Osgoode Hall Law Journal

Volume 46, Number 3 (Fall 2008) Article 2

The Constitutive Paradox of Modern Law: A Comment on Tully

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Abstract
This commentary draws out and elaborates upon some of the more challenging aspects of Professor Tully's sophisticated taxonomy of the relationship between modern constitutional forms and constituent powers. Tully's article reveals the historical particularities of these formations, and at the same time encourages the reader to think beyond them, towards the potentially uncategorizable realm of democratic constitutionalism. Yet, how is it possible to use a taxonomy of modern constitutional democracy as a means of understanding what ties in the uncharted territory beyond? This commentary further explores to what extent this paradoxical modern configuration of constituent powers and constitutional forms may be connected to a paradox at the heart of modern law.

Keywords
Constitutional history; Constitutional law; Democracy

The Constitutive Paradox of Modern Law: A Comment on Tully

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This commentary draws out and elaborates upon some of the more challenging aspects of Professor Tully's sophisticated taxonomy of the relationship between modern constitutional forms and constituent powers. Tully's article reveals the historical particularities of these formations, and at the same time encourages the reader to think beyond them, towards the potentially uncategorizable realm of democratic constitutionalism. Yet, how is it possible to use a taxonomy of modern constitutional democracy as a means of understanding what lies in the uncharted territory beyond? This commentary further explores to what extent this paradoxical modern configuration of constituent powers and constitutional forms may be connected to a paradox at the heart of modern law.

Ce commentaire élabore et fait ressortir certains des aspects les plus provocateurs de la taxonomie sophistiquée du professeur Tully, qui concerne la relation entre les formes modernes constitutionnelles et les pouvoirs des mandants. L'article du professeur Tully révèle les particularités historiques de ces formations et, parallèlement, encourage le lecteur à penser au-delà de celles-ci, en direction du domaine, potentiellement non catégorisable, du constitutionnalisme démocratique. Pourtant, comment est-il possible de recourir à une taxonomie de la démocratie constitutionnelle moderne comme moyen de comprendre ce qui réside dans le territoire inexploré? Ce commentaire examine plus en profondeur la question de savoir dans quelle mesure cette configuration paradoxale moderne des pouvoirs des mandants et des formes constitutionnelles peut être liée à un paradoxe au cœur du droit moderne.

PROFESSOR TULLY'S ARTICLE is both important and challenging, but it may be difficult for readers to fully grasp just how challenging, indeed, destabilizing, some of its arguments might be.[1] Part of the task for a commentator, then,

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* Associate Professor, Osgoode Hall Law School. The author wishes to thank Peer Zumbansen and Craig Scott for the initial invitation to present this comment at the second Osgoode Hall Constitutional Law Roundtable, "Comparative Constitutional Law and Globalization: Towards Common Rights and Procedures?" Osgoode Hall Law School, 24 February 2007, as well as Professor Tully for his exceptional generosity and willingness to engage in dialogue.

1. James Tully, "Modern Constitutional Democracy and Imperialism" (2008) 46 Osgoode Hall L.J. 461 [Tully, "Democracy and Imperialism"].

especially one who is an admittedly sympathetic reader of Tully's work, is to draw out and elaborate upon some of the more radical dimensions of this article. Indeed, the argument which the article so elegantly presents reaches down to the very roots of our understanding about how political society is organized and governed through law in the West. In particular, it is an argument that has quite destabilizing implications for the sort of comparative discussion that this special issue undertakes, because it calls into question some of the assumptions we need to make in order to engage in these types of classificatory exercises.

One problem for "comparative constitutionalism" potentially raised by Tully is illustrated by a Borges story which describes a "certain Chinese encyclopedia," the Heavenly Emporium of Benevolent Knowledge, in whose "distant pages" it was recorded that

> animals are divided into: (a) those that belong to the emperor; (b) embalmed ones; (c) those that are trained; (d) suckling pigs; (e) mermaids; (f) fabulous ones; (g) stray dogs; (h) those that are included in this classification; (i) those that tremble as if they were mad; (j) innumerable ones; (k) those drawn with a very fine camel's-hair brush; (l) etcetera; (m) those that have just broken the flower vase; (n) those that at a distance resemble flies.[2]

As Derek Gregory reports:

> When he read this, Foucault said that he roared with laughter, a laughter that seemed to shatter all the familiar landmarks of European thought, breaking "all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things." In his wonderment at this strange taxonomy, Foucault claimed to recognize the limitation of his own—"our" own—system of thought: "the stark impossibility of thinking *that*."[3]

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2. Jorge Luis Borges, "John Wilkins' Analytical Language" in Eliot Weinberger, ed., *Borges: Selected Non-Fictions* (New York: Viking, 1999) 229 at 231. Borges's Encyclopedia is well-known in part because of its famous reading by Foucault. See Michel Foucault, *The Order of Things: An Archaeology of Human Sciences* (London: Tavistock, 1970) xv.

3. Derek Gregory, *The Colonial Present* (Oxford: Blackwell, 2004) at 1 [emphasis in original, footnotes omitted]. Gregory takes up the example of "Foucault's laughter" to make a point about what he thinks Foucault's laughter forgets: the "Orientalism" of our western constructions of "non-modern" thought. While I return to the matter of the "encyclopedia" at the end of this commentary, my preliminary observation here, about the potential limitations of "modern" forms of argumentative structure (taxonomy) in directing our attention to those "other" forms that lie beyond/outside them, is inspired by Gregory.

Tully's article lays out in careful detail the limits of the modern form of "western constitutional democracy," revealing it as a historical and contingent construction of an imperial world order, but a form, nonetheless, that has increasingly come to be seen as "a universal and cosmopolitan endpoint for one and all."[4] Indeed, the seventh aspect of "constitutional democracy" detailed in his article refers to this teleology and its "legitimating meta-narratives [that] are woven into the horizons of modern humanities and social and legal sciences, and into the day-to-day administration of all aspects of constitutional democracies, so deeply that even critics often accept them as the bounds of reasonable argument."[5] Thus, Tully's analysis is a careful taxonomy of eight aspects of the dynamics of the relationship between modern constitutional forms and constituent powers. At the same time, it is a taxonomy that invites us to not only reflect on the particulars of these "ordered surfaces and planes" of modern constitutional democracy, but also to think beyond them towards the unthinkable, or at very least, the rather messy and potentially uncategorizable realm of democratic constitutionalism.

Gregory comments on Foucault's reading of Borges in a book that seeks to trace the contemporary effects of the "extraordinary power and performative force of colonial modernity" in the contested spaces of Afghanistan, Palestine, and Iraq.[6] Gregory observes that the "nominally 'unthinkable space'" of the Chinese encyclopedia was also produced from within the modern—the modern imagination of Borges himself—and so, Gregory says, the joke is on Foucault.[7] Colonial modernity is a double-headed coin: that is, its production already depends on the representation of what is outside of itself as other. In a similar vein, "modernist" forms of analysis such as taxonomies play a role in structuring our thinking in certain ways, so that which lies outside or beyond the list is not merely seen as not "modern," but as "uncategorizable."

In this vein, one observation that might be made of Tully's article would not have to do with its substance, but with its method of argument. Does the form of taxonomy have the effect of defining not only what it includes, but also those "other" forms that lie outside/beyond it? If so, is it possible that the very

4. Tully, "Democracy and Imperialism," *supra* note 1 at 479 [footnotes omitted].

5. *Ibid.*

6. Gregory, *supra* note 3 at 4.

7. *Ibid.* at 3.

accomplished taxonomy we are presented in the first part of the article, which encompasses in its bibliographic sights a considerable swath of the history of western political thought, could work at cross purposes with the democratizing project of the second part? But then how does one seek to understand a modern "form" such as constitutional democracy in relation to its other, here, democratic constitutionalism, without reproducing this Orientalist blind spot?

Tully's collaborative approach to democratic critique as entailing a "participatory and reflexive freedom of negotiating the norms to which we are subject *en passant*"[8] provides the beginning of a response. It would appear that "acting otherwise" is a provocative formulation that might function to disrupt the inside/outside dichotomies that constantly threaten to recapture efforts to think differently about states, constitutions, and imperialism in our times. Although, as I will suggest later, more needs to be said about how "acting otherwise" might be recognized in particular states, and how it might take different forms in relation to the various aspects of constitutionalism that are so carefully detailed in the first part of the article.

It would be premature, however, to leap to a discussion of the concluding and more schematic remarks on democratic constitutionalism without taking more time to reflect on the contribution of what I call the "taxonomy" in the first part of the article. I think it is worth noting that Tully, in identifying the contemporary international order as "imperial,"[9] takes this as the beginning, rather than the end of the inquiry. Too often, I think, analyses rest on not much more than the assertion that imperialism can be found where dramatically unequal economic and political relations exist between nations, and fail to more rigorously undertake the crucial investigations of how the inequalities are a product of relations constructed and maintained through law. Imperialism is defined in this article as a specifically legal matter: it is a particular "form of rule" (or, I might say, a mode of governance) that is exercised through, and re-inscribes, a specific set of relations between a hegemon and a subaltern.[10]

However, this form of rule is not understood in the usual sense as merely or even primarily a matter of international law, and this is one of the major contributions of the argument concerning the literature on legal imperialism as

8. Tully, "Democracy and Imperialism," *supra* note 1 at 488 [emphasis in original].

9. *Ibid.* at 461.

10. *Ibid.* at 463.

I understand it. Tully performs an important reversal in the passage where he states, "it is impossible to understand the relationship between modern constitutional forms and constituent powers unless the imperial and post-imperial supra-state constitutional forms are seen as internally related to the state constitutional forms."[11] That is, the state constitutional form is itself a product of an imperialist supra-state order. With this seemingly obvious historical insight, however, the form of the nation-state as we commonly understand it is turned inside out, and the conventional boundary between domestic and international law is erased. This all occurs in Tully's discussion of the first aspect, and so, is in effect the starting point of his argument. Because of its significant implications for the disciplines of international and comparative law, as conventionally understood, I am tempted to go on in this vein, retracing the steps in which this article leads us inexorably to the insight that the current phase of western imperialism should properly be called "legalized hegemony," adding exclamations and points of emphasis as road signs for the legal reader.[12]

Instead, at the risk of dealing with only a small piece of a complex and subtle project, I will pose some questions that seek to engage with this article from a slightly different set of reference points. First, to what extent is this "paradoxical modern configuration of constituent powers and constitutional forms"[13] that Tully explores connected to a problem or a paradox at the heart of modern law? As well, how might thinking specifically about that aspect of the argument in the initial part of the article help us to think about Tully's comments on the possibilities for democratic constitutionalism in the latter part?

Peter Fitzpatrick has argued that modern nations are wholly compatible with a notion of continuous and ongoing imperialism, largely because of the particular role of modern law. In Fitzpatrick's view, modern law lacks a stable "ground"—and in seeking to maintain a facsimile of "groundedness," it must

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11. *Ibid.* at 468 [footnotes omitted].

12. I acknowledge that the argument may be slightly less devastating for readers not working within the disciplines of international or comparative law. And, of course, many of the specific observations may not be particularly surprising for international lawyers, but then, the capacity of international legal thought to withstand or pragmatically incorporate such conceptual challenges itself becomes the site of inquiry. See *e.g.* Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law" (2007) 8 Theor. Inq. L. 8.

13. Tully, "Democracy and Imperialism," *supra* note 1 at 465.

oscillate between universal and particular reference points.[14] Fitzpatrick states that there are "constituent complicities between sovereignty and law, even the rule of law," and that "law takes content and coherence from the dictates of monadic sovereign power."[15] But then he reverses the argument and suggests that the sovereign (nation) must equally rely on the law for its coherence, not just domestic but also international law. I think that this parallels the first argument made by Tully about the "internal" relation of the imperial and post-imperial international orders and the constitutional form of the state, except that Fitzpatrick's suggestion is articulated in relation to law, sovereign nations, and the necessity of international law to each.[16] In a way, it is not very surprising that one might find the same paradox at the "ground" of modern law that one finds in the form of modern constitutional democracy. They share many originating narratives; indeed, they are so deeply intertwined in our thinking that it is hard to pull them apart.[17] In emphasizing the impact of the argument as a whole on foundational assumptions that are conventionally made about the nature and function of modern law, I am amplifying the connection between Tully's work and a specific (and admittedly marginal) tradition of critical legal thought in international law.[18] There are also important differences between Tully's approach and the critical legal approach I have crudely

14. See Ruth Buchanan & Sundhya Pahuja, "Law, nation, and (imagined) international communities" (2004) 8 L. Text Cult. 137.

15. Peter Fitzpatrick, "'Gods would be needed...': American Empire and the Rule of (International) Law" (2003) 16 Leiden J. Int'l L. 429 at 431. How this "constituent complicity" might play itself out in relation to international law is discussed in Buchanan & Pahuja, *ibid.*

16. "Might it not be that sovereignty is reliant on law for its sustained cohering rather than, or just as much as, vice versa? And if that proves to be the case, might it not be that the reliance of the national sovereign on law is a reliance not just on the law of its bounded nation but also a reliance on international law? If so, how may that law be constituted— and constituted apart from its commonly assumed reliance on nation or on the nation-state?" Fitzpatrick, *ibid.*

17. See the essays in Jennifer L. Beard & Sundhya Pahuja, eds., "Divining the Source: Law's Foundation and the Question Of Authority" (2003) 19 Austl. Fem. L.J. See also Ruth Buchanan & Rebecca Johnson, "The 'Unforgiven' Sources of International Law: Nation-building, Violence and Gender in the West(ern)" in Doris Buss & Ambreena Manji, eds., *International Law: Modern Feminist Approaches* (Oxford: Hart, 2005) 239.

18. In addition to the references to Anghie, Marks, Simpson, and Koskenniemi in the article, one might include the recent collection edited by Anne Orford. See Anne Orford, ed., *International Law and its Others* (Cambridge: Cambridge University Press, 2006).

identified. These differences reference Tully's views on the specific work of "critique" which he has elegantly articulated elsewhere.[19]

Reformulating the problem as one of the paradox at the heart of modern law, as well as modern constitutional democracy, as I am suggesting, might also have implications for the final part of Tully's argument. I suggest that distinctly different answers present themselves to the question of "what can be done"[20] if it is formulated in the first instance as a problem of law, rather than a problem of politics, as in the approach to democratic constitutionalism in Tully's article. Although we know from the analysis that the form of "constitutional democracy" is both political and legal, the problem is presented as one of "democratizing" imperialism, not of de-imperializing law. There may be even less "room to manoeuvre" if the critique is reformulated in legal terms, but perhaps that is part of the matter that needs to be addressed, as I will try to suggest below.

There is a divergence between what flows from the critiques of the form of modern constitutional democracy and the form of modern law in the attempt to integrate the insights of legal pluralism into our analysis. As Tully puts it, legal pluralism draws attention to the "subjugated and overlooked 'alternative worlds' ... of law and governance"[21] which coexist with the modern forms of law and democracy. But what, more precisely, does it mean to incorporate the "legal pluralist" perspective at this point in the argument? The answer must depend on which legal pluralism you are talking about. There are a range of approaches to legal pluralism itself, and each has limitations.

As I have observed elsewhere, an influential strand of legal pluralist thinking emerges from legal sociology and anthropology which is more or less straightforwardly "empirical" in its orientation, insofar as it defines its project in terms of describing and documenting a variety of non-western legal systems.[22] This version of legal pluralism tends to be easily collapsed, in the context of constitutional arguments such as the one at hand, into a variant of political pluralism. This approach can also be seen as influenced by the same modernist impetus to categorizations, with its attendant dangers of "othering"

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19. James Tully, "Political Philosophy as a Critical Activity" (2002) 30 Pol. Theor. 533.

20. Tully, "Democracy and Imperialism," *supra* note 1 at 490.

21. *Ibid.*

22. Ruth Buchanan "Legitimating Global Trade Governance: Constitutional and Legal Pluralist Approaches" (2006) 57 N. Ir. Legal Q. 654.

that I discussed at the outset. I have argued, further, that most extant approaches to legal pluralism tend to implicitly reproduce a positivist conception of law. All of these features may serve to limit the utility of extant approaches for the type of critical project envisioned by Tully, which is a transformation from within. Therefore, rather than a legal pluralism that merely offers an external account of the contemporaneous coexistence of multiple legal systems (imagined as discrete normative containers), we need a legal pluralist analysis that will help us understand how these multiple normativities coexist (not always harmoniously, it is clear) within the "law." Simply put, we need an understanding of the internal or inherent plurality of law itself.[23]

A critical focus on the contested plurality of law (in contrast with "legal pluralism") helps us to appreciate the many specific ways in which the agonistic processes of lawmaking extend well beyond the domestic political institutions of particular "constitutional democracies." This is an important "antidote," as Gavin Anderson points out, to the "prevailing constitutional politics of definition,"[24] which confine the politics of lawmaking to the domestic sphere and imagine its possibilities as exhausted by the dichotomy of state and civil society.[25] Anderson's account is useful insofar as it elaborates the implications of the legal pluralist insight that "constitutionalism always involves questions of private, as well as, public power."[26] One of the most important aspects of his argument for my purposes is not only the necessity of grappling with multiple

23. *Ibid.* at 669.

24. Gavin W. Anderson, *Constitutional Rights After Globalization* (Oxford: Hart, 2005) at 143. Anderson persuasively argues for the utility, indeed, the necessity of a legal pluralist approach to constitutionalism, in light of the dangerous reductions effected by currently hegemonic conceptions, as in the following passage from page 143 of his book [footnotes omitted]:

> The most important artefact of the successful articulation of hegemonic globalization with rights constitutionalism remains the state-civil society divide, which lies at the heart of the prevailing constitutional politics of definition. This serves the crucial legitimating function of obscuring the broader constellation of law and political power—including corporate law-making and corporate political power—operating in society. In this way, a politics of definition that equates law with state law, and constitutionalism with limits on state law, to the extent it takes hold in the political and legal imagination, is a powerful antidote to regarding corporations as sites of political power, and sources of constitutional law, which a critical approach to legal pluralism suggests they always have been.

25. A vibrant illustration of the limits of this approach to the political realm is found in Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (New York: Columbia University Press, 2004).

26. Anderson, *supra* note 24 at 145.

sources of constitutional law, but the question of how constitutionalism engages with private power. The question of means brings us into conversation, I would suggest, with the discussion of democratic constitutionalism in the latter part of Tully's article. I believe Tully would agree with Anderson's suggestion that

> a legal pluralist constitutionalism stands for the idea that no form of social power should attract special constitutional protection or limitation on account of its provenance alone. Instead, it "presumes that inquiries about legitimacy, due process, and substantive justification" are relevant with regard to all exercises of political authority, whatever the source.[27]

This is one avenue by which we might come to a discussion of the necessity of considering matters of "legitimacy, due process and substantive justification" in relation to a contemporary supranational institution such as the WTO (World Trade Organization). The WTO is a pivotal, but also somewhat difficult, example to place in Tully's analysis. It is among those exemplars of the "second class" of transnational and international "modern constitutional forms" that have developed in the post-colonial West. Tully notes that the WTO, along with other supranational institutions such as NAFTA (North American Free Trade Agreement), the EU (European Union), the UN (United Nations) *Charter*, and basic international human rights law, did not emerge in a vacuum, but were built on the foundations of older bodies of imperial and colonial law, and by the conventions of *lex mercatoria*. However, to observe both the internal relationship between constitutional state formation and (European) imperialism, and the continuing influence of the legal formations of European imperialism on contemporary international institutions, does not yet demonstrate how the ongoing effects of these sedimented international legal forms take shape in the contemporary supranational order, nor how they shape the ongoing struggles that are taking place in and around them.

For example, a more detailed account of the interstate negotiations over the liberalization of trade since the mid-century under the auspices of the GATT (General Agreement on Tariffs and Trade) and the effects of the GATT's transformation into the WTO in 1995 seems crucial to a full account of our contemporary order as "'open door' [or] 'free trade' imperialism."[28] Of particular importance in this account are the means by which a core group of developed

27. *Ibid.* at 147 [footnotes omitted].

28. Tully, "Democracy and Imperialism," *supra* note 1 at 463.

nations ("the Quad") were for many years able to define the agenda for negotiations at biannual ministerial meetings, and further to engineer the production of a "consensus" outcome at those meetings.[29] The mechanisms by which that consensus was generated are no longer as effective as they once were. The last two ministerial meetings, in Cancun and Hong Kong, were unable to generate any agreement, and negotiations on the most recent "Doha Round" have been effectively stalled.[30] The explanation for these developments is complex, and this complexity raises some further questions for Tully's proposals regarding the avenues by which contemporary imperialism may be democratized.

In Tully's account, as in many legal pluralist accounts, the privileged agent of change is the "subaltern." Tully notes that the parasitism of imperial rule, and the fact that it must rely on the collaboration of the subaltern, allows for the majority of the world's population who are in effect "the governed" to "act otherwise" in some limited ways.[31] Tully draws here on the work of Boaventura de Sousa Santos, among others. Santos has brought to the attention of socio-legal scholars a number of experiments with what he identifies as non-imperial (or "counter-hegemonic" to use Santos's term) global networking and forms of legality.[32] The questions that arise relate to the scope of this agency and its potentially transformative effects, the dangers of co-optation (the "irresolution thesis"[33]), and its relationship to the state, in both the North and the South.

Why providing answers to these questions in relation to particular institutions is important can be seen from a further examination of the WTO. Its legitimacy has indeed been challenged, from both the "inside" and the "outside." Developing states have pressed for more internal transparency and fairer processes of negotiation, even as they have been the main actors who are resisting challenges to the institution's "accountability" from the "outside," that is, from global civil society, which is seen by developing states as balanced

29. Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: the Real World of International Trade Negotiations* (London: Zed books, 2003).

30. See *e.g.* Jürgen Kurtz, "Developing Countries and their Engagement in the World Trade Organization: An Assessment of the Cancun Ministerial" (2004) 5 Melbourne J. Int'l L. 280.

31. Tully, "Democracy and Imperialism," *supra* note 1 at 491.

32. *Ibid.* See also Boaventura de Sousa Santos & César A. Rodríguez-Garavito, eds., *Introduction to Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge, Cambridge University Press: 2005).

33. Tully, "Democracy and Imperialism," *ibid.* at 477.

toward northern interests and perspectives. The contradiction embedded in this dual challenge might raise questions about how to define the roles of constituent and constitutive power in relation to such an institution. The WTO has, for the most part, resiliently clung to a notion of itself (even as it slowly implodes) as composed of sovereign "member states." Furthermore, these states largely appear to act in relation to the WTO as sovereigns—that is, exemplifying what Tully describes as "constitutive" power, in agonistic relationship with "the people" or the "constitution" from which they derive their authority.[34] Tully's analysis, and that of many others, would lead us to identify the dimension of constituent power in relation to the WTO in the resistant practices of "global civil society," that is, those social movements and civil society networks that have mobilized around the WTO. Yet, they have not turned out to be the primary agents of change.

In this instance, at least, it would seem that the locus of resistance has emanated from a coalition of developing states, acting in the interests of some of their poorer populations, in refusing to agree to new WTO "disciplines" relating to investment or services, before agreements can be reached that will facilitate the dismantling of extensive and damaging first-world agricultural subsidies. The failure of the Doha Round, to date, is likely more about the emerging challenge to US economic hegemony by the collective market power of sovereigns in the developing world than the efforts of a handful of underfunded and understaffed non-governmental organizations (NGOs) in Geneva. Nonetheless, the patent unfairness of the global trading order seems to have reached a breaking point, one which brings into being the possibility that the agonistic relations between "constitutive" and "constituent" power might be reconfigured. The possibility that the ensuing reconfigurations could be transformative seems highly circumscribed, however, for as multilateral negotiations at the WTO have faltered, a supplementary network of bilateral and regional agreements has sprung up in their place, most of which already include the contested provisions on investment and services.[35] What it would

34. *Ibid.* at 471.

35. Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46 Harv. Int'l L.J. 67; Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes" (2006) 14 Geo. Mason L. Rev. 135. A useful and up-to-date online database of

mean to "democratize" the WTO, or even whether the WTO is as important a piece of "open door imperialism" as some assume it to be, is left rather unclear.

Finally, in light of the above, how should we assess the voluminous debates over the "constitutionalization" of the transnational? I would suggest that at least in relation to the WTO, these debates now seem naive, even dangerously out of touch. It is true that the WTO's "liberal legalist" account of itself as a collection of equal sovereigns is no longer able to hold in place the hegemonic narrative of the divide between law and politics in the transnational, and, hence, justify the broad scope of its operation as an exclusively "legal" institution. Debates over the "constitutionalization" of the WTO stem from these concerns about the "crisis of legitimacy" and, ironically, as such debates have gained momentum, the imagined potential reach of the institution has broadened correspondingly.

I have argued elsewhere, adopting a version of what Tully calls the irresolution thesis, that these institutional re-imaginings are not benign, but potentially dangerous.[36] There, I suggest that it might be important to attend to the risk inherent in attempts to "democratize" global constitutionalism of overstating or over-valorizing the role played by constituent power, especially where that power is identified with "global civil society." Santos explicitly acknowledges such amplifications in his work, identifying them in terms of a "sociology of emergence."[37] Santos claims such amplifications are necessary both to "render visible and credible the potential that lies implicit or remains embryonic in the experiences under examination," and to avoid "the discrediting of budding options brought about by structuralist conceptions of global legal hegemony."[38] Tully's response to the irresolution thesis is less prescriptive, in keeping with his approach to democratic constitutionalism more generally.

The basic idea of democratic constitutionalism set out in Tully's article is that laws, even constitutional laws, must always be open to criticism, negotiation, and modification. As Anderson notes, it follows that inquiries about legitimacy, due process, and substantive justifications are relevant with

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Bilateral Investment Treaties (BITs) is available online at: <http://ita.law.uvic.ca/investmenttreaties.htm>.

36. Ruth Buchanan, "Global Civil Society and Cosmopolitan Legality at the WTO: Perpetual Peace or Perpetual Process?"(2003) 16 Leiden J. Int'l L. 673.

37. Santos & Rodríguez-Garavito, *supra* note 32 at 17.

38. *Ibid.*

regard to all exercises of political authority, including those of multinational institutions such as the WTO.[39] However, Tully says little about the formal shape that these types of inquiries might take. The only measure of whether we are looking at an example of "democratic constitutionalism," rather than its nemesis, is whether "the constitutional form of the network is based on the ongoing democratic and non-violent exercise of the constituent powers of the partners who subject themselves to it."[40] In contrast to the detailed examination of the "form" of constitutional democracy we find in the article, democratic constitutionalism is explained and understood as an open-ended process.

I will now return, in lieu of a conclusion, to the invocation of Borges's "Chinese encyclopaedia," and the distance that separates "us," as its uncomprehending readers, from "them," who might "get" it somehow. This return is prompted by the final remarks in Tully's article, which speak hopefully of a partnership role between critical scholarship and critical scholars in the West, and those (subalterns) "who are building networks of globalization ... based on the ongoing democratic and non-violent exercise of constituent powers."[41] While I *want* to believe, like Tully, that this is indeed a relationship of reciprocal elucidation, I am inclined to think that it might more frequently take on a Borgesian aspect—as a relationship characterized more by mutual mystification and incomprehension.

As with most important issues of social theory, our basic understandings of human nature are at issue here. Are we capable of learning from each other or are we doomed to mutual misunderstanding? In responding to the skeptics, Tully need only look as far as his own significant body of work, although a wide range of other important sources are, of course, embedded within it.[42] He draws attention to the important work of Santos and others on "translation," but would describe his own approach as more indebted to the critical pedagogy

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39. Anderson, *supra* note 24.

40. Tully, "Democracy and Imperialism," *supra* note 1 at 492 [footnotes omitted].

41. *Ibid.*

42. James Tully, "Recognition and Dialogue: The Emergence of a New Field" (2004) 7:3 Crit. Rev. Int'l Soc. & Pol. Phil. 84. See also James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); James Tully, "The Unfreedom of the Moderns in Relation to Their Ideals of Constitutionalism and Democracy" (2002) 65 Mod. L. Rev. 204; and James Tully, *Public Philosophy in a New Key*, vols. 1 & 2 (Cambridge: Cambridge University Press, 2008).

of Paulo Friere, and a Ghandian-inspired conception of "dialogue."[43] Another contemporary thinker who has made important contributions in this area is Paul Gilroy. In his recent *Postcolonial Melancholia,* Gilroy confronts the skeptical view directly:

> In the resulting world of racial and ethnic common sense, it does not matter that all demands for the recognition of supposedly absolute difference presuppose extensive transcultural knowledge that would have been impossible to acquire if cultural divisions always constituted impermeable barriers to understanding. Appreciating this paradox of discrepant ontologies provides a chance to approach the problems of multiculture from a different angle and consider instead why the alibis that derive from the cheapest invocations of incommensurable otherness command such wide respect? Why should the assertions of ethnocentricity and untranslatability that are pronounced in the face of difference have become an attractive and respectable alternative to the hard but scarcely mysterious work involved in translation, principled internationalism, and cosmopolitan conviviality?[44]

While it is sometimes difficult in scholarship to draw attention to developments on the margins without seeming to over-valorize them, or overstate the case that they may represent important changes ahead, Tully's work does precisely this. He provides an admirably clear account of the challenges facing us, and inspires us to get on with the "hard but scarcely mysterious work" of translation, dialogue, and conviviality.

43. Author's communication with Professor Tully (March 2007).

44. Paul Gilroy, *Postcolonial Melancholia* (New York: Columbia University Press, 2004) at 8.