

REVIEW ESSAY

RESOURCES FOR A FUTURE: TOWARDS AN ARTICULATION OF GLOBAL GOVERNANCE

BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION EDITED BY GÜNTHER HANDL, JOACHIM ZEKOLL AND PEER ZUMBANSEN (MARTINUS NIJHOFF, 2012) 565 PAGES. PRICE €181.00 (HARDCOVER) ISBN 9789004186477;

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I INTRODUCTION

Is global governance part of our past, of our present or of our future? Perhaps it is all of these — an unavoidable analytic framework, which we continue to apply as circumstances change around us with consequent changes in our perception of our political world. As David Kennedy has observed, ‘we are only just beginning to unravel the mystery of global governance. Simply mapping the modes of global power and identifying the channels and levers of influence remains an enormous sociological challenge’.¹ Some versions of international law’s history of itself suggest that in pre-modern times a form of global governance indeed prevailed, namely the global domination of the Roman

¹ David Kennedy, ‘The Mystery of Global Governance’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 37, 39.

Catholic Church or of the Holy Roman Empire.² In the minds of English-educated writers at least, congenitally vague about European history, the Holy Roman Empire was more or less the same thing as the universal Church, and that imagined religious conglomerate purported to rule the globe from the days of Charlemagne until 1648. In that remarkable year, so the story goes, global governance was transformed. No more Papal string-pulling: instead, the plural sovereignty of local monarchs, each ensconced in his 'nation-state', getting on with the business of delegated sovereignty. For the outcome of the Westphalia settlement, as perceived with the special hindsight of the international lawyer, was no less than an evolutionary leap in global governance. With the same hindsight, the special form taken by the Reformation in England in the century before Westphalia is seen as a remarkable anticipation of this new world of Princes. The nation-state with its autocratic but circumscribed sovereignty, for all its faults and limitations, prepared the way for the popular sovereignty of liberal democracy and for free trade. Thus global governance both in 'bad' (Papal) and 'good' (Westphalian) variants is central to our past.

In the present, globalisation, however parsed, implies global governance in some form or another. The United Nations system itself is some kind of global governance, as is the matrix of quasi-universal agreements on human rights and on humanitarian law. The network of surveillance orchestrated by the Anglo-Saxon powers (the 'Five Eyes') could be said to be a form of global regulation, if not governance. The same could be said for the effects of the internet, for the market and lifestyle manipulations of multinationals and so on. Thus the question of whether the future holds global governance needs to be contextualised both in terms of our imagining of possibilities, including our imagining of the past, and of whatever material realities we recognise as being 'out there'. Above all we need the intellectual resources with which to approach the many tangled questions posed by global governance. These include the role to be played by tradition-based forms of regulation and the articulation of a genuine legal pluralism;³ and the question of relationships between states in a world connected by wrongs as well as by rights.⁴ What is at stake is our collective stewardship of a fragile evolutionary project.

'Global governance' is, then, a term of wide scope. Here I take it to mean, roughly, 'the way the world is managed'. A Westphalian template or a hegemonic Papacy, a transcendental 'law of nations' or a centralised World Federation, would all be forms of management of the world's affairs: competing explanatory and justificatory frameworks for geopolitics, each with its own balance of agency and structure, of expertise and tradition. 'Anarchy' might be

² This is the view that Patrick Capps critically characterises in the following passage:

The emergence of a set of claims that natural law governed nations coincided with the demise of the authority of the Holy Roman Empire ... Natural law, rather than the Pope or the Emperor, was now [around the mid sixteenth century] understood to govern international relations.

Patrick Capps, 'Natural Law and the Law of Nations' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 61, 61 (citations omitted).

³ John R Morss, 'Good Global Governance: Custom, the Cosmopolitan and International Law' (2007) 3 *International Journal of Law in Context* 59.

⁴ Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011).

another alternative, not necessarily to be identified with the Westphalian.⁵ Yet another might be derived from an Hohfeldian analysis, an apt recognition of the centenary of the first announcement of Hohfeld's scheme.⁶ As these last two examples illustrate, different models of world management — of global governance — differ greatly in terms of the constraints and the freedoms that are implicated in their particular ecological or systemic perspective.

Looked at in this way, regulation is an expression of governance. The relationship between governance and regulation might be thought of along the lines of the langue/parole difference in structural linguistics or the competence/performance distinction in the generative linguistics of Noam Chomsky.⁷ Governance is structural; regulation is performative. The global, regulative reach of the manipulators of markets, and of the state-sponsored surveillance industry, is in both cases more symptom than syndrome, more effect than cause. In thinking about the global, about governance, and about whatever is meant by the combination of these terms, we need to call upon the kind of technical and procedural expertise in which law excels. As Fleur Johns puts it, we should not necessarily 'read down the capacities of international legal technicians as monolingual managerialism'.⁸ Our thinking about such issues as territoriality, the role played by communities in governance, and the role played by regulation in a globalised economy, is sufficiently sophisticated to make a contribution to the imagining of the global. Evolving debates over statehood in international law⁹ provide an illustration: effectiveness coupled with legitimacy seems to be taking centre stage. Legitimacy in turn is increasingly defined in terms of a democratic reading of self-determination. Political process is prioritised over the domination of delimited territory as such. Cross-border flows of regulation, capital, communications and ideology are the rule and not the exception, and dispute resolution across state boundaries is likewise unexceptional. The role of boundaries between states therefore needs some careful evaluation in relation to territoriality, neither over-playing nor under-playing their effects.

The three books under review all seek, in diverse ways, to chart and to guide the future of international law. One (Handl, Zekoll and Zumbansen) explores the multidimensional phenomenon of the extraterritorial, including the analysis of how and why our understandings of territoriality in law need to adapt to a changing world.¹⁰ Another (Trachtman) adopts a particular theoretical framework, an orthodox economic functionalism, in order to identify causative trends in international law and hence to predict its future growth and

⁵ John R Morss, *International Law as the Law of Collectives: Toward a Law of People* (Ashgate, 2013) 133.

⁶ John R Morss, 'The Legal Relations of Collectives: Belated Insights from Hohfeld' (2009) 22 *Leiden Journal of International Law* 289.

⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 8.

⁸ Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013) 223.

⁹ Karen Knop, 'Statehood: Territory, People, Government' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 95.

¹⁰ Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff, 2012).

characteristics.¹¹ The third (Weston and Bollier) sets out a program for the greening of governance, by which is meant the design and implementation of a sustainable, commons-based scheme for global governance.¹²

II REGULATION AND ITS CONSEQUENCES

The nature of territoriality continues to challenge our thinking. As the reference to the mythical Papal hegemony above reminds us, the international community continues to accept claims to international legal status of the contemporary vestigial manifestation of the former Papal States, claims which among other things, point to controlled territory as evidence of independence. Of course independence and sovereignty are moveable feasts. While Vatican City is an extreme example, it illustrates the general point that cross-border flows of regulation, capital, communications and ideology are the rule and not the exception. Physical barriers between states such as the oceans surrounding Australia, or the Berlin Wall, have certain effects which differ from the effects of a boundary such as that between Scotland and England. These effects include the construction of different senses of territory and different kinds of territoriality. Whatever may be meant by global governance, an articulated understanding of the changing role of territory in transnational legal regulation is going to be required. So is an understanding of the big picture of international regulation, and of the drivers of change in that system, standing back to some extent from the current disposition of territorial states.

The editors of *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* focus the attention of their contributors on extraterritoriality. Handl, Zekoll and Zumbansen maintain a focus on legal senses of territoriality and of extraterritoriality, and on ways in which international legal discourse, both private and public, articulates extraterritoriality. This narrow focus is helpful because there is considerable diversity in those legal senses, a diversity that may well be obscured by a premature appeal to other disciplines or by the attempt to comprehensively contextualise. Private international law seems to be somewhat ahead of the public variety in the sophistication, or at least the technical complexity, of its analysis of territoriality. The chapters on intellectual property (by Alexander Peukert), on antitrust law (by Imelda Maher), on World Trade Organization ('WTO') law (by Friedl Weiss) and on international investment law (by Rainer Hofmann) open up the technicalities of territoriality in these different zones of legal activity across borders. International law knows many forms of territoriality or territorialities.

It is therefore not a criticism of the Handl, Zekoll and Zumbansen collection to observe that interdisciplinarity plays a limited role. Most of the contributors to this collection focus their attention on legal regulation, eschewing appeal to other disciplines. Peer Zumbansen is an exception. Zumbansen's two contributions to the collection both propose that socio-legal studies, and the social sciences more generally, need to make a bigger contribution to the question of (legal) territoriality. In the scope afforded in these chapters Zumbansen does not make

¹¹ Joel P Trachtman, *The Future of International Law: Global Government* (Cambridge University Press, 2013).

¹² Burns H Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press, 2013).

great progress with these proposals. ‘Transnational legal pluralism’, as Zumbansen terms the approach he favours, is said to recognise the contestation and the erosion of boundaries between form and substance, and between public and private, in law.¹³ Above all, transnational legal pluralism is said to grasp the significance of the ‘contestation, de-construction [sic] and relativisation of the boundaries between law and non-law’.¹⁴ For Zumbansen these convergent processes are to be thought of in terms of ‘legal evolution’, with the emergence of a ‘transnational normative order’, for example, in the field of corporate governance.¹⁵ As Zumbansen notes somewhat in passing, the distinction between law and non-law is itself a kind of territorial question.¹⁶ But that question is even more challenging than Zumbansen here indicates. Johns’ *Non-Legality in International Law* is, among other things, an extended interrogation of that borderline: what might be called ‘beating the bounds’. For Johns, in a more rigorously deconstructivist mode than Zumbansen, non-legality lurks within the legal and legality lurks within the non-legal.

This point brings us to the question of international law’s understanding of communities. In *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (‘Green Governance’), Burns Weston and David Bollier seek a future for sustainable global governance in grassroots developments where sovereignty is fragmented and fluid. For Weston and Bollier, imperatives of climate degradation, and other threats to the sustainability of human life on our planet, present us with the challenge of adjusting our whole approach to sovereignty and authority on both global and local scales.¹⁷ The substance of their program is centred around rights to a sustainable environment, such that those rights are attributable to future generations just as much as to the present world population, and even to the natural world itself. The vehicle is the commons. Thus Weston and Bollier call for ‘a reconceptualization of the human right to a clean and healthy environment achieved through new modes of commons-based governance’.¹⁸ Weston and Bollier do not here examine the conceptual underpinnings of such a right in relation to the plurality of its holders. Their proposed ‘Universal Covenant Affirming a Human Right to Commons- and Rights-Based Governance of Earth’s Natural Wealth and Resources’, which is couched in terms of the rights of ‘natural persons’, is sufficiently ambitious as it stands.¹⁹ Yet this ‘ontological’ exercise might be of importance.²⁰ The role of rights of communities or of populations might play a useful part in articulating the entitlements and protections that Weston and Bollier are advocating.

¹³ Peer Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’ in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff, 2012) 53, 56.

¹⁴ *Ibid* 67 (emphasis altered).

¹⁵ *Ibid* 57–8.

¹⁶ *Ibid*.

¹⁷ Weston and Bollier, above n 12, 77–9.

¹⁸ *Ibid* 28 (emphasis altered).

¹⁹ *Ibid* 269.

²⁰ *Ibid* 171.

Concrete proposals are offered by Weston and Bollier for the coordination of international efforts aimed at conserving natural resources and enabling sustainable enjoyment of resources by the public at large, as against the exploitation of resources by private capital. Regimes already in place for access to and protection of the Antarctic, the deep seabed and the Moon/outer space, are examples of ways of managing collective resources in a collective manner, honouring and operationalising the rhetoric of the ‘common heritage of mankind’.²¹ A ‘new architecture of law and policy’²² would involve a ‘Triarchy’ of State, Market and Commons.²³ For example, private companies would need to take environmental impact into account much more rigorously than at present, and would be required to consult with appropriate ‘commons’ such as organisations responsible for community-managed resources. Empowerment of the commons might be thought of as a 21st century, post-Communist echo of the ‘all power to the Soviets’ by which workers’ control of the means of production was to be implemented in the heady, early days of the Union of Soviet Socialist Republics. There is in some ways a similar celebration of the legitimacy and the responsibility of the local community, one which forges a conceptual alliance with a deregulatory libertarianism that is less unfamiliar in the United States than is revolutionary socialism. Libertarianism in the fundamentalist form of anarchy also has its contemporary proponents²⁴ and in some ways Chartier’s root and branch philosophical attack on the state complements the Weston and Bollier argument.

Somewhat related to this point, there is on occasion in Weston and Bollier a slightly sentimental or populist attitude to the commoners’ worldview²⁵ and its attachment to territory. This attitude could perhaps be balanced with reference to the dark side of community. A footnote in *Green Governance* on surfers’ collective control of surfing resources on Oahu²⁶ refers to locals’ allocation of resources (the waves) and punishing breaches of respect (for local residents and the waves). This example is aptly used by the authors to illustrate the diversity and particularity of the commons. But surely it is also open to critique as an example of ethnocentrism and of collective greed. To the extent that the Weston and Bollier commons is characterised by deference to traditional practices and by claims to authenticity of affiliation, it seems regressive at least from a cosmopolitan perspective.

International law is part of the solution for Weston and Bollier, since it already recognises a variety of relevant forms of entitlement for citizens and of obligations on behalf of states and corporations. Customary international law and international conventions both contribute to their toolkit of global regulation. A key regulatory role in the development of Green Governance is to be played by what Weston and Bollier call ‘Vernacular Law’.²⁷ Vernacular Law is informal

²¹ Ibid 216–19.

²² Ibid 179.

²³ Ibid 195.

²⁴ Gary Chartier, *Anarchy and Legal Order: Law and Politics for a Stateless Society* (Cambridge University Press, 2013).

²⁵ Weston and Bollier, above n 12, 108.

²⁶ Ibid 158 n 5.

²⁷ Ibid 177.

and maintained by sociocultural processes and is by its nature a communal matter. It includes customary law in a general sense although the role of customary international law as such is not spelled out. But international law is also part of the problem. Except for its highly specialised, state-centred recognition of customary international law, it marginalises customary law more generally, and is apparently reluctant to recognise as justiciable so many of the concerns of indigenous peoples and other communities who suffer at the hands of residual colonialism or transnational capital. For Weston and Bollier, international law is an instrument that can be directed toward a variety of purposes, and the purposes or values are more important than the instrument. *Green Governance* is unapologetically political and communitarian. Consistent with this, Weston and Bollier are critical of ‘the impersonal, transactional, self-servingly rational, money-based models typically fostered by property rights and market exchange’.²⁸ These are approaches that brought us to the global financial crisis and are of little help as we try to move forward. Thus they advocate that attention be paid to a wide range of economic models or paradigms, including approaches that attempt to break free from Enlightenment assumptions. ‘Commons models generally embody a different type of social order’²⁹ than the above money-based models. But while Weston and Bollier gesture toward a communitarian account of international regulation, some of the communities they discuss are described in terms of voluntaristic individuals. In the context of communities in cyberspace, the *Green Governance* vision is an expressly liberal one; reference is made to ‘[s]elf-selecting individuals who come together on open platforms’.³⁰

Weston and Bollier thus adopt an eclectic approach, but eclecticism has its price. Joel Trachtman is much more disciplined, if that is the correct contrast. Trachtman strongly advocates an economic paradigm for international relations according to which states attempt to realise their preferences, and these preferences are seen to derive directly from the aggregated preferences of their individual citizens. Entertaining the hypothesis that a state ‘is behaving like an individual’, Trachtman observes that the state ‘would maximize its expected utility by a cost-benefit analysis’ and that states’ motivations sometimes gives rise to cooperation.³¹ According to Trachtman, ‘we might simply say that we seek efficiency in horizontal allocation of authority among states’.³² International law for Trachtman is therefore secondary to economic processes. For Trachtman, societies consist of individuals and the characteristics of societies are aggregates of the characteristics of those individuals. Global government — Trachtman eschews the term ‘governance’ as being too vague — is to be thought of in ‘welfarist’ terms according to which ‘citizens ... would determine to utilize international legal cooperation in order to improve their welfare’.³³ Thus Trachtman’s liberalism is express, and this transparency of intellectual commitment is a virtue of his book. Trachtman’s is a ‘policy-exchange

²⁸ Ibid 15–16.

²⁹ Ibid 15.

³⁰ Ibid 17.

³¹ Trachtman, above n 11, 264.

³² Ibid 221.

³³ Ibid 17.

contractual theory of international law'.³⁴ Trachtman writes that 'constitutional economics does not accept preemptive values such as human rights, environmental protection, or wealth maximization'³⁵ except in so far as these are embodied in individual preferences. The approach is an attempt at a rigorously individualistic analysis, of 'rational individuals seeking to maximize utility'.³⁶ State-individuals, or natural-person-individuals, undertake rational calculation in order to carry forward their interests. This line of argument is of course a venerable one, and whether the reader is an adherent of this view, a sceptic or even an opponent who considers it invidious, it is helpful to have the argument rehearsed. Any reader in either the second or third of these camps would wish for more detail in the foundations of the argument than is generally supplied by Trachtman in this book. For example, while much of Trachtman's emphasis is on cooperation, cooperation is thought of as a strategic outcome designed to maximise objectives which are, at root, competitive.³⁷ The Mutually Assured Destruction of the Cold War era's deterrence policies were presumably cooperative in that sense. But this seems an incomplete analysis. Additionally, the under-theorised treatment of states as if they are kinds of individual, interacting with each other in ways that individual persons do, impacts on the plausibility of Trachtman's claims.

Trachtman's methodological colours are thus nailed to the mast with as much zeal as are the activist colours of Weston and Bollier. While Trachtman's individualism is in some ways in direct conflict with the communitarianism of Weston and Bollier, the two projects are not diametrically opposed on all points. It would be possible to employ Trachtman's approach, or at least some variant of it, in the service of a political program such as that of Weston and Bollier. A cost-benefit analysis, based on human welfare, might well come down in favour of a sustainable planet rather than one that is rapidly exhausted of its potential to sustain human life (cf Weston and Bollier's 'more holistic, long-term cost accounting of our uses of Nature'³⁸). Trachtman quotes with approval Friedmann's 1964 account of 'the growing structure of international organization and the *pursuit* of common human interests'.³⁹ There is a danger of begging the question over the concept of 'human welfare' — its definition requiring an ideological choice — yet it seems possible to treat 'common human interests' in a manner that is not technical in the sense of economics and yet retains some precision, for example as including survival, again in alliance with Weston and Bollier.

III THE PRODUCTION OF REGULATION

Regulation is a theme for all three books being considered in this review but is perhaps an especial focus of Trachtman. For Trachtman regulation is fundamentally cooperative, arising from the reciprocal meeting of needs by free

³⁴ Ibid 64.

³⁵ Ibid 262.

³⁶ Ibid 262.

³⁷ Ibid 264.

³⁸ Weston and Bollier, above n 12, 14.

³⁹ Trachtman, above n 11, 1 (emphasis added by Trachtman), quoting Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens, 1964) xiii.

agents: a market of interests. Trachtman describes the need for cooperation and for international agreements, situations in which cooperation becomes desirable. There can be said to be ‘extensive needs for greater international legal cooperation in order to cope with future opportunities and challenges’.⁴⁰ Similarly, there are for Trachtman ‘important reasons for international cooperation’ in the area of ‘cyberterrorism’ threats;⁴¹ and the reasons are at least as cogent for international cooperation over climate change, food security and so on. Trachtman is thus sanguine, almost Panglossian, about the future of international law: ‘as international law grows, it grows stronger. Furthermore, as it grows stronger it will be more useful for a wider range of tasks, causing the scope of international law to become more extensive’.⁴² More generally:

as the frequency, intensity, and cumulation of ... instances of cooperation increase, it is also to be expected that economies of scale and scope, arising from a number of sources, would suggest some degree of movement toward coherence. With increasing substantive interactions brought about by globalization, states would naturally find it useful to coordinate on issues of governing rules, regulatory cooperation, and regulatory competition. With increasing instances of coordination, states would naturally find it useful to ensure that the interactions among diverse rules is sorted out in a productive fashion.⁴³

Clearly, however, cooperation does not happen just because it is desirable, otherwise the project of Weston and Bollier, for example, would not be needed: we would not have got ourselves into this mess (both ecological and economic) in the first place. Good reasons or ‘needs’ do not seem to have been enough in the past for coordinated global action by governments. It is therefore not clear how much explanatory weight can be placed on the kind of analysis that Trachtman is carrying out here. So the Green Governance project among other virtues might be said to expose some of the gaps, or at least current limitations, in our available theoretical frameworks. Trachtman may be correct to predict such developments as the ‘increasing democratization or accountability of governments’.⁴⁴ Elsewhere in Trachtman there is more nuance on democracy’s relationship with globalisation but from time to time trends such as this are discerned in terms that seem simplistic. Thus ‘sovereigns will be understood as trustee governments, holding power only insofar as they are servants of the people’.⁴⁵ This reference to trusteeship is important: the work of Evan Criddle and Evan Fox-Decent on so-called peremptory norms of international law⁴⁶ has demonstrated the significance of the notion of a fiduciary relationship in our thinking about global governance. But Trachtman does not seem to wish to clothe these bones in flesh. It is therefore difficult to evaluate Trachtman’s nod in the direction of a Weston and Bollier approach when he suggests that

⁴⁰ Trachtman, above n 11, 21.

⁴¹ *Ibid* 117.

⁴² *Ibid* 56.

⁴³ *Ibid* 222.

⁴⁴ *Ibid* 4.

⁴⁵ *Ibid* 83.

⁴⁶ Evan J Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 *Yale Journal of International Law* 331.

in order to serve the people best, there will be situations in which [the trustee government] must give up authority ... to allocate authority to the social organization best suited to exercise authority in the particular context. This can be expected to result in more international law.⁴⁷

Trachtman's analysis is, to put it kindly, underdeveloped here.

Trachtman describes his methodology as functionalist, and he has a specific tradition in mind in this connection.⁴⁸ David Mitrany explored the nature of international organisations and international government, on the basis of posited national preferences and the bureaucratic consequences of states' attempts to efficiently achieve those preferences.⁴⁹ However Trachtman's approach is functionalist in a somewhat wider sense also. Functionalist explanation is frequently to be encountered in references to the 'natural', and both Weston and Bollier, and Trachtman, give us examples. For Weston and Bollier, biological or evolutionary underpinnings of cooperation and competition are said to be illuminating.⁵⁰ In Trachtman, the suggestion is made that quasi-natural processes are repeating themselves, displaying the same developmental pattern at the international level as supposedly on the municipal: 'establishing basic property rights and rules of security first and turning to creation of public good and regulatory purposes later'.⁵¹ The remark is introductory and too much weight should not be placed on it; yet it is characteristic of Trachtman's approach, and the later description of fragmentation as 'a developmental problem of the international governmental system'⁵² is in the same vein. All is for the best, it seems, as a predictable process works its way out.

Trachtman's generalities and summary statements would benefit from unpacking. Of course Trachtman may feel that he has written enough about these matters elsewhere and does not wish to repeat himself in his latest book. But in some ways the unpacking is especially important when a functionalist analysis is being applied. There is a danger of circular argument and a kind of blandness in functionalist analysis as commentators such as Anthony Giddens have long ago observed.⁵³ The above quotation from Trachtman ('as international law grows, it grows stronger') is an example. A similar style is to be found in the following: 'as the market of international relations becomes deeper and more efficient, it will increasingly be a part of a normal, and more stable, national equilibrium'.⁵⁴ Functionalism is notoriously difficult to avoid. In Handl's introduction to the edited collection, it is asserted that 'growing inter-dependence entailed the emergence of functional international organisations and institutions with which

⁴⁷ Trachtman, above n 11, 83.

⁴⁸ Ibid 14. It should be observed that Joel Trachtman is by no means uncritical of the Mitrany-Haas tradition of functionalism and neo-functionalism in international government, for example in its neglect of international law as such and in its tendency to teleological analysis of increasing integration in supranational affairs. See also David Mitrany, *The Functional Theory of Politics* (Martin Robertson, 1975).

⁴⁹ David Mitrany, above n 48.

⁵⁰ Weston and Bollier, above n 12, 132.

⁵¹ Trachtman, above n 11, 1.

⁵² Ibid 222.

⁵³ Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press, 1984).

⁵⁴ Trachtman, above n 11, 43.

states began to share transnational legal authority',⁵⁵ which seems to say little. In a similar vein, elsewhere in Handl, Zekoll and Zumbansen's collection, the introduction to Weiss's chapter on the WTO takes us from the supposed papal hegemony and Westphalia to the *SS Lotus* case⁵⁶ in 20 lines, suggesting an evolutionary imperative shaping our ends.⁵⁷ This superficiality is perhaps unavoidable in an introductory context such as that of Handl or of Weiss but more of a problem if it can be said to characterise Trachtman's analyses. Observations such as 'men and women have found it good to depart anarchy and establish constitutional rules in many contexts'⁵⁸ give cause for concern in this respect. This kind of claim has all the vacuity of functionalist analysis; it says little more than that this purported state of affairs 'works', and that alternatives such as imagined precursor alternatives, do not. Similarly, Trachtman cites with approval Francis Fukuyama's mundane observation that with environmental change and other challenges, 'there is often a disjunction between existing institutions and present needs'.⁵⁹ Yet Fukuyama himself goes on to say, somewhat more substantively, that those institutions 'are supported by legions of entrenched stakeholders who oppose any fundamental change'.⁶⁰ Any new analysis of broad trends in global regulation or governance must reach, if only speculatively, beyond the familiar.

Trachtman's style is straightforward and engaging, which may thus at times be at the expense of precision. Weston and Bollier think that we are globally in crisis, and they make a case for this claim. Trachtman's introductory chapter is entitled 'The Crisis in International Law' but, unlike the former authors, it is not clear what Trachtman thinks the crisis is. He argues that international law is evolving, that it responds to changes in its environment and that it is a kind of marketplace; the tenor of which is to deflate the notion of crisis. It may be that by 'crisis' Trachtman is referring to the challenge presented by current international concerns over such matters as human rights, environmental degradation, cyberterrorism and so on — topics which he investigates in depth in later chapters of the book. These are pressing issues but Trachtman overstates his case by asserting that one hundred years ago '[t]here simply were few international concerns raised by these types of issues'.⁶¹ That is to say, what Trachtman thinks of as a classical 'Grotian' form of international law, setting out expectations for diplomatic interaction around war and peace and free trade, was in the past adequate and therefore was not exceeded. Again this statement is intended to be a pragmatic generalisation but it does seem unhelpfully sweeping. Significant political pressures arose in Great Britain, for example, nearly two

⁵⁵ Günther Handl, 'Extra-Territoriality and Transnational Legal Authority' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff, 2012) 3, 4–5.

⁵⁶ *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10.

⁵⁷ Friedl Weiss, 'Extra-Territoriality in the Context of WTO Law' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff, 2012) 463, 463.

⁵⁸ Trachtman, above n 11, 286.

⁵⁹ *Ibid* 11.

⁶⁰ Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (Farrar, Straus and Giroux, 2011) 7.

⁶¹ Trachtman, above n 11, 3.

centuries ago in response to the perceived persecution of co-religionists by the Ottoman Empire.⁶² *The Communist Manifesto*⁶³ was published not much later, still more than a century and a half ago, and without accepting its own hyperbole at full face value, its significance as an expression of internationalism can hardly be dismissed. Earlier than both, the American Revolution influenced the French event and both caused ripples across Europe and Asia.⁶⁴

IV THE CONSUMPTION OF REGULATION

Trachtman's summary view, while acknowledging the openness of the future of the global states system, somewhat overlooks the historically contingent and transient (as well as incomplete) nature of that system as a manifestation of a Grotian brand of regulation. Greater historical sensitivity would assist here. The observations of James Gordley in the Handl, Zekoll and Zumbansen collection are apposite. Discussing the medieval jurists, Gordley argues that 'explanations in terms [of] territorial sovereignty never solved the old problems',⁶⁵ that is to say, the problems of that era. Gordley's point is that articulations on conflict of laws in medieval times were worked out absent a modern sense of territory or of territorial sovereignty. It is not surprising, Gordley thus argues, that such articulations make a poor fit with conflict of laws problems in a modern world if a so-called Westphalian territorial states system is presupposed for that world. On the other hand, to the extent that our contemporary times, and the times ahead that we can visualise, demand that we free ourselves of such a state-territorialist presupposition, the medievals' formulations might be informative. While this proposal is not worked out in detail, there is a subtlety in Gordley's analysis which would make a valuable contribution to the historical dimension of Trachtman's project. It is in the Handl, Zekoll and Zumbansen collection, again, that the most sophisticated (if exploratory) account of regulation is to be found. Larry Catá Backer's chapter on 'Governance without Government' looks at statehood and territoriality from the perspective of multinational enterprises with their detachment from territoriality as traditionally understood. Backer considers the possibility that

the idea of the state can morph from a territorially-privileged totalitarian ideal, understood in its sense of the state as the ultimate repository of all authority, to a social system expressed through territory and embedded in more complex co-ordinated governance.⁶⁶

⁶² Gary J Bass, *Freedom's Battle: The Origins of Humanitarian Intervention* (Knopf, 2008) 57.

⁶³ Karl Marx and Friedrich Engels, *The Communist Manifesto* (Victor Gollancz, 1936).

⁶⁴ Jay Winik, *The Great Upheaval: America and the Birth of the Modern World 1788–1800* (Harper, 2007).

⁶⁵ James Gordley, 'Extra-Territorial Legal Problems in a World without Nations: What the Medieval Jurists Could Teach Us' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff, 2012) 35, 35.

⁶⁶ Larry Catá Backer, 'Governance without Government: An Overview' in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff, 2012) 87, 91 (citations omitted).

Strikingly, Backer observes that, '[n]o longer having a monopoly power to regulate enterprises, states are now understood as mere producers of an important good — regulation — that can be characterised as a cost of operations'.⁶⁷

This, for Backer, is an explanation for the phenomenon that corporate law 'seems strongly attached to the ideology of the state and state power'.⁶⁸ Thus '[c]orporations consume regulation in the same way that they consume labour, capital and other items necessary for their operations'.⁶⁹ One is reminded of Herman Melville's *Bartleby*, who the lawyer narrator tells us 'seemed to gorge himself on my documents. There was no pause for digestion'.⁷⁰ Feeding on regulation seems a more insightful commentary than the oft-heard cliché that firms above all value certainty so far as the law is concerned. As has been observed by others, certainty would stifle competition and enterprise in general, whereas the imperfect predictability that inevitably arises from regulation in the real world generates opportunities. One may cautiously employ a Darwinian metaphor at this point, by observing that natural selection works on relative fitness and not absolute fitness — an 'edge' so to speak. Controlled and delimited uncertainty in the regulation of business is its lifeblood.

In his conclusion Backer indicates that Foucault's 1970s account of the state and governmentality is of its time, and has been rendered obsolete, no less than Mussolini's vitalist and organicist account of the state of the 1920s. In Backer's words, '[g]lobalisation has begun to undo these pre-Twenty-first century verities'.⁷¹ Governance comes to be 'organised as government without a state ... [and] this governance necessarily reaches out beyond its borders into states and other governance entities'.⁷² Thus, instead of Foucault's assertion of the 'governmentalisation' of the state, 'what is important for our modernity is the governmentalisation of the non-state actors'.⁷³ For Backer, '[t]his emerging governance framework to some extent displaces and supplements state power, in the sense of appropriating governance space beyond territory and projecting it back into territorially-defined competences'.⁷⁴ International law's Foucauldian scholars might give some attention to Backer's necessarily brief remarks on Foucault,⁷⁵ and to his exploration of a somewhat more Deleuzian vocabulary of speed, in provocatively suggesting that "[e]scape velocity" from the orbit of the state⁷⁶ becomes a key parameter in the contemporary era. This innovative vocabulary is of service at the very least in offering us distance from the more familiar terminology of Westphalia, the *Lotus* and so on. But it also introduces a kind of materialism that legal theory should be in a position to take on board. Having expressed reservations above concerning Trachtman's position, it should be acknowledged that Trachtman's economics-based approach is apposite here.

⁶⁷ Ibid 111–12.

⁶⁸ Ibid 112.

⁶⁹ Ibid 113.

⁷⁰ Herman Melville, 'Bartleby, the Scrivener: A Story of Wall-Street' in Warner Berthoff (ed), *Great Short Works of Herman Melville* (Harper and Row, 1969) 46.

⁷¹ Backer, above n 66, 121.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid 122.

⁷⁵ Ibid 90.

⁷⁶ Ibid 89.

Backer's proposal that corporations can be said to 'consume regulation' can be connected with Trachtman's analysis. Trachtman notes that the status of being a party to a human rights treaty (for example), and compliance or otherwise with the requirements of such a treaty, can be analysed in terms of supply and demand.⁷⁷ Again, discretion and 'incomplete contracts'⁷⁸ are discussed by Trachtman. The discipline which Trachtman would wish to bring to bear on international law would certainly have ways of grappling with, and trying to render much more precise, the kinds of points made above concerning uncertainty in international business. Risking the Panglossian, elements of the diverse apparatus developed in each of these three volumes can be said to converse with, as well as to challenge, each other so that a kind of lumbering conceptual progress might be discerned in the ongoing debate on global justice and governance.⁷⁹ The three books together are more than a sum of their parts: to use Thatcherian language, the 'dry' Trachtman is challenged by the 'wet' Weston and Bollier, and both lack the earthiness of Handl, Zekoll and Zumbansen. Collectively, we are globally governing. We are not a caretaker government: the buck stops here.

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⁷⁷ Trachtman, above n 11, 121.

⁷⁸ Ibid 231.

⁷⁹ See generally Larry May, *Global Justice and Due Process* (Cambridge University Press, 2011); Jan Klabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press, 2013).

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