Instrumentalism or Constitutivism: A Dilemma for Accounts Transnational Political Authority

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This paper argues that discussions of transnational authority are hampered by an equivocation between two radically different kinds of authority, each possessing different normative logics. Instrumental authority, which treats political institutions as tools, is amenable to the disunited, pluralistic, and highly contextualized nature of transnational governance. Furthermore, instrumental-transnational authority is compatible with the authority and sovereignty of states. Yet, instrumental authority is comparatively weak in terms of the political interventions it can justify. Constitutive authority, on the other hand, can justify much more intrusive and coercive political actions. Yet, I shall argue that only sovereign agents with unified legislative, judicial, and executive powers can possess constitutive authority. I investigate different ways that transnational institutions can be structured—from Slaughter’s horizontal networks to Ruggie’s substantive multilateralism—in order to illustrate a dilemma: transnational and global institutions can indeed possess authority, but it is of a kind that justifies a relatively narrow and weak set of political interventions.

Introduction

The realm of international politics has become populated with an increasingly complex and multifarious set of actors at the transnational level. These agents—running the gamut from

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1 I would like to thank all of the participants at the 3rd AUSTAT International Workshop on Authority Beyond States and the follow-up workshop at the Max Planck Institute for Comparative Public Law and International Law, especially Professors Armin von Bogdandy, Birgit Peters, and Johan Karlsson Schaffer. Additionally, I would also like to thank Professor Sara Goering, Professor William Talbott, Matthias Goldmann, and Olin Robus, who have all commented on the entire draft at various times. Finally, I would also like to thank two anonymous reviewers for their constructive and insightful comments.
formal international organizations to *ad hoc* advocacy networks of experts—exert pressure, provide information, and make administrative rules and judgments that influence the life chances of people around the globe. As a consequence, some have argued that we should understand the functioning and normative justification of these new actors in terms of 'international public authority.' While these thinkers have thought much about what makes an authority relevantly public or political, thus excluding some actors and institutions from their analysis, much less time has been spent on what it precisely means to have authority. I suggest that discussions of transnational political authority and its justification are hampered by a problematic equivocation between two different accounts of the concept, each with their own normative and justificatory logics. The first is *instrumentalist*, which treats political authority as an especially useful social 'tool' that aids us in the achievement of antecedently defined moral ends. The second is *constitutivist*, which emphasizes the justification of political authority as the ability to rightfully issue *coercively enforceable* commands. These two different accounts of authority present a dilemma to the international actor. On the one hand, it is easy to see how an international agent could possess *instrumentalist* authority, but this authority can only justify political interventions and prescriptions that, while normatively and practically significant, cannot be backed by force or the threat of it. In other words, instrumentalist authority is friendly to the multiplicity and diversity of actors that currently exercise influence or *condition* the choices of others, but it cannot provide a normative guide when it comes to justification of the use of coercive power. On the other hand, constitutivist authority can justify the exercise of force, but it—as we shall see—is *territorial*; it is hard to see how any political agent that wasn't a sovereign state could possess it.

Rather than attempt to show that one account of authority is better than the other, I suggest that


3 I would suggest that this equivocation drives many of the debates ably described in Henrik Enroth 'On the Concept of Authority in Global Governance,' this issue.
they pick out different yet important and salient features of the global order. The purpose of this paper, then, is to draw out these differences and to illustrate the implications of analyzing transnational institutions in terms of them. More specifically, I wish to show that many international and supranational institutions may have, or could easily come to have, a particular kind of political authority, but that this authority cannot justify the more robust, coercive interventions that we typically associate with the political power of the state.

**Instrumentalist Authority and the Transnational**

*The Nature of Instrumentalist Authority*

An agent with authority can, by their very uttering of a command, bind their subjects, obligating them to act in a certain way. Another way to describe this is that an authority conditions the choices of others by providing them with particular reasons to act this way rather than that way. Instrumentalist authority attempts to provide an account of the normative force justification of that kind of authoritative bindingness. The most sophisticated theory of instrumentalist authority is Joseph Raz's influential 'service account.' Raz defines authority in terms of preemptive reasons. He writes:

...the normal way to establish that a person has authority over another involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them rather than by trying to follow the reasons which apply to him directly...  

For Raz, the bindingness of an authoritative command normally depends on that authority's expert knowledge and judgment. Agents have a wide variety of reasons, both prudential and

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5 For this way of putting it, see Bogdandy et al (n 2), 1382, though Bogdandy is only discussing the authority of political collectivities and not of individuals.

6 Raz (n 4), 53

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other-regarding, to act in particular ways. Importantly, since agents have different capabilities and sensitivities, different agents will not necessarily be equally effective in responding appropriately to those reasons, either generally or in a particular domain. On Raz's view, authority is *relational, context-dependent, and instrumental*: one agent possesses authority over another (i.e., relational) when they have sufficiently superior expert knowledge and judgment over a particular domain of reasons (i.e., context dependent) that the subordinate will do a better job of acting in accordance with those reasons by *substituting* the expert’s judgment for their own (i.e., instrumental). On this 'service account' of authority, authoritative prescriptions are distinguished from mere advice by appeal to the *preemptive* nature of the reasons one has to obey the authority. When someone gives friendly advice about what one should do, one ought to treat that advice as a piece of evidence, as one input among many in one's deliberations. However, when an authority issues a pronouncement, the appropriate reaction is to adopt the authority's judgment directly, to exchange one’s judgment for that of the authority's. And the reason is simple: when the authority is sufficiently expert, the subordinate will simply *be better* at acting according to the reasons the subordinate agent already possesses. The authority is an instrument used in service of the interests and reasons the agent possessed *independently* of the authority’s prescriptions. After all, as long as one has good reason to think a Geiger counter is functional, one does not question its pronouncements concerning the amount of radiation in the area. One is better off simply acting upon the judgment of that instrument. The instrumentalist claim is that, essentially, justified

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7 The preemptive nature of these reasons that, on this view, explains the difference between authoritative commands and persuasion, though both of these involve 'consent' in some sense. Justified persuasion operates on the rational relations between concepts, whomever happens to utter the good argument is normatively irrelevant. In the case of authority, the preemptive nature of the reasons for obedience or acceptance make who utters the prescription deeply relevant. Yet, in both cases, one 'voluntarily' acts upon the advice or the authoritative command. Whether your doctor tells you to stop smoking or your friend convinces you, you must choose to stop yourself. See Ingo Venzke's 'Constructing Communicative Authority Beyond the State: Between Power and Persuasion" in this volume, on consent based accounts of authority. Unlike Venzke's more descriptive view, however, the service account of authority is meant to be normative, grounding *legitimate* claims to authority.
authority normally operates in this fashion: the 'bindingness' of their orders lies in the fact that treating them as if they were unquestionable commands would be better for the commanded.

Political authority is, on this view, a particular example of the more general concept. Beyond the authority of the expert, Raz also argues that it is significant that political authority is frequently concerned with the large-scale coordination of social behavior. As a consequence, even inexpert political authority can be justified if it is more important for the satisfaction of one’s prior reasons that your behavior converge with others than for you to act optimally. That is, if one’s reasons are substantially entangled with others, then everyone might be better off accepting one agent’s authority even if that authority isn’t more knowledgeable than anybody else. It might be better to drive on the left side of the road or on the right side, but it is far more important everyone converge on one side. So, every driver will do better if they simply accept the traffic laws about which side of the road to drive as authoritative. To see how these two justifications work together, the authority of a ship captain during a disaster is grounded, if it is indeed justified, by the combination of expertise and coordination. First, the ship captain is likely, through training and experience, to be in a position of superior expertise about what needs to be done. Second, there is a practical requirement that the response to the disaster be relatively unified: the crew and passengers are almost certain to do better with a unified response to the disaster and it is difficult to see, under the time pressure of a sinking ship, how everyone could converge on anyone else than the captain. As a consequence, the instrumentalist conception would suggest that the captain's commands are binding and preempt individual deliberation about what needs to be done.

This instrumentalist conception is often the implicit backdrop for discussions of both domestic and international political authority. For example, Allen Buchanan and Robert Keohane
argue that legitimate international institutions essentially fulfill two requirements. Buchanan writes:

(1) The institution must be morally justified in attempting to govern (must have a liberty right or permission to try to govern) in the sense of issuing rules (that prescribe duties for various actors) and attempting to secure compliance with them by imposing costs for noncompliance and/or benefits for compliance and (2) those toward whom the rules are directed have substantial, content independent moral reasons for compliance and others have substantial content-independent reasons for supporting [or to not interfere with] the institution's efforts to secure compliance...

These conditions are instrumentalist. First, Buchanan and Keohane set the relevant domain of reasons for actions as the interests protected by basic human rights (thus, providing political institutions with a liberty right to issue commands backed by sanction) which states and individual citizens have strong reason to respect antecedent to the authoritative pronouncements of legitimate institutions. Second, legitimate international institutions are structured and organized such that those subject to their commands have 'content-independent' reasons to think that obeying those commands will lead to greater protection of human rights. In other words, an international institution possesses the authority to issue binding commands when there are good reasons to think that adopting the general policy of obeying their orders will lead to superior respect and protection for fundamental human interests. "Content independent" reasons are multifarious; an institution can possess them due to policy expertise, capability to coordinate

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8 It should be noted that this is Buchanan's definition of legitimacy for international institutions, but it is not substantially different and, if anything, more detailed and sophisticated than his corresponding account of state legitimacy (See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford University 2010, 247-260) The broad point is that there will be no difference between the accounts of legitimacy for states and international institutions, though states will probably require stronger moral reasons to justify their right to rule since states interfere in individual lives to a much greater extent. Hence, Buchanan emphasizes the protection of basic rights to a greater extent in his account of state legitimacy.

9 Buchanan (n 4), 138

10 In a sense, *all* of the work, for Buchanan and Keohane, in justifying *coercion* (as opposed to preemptive commands) is done by the sheer importance and urgency of human rights; the 'authoritative' nature of a particular institution does not necessarily tell us about the legitimacy of their acts of coercive enforcement.
grassroots political action, or an epistemically virtuous internal structure. In any case, Buchanan and Keohane ground an agent's right to issue commands by arguing that treating those commands are authoritative will make things go better in the relevant domain of reasons for action.

The instrumentalist conception is plausible, but there are important limitations to what it can justify. The command of an authoritative agent can change what you are obligated to do or what you have reason to do: if the ship captain tells you to hoist the main sail, you are obligated to do it, but if she tells you to lower the lifeboats, then you are obligated to do that. Yet, even if an authority could fully determine what you ought to do simply by issuing a command and you would be morally required to act as the authority dictates, it does not follow that the authority may then use force to ensure compliance. The key instrumentalist limitation is that a person can wrongfully disobey your orders without thereby generating in the authoritative agent a right to use force to keep the disobedient in line. A vigilante might be an expert at law enforcement, might know that the person has committed a serious crime, and yet would act wrongfully if she punished that criminal. Even if a doctor is acting clearly in the best interests of the patient, she may not forcibly impose a treatment. An investment banker may not steal the money he needs, even if he knows he will be able to pay the money back with interest. In other words, it looks like the kind of theoretical authority that serves as the model for the instrumentalist conception, even if we grant that it generates preemptive moral reasons to obey, is not an especially plausible ground for the coercive authority routinely claimed by states. It could be the case that an agent with instrumentalist authority is also justified in using coercive power to effect compliance, but instrumentalist authority is not sufficient for rightful coercion.

Implications for the Analysis Transnational Political Authority

Buchanan and Keohane say that the authority must be based on content-independent 'moral reasons.' This is meant to block an institution from imposing a sanction, thus giving people a self-interested reason to obey, and then claiming that sanction as a 'content-independent' reason for obedience. Reasonably thinking that following someone's orders will lead to better human rights protection because they have policy expertise is a 'content-independent moral reason.'
Instrumentalist authority is amenable to the complexity of the current system of global governance. It can readily be made consistent with the diverse, pluralistic, and disunited nature of global politics, which is characterized by complicated mosaic of organizations that vary along a whole range of vectors: informal or formal, private or public, functionalist or territorial. Just as there is no conflict between the authority of the doctor and the auto mechanic in the context of their specific domains, there need not be any problematic conflict between the authorities of two transnational organizations. Of course, there is the issue of which prescription to consider when one cannot perform both actions commanded by two different authorities, such as when an agent must decide whether to put off automotive repairs in order to pay for medical coverage. But these sorts of tough conflicts are not unique to the transnational realm, and they do not represent a challenge to either organization's authority. After all, the auto mechanic is not an authority concerning the question of how one's automotive purchases fit into a complete life: if the customer rejected the mechanic's advice concerning whether a particular repair is needed for the further running of the car, that would be irrational. But the customer's judgment is certainly as good or better than a mechanic's concerning whether she ought to repair the car in order to more easily get to work or instead pay for night classes in order to increase her likelihood of promotion at work. This means that, in the international case, many different agents can possess instrumental authority over the same subject, especially if that authority is set along functional lines in order to

12 Instrumentalist authority is especially conducive to the global administrative law analysis, where various procedural elements of administrative law and technocratic expertise, as well as the need to coordinate, can provide content-independent reasons for compliance. In other words, one can readily see how the authority of global administrative law could be justified by appeal to the rational need to coordinate, technocratic expertise, transparency, and impartiality without appeal to democratic legitimation or robust constitutionalization. Instrumentalist political authority often requires democratic input for epistemic reasons, but it does not necessarily require democracy for its justification. On the other hand, global administrative law would not be justified in exercising coercive power: it could only influence those that did have the authority to use force. For discussions of global administrative law, see Benedict Kingsbury, Nico Krisch, Richard Stewart, and Jonathan Weiner in their ‘Global Governance as Administration—National and Transnational Approaches to Global Administrative Law’ 68 Law and Contemporary Problems 1. For an article that would be a more effective critique of Global Administrative Law if it differentiated between instrumentalist and constitutive authority, see Martin Shapiro’s ‘‘Deliberative,’ ‘Independent’ Technocracy vs. Democratic Politics: Will the Globe Echo the E.U.?’ 68 Law and Contemporary Problems 341.
coordinate the behavior of citizens and states. Policy-makers might be subject to the authority of
the WHO in one context and Amnesty International in another. What's more, different
transnational agents and institutions can have authority over one another. Insofar as human rights
institutions see their issues come into contact with concerns of medicine and finance, they might
find themselves subject to the authoritative advice of other organizations. Conversely,
organizations can develop new competencies that might lead them to move out of a position of
subordination or lead them to come to have authority where they had none before. Finally,
instrumental authority is fully compatible with a wide variety of institutional forms: formal
organizations and ad hoc networks are both capable of possessing it.

Let's look at some more specific examples. First, it is easy to see, at least in theory, how
transnational institutions could have instrumentalist authority. It is increasingly true that states,
especially but not limited to those with diminished or dysfunctional capacities, are turning to non-
state organizations for guidance, advice, and policy expertise. One only need observe the work of
the IPCC in climate change, the coordination efforts of the WHO during the SARS crisis\textsuperscript{13}, and
the hiring of multinational private military firms for training and advisory roles to see that states
can rely heavily on the ability of non-state institutions to produce and coordinate policy
expertise.\textsuperscript{14} Furthermore, these nonstate institutions, movements, and organizations may not only
have expertise, but also have access to a wider and deeper set of data about the effects of various
policies and the effectiveness of various forms of government intervention. In these cases,
nonstate institutions are analogous to the doctor offering treatment advice. The legitimation of
this authority is, in principle, correspondingly simple. A transnational organization need only be a
source of the relevant expertise or the site of coordination. Similarly, transnational institutions
can have a coordinative authority in contexts where state convergence on the same rules is

\textsuperscript{13} The behavior of the WHO and its authoritative pronouncements during various disease outbreaks has
shown that one can have coordinating instrumentalist authority without coercion. See also the Paris Declaration on Aid Effectiveness, which evinces both expert and coordinating authority without coercion but in the context of making transnational aid organizations more effective.
significant.15 So, we can see clearly, in the transnational context, that two justificatory paths for instrumentalist authority exist: transnational institutions can possess expertise and can play a coordinative role both between themselves and between states. But all of this falls short of coercive power, the agent subject to the authority still retains the power to decide to accept or reject the judgments of the authority.

Nonstate actors can possess even more robust forms of this instrumentalist authority when they play agenda-setting, lobbying, and delegating roles.16 In other words, a particular transnational authority can issue a pronouncement which is morally binding on other actors, and then use its resources to persuade, cajole, and influence in order to achieve compliance. In the first case, nonstate actors can bring (both in their home country and internationally) to state attention issues which had been previously been ignored. In the second case, nonstate actors can add their voice to domestic lobbying and advocacy organizations, providing them with international attention, funding, and organizational expertise. In the third case, a state may simply hire nonstate actors to replace capacities that they are no longer able or willing to provide themselves, such as when Ethiopia hired private military contractors to provide airpower in their war with Eritrea. The key feature of these roles is that they do not represent a conflict with state sovereignty, nor do they represent exercises of coercive power independent of the state. So, not only is it true that instrumentalist authority is compatible with the complex, diversity of global politics, but the exercise of that authority does not need to conflict with privileges claimed by states. Increasing the salience of a previously ignored issue or assisting in domestic reform efforts are attempts to persuade a state to use force in particular ways but are not themselves exercises of coercive power. In the cases of delegation, as long as the state retains the meaningful capacity to

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15 This is the feature of transnational authority that is emphasized in Samantha Besson, 'The Authority of International Law–Lifting the Veil' (2009) 31 Sydney Law Review 343.
16 This process and elements of the third role are described, in part, in Kathryn Sikkink The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics (W.W. Norton and Company 2011).
rescind the grant of power, then the transnational organization's power is not rivalrous with that of the state.\(^1\)

So, nonstate actors can play various instrumentalist roles within particular states and influence domestic politics without exercising political authority. However, nonstate actors can also influence how states deploy coercive power against other states. For example, transnational advocacy organizations can lobby one state to issue sanctions against another state that has committed some domestic atrocity. In the limit case, transnational organizations might even convince a nation to invade another. Obviously, there is something worrisome about nonstate agents influencing the politics of powerful countries with little or no accountability to the states being subject to that power. But, ultimately, the agents wielding that power are states, and while these international institutions are influencing the exercise of coercive power, they are not coercing nations themselves.

In other words, we can see that many of the activities of transnational nonstate actors bear a kind of symbiotic yet asymmetrical relationship to the coercive power of states in order to ensure compliance with their directives. They provide expertise and coordinate information in order to help exercise power more effectively. They might help marginalized citizens or groups within states gain a larger hearing and audience, or they might lobby other states to intervene on a particular issue. But in each case, they are informing, aiding, or influencing the coercive power of the modern state. These roles are fully consistent with an instrumentalist understanding of their authority, and they can be morally justified in much the same way as the instrumentalist authority of truly expert doctors, scientists, and bankers. If states (or perhaps, policymakers within states) would do better in acting in accordance with the reasons they have (which are, presumably, based upon the interests of their constituents), then those experts are authorities to those states. And we

\(^{17}\) Delegation can, especially in these contexts of diminished capacities, can strengthen state sovereignty rather than compete with it. See Eric De Brabandere "The Impact of 'Supranationalism' on State Sovereignty from the Perspective of the Legitimacy of International Organizations" in Duncan French (ed), Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law (Cambridge University Press 2013).
can think of a number of issues—such as climate change or AIDS prevention—where many states would do much better if they were more willing to treat the judgments of experts and expert organization with greater respect. Similar things can be said for state coordination via transnational institutions. But just as a doctor may cajole, persuade and inform without using force, so can many of these new participants in international politics influence, cajole, and inform without coercive power. This is yet another way of saying that the transnational institutions may have instrumentalist authority.

The idea that there is a sharp distinction between a transnational institution having instrumentalist authority that can influence the exercise of coercive power without exercising that power itself should not be taken too strongly. It is not the case that the operation of state power occurs in a vacuum: instrumentally authoritative transnational institutions can, should, and do offer various inducements for compliance, including the possible refusal to help the noncompliant actor in the future, and costs are often imposed on those who do not coordinate with other agents. What's more, if the transnational actor genuinely does have authority, then their orders are—in some cases at least—morally binding on the agents that possess coercive power. So, the distinction between influencing and making a decision is vague and porous. Furthermore, if the costs become too high or the coercive agent is sufficiently suggestive or dysfunctional, then what looks like a suggestion or an offer can, in fact, ultimately be a coercive threat. Some transnational organizations may then come to have power and authority that ultimately moves beyond instrumentalism. However, even though the distinction is not sharp and it can be crossed, there remains a difference between those that attempt to convince those with coercive power to act and

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18 I thank an anonymous reviewer for pressing me to be clearer on this point.
19 This is, in fact, one the criticisms that Joshua Cohen and Charles Sabel lay against the World Trade Organization in their "Extra Republican Nulla Justititia" (2006) in 34 Philosophy and Public Affairs 147. They argue that the WTO has come to exercise coercive power, yet the justification for its authority is instrumentalist. As a consequence, the WTO needs to become more inclusive in order to justify its newfound possession of coercive power.
those that actually do possess that power. But, can transnational institutions come to have justified coercive political authority without being reliant upon states? It is to that question we now turn.

**Authority and Coercion**

*The Nature of Constitutivist Authority*

Political institutions do not simply issue pronouncements; they demand compliance and coercively enforce obedience. Frequently, we structure our institutions so that those with expert knowledge also act as political agents, but this should not obscure the difference between those kinds of authority. At its most fundamental level, instrumentalism treats political institutions like thermometers, traffic lights, or Geiger counters. We have an (often pre-social or pre-political) interest or a right that can be described entirely separately from the instrument or tool (the reasons authoritative prescriptions will help us follow), and political institutions are justified only insofar as they provide superior means for the respect, protection, and satisfaction of those prior described interests or rights. The correspondingly fundamental idea for constitutivism is that how power is exercised is as important for its legitimation as the ends to which it is put. One can be wrongfully subject to the whims of another even if the person with power is virtuous and uses the power for virtuous ends. The benevolent despot remains a despot. So, legitimate political authority, for the constitutivists, is what allows the possessor to rightfully coerce others.

Constitutivists then argue that legitimate political authority, in the sense of a right to use force to assure compliance with one's commands, is an ineliminable element of justice and not

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simply a contingently useful instrument for its provision. Hence, an appropriately structured political power is partly constitutive of what it is to live justly with fellow members of the community. Following Kant, Hegel, and Rousseau, the idea is not that legitimate political authority helps you be free, but rather that membership in a legitimately constituted polity makes freedom possible. As Kant says, justice is only possible under a political authority, and we always do wrong by remaining in the state of nature:

From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful that is, a condition of distributive justice...Given the intention to be and remain in this state [i.e. the state of nature] of externally lawless freedom, human beings do one another no wrong at all when they feud among themselves; for what holds for one holds in turn for the other, as if by mutual consent. But in general they do wrong in the highest degree [my emphasis] by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.\footnote{Kant, \textit{Metaphysics of Morals} (n 20), 6:307-6:308}

In other words, a world without political authority is one where everyone must be unfree and must necessarily act unjustly. On Kant’s view, the world without political authority (i.e., the state of nature) is one where we must necessarily be subject to the private wills of those with whom we interact, and that our rights ultimately depend on the contingent desires of those who happen to cross our paths. This fundamental and necessary moral failure justifies the use of force in leaving the state of nature and entering into civil society:

It is true that the state of nature need not, just because it is natural, be a state of injustice, of dealing with another only in terms of degree of force each has. But it would be a state devoid of justice in which rights are in dispute, there would be no judge competent to render a verdict having rightful force. Hence each may impel the other by force to leave this state and enter into a rightful condition; for although each can acquire something external by taking control of it or by contract in accordance with its concepts of right, this acquisition is still only provisional as long as it does not yet have the sanction of public law...\footnote{ibid, 6:312}

Constitutivism thus has a different justificatory perspective on coercive authority, when compared to instrumentalists like Buchanan and Keohane. It is not that freedom is an especially...
important and urgent (and neutrally definable) goal that political authority is aiming to further or achieve and, as a consequence, potentially be disposable or unnecessary. Rather, failure to be subject to political authority makes one inherently or intrinsically unfree. Being subject to some kind of power is ineliminable, so all that remains is to be subject to rightful power. This is done by structuring the power in the appropriate way, along constitutional lines. As Philip Pettit says:

The strategy of constitutional provision seeks to eliminate domination, not by enabling dominated parties to defend themselves against arbitrary interference or to deter interferers but rather by introducing a constitutional authority—say a corporate, elective agent—to the situation. The authority will deprive parties of the power of arbitrary interference...The reason the constitutional authority will not itself dominate the parties involved, if it does not dominate them, is that the interference it practices has to track their interests according to their ideas; it is suitably responsive to the common good.23

A legitimate political order replaces the anarchy, domination, and gangsterism of state of nature with the rule-governed and public power of a well-ordered sovereign state.24

For the constitutivist, legitimate political authority successfully resolves the moral failures of the lawless and anarchic state of nature in virtue of its particular institutional structure.

The state of nature is characterized by three fundamental problems, all predicated on the notion of one person taking unilateral action against another person of equal status. First, the principles of justice are indeterminate, with multiple reasonable instantiations. As a consequence, particular realizations—which form the basis of particular entitlements owed to particular people—of the principles of justice need to be accepted or rejected. Yet, if the principles were specified by one person or group of persons and then imposed on others, then individuals' rights would depend on

23 Pettit (n 20), 68
24 One might worry that Pettit’s view is ultimately—and problematically—instrumentalist since it looks like the purpose of the constitutional order is to serve the common good. In fact, Louis-Philippe Hodgson 'Kant on the Right to Freedom: A Defense,' (2010) 120 Ethics 791 criticizes precisely this feature of the view: Pettit's instrumentalism makes him indifferent to the ways in which a public legal order changes the status of those subject to it. Yet, Pettit still has a fundamental requirement that only an external constitutional order can serve as a check on individual power. The virtuous or expert judgment of the powerful agent is—even in principle—insufficient. This is enough to make him a constitutivist. Furthermore, Pettit, in his On the People's Terms (Cambridge University Press, 2012), has recently argued that equal control of the constitutional order is a necessary feature of nondomination, which is even more strongly constitutivist.
the unilateral judgment of others. So, the principles of justice need to be specified *jointly*. Second, conflicts in the state of nature are ultimately adjudicated by the parties to those disputes since, by necessity, people are ‘the judge in their own case’ in the state of nature. Third, the state of nature lacks a clear sovereign with overwhelming power, so the executive enforcement of rights claims ultimately depends upon the contingent constellations of power amongst private citizens. The powers traditionally granted to modern states then, on this view, aim to resolve these failures of the anarchy. The representative legislature, through the passage of positive law, allows the citizenry to collectively select and decide upon which of the reasonable instantiations of general principles of justice that will bind them. The judiciary provides a public, transparent, and impartial mechanism for the adjudication of disputes. Finally, the executive power of the state—represented by a monopoly on the legitimate use of force deploys a coercive power overwhelmingly superior to any private person’s.

A full account of the institutional consequences and conceptual underpinnings of constitutivism is beyond the scope of the paper, but I do wish to lay out some general features that a legitimate political authority will necessarily possess. First, the exercise of power by a legitimate, political authority must be *public* in the sense of being *transparent* and *contestable*. That is, power must be exercised according to rules and principles that are made available and known (usually through written promulgation) to those subject to it prior to its exercise and this combined with a meaningful, public process by which citizens can demand a justification for particular exercises of power. Second, the exercise of power must be *non-arbitrary*. That is, legitimate agents who exercise power—even if they do follow public rules—are not simply doing so as a private desire, virtue, or whim but as a consequence of the institutional structure in which they are embedded. To put it another way, there are *external* checks and balances to the particular agent that effectively constrain the political agent such that the exercise of power follows public rules and ensures that the agent is responsive to mechanisms of public accountability and contestation. Finally, the institutional structure of coercive power must be *effectively action-
guiding in the sense of being final and coherent. That is, the public principles and rules that define that the scope of the coercive authority of agents must fit together in such a way that those subject to that authority will not be faced with contradictory commands and coercive injunctions. Or, if there are contradictions and ambiguities, there must be offices empowered to adjudicate jurisdictional disputes. What's more, agents who exercise coercive power must operate within an institutional and political web of institutions that claims the authority to end disputes decisively even in cases where losing parties to the disputes might reasonably object.

The 'effectively action-guiding' element of legitimate authority is going to be especially important later, so it is worthwhile to analyze it more deeply. Imagine a legal system where there is no final adjudicative authority and where there are multiple, legitimate coercive agents in a territory (this assumes that we can make sense of this scenario as being a single legal system at all). Now imagine that there is a dispute between two neighbors over the placement of a boundary fence and there are two legitimate, coercive authorities that issue judgments in the matter, with one judgment favoring each of the neighbors. There are, perhaps, several ways that this dispute could be resolved, but they all recapitulate the problems of the state of nature. For example, it is possible that one of the coercive authorities is simply more powerful and so one of the neighbors is forced to yield by either threat or actual coercion. But this is simply the third problem of the state of nature, where the lack of a superior powerful authority means that disputes are resolved according to arbitrary constellations of power. Or the two neighbors could themselves resolve the dispute, but this would be a recapitulation of both the second and third problems of the state of nature: this is another way of having the private judgments and negotiations of the two parties to the dispute determine the outcome of the issue. Finally, the two coercive parties could negotiate the resolution, either on an ad hoc basis or using mutually agreed upon rules. But, again, it is hard to see how this does not simply repeat the problems between the two neighbors at a higher level.

Lon Fuller, in The Morality of Law (Yale University Press 1969) and, subsequently, Jeremy Waldron's "How the Law Protects Dignity" (Available at SSRN: http://ssrn.com/abstract=1973341) both discuss the ways in which legal orders are structured in order to protect the autonomy of those subject to it.
Ad hoc determinations would fail to be relevantly public, and even rule-guided agreements would either be unenforced as there is no superior power between the two authorities or only be enforced through the arbitrarily and contingently superior coercive power of one authority or another. Thus, it appears that having two equally legitimate coercive authorities within a legal system re-instantiates the problems of the state of nature.

One could object that this analysis depends on the coercive authorities making different judgments and issuing different pronouncements. After all, this objection goes, it is only because there is a *disagreement* between the coercively backed commands of two apparently legitimate authorities that the resolution of the dispute between the two neighbors looks conflictual and arbitrary. Perhaps it will be the case that, as institutions become more just and more responsive to the interests of their constituents, there will be greater and greater effective convergence on what justice requires. Therefore, legitimate authorities will rarely disagree. We can strengthen this tendency by having the two authorities engage in regular dialogue and consensus building. If both authorities always agree, then there is, apparently, no need for a superior authority to adjudicate disputes between authorities that never arise.

There are, at least, three problems with this objection. First, it is far from obvious that, empirically, it will be the case that even fairly responsive and well-constructed political institutions will reliably converge on principles of justice or on judgments in particular cases.26 One might think, in fact, that disagreement and dispute are ineliminable features of human social interaction, even amongst those of good faith.27 Second, the objection assumes—contra the constitutivist account—that there is a uniquely correct specification of the principles of justice. It

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26 Certainly, 'democratic peace theory' (See Michael Doyle, 'Kant, Liberal Legacies, and Foreign Affairs, 1983, 12 *Philosophy and Public Affairs* 205 and 323) is not much help here. It could be the case that democracies do not go to war with each other, but this is not the same thing as converging upon the view that a particular scheme of entitlements is uniquely reasonable.

27 This is essentially a restatement of Rawls's Fact of Reasonable Pluralism (John Rawls, *Political Liberalism*, 1993, Columbia University Press, 4): the free exercise of human reason operating under the burdens of judgment will inevitably produce reasonable disagreements concerning the nature of the good and the right.
must be the case that there is a single, correct resolution of a particular dispute concerning particular entitlements for the nonarbitrary convergence by just institutions on a single solution to be plausible. If, however, we grant with the constitutivists that one function of political authority is the legislative specification of particular entitlements among a range of reasonable yet exclusive possibilities, then there is no uniquely just solution for political institutions to converge upon. Third, to argue that the fact of general agreement eliminates the need for non-arbitrary methods of adjudication is to implicitly adopt the instrumentalist conception of authority. It is to rely on the idea that there is no problem since the two authorities both ‘got the right answer.’ But part of what motivates the constitutivist understanding of political authority is that being correct, even reliably correct, in one's judgments does not necessarily confer authority to coercively impose one's view. To put it another way, constitutivists argue that even though two agents—which are equally positioned in terms of their authority over each other—in the state of nature might be able to form a consensus, the lack of a public, common, and non-arbitrary mechanism of adjudication nonetheless undermines the freedom of both agents. If you accept that argument, then it seems like it applies mutatis mutandis to the two political authorities that are equally positioned with regards to the authority they have over each other. They may be able to form a consensus, even a fairly reliable one, but the lack of a public, common, and non-arbitrary authority over each other represents a serious moral failing.

So, it looks like constitutive (i.e., coercive) authority, unlike instrumentalist authority, must inhere in a unified constitutional order that possesses an executive with a monopoly on the legitimate use of force, a representative legislature, and an independent judiciary.

Case Study in Constitutivist, Political Authority: Anne Marie Slaughter

Yet, we have not yet determined whether that authority must possess a distinct territorial jurisdiction. Thomas Pogge has, for example, suggested that we need to reject the notion of a
single set of political institutions that claim sovereignty over a particular territory. We can have institutions that have coercive authority, but this authority can be possessed by different agents at different levels and across territorial boundaries without constitutional principles that place these authorities in a strict hierarchy with each other. The idea is that these institutions can be related in informal non-hierarchical ways that can roam across territorial jurisdictions. Pogge, unfortunately, has not discussed in much detail the institutional form this rejection would take, but Anne-Marie Slaughter, in her work *A New World Order*, describes a world where state sovereignty has been consistently worn away by the development of ‘disaggregated’ governance networks. Slaughter imagines a global political order where the authority and sovereignty normally held by a territorially limited state has been distributed horizontally across multiple polities. Thus, it would be fundamentally different from the current state-driven dynamic where legislative and judicial power is distributed vertically. It would lack the dynamic of hierarchy and jurisdiction: we would have networks of equally situated political agents working cooperatively rather than a hierarchy of agents organized along lines of super- and sub-ordination. Vertical integration is consistent with there being multiple arenas of political power, as long as there are clear lines of superior authority and corresponding subordination. There might be multiple legislatures that govern a territory, but they are hierarchically organized: municipal councils are subject to state or department legislatures that, in turn, are subject to the national assembly or congress. A *horizontal* distribution represents a cooperative network of formal equals. In a horizontal structure, a municipal council takes seriously the decisions of other, similarly situated, municipal councils in other states and, in turn, their decisions are taken seriously by their counterparts. In fact, these municipal councils may create formal or semi-formal means to trade information, laws, and effective tools of governance and insofar as they have collective interests, these formal or semi-formal collective bodies may make binding legislative decisions for councils.

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across state boundaries. Thus, the suggestion is to simply reject the idea of a vertically sovereign state with an ultimate authority and more broadly distribute decision-making authority across many agencies that are not hierarchically related.\textsuperscript{30}

Now, Slaughter herself suggests that there are serious problems of contestability and accountability\textsuperscript{31} associated with horizontal integration, but it does have one significant benefit: it produces an organic and flexible means for similarly situated political agents to replicate the effectiveness of hierarchical organizations. If the problems with accountability can be worked out, then, presumably, we do not need to rely on states or on vertically integrated institutions at all. What we require is a greater degree of institutional imagination and less of a reliance on vertically integrated, hierarchical political orders.

Again, there is something attractive about this, especially when one considers the horrors that can be produced when the full and unchecked institutional power of the modern state is unleashed upon its defenseless citizenry. However, it is telling that Slaughter spends her book discussing the horizontal distribution of authority amongst judiciaries and legislatures but does not discuss the horizontal distribution of executive authority.\textsuperscript{32} In other words, Slaughter does not show how the authority to wield coercive power can be distributed horizontally. And this seems to be yet another consequence of adopting the instrumentalist view of the justification of political power. If the real questions are those that are resolved by judges and legislators, and the enforcement of those commands by presidents, cops, and soldiers is really only a pragmatic issue, then it makes sense that Slaughter is unconcerned about how coercive power could be horizontally distributed.

\textsuperscript{30} Young (n 20) suggests something quite similar, as does Buchanan (n 4).
\textsuperscript{31} Slaughter (n 29), 29-31
\textsuperscript{32} Slaughter does discuss regulators as creating yet another horizontal network in Chapter 1 but does not really discuss the possibility of those regulators coercively enforcing the laws without the let of their national governments. Even 'enforcement networks' are limited to 'intelligence sharing' and 'capacity building' but not independent coercive enforcement. Ibid, 55-58. It is clearly true that some political functions we commonly associate with executive agencies, such as those Slaughter describes, are not especially problematic. I focus here specifically on the use of force to achieve the ends set by legislatures and judges.
It is also likely that Slaughter fails to discuss the horizontal distribution of executive power because it is very hard to see how that could be done in a normatively attractive way. The important thing to understand about executive power is that it is constituted by coercion in a way that judicial and legislative authority are not. Legislators make laws and judges make rulings, but legitimate executives are the ones that non-arbitrarily assure that people actually follow those laws and act according to those rulings. And this coercive assurance is inherently physical. That is, the ability to coerce is about moving people about in the physical world.\textsuperscript{33} Executing an injunction requires the use (or threat of use) of people with weapons to move to a particular area and preventing other people from doing what they want. Executing a subpoena or a discovery order requires sending (or the threat of sending) an enforcement agent to seize a person or a document and taking them or it to another location. Or consider an economic transaction that operates at the highest level of abstraction: the large-scale movement of capital across transnational boundaries. Of course, such transactions can be immensely complicated and difficult to fully parse, but they still represent an \textit{entitlement} that allow the persons who engage in them (or represent those that do so) to do things in the world that would not have been able to do otherwise. And the \textit{enforcement} of those entitlements will similarly invoke a kind of physicality: the physical movements—whether it be the withdrawal of cash from a bank, the use of a credit card to purchase heavy equipment, land, or labor for a factory, or the right to the use of an object or home via contract, lease, or mortgage—are what the state guarantees through its effective enforcement. The broad point is that executive authority is fundamentally about the control of

\textsuperscript{33} By emphasizing the \textit{physicality} of executive political power, I do not mean to suggest that all power, or even all political power, operates through the mechanism of crude threats to the body. Rather, it is to show that political adjudication and entitlements are about inducing behavior and structuring people's relations in space. Even the transfer of money, which in of itself does not necessarily involve the transfer of anything physical, leads to differences in terms of what individuals can \textit{do}. Even if, for example, 'biopower' (see Michel Foucault, \textit{The History of Sexuality}, Allen Lane 1976, especially Part IV) operates through medicalization, essentialization, or the internalization of social norms, biopower fundamentally concerns the control of bodies and the regulation of behavior.
bodies in space. And it is hard to see how reliable, non-arbitrary, and effective coercive authority can be organized spatially along any other lines than hierarchical.

At a fundamental level, the very fact of political conflict is motivated by our embodied vulnerability and our need to causally interact with each other. As Kant said, political authority is only made necessary if you cannot ‘avoid living side by side with everyone.’ It is causal interaction that makes coercively enforceable rights necessary by making rights violations possible. So, we have the following conjunction of claims. Coercive political authority is justified by the need for embodied beings to be assured of fully specified rights. One necessary mechanism for the satisfaction of this role is the effective capability of that authority to adjudicate disputes between those who engage in substantive causal interaction and then reliably enforce those adjudications. Finally, we see that we cannot have two authorities that claim sovereignty over the same domain of dispute between people. Combined, these claims appear to imply that political authority is about controlling territory and that it must be hierarchically organized. After all, if multiple political authorities lay claim over the same physical territory, then we have all the problems described in the previous section of two authorities claiming sovereignty over adjudicating disputes between constituents.³⁴

Constitutive Authority and its Implications for Transnational Authority:

Substantive Multilateralism

There is one obvious way in which constitutive authority could apply globally: there could be a world federal republic. If there was a global state with the constitutionally unified three powers, then even significant devolution of authority to the federal subunits (e.g., current states) would pose no special problem. Of course, the world state may fail to be legitimate for all

³⁴ This is consistent with a federal system of political authority, such as that of the United States, where considerable authority and important domains are constitutionally devolved to local and provincial governments. The key element is that the national or federal government is composed of elements that can make a final determination as to how powers are distributed: American states have certain domains of authority, but these are constrained, specified, and defined by Congress, the Constitution, and the Supreme Court.
sorts of reasons, but it would obviously be the kind of institution that could possess legitimate, constitutive authority. But the question I wish to explore here is whether current transnational institutions that represent a global governance order short of a world state can nonetheless have the appropriate structure as to be plausible candidates for constitutive authority. At any rate, organizations as diverse as the WTO, the ICC, and UN Security Council purport to adjudicate disputes and to issue binding pronouncements that are backed by the threat of sanction according to publicly promulgated rules and principles. In other words, there are transnational institutions that purport to exercise constitutivist political authority over states and their citizens.

In fact, John Ruggie has argued that the development of these institutions represents a kind of decisive break from previous iterations of international politics. Historically, states have frequently acted in ways that were only "nominally multilateral." There have long been international political interactions whereby two or more states acted together in a coordinated fashion to achieve some particular goal, such as when a coalition of states acted to restrict the power of Napoleonic France. Yet, the post WWII international environment has been increasingly characterized by an institutionalized substantive multilateralism. Ruggie describes the difference thusly:

Multilateralism is an institutional form which coordinates relations among three or more states on the basis of 'generalized' principles of conduct—that

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35 This is, ultimately the suggestion of David Held in *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, 1995) and Luis Cabrera in *Political Theory of Global Justice: A Cosmopolitan Case for the World State* (Routledge, 2004), who both argue for a highly federated world government. The world state also divides constitutive theorists, with republicans generally arguing that it is unnecessary (e.g., see Pettit 'Legitimate International Institutions: A Neo-Republican Perspective' in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, Oxford University Press, 2010) and Kantians usually arguing, pace Kant himself, that creating a world state is a moral imperative in order to resolve the second order anarchy of international politics (e.g., see Hodgson 'Realizing External Freedom: The Kantian Argument for the World State,' in *Kant’s Political Theory: Interpretations and Applications*, edited by Elisabeth Ellis, Pennsylvania State University Press, 2012). For a contrary Kantian view, see Pauline Kleingeld (2006) "Defending the Plurality of States: Cloots, Kant, and Rawls" 32 *Social Theory and Practice* 559.

36 I thank an anonymous reviewer for pushing me to be clearer on how my paper's thesis relates to the world state.

37 I am going to deliberately remain neutral concerning the institutions of the European Union. At the moment, it might be possible to interpret the EU as a quasi- or nascent constitutive authority, but it also seems possible to interpret it as an extremely robust set of transnational instrumental authorities.
is, principles which specify appropriate conduct for classes of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence. In contrast, the bilateralist form, such as the Schachtian device and traditional alliances, differentiates relations case-by-case based precisely on a priori particularistic grounds of situational exigencies. 38

Several features characterize this new multilateralism. First, unlike an international politics that is mostly built out of particular state-to-state diplomatic interactions (i.e. when Bismarck engages in immensely complicated and secret negotiations with Austria and Russia), the postwar international era has been replete with the creation of multi-member regimes. So, we get the WTO—where many different states all sign on to the same regime of rules—as opposed to particular trade agreements between particular states. Relatedly, these regimes are constructed out of general norms and rules. Thus, instead of bilateral treaties that make essential reference to the particular parties of the agreement, postwar multilateralism creates rules that apply to all states that are members of the international order simply in virtue of their membership.

Ruggie argues that these multilateral institutions have independent political power combined with considerable flexibility and durability. What they represent, perhaps, is a new way of structuring international politics such that political authority rests in these new institutions rather than (or, perhaps, in addition to) the authority that currently rests in states. After all, nominal multilateral or simple bilateral arrangements do not represent a challenge to state authority. States, in these types of agreements, represent their own interest and their own judgments. In substantively multilateral agreements, however, states ‘give up’ their judgments in particular cases by committing themselves to public, general rules. In a multilateral, substantive collective security arrangement such as NATO, states are committed to protecting members (understood generally) from threats (again, understood generally), regardless of who is attacking or being attacked. It would be considered inappropriate and contrary to the animating logic of NATO for individual states to act as if they had strategic discretion when one member was

subject to unprovoked aggression. There is a sense in which states now must replace their strategic judgments for the political judgments of the multilateral institution. And these processes can take on a life of their own, such as when Canada finds itself contributing troops to counterinsurgency in Afghanistan as a result of an attack on the United States by a transnational and stateless terrorist organization.

Do these multilateral institutions possess constitutive authority? They certainly have the potential to solve some problems of the state of nature, and as a consequence, they come much closer than the informal networks of Slaughter. Insofar as the regimes are constituted by rules and norms that specify particular entitlements (which seems plausible in cases like the WTO, the UNSC, and NATO), then they can play a legislative function. Furthermore, many substantively multilateral regimes create a judicial component (such as the International Criminal Tribunal for Former Yugoslavia or the WTO’s Dispute Settlement Body) that could, at least in principle, provide an impartial mechanism for the adjudication of disputes. What’s more, these elements seem to be structured by public and transparent rules and principles. So far, so good. And while it is true that many current multilateral institutions have a problematic and difficult relationship with genuine accountability (e.g., the ‘democratic deficit’ whereby international institutions seem to be cutoff from the interests of those subject to their rule-making, especially in the cases where the member states who sign the multilateral agreements are not themselves democratic), this does not seem like a necessary feature of multilateral institution making as some regimes seem to be more accountable than others. The democratic deficit is a call for a reform, not a demonstration of conceptual inadequacy.

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39 This is stated somewhat too strongly in the actual case of NATO, since member nations are only required to ‘assist’ attacked nations in ways they ‘deem necessary.’ So, member nations retain some discretion about the nature of the assistance when the collective right of self-defense is invoked. I do not think this undermines any of the subsequent argument since some state discretion is given up and we could readily imagine a NATO charter that played a similar role but more specifically defined necessary state responses to aggression against an ally. This would be a difference in degree rather than in kind.

40 A possible way these reforms might go is described in David Held Democracy and the Global Order (n 36), 267-283
Yet, substantively multilateral regimes do fall short in other ways. One necessary component of the political authority, on the constitutivist view, is that it possesses executive, coercive power superior to any private individual in order to assure compliance with the relevant principles. This is connected with the condition of non-arbitrariness; there needs to be an agent external to the antecedently existing parties to the agreement that can reliably assure obedience to its precepts. In other words, just as one cannot be the judge in one's own case, one cannot be the executive in one's own case. And this is lacking in the case of international multilateralism. To put it another way, while it is true that a multilateral regime might have public mechanisms of legislation and adjudication, the actual coercive enforcement of those principles depends on the contingent choices of the member states that possess the relevant military, paramilitary, and administrative capacities. Yet, those members have radically different coercive capabilities, economic power, and cultural influence. This means that particular instances of coercive obedience are consequences of arbitrary constellations of power amongst the states that are members of the regimes. Instead of having a police or a military that enforces the commands of a sovereign, international regimes essentially ‘hire out’ enforcement to the executive capabilities of member states. And importantly, this ‘hiring out’ is not responsive to the massive power differentials between the members of the regime. It is as if, in the domestic context, the state was in charge of law making and adjudication, but then ‘contracted out’ the enforcement of those law and rulings to the resources of private citizens. A predictable consequence of this policy would be that private citizens with greater resources would be able to purchase superior enforcement capabilities and, if sufficiently motivated, use those capabilities to simply ignore the prescriptions of the state. Now, perhaps wealthy private individuals are so virtuous and so public spirited that they will use these resources only in the name of the common good, but that is problematically dependent on the desires of the rich and powerful. Similarly, perhaps the global hegemon, or an alliance of particularly powerful states, will use their resources to provision global public goods and support justice-enhancing multilateral regimes, but that is dependent on the contingent
intentions of the hegemon or the alliance. In both cases, the arbitrariness of that reliance is normatively unacceptable. If we accept the constitutivist understanding of legitimate political authority, then relying on the contingent whims of others for the protection of rights is unjust even if those whims happen to push people in the right direction. Again, it should be noted that this argument against the constitutive authority of transnational institutions is not predicated on any particular 'democratic deficit' or on any decision rule that any particular institution has. For example, Habermas argues that international orders can be made to have constitutive authority through effective constitutionalization. But much rides, on my view, in how that constitutionalization structures executive power (and thus I focus on the need for the 'first innovation' to be very robust). But the problem I describe could not be solved by through civic solidarity or power sharing between the multilateral institution and the constituent members (the second and third innovations). Of course, Habermas could be right that those things are necessary for legitimate authority; I remain agnostic on that question. So, although it is possible that constitutionalization could ultimately result in a new constitutive authority, it would necessarily depend on the particular details of the constitutional order was eventually produced. But this reliance appears to be an ineliminable feature of any meaningfully multilateral international politics. After all, if these multilateral institutions could command armies of their own, support them with taxation, and impose their will on their constituent members, what is the important difference between them and states?

**Conclusion**

Can there be legitimate transnational political authority? The transnational theorist is faced with a dilemma. While it is easy to see how transnational organizations can come to have justified instrumentalist authority, such authority does not legitimate the exercise of coercive power. On the other hand, while possession of legitimate constitutive authority could justify

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41 See Habermas's 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' (2012) in 23 *The European Journal of International Law* 335. I thank an anonymous reviewer for requiring me to be clearer on this point.
political coercion, it is much harder to see how transnational institutions could possess it. This paper examined two possible understandings of international politics that see a transition away from an ‘outdated’ state-centric model. In each case, these new models have serious normative failings when it comes to the nonarbitrary deployment of coercive power. Transnational organizations are simply not the right type of institution to possess constitutive political authority, yet they can be of excellent assistance to states and to particular citizens in virtue of their possession of instrumentalist authority. Somewhat speculatively, this might imply that that these newly developing institutions ought to view themselves as complementing states rather than as rivals or replacements to them.\(^\text{42}\)

\(^{42}\) For the expression of a similar sentiment about international and domestic courts, see Simon Hentrei 'Generalizing the Principle of Complementarity: a Possible Way to Structure and Guide the Relationship between International and Domestic Court?' in this volume.