. Indeed, as Thornhill (2016: 100) rightly insists, they have a 'categorically public' character, but their publicness is not necessarily tied to power politics. Increasingly, in transnational contexts, private law, even private ordering by non-state actors, takes on a categorically public character (Muir Watt 2015; Kingsbury 2009; Wai 2008). The 'politics' of the central banks, of universities and of other scientific organizations, of constitutional courts, or of self-regulating professions cannot be simply understood as partial processes within the construction of political power for the production of collectively binding decisions. On the contrary, this politics needs to be understood as a mode of reflexive politics within societal institutions, which makes decisions in its own forms of communication about its public function and its performances for other partial spheres of society.

Nonetheless, there is one motif in Thornhill's variation on the theme, which should definitely be retained and developed further. The function of constitutions, for Thornhill, is the 'formalization' of power as a medium of communication. This formalization is the 'self-produced condition for the positive and differentiated autonomy of power' (Thornhill 2010: 18). This is a truly significant thought, which now, however, requires greater generalization. Constitutions formalize media of communication of very different kinds (Steinhauer 2015: 41 ff.). It is not only the medium of power in politics which is constitutionally formalized – the media of money, knowledge, law and information are all also formalized in their own particular spheres of action through a series of sui-generis constitutionalization processes. Is an economic constitution restricted to formulating fundamental norms only when addressing phenomena of economic power, or does it not also produce norms for monetary communication *as such*, regardless of whether or not it is 'translated' into power communications – for example, in corporate hierarchies or market monopolies? What does the constitution of science formalize? Power struggles within scientific institutions or epistemic operations? And the constitution of religion? The constitution of the internet? The answer to these questions is: constitutions do not only formalize power processes. They also formalize communication processes that are unrelated to power, which are performed through other media, specific to other systems.

Variation III. Rational choice everywhere
In contrast to the variations discussed above, economic constitutional theories develop a more radical version of societal constitutionalism. They definitely de-couple constitutions from the state, politics, power, or international politics and they view them as autonomous societal orders, especially in the case of economic organizations and markets. In the narrower version of this theory, the concept of the constitution is applied to fundamental norms of genuinely economic action. This is the case in the ordo-liberal account of the global economic constitution, which combats economic power in order to protect free competition as a constitutional imperative (Fikentscher and Immenga 1995: 35 ff.) The exponents of 'New constitutionalism' who critically analyze the institutions of the Washington Consensus outline a similar concept of the constitution, albeit with a different ideological emphasis (Schneiderman 2014; Anderson 2013). The broader version of this theory, then, identifies constitutions in all societal group formations, including those of non-economic character, and it claims then that they all comply with the economic logic of rational choice (Buchanan 1991; Vanberg 2005).

Just like the expansion of the political system, which we criticized above, these concepts also reflect an imperialistic expansion of a social system – this time, of the economic system – which also requires criticism. It is absolutely beyond doubt that any attempt to subordinate the internal structures of religion, of art, or of information media to the principles of an economic constitution, or to judge these structures exclusively by principles of rational choice, would inflict intolerable violence both on the rationality of each system and on the basic orientation of society in its totality.

Nonetheless, a valuable motif can also be discerned in economic theories of the constitution. This can be found in their insistence that constitutions are manifest, not only in legal-political configurations, but also in the economy and, in fact, in all societal institutions. It is also noteworthy how strongly these theories emphasize the independence of societal constitutions from the state, such that the self-organization of partial sectors of society culminates in their self-constitutionalization.

Variation IV. Summum ius
Previous variations attributed societal constitutions to the expansion of either the political system or the economic system. However, a further variation attributes them to the expansion of the legal system, or more generally, of the normative-institutional sphere. This variation proceeds from a definition of institutions as ensembles of norms, and it identifies societal 'sectorial constitutions' in situations where legal orders not based in the state begin to institutionalize higher-ranking norms (Peters et al. 2009: 211 ff.). This is illuminated by the legal sociologist, Alberto Febbrajo (2016: 84), who states:

> the formula *ubi* state *ibi* constitution tends gradually to be replaced by a radical institutionalism based on the formula *ubi* institution *ibi* constitution, which explicitly bypasses the state and the centrality of its political dimension.

These theories perpetuate the legacy of institutionalism, which attributed a legal character to the norms of societal institutions (Romano 1918; Hauriou 1986 [1933]), and they elaborate this theory at the level of constitutional normativity. This institutionalist perspective is also deployed by international lawyers who describe the emergence of higher-ranked legal norms in international organizations and in 'self-contained regimes' as a form of constitutional pluralism beyond the nation state (Walker 2014). In so doing, they emphasize, quite rightly, the absolutely essential legal-normative quality of constitutions.

The achievements of institutionalism in establishing, in contrast to the narrow approach of methodological nationalism, the legal distinctiveness of transnational constitutional pluralism are very considerable. However, this approach is also not unaffected by certain reductivist tendencies, albeit of a completely different kind. A particular danger in the institutionalist approach is that it restricts its outlook, rather formalistically, to legal norms, both to norms centred around the state and norms of private ordering, and, as a result, neglects to address the social dynamics which impel the constitutionalization of society. Even the constitutions of states cannot be adequately understood if, like many constitutional lawyers in the Kelsenian tradition (Kelsen 1978 [1934]: 221 ff.), we approach them merely as ensembles of legal norms and, in so doing, fail to take into account the constitutional dynamics of the political process. The same can be said, analogously, of societal constitutions, in the analysis of which, equally, we should not neglect the fact that they are based primarily in the

self-constitutionalization of social systems and only secondarily in legal normative constructions. An institutionalist approach which only identifies societal constitutionalism with legal norms, which regulate different spheres of society, reduces constitutions to simple hierarchies of norms. The really important thing is to observe the distinctive connection which emerges between hierarchies of norms in the law and processes of reflection in social systems (Teubner 2012: 102 ff.). The material constitutional principles, which are most truly interesting, cannot be simply understood as higher-ranking legal norms in an institution. Instead, they need to be understood as the results of constitutional conflicts in society, whose juridification only takes place subsequently.

Nonetheless, institutionalism creates a valuable perspective in which we can identify more precisely the connection between a particular social system and the law. This is because institutions, constructed as ensembles of norms, make it possible for fundamental societal norms and the norms of constitutional law to assume close contact, and they allow us to interpret the process of constitutionalization as a process of two-directional 'translation' – that is, more precisely, as a co-evolutionary dynamic between constituted social systems and constitutional law (Teubner 2012: 110 ff.).

The compositional principle that underlies all these variations is the idea, with distinctions from case to case, that one single societal rationality expands into all spheres of society. It is the attempt to find a unifying principle of order in the unsettling multiplicity of societal constitutions, be this through the expansion of the political system, of the economic system, or of the legal system. However, these variations are far from exhausting the potential of Sciulli's theme. His societal constitutionalism is specifically intended to preserve and to promote the plurality of 'non-rational' orientations, against one-dimensional patterns of instrumental reason. In the final analysis, the four variations discussed thus far simply replace the old monism of the single constitution of the state with a new monism, centred on a single rationality, which is supposed to underlie all societal constitutions. These variations on the theme, however, are not able to appreciate the fact that the role of societal constitutions resides in their ability to institutionalize completely heterogeneous and incompatible rationalities alongside one another, and, at the same time, to limit their totalizing tendencies, with which they endanger each other.

Second series of variations: The unity of a global constitution
Variation V: The holistic constitution of society
The following variations on Sciulli's theme utilize a different compositional principle to explain societal constitutionalization – the insoluble unity of the constitution. This principle was originally developed for nation states. National constitutions claim in categorical fashion that they subordinate all activities of the state to their regulatory demands (Grimm 2005). Walker (2010) views the 'holistic' character – that is, the fact that they make such encompassing regulatory demands – as a defining feature of constitutions. This is justified through the assertion that constitutions are characterised by an integrative function, i.e. their ability to establish a common orientation for different social group formations, despite the conflicts between them (Smend 1928: chap. 7).

Some theorists transfer these ideas to societal constitutions, and posit the existence of a uniform constitution, not only for the state, but also for society in its entirety, in

some cases, even for global society. The historian, Reinhart Koselleck (2006: 369 ff.), claimed that the age of the nation state was defined historically by the existence, not only of a constitution for the state, but of a more encompassing constitution for society, which, in addition to political activities performed by the state, also subjected economic, social and cultural institutions to the requirements of constitutional law. Matters relating to social questions, to ecclesiastical organization, and to economic or fiscal institutions, were no longer problems to be addressed through simple acts of legislation. Rather, they had to be viewed as problems belonging to a genuine 'constitution of society'. If carried over into the process of transnationalization, this construction would imply that the transnational corporations are the most important actors whose constitutions form parts of a global constitution of all society.

In both international law and political philosophy, different authors claim that the constitutionalization of international law, which can currently be observed, is able to create a cosmopolitical constitutional order, a uniform constitution for global society in its entirety (Fassbender 2007: 281 ff.; Höffe 2005). To be sure, such theorists reject as unrealistic the idea that a uniform constitution of this kind is founded in a global state. However, they see the 'international community' as the primary point of reference for an emergent body of global constitutional law. In so doing, they conceive the 'international community', not, as in traditional international law, as a mere community of sovereign states, but as an aggregate of political and social actors and as a legal community of individuals.[4]

It is quite obvious that such ideas of an encompassing global constitution are hopelessly idealistic, and they are supported more by pious hopes than by realistic analyses (see the trenchant critique in Fischer-Lescano 2005: 247 ff.). Nonetheless, these cosmopolitan exaggerations also contain a valuable motif – the idea of integration by constitution. Of course, societal constitutionalism does not need to go looking, vainly, for an institutionally unified constitution of global society. However, it certainly does need to address questions concerning the integration or the co-ordination of the plurality of diverse constitutional orders. If it is correct that in nation states, alongside their constitutive and limiting functions, the integrative function of constitutions had decisive importance, then the question has to be addressed whether, precisely in the extreme fragmentation of transnational constitutions, there might still be institutions, which can perform this integrative function.

Variation VI. Constitution as collective imagination
There are theories, which place their focus on the symbolic function of constitutions, instead of their institutional reality. They ultimately attempt to salvage an insolubly unified constitution for all society. Confronted with the undeniable plurality of public and private legal regimes, and with the impossibility of creating a uniform global constitutional institution for these regimes, these theories cling nevertheless to the idea of the unity of the constitution. However, they reduce this unity to the idea that it only exists as the founding myth of a collective, be this a nation or the international community. This is expressed in the following conception: 'In its symbolic dimension, the constitution can only assume a unitary form when it is insolubly bound up with institutions such as language, media, culture, common knowledge, cultural memory', and it is 'dependent on a symbolically filled space, a cultural text', which enables the

---

[4] A thorough analysis of different variants on the idea of a cosmopolitan global constitution is offered by Rasilla del Moral (2011).

constitution normatively to cement a collective identity which overarches multiple processes of fragmentation (Vesting 2012: 95). This unitary constitution, which is merely fictitious, yet which has pervasive impact through society, can be harmonized with a plurality of real 'successive constitutions', which are institutionalized in various spheres of society, but which constantly refer back to the founding myth of the unitary constitution.

It is very debatable whether a cultural text of this kind can be seen as a constitution in the strict sense, if it does not assume hard institutional form. For in the absence of real institutions, which do not only symbolize unity, but also produce it in ceaseless processes of decision making, the unity of the constitution remains of course a mere fiction. Only in the 'successive constitutions', as Vesting calls them, in the fragmented constitutions of particular spheres of society, can the mutually constitutive relation between constitutional rules and symbolizations of unity become reality.

Two things are valuable, however, in this fictional theory of the constitution. On one hand, it rightly emphasizes that constitutions do not only produce positive law and resolve conflicts, but also create an identity for a collective, by means of a founding myth. Constitutions are, in reality, living processes, in which a social system assumes an identity, expressed in legal form. The fictional theory of the constitution quite rightly places greater emphasis on the symbolic function of the constitution, usually neglected by 'realistic' constitutional theories, than on its constitutive, its limiting and its integrative functions. On the other hand, this theory has merit because it constructs a two-level conceptual edifice to explain constitutional phenomena, comprising a symbolic total constitution and a number of institutionalized successive constitutions, which can be used in further reflections on these questions. The only question is – how?

Final movement: Unitas multiplex

In this concluding section, I will test three further variations on Sciulli's theme. These are intended to reprise, to bring together, and to develop further those motifs heard in the previous variations, which have proved to be of value.

The following motifs heard in the above variations appear to have enduring value:

- The idea of the *formalization of power as a medium of communication*: this is the core of the constitution – a motif, which requires further generalization;

- The idea of the *integrative function of constitutions*: this underpins the attempt to find the unity of the constitution, both in the national and in the transnational domain;

- The idea of the *constitution as a founding myth*: this reflects their symbolic function, which extends beyond their constitutive, their limiting and their integrative function;

- The idea of the *interplay between different constitutional levels*: this establishes a relation between the plurality and the unity of the constitution;

- The idea of the *self-constitutionalization of social systems*: this reacts critically towards the general imposition of social constitutions by the political system or the legal system

- *The core role of institutionalization*: only institutions, as ensembles of norms, establish an enduring contact, fundamental to constitutions, between legal norms and extra-legal norms;

- The idea of *state constitutions as historical model*: they play an exemplary role for societal constitutions most particularly because of their paradoxical capacity for self-limitation.

Variation VII. Meta-Constitution
The variations in the second group rightly emphasized that it is precisely constitutional pluralism that gives rise, both empirically and normatively, to the question of constitutional unity. Does pluralism only amount to a series of unrelated constitutions or does it in fact, in one form or other, produce constitutional unity – specifically, for global society? Existing answers to this question are unsatisfactory, and they subside into extreme positions. One extreme position denies the realities of global society by declaring that the United Nations forms the nucleus of an institutionalized constitution for global society. The other extreme position seeks refuge in fictional worlds by reducing the global constitution to a collective imagination, a founding myth. By contrast, 'transconstitutionalism' might potentially form an outlook, which is both realistic, and normatively challenging. However, in clear distinction from the concept with the same name proposed by Neves (2013), this position needs to combine the following four elements. (1) A uniform global constitution, which is indeed emerging, formed, however, only as a 'meta-constitution'; (2) This meta-constitution does not impose substantial constitutional principles, but projects procedural rules for resolving conflicts between partial societal constitutions; (3) More importantly, the meta-constitution is not constituted hierarchically in a free-standing institution, which resolves conflicts from the position of a third instance standing above the conflicting sub-constitutions; rather it resolves these conflicts heterarchically through the decisions of these partial constitutions themselves; (4) These decisions are realized either in acts of cooperation and negotiation or rules for resolving conflicts of laws, which are developed within the partial constitutions. The expression 'transconstitutionalism' captures the double meaning of this situation very precisely. It transcends the particularism of partial constitutions, yet, at the same time, it penetrates through the partial constitutions, without establishing a new, distinct institutional level.[5]

These tendencies towards the emergence of a conflict-of-laws constitution can be empirically observed in the (in)famous 'war of judges', which articulates the conflicts between the constitutions of nation states and the constitution of the EU as a 'judicial dialogue' between the European Court of Justice and the constitutional courts of nation states (see for example Arden 2010). In such cases, decisions that resolve collisions are made in one of the courts involved. However, the courts react to each other and, as in the common law, they adopt arguments of other courts (Shany 2007). Similar tendencies are observable in the conflicts between norms in

---

[5] In a similar vein, Thornhill (2016: 101) speaks of 'transjudicial communication' when courts decide on collisions of transnational norms and thus produce a strange *unitas multiplex* of global law.

transnational regimes, most obviously in the case of the WTO, which, in its case law concerning 'free trade and health', free trade and environment etc., has developed a free-standing conflict-of-laws jurisprudence, which, viewed from its own perspective, absorbs the normative demands of other regimes (Cass 2005: 197 ff.).

Seen historically, a transnational meta-constitution of this kind can build on the tradition of international private law. In parallel situations, in which national legal orders enter conflict without the presence of a third instance, the implicated legal orders have developed a large number of conflict rules for themselves. It is currently an object of intense discussion whether the potential of international private law can be used for constitutional conflicts and modified to fit a novel historical situation (Bomhoff 2015; Michaels and Pauwelyn 2011; Joerges 2011). For example, Horatia Muir Watt (2015) rejects all attempts to legitimate transnational legal order through recourse to a unified constitution. Instead, she places her faith in:

> interactions themselves as the starting point from which to approach issues of legitimacy. This would mean renouncing to decide the legitimacy question – in other words to sift through concurrent claims ex ante, and dealing with it ex post and in relative terms. This idea seems perfectly in line with global law's instable reflexivity. It suggests that the legitimacy question arises   in   different terms according to the type of claim - collaborative, confrontational, concurrent - that is being made in respect to other legal systems.

She makes it clear in this respect that a transnational conflict-of-laws constitution has to generalize and respecify the 'heterarchical' methods of international private law – that is, renvoi, preliminary questions, characterization lege causae. It is equally important to re-formulate the two opposing basic principles of international private law – mutual recognition and *ordre public* – for the relation between transnational constitutions. The principle of full faith and credit or mutual recognition does not only mean that transnational constitutions show reciprocal tolerance for one another, as is indicated by the principle of 'constitutional tolerance' (Kumm 2006: 528 ff.). It also contains the additional demand that constitutions need to realize 'constitutional responsiveness' (Viellechner 2015), and to develop substantive rules, which resolve the requirements of conflicting constitutions by establishing a compromise.

By contrast, *ordre public national* describes the limits to the recognition of a foreign legal order, which are reached when the foreign norm contravenes fundamental norms the domestic law (Forde 1980). Extended to the context described here, this means that under such circumstances one transnational constitution has to refuse to recognize a different transnational constitution (Muir Watt 2015).

Variation VIII. Nomos and Narrative
In contrast to this traditional meaning of *ordre public*, the legal concept of *ordre public transnational* has now been established, as a principle of conflict of laws, which can also be used in the context of transnational constitutional pluralism (Renner 2009; 2011: 88 ff.). Unlike the *ordre public national*, this concept is not intended to protect the foundations of the domestic legal order from foreign intrusion. The transnational *ordre public* deals with the relation of partial constitutions to society in its entirety. Each of the implicated constitutions constructs an *ordre public transnational* from its own perspective. Then every transnational regime becomes responsible for addressing two contradictory claims at the same time. On one hand, as examined in

the previous variation, each partial constitution is required to reflect itself in autonomous and decentralized fashion and to render itself compatible with the competing norms of other partial constitutions. In addition, however, each of the implicated partial constitutions has to construct, from its own perspective, principles of an *ordre public transnational* which encompasses all of society: that is, principles of a unified meta-constitution, in relation to which it evaluates its own norms.

At this point, two motifs which were audible in the different Sciulli-Variations reappear and run together: the unity of the constitution and, at the same time, the fictitious quality of this unity. The fact that they claim common points of reference and a (necessarily abstract) horizon of meaning, to which they refer in the production of norms, means that all partial constitutions can counterfactually project the existence of a unitary meta-constitution. This projection makes the fictitious quality of this unity apparent. For it needs to be constantly re-emphasized that this common horizon is not factually 'given'. On the contrary, it is merely a fiction, which each partial constitution produces through its own view of the world. The fact that a common core of validity can be counter-factually projected means that it is possible for different constitutional texts to promote a reference, varying from text to text, to constructions of the common good, which are then reflected in concrete norms.

Vesting moves very close to these ideas in describing the relation between the constitutions of society's sub-spheres and the constitution of society as totality. He claims that partial constitutions generate normatively binding force, but that they are also bound, in their self-construction, by 'retro-fictions', which produce the 'belief in their unity', or the 'imaginary unity of a total constitution'. Using categories influenced by Robert Cover, he speaks of this total constitution as follows: 'The constitution contains a single nomos, but this generates a variety of narratives' (Vesting 2015: 100; Cover 1983). In this, he correctly captures the difficult relation between institutionalized partial constitutions and the fictitious meta-constitution; notably, he sees this relation, not as a two-level structure, but rather as a process of reciprocal interpenetration on one distinct level – on the level of partial constitutions. However, his model requires two corrections. On one hand, it is not correct to view the fiction of unity as projecting substantial constitutional principles for the meta-constitution. The global meta-constitution does not extend beyond procedures and principles of conflict, co-operation and confrontation. On the other hand, the fiction of unity is not only produced by narratives. It is also produced through hard decision-making practices of the partial constitutions themselves; that is, in cases in which they make decisions about these conflicts. In the final analysis, Cover's formula needs to be interpreted in a different way. It needs to be taken to imply, not that the one nomos stands separately from the many narratives, but that a distinct and free-standing relation develops between nomos and narrative, both in the partial constitutions and in the conflict-of-laws constitution. Whilst the nomos of the sectorial constitutions draws out the different narratives contained in different partial expressions of substantial normativity, the narrative of integration by procedure is formed in the nomos of the conflict-of-laws constitution. Cover's formula – 'For every constitution there is an epic, for each decalogue a scripture' (1983: 4) – can be applied both to the fictitious global constitution and to the real constitutions of societal sub-spheres.

Variation IX Self-subversion
The dual formula of nomos and narrative rightly emphasizes that every social system develops its own self-descriptions, which form a larger context for its constitutional

rules. In self-descriptions, systems reflect both cognitively and normatively about their own identity. In this respect, again, the constitution of the state is the key historical model. Just as political theories concerned with the empirical reality of power and the normative projects of politics gain impact in the constitutions of state, other social domains formulate free-standing narratives – that is, descriptions of reality and normative constructions, which form the foundations of their distinct constitution (Koskenniemi 2009: 12 f.; Dunoff 2011: 150 ff.).

However, it is only in a final variation on the theme of Sciulli that we can penetrate the inner core of the constitution. To do this, like (Thornhill 2010: 18), we need to identify the 'formalization of the medium of communication' as the defining criterion for constitutionalization. Formalization of a medium – that means, that a constitution is produced, not only by cognitive and normative but also by medial reflection processes. For formalization is obtained, not only through the production of legal norms, but also, and more importantly, through the establishment of a self-referential relation – that is, through the application of a medium of communication to itself. Form is 'articulated self-reference' (Luhmann 2012: chap. 1, IV). The reflexivity of a medium means that media-oriented operations are themselves applied to the medium. In politics, this means the application of power to power; in law, it means the application of legal norms to legal norms; in the economy, this means the application of monetary operations to monetary operations; in science, this means the application of epistemic operations to epistemic operations (Luhmann 2000: 64). Constitutions are produced by formalization.

Formalization has constitutive consequences, and, paradoxically, it has self-limiting, even self-subverting consequences. And this paradoxical effect of medial reflexivity is what is important in late modernity when the negative consequences of functional differentiation become visible, particularly in today's ecological crisis (Luhmann 2012, chap. 4 XI). If the damaging consequences of the expansion of power, money, technologies and law are to be limited, a particular characteristic of medial reflexivity – its capacity for self-subversion (Teubner 2009) – will play a central role. It is rather unusual to ascribe this characteristic to constitutions, which are usually seen as 'entrenched' guarantees for enduring structures and long-term stability. Yet, the constitutions also contain subversive practices, which are evident in the fact that they also work towards their own self-transcendence, a fact, which is neglected in more orthodox constitutional theory. Medial reflexivity in constitutions operates as an internal subversive force with which a social system protests against its closure. This is the real sense of the famous 'constitutional moments' (Ackerman 2000) – they emerge when a potentially catastrophic development begins and transformative societal forces are mobilised which reach such intensity that the 'inner constitution' of a social system transforms itself under their pressure.[6] Reflexivity protests against 'natural' tendencies in social systems to recursiveness, routine, security, stability, authority and tradition. Against such inbuilt tendencies to orderly self-continuation, reflexivity infuses into the order a tendency towards disorder, deviation, variability and change. The constitution protests against itself – in the name of society, people and nature – but does so not from the outside but from within, from the inner constitution of the social system itself.

---

[6] For various aspects of this constitutional self-subversion, see the contributions in Kjaer et al. (2011).

The paradoxical effect of medial reflexivity is one of the most important messages that the sociology of constitutions has to relate. It criticizes the tendency of some theorists, which is also become increasingly pronounced in transnational relations, to assume that both political and societal constitutionalization can be exclusively conducted by the law and, by contrast, to marginalize the contributions of society. Empirical studies of transnational processes of constitutionalization come to the conclusion that their protagonists are no longer collective social actors, but legal instances: constitutional courts, national courts, transnational arbitration tribunals. By contrast, these studies of transnational constitutionalism suggest that the classical sources of the *pouvoir constituant* – social revolutions, political upheavals, constituant assemblies – now play an (almost) non-existent role. In somewhat exaggerated form, the thesis behind this can be distilled as follows: *From demos to rights*. The *pouvoir constituant* has migrated from external political processes into internal legal processes (Thornhill 2016: 103 ff.; 2013: 554 f.).

This, however, is a highly problematic tendency. The constitutive and limiting functions of constitutions cannot be performed by legal norms only. They are performed primarily by the reflexivity of media of social communication. Courts cannot create 'living constitutions' by command. The law only acquires a subsidiary impact in this regard, as it supports and, at most, induces reflexivity in societal institutions. Its role is to institutionalize medial reflexivity in diverse social systems, which it does by prescribing procedures of self-limitation and reconstructing social norms as constitutional norms. Both politics and social movements, which seek to use constitutionalization by law in order to combat destructive tendencies in the economy, in technology, in medicine or in new media of information, have to take into account this limited potential of law. They will not be able to realize the desired limitation of these systems by means of external legal intervention. At this point, one of the most significant changes in the legal structure that occurs in the transition to world society becomes visible. Niklas Luhmann (1975: 63), described this change in the following way:

> [A]t the level of the consolidating world society, norms (in the form of values, regulations, purposes) no longer steer the pre-selection of the cognitive. On the contrary, the problem of adaptation through learning gains structural   primacy, and the structural conditions for the learning-capability of all subsystems have to be supported.

The best the courts can achieve for societal constitutions is to create 'learning pressures' for social systems. They can induce them, in salutary fashion, into self-subversion.

Literature

Ackerman, Bruce A. (2000). *We the People: Transformations*. Cambridge (Mass.): Harvard University Press.

Anderson, Gavin W. (2013). 'Societal Constitutionalism, Social Movements and Constitutionalism from Below.' *Indiana Journal of Global Legal Studies* 20: 881-906.

Arden, Mary (2010). 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe.' *Yearbook of European Law* 29:3-20.

Böhm, Franz (1966). 'Privatrechtsgesellschaft und Marktwirtschaft.' *ORDO* 17:75-151.

Bomhoff, Jacco (2015). 'The Constitution of the Conflict of Law (LSE Legal Studies Working Paper No. 4/2014)' in Horatia Muir Watt and Ralf Michaels (eds.), *Private International Law as Global Governance*. Oxford: Oxford University Press, pp. 262-276.

Buchanan, James M. (1991). *Constitutional Economics*. Oxford: Blackwell.

Cass, Deborah Z. (2005). *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System*. Oxford: Oxford University Press.

Cover, Robert M. (1983). 'The Supreme Court, 1982 Term - Foreword: Nomos and Narrative.' *Harvard Law Review* 97: 4-68.

Dunoff, Jeffrey L. (2011). 'A New Approach to Regime Interaction' in Margaret Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*. Cambridge: Cambridge University Press, pp. 136-174.

Ellis, Jaye (2013). 'Constitutionalization of Nongovernmental Certification Programs.' *Indiana Journal of Global Legal Studies* 20: 1035-1069.

Fassbender, Bardo (2007). 'We the Peoples of the United Nations': Constituent Power and Constitutional Form in International Law' in Neil Walker and Martin Loughlin (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press, pp. 269-290.

Febbrajo, Alberto (2016). 'Constitutionalism and Legal Pluralism' in Alberto Febbrajo and Giancarlo Corsi (eds.), *Sociology of Constitutions: A Paradoxical Perspective* Abingdon: Ashgate, pp. 68-96.

Femia, Pasquale (2011). 'Against the "Pestilential Gods": Teubner on Human Rights.' *Rechtsfilosofie & Rechtstheorie* 40, pp. 260-274.

Fikentscher, Wolfgang and Ulrich Immenga (eds.) (1995) *Draft International Antitrust Code*. Baden-Baden: Nomos.

Fischer-Lescano, Andreas (2005). *Globalverfassung: Die Geltungsbegründung der Menschenrechte*. Weilerswist: Velbrück.

Forde, M. (1980). 'The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions.' *The International and Comparative Law Quarterly* 29: 259-273.

Grimm, Dieter (2005). 'The Constitution in the Process of Denationalization.' *Constellations* 12: 447-463.

Hauriou, Maurice (1986 [1933]). 'La théorie de l'institution et de la fondation: Essai de vitalisme social' in Maurice Hauriou, *Aux sources du droit*. Caen: Bloud & Gay, pp. 89-128.

Höffe, Otfried (2005). 'Vision Weltrepublik: Eine philosophische Antwort auf die Globalisierung' in Dieter Ruloff, Christoph Bertram and Bruno Frey (eds.), *Welche Weltordnung?* Zürich: Rüegger, pp. 33-53.

Joerges, Christian (2011). 'A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation' in Christian Joerges and Josef Falke (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*. Oxford: Hart, pp. 465-501.

Kelsen, Hans (1978 [1934]). *Pure Theory of Law*. Berkeley: University of California Press.

Kingsbury, Benedict (2009). 'International Law as Inter-Public Law' in Henry R. Richardson and Melissa S. Williams (eds.), *NOMOS XLIX: Moral Universalism and Pluralism*. New York: New York University Press, pp. 167-204.

Kjaer, Poul F., Gunther Teubner & Alberto Febbrajo (eds.) (2011) *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*. Oxford: Hart.

Kjaer, Paul F. (2014). *Constitutionalism in the Global Realm: A Sociological Approach*. London: Routledge.

Kjaer, Paul F. (2015). 'From Corporatism to Governance : Dimensions of a Theory of Intermediary Institutions' in Paul F. Kjaer and Eva Harmann (eds.), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance*. Basingstoke: Palgrave Macmillan, pp. 11-28.

Koselleck, Reinhart (2006). 'Begriffsgeschichtliche Probleme der Verfassungsgeschichtsschreibung' in Reinhart Koselleck, *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*. Frankfurt: Suhrkamp, pp. 365-401.

Koskenniemi, Martti (2009). 'The Politics of International Law – 20 Years Later.' *European Journal of International Law* 29: 7-19.

Krajewska, Atina (2013). 'In Search of the Holy Grail of Transparent and Coherent Global Health Law.' http://campus.hec.fr/global-transparency/wp-content/uploads/2013/10/Krajewska-Transparency-and-global-health.pdf.

Kumm, Mattias (2006). 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called.' *American Journal of Comparative Law* 54: 505-530.

Ladeur, Karl-Heinz (2009). 'Die Drittwirkung der Grundrechte im Privatrecht – „Verfassungsprivatrecht" als Kollisionsrecht' in Gralf-Peter Calliess, Andreas Fischer-

Lescano, Dan Wielsch and Peer Zumbansen (eds.), *Soziologische Jurisprudenz, Festschrift für Gunther Teubner zum 65. Geburtstag am 30. April 2009*. Berlin: De Gruyter Recht, pp. 543-558.

Ladeur, Karl-Heinz and Lars Viellechner (2008). 'Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privatrechtsregimes.' *Archiv des Völkerrechts* 46: 42-73.

Lindahl, Hans (2013). 'We and Cyberlaw: The Spatial Unity of Constitutional Orders.' *Indiana Journal of Global Legal Studies* 20: 697-730.

Loughlin, Martin (2010). 'What Is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?* Oxford: Oxford University Press, pp. 47-72.

Luhmann, Niklas (1965). *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*. Berlin: Duncker & Humblot.

Luhmann, Niklas (1975). 'Die Weltgesellschaft' in Niklas Luhmann, *Soziologische Aufklärung Band 2: Aufsätze zur Theorie der Gesellschaft*. Opladen: Westdeutscher Verlag, pp. 51-71.

Luhmann, Niklas (1990). 'Verfassung als evolutionäre Errungenschaft', *Rechtshistorisches Journal* 9: 176-220.

Luhmann, Niklas (1998). 'Der Staat des politischen Systems: Geschichte und Stellung in der Weltgesellschaft' in Ulrich Beck (ed.), *Perspektiven der Weltgesellschaft*. Frankfurt: Suhrkamp, pp. 345-380.

Luhmann, Niklas (2000). *Die Politik der Gesellschaft*. Frankfurt: Suhrkamp.

Luhmann, Niklas (2012). *Theory of Society*. Stanford: Stanford University Press.

Michaels, Ralf and Joost Pauwelyn (2011). 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' in Tomer Broude and Yuval Shany (eds.), *Multi-Sourced Equivalent Norms in International Law*. Oxford: Hart, pp. 19-68.

Muir Watt, Horatia (2015). 'Conflicts of Laws Unbounded: The Case for a Legal-Pluralist Revival', *Transnational Legal Theory* 6, pp. forthcoming.

Neves, Marcelo (2013). *Transconstitutionalism*. London: Hart.

Peters, Anne, Jan Klabbers and Geir Ulfstein (eds.) (2009) *The Constitutionalization of International Law*. Oxford: Oxford University Press

Prandini, Riccardo (2010). 'The Morphogenesis of Constitutionalism' in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?* Oxford: Oxford University Press, pp. 309-326.

Preuss, Ulrich K. (2012). 'La garantie des droits: "les droits horizontaux"' in Michel Troper and Dominique Chagnollaud (eds.), *Traité International de Droit Constitutionnel, Tome III*. Paris: Dalloz, pp. 233-270.

Pribán, Jirí (2015). 'Asking the Sovereignty Question in Global Legal Pluralism: From "Weak" Jurisprudence to "Strong" Socio-Legal Theories of Constitutional Power Operations', *Ratio Juris* 28: 31–51.

Rasilla del Moral, Ignacio de la (2011). 'At King Agramant's Camp: Old Debates, New Constitutional Times.' *International Journal of Constitutional Law* 8: 580-610.

Renner, Moritz (2009). 'Towards a Hierarchy of Norms in Transnational Law?' *Journal of International Arbitration* 26: 533-555.

Renner, Moritz (2011). *Zwingendes transnationales Recht: Zur Struktur der Wirtschaftsverfassung jenseits des Staates*. Baden-Baden: Nomos.

Romano, Santi (1918). *L'ordinamento giuridico*. Florenz: Sansoni.

Scholz, Rupert (1971). *Die Koalitionsfreiheit als Verfassungsproblem*. München: C.H. Beck.

Scholz, Rupert (1978). *Pressefreiheit und Arbeitsverfassung*. Berlin: Duncker & Humblot.

Sciulli, David (1988). 'Foundations of Societal Constitutionalism: Principles from the Concepts of Communicative Action and Procedural Legality.' *British Journal of Sociology* 39: 377-407.

Sciulli, David (1992). *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory*. Cambridge: Cambridge University Press.

Sciulli, David (2001). *Corporate Power in Civil Society: An Application of Societal Constitutionalism*. New York: New York University Press.

Selznick, Philip (1969). *Law, Society and Industrial Justice*. New York: Russell Sage.

Shany, Yuval (2007). *Regulating Jurisdictional Relations between National and International Courts*. Oxford: Oxford University Press.

Sinzheimer, Hugo (1976 [1927]). 'Das Wesen des Arbeitsrechts' in Otto Kahn-Freund and Thilo Ramm (eds.), *Arbeitsrecht und Rechtssoziologie*. Frankfurt: Europäische Verlagsanstalt, pp. 108-114.

Smend, Rudolf (1928). *Verfassung und Verfassungsrecht*. München: Duncker & Humblot.

Steinhauer, Fabian (2015). *Medienverfassung: Untersuchung zur Verfassungswissenschaft nach 1990* Frankurt: Habilitationsschrift.

Teubner, Gunther (2009). 'Self-Subversive Justice: Contingency or Transcendence Formula of Law?' *Modern Law Review* 72: 1-23.

Teubner, Gunther (2012). *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford: Oxford University Press.

Teubner, Gunther (2013). 'The Project of Constitutional Sociology: Irritating Nation State Constitutionalism', *Transnational Legal Theory* 4: 44–58.

Thompson, Grahame (2015). 'Review Essay: Socializing the Constitution?' *Economy and Society* 44: 480-493.

Thornhill, Chris (2010). 'Niklas Luhmann and the Sociology of Constitutions.' *Journal of Classical Sociology* 10: 1-23.

Thornhill, Chris (2011). *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*. Cambridge: Cambridge University Press.

Thornhill, Chris (2013). 'A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions.' *Indiana Journal of Global Legal Studies* 20: 551-603.

Thornhill, Chris (2016). 'The Sociological Origins of Global Constitutional Law' in Alberto Febbrajo and Giancarlo Corsi (eds.), *Sociology of Constitutions: A Paradoxical Perspective*. Abingdon: Ashgate, pp. 99-124.

Vanberg, Viktor (2005). 'Market and State: The Perspective of Constitutional Political Economy', *Journal of Institutional Economics* 1: 23-49.

Verschraegen, Gert (2013). 'Differentiation and Inclusion: A Neglected Sociological Approach to Fundamental Rights' in Mikael Rask Madsen and Gert Verschraegen (eds.), *Making Human Rights Intelligible: Towards a Sociology of Human Rights*. Oxford: Hart, pp. 61-80.

Vesting, Thomas (2012). 'Ende der Verfassung? Zur Notwendigkeit der Neubewertung der symbolischen Dimension der Verfassung in der Postmoderne' in Stefan Korioth and Thomas Vesting (eds.), *Der Eigenwert des Verfassungsrechts: Was bleibt von der Verfassung nach der Globalisierung?* Tübingen: Mohr Siebeck, pp. 71-93

Vesting, Thomas (2015). *Die Medien des Rechts: Computernetzwerke*. Weilerswist: Velbrück.

Viellechner, Lars (2012). 'Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law.' *Goettingen Journal of International Law* 4: 599-623.

Viellechner, Lars (2015). 'Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law.' *Transnational Legal Theory* 6: 1-21.

Wai, Robert (2008). 'The Interlegality of Transnational Private Law.' *Law & Contemporary Problems* 71: 107-127.

Walker, Neil (2010). 'Beyond the Holistic Constitution?' in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?* Oxford: Oxford University Press, pp. 291-308.

Walker, Neil (2014). *Intimations of Global Law*. Cambridge: Cambridge Universit Press.

Wielsch, Dan (2013). 'Private Governance of Knowledge: Societally Crafted Intellectual Properties Regimes.' *Indiana Journal of Global Legal Studies* 20: 907-940.