

# The Re-constitution of the Public Domain

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## Introduction

The Washington consensus represented a tacit but powerful agreement amongst neo-liberal ideologues, academic and government economists, central bankers, global business and financial institutions, publicists and politicians across the political spectrum. It expressed a few simple and seemingly irresistible “truths”: that during the post-war period, the state had become too expensive to sustain and too intrusive to tolerate; that if markets were freed of regulatory constraints, they would generate wealth and prosperity both locally and globally; and that wealth and prosperity were necessary (and seemingly sufficient) conditions for democracy and social well-being. The Washington consensus, as might be expected, was quite unsympathetic to any such notion as “the public domain”. Moreover, it seldom put “governing” on its agenda, except when emphasizing the need to govern less (by reducing social programs and market regulation), to govern tougher (by coercing the poor, workers, undocumented immigrants or practitioners of non-standard lifestyles), to govern “smarter” (through privatization) or to govern more “accountably” (to corporate interests).

But, it seems, the Washington consensus may be undergoing a transformation. First, its logic is no longer seen as irresistible. Currencies and commodities,

corporations and countries once touted as exemplars are in varying degrees of disgrace and disrepair. As a result, local business elites, transnational social movements, ordinary citizens, even some national governments, are having second thoughts about neo-liberalism. Second, even “truebelievers” in liberalized trade, open markets and diminished state activism have had to acknowledge publicly that the Washington consensus has delivered the goods only selectively and partially; that some of its peripheral features have to be reconfigured, if only with a view to preserving its core ideas; and - critical for the present discussion - that markets work best in reciprocity with other systems of social ordering (Wolfensohn, 1998; Soros, 1998). The result has been increasing interest within the World Bank and amongst leading representatives of the world business community in “global governance” and “civil society”, in “transparency” and “accountability”, and especially in “the rule of law” (World Bank, 1997). And third, recent research has hinted that despite the Washington consensus, the state may not, after all, have been “hollowed out”; that most advanced economies have maintained relatively high levels of state expenditure; and that the idea of sustaining and reinvigorating the “public domain” still commands widespread support (Drache, 2000).

This essay takes issue with none of these hypotheses; rather it proceeds from a willing suspension of disbelief. It assumes that reports of the transformation of the Washington consensus are not premature; that the project of making global capitalism more benign will proceed; and that the new politics and policies of the “public domain” are indeed authentic successors to social democracy and social market capitalism, not

merely a sweet-smelling version of neo-liberalism by any other name. If all these things are true - if we are indeed in a moment of paradigmatic transition; if in Drache's phrase, we are "redrawing the line between the state and the market"; if we are seeking to reconcile the imperatives of wealth creation with the claims of social justice, environmental responsibility and genuine democratic accountability - then two tasks seem to demand urgent attention. First, we must understand more clearly what we mean by the "public domain", and second, we must begin to think about its "constitution" - the values, symbols, norms, practices and institutions which will translate the idea of the public domain into a new social and political reality. That is the ambition of this essay.

### **Defining the public domain: the role of law**

Daniel Drache has proposed that the public domain comprises "the things we have in common", things which - in contrast to private property - "cannot be bought or sold on the open market"(Drache, 2000). In Drache's metaphor, of course, the public domain is more than "things": it is a world view concerning "things" which are held in common or for a public purpose, as well as constituencies of interest embedded within that world view, and an historically contingent set of institutions and processes which constitute, embody and administer it. Moreover, it follows that the public domain exists alongside and in tension with private domains - things we do *not* hold in common, things which *can* be bought or sold on the open market. Private domains are also

defined by a distinctive ideology or belief system - one which privileges private property; are constituted and legitimated by institutions; and are sustained by processes of expansion and exploitation. And finally - to persevere with Drache's metaphor - public and private domains are divided only by shifting, permeable and contested boundaries. We have therefore to pay special attention to boundary disputes.

Boundary disputes in the non-metaphoric sense are typically settled by recourse to law. So too with those around the public domain which, after all, is a term with a lengthy legal pedigree. An account of law's historical encounters with the public domain may therefore shed some light on the significance of contemporary efforts to redraw its boundaries. The story, as I will tell it, is that determined, powerful "modernizing" interests have always sought to carve private domains out of public; that they have used the discourse, processes and agencies of law not only to bring about these encroachments but to legitimate them; and that in doing so, they have sought to discredit and suppress social institutions and practices, which embody traditional values of "commons" and vague ideals of "community". This pattern, I suggest, repeats itself in the mediaeval and early modern "commons" which were suppressed by the parliamentary enclosure movement of 18th and 19th century England; in the metaphoric public domains of classical liberal democracy, which in the inter-war period rapidly succumbed to a succession of economic, moral and political crises; in the postwar social democracies and their capitalist *doppelgänger*s, which experienced a sudden erosion of credibility and political support in the 1970s; in the present,

millennial version of the public domain whose short list of “things we have in common” - the marketplace and the modalities of exchange - turns out to have been too short for its own good; and in the endangered global commons-in-the-making: our cultural inheritance, natural environments, deep oceans and outer space. In each of these cases, law has been used to shrink the boundaries of the public domain, to justify encroachments by private interests, and to introduce new institutional structures and constitutional regimes, which “normalize” the new boundary conditions. And at the same time, law has often been invoked to defend the public domain - usually as an unavailing, last ditch strategy whose limited success tells us as much about law as it does about public domains.

This recurring pattern of events forces us to consider the highly ambiguous relationship amongst state, law and public domains.

The public domain is not coterminous with the state. Sometimes the public domain has been identified with local or communal institutions operating at arm’s length from the state; sometimes the state has acted as trustee and executor of public domain values; sometimes deep contradictions of state policy towards public domain values have existed within and amongst the legislative, executive and judicial branches of government; and most recently, under the Washington consensus, state policy has been indifferent, even hostile, to the public domain. Given this complex and varied connection between the two, it is at least clear that to argue for the resuscitation of the public domain is not necessarily to argue for a large and active state sector.

Nor should state and law be conflated. It is true that in popular and legal-professional circles, law is generally defined as a body of norms promulgated and enforced by the state. But social scientists have long observed that both public and private domains also produce their own distinctive norms - bodies of "law", which the state may acknowledge and enforce, or on the other hand, refuse to recognize or even tolerate.<sup>1</sup> In its post-modern formulation, this theory of "legal pluralism" holds that law need not originate with or be enforced by the state; that law is immanent in all social and economic relations; that the outcome of encounters between state and non-state legal systems are unpredictable; and that state law ought to be respectful of non-state normative systems which express the "otherness" of those who inhabit the plethora of private and public domains which exist in any society or polity. Any discussion of the public domain thus implicates a controversy over competing visions of law, over law's relationship to the state and over just how law "rules" - if and when it does (Griffiths 1986; Merry 1988; Teubner 1992).

An understanding of the relationship amongst state, law and the public domain has become particularly important because recent attempts to renovate the Washington consensus place significant emphasis on "the rule of law". In one sense, this is not surprising: the "rule of law" was historically used both to suppress communal interests and to hobble intervention-minded governments. In fact, the principal theorist and popularizer of the rule of law - A.V. Dicey - was an avowed foe of "collectivism" (Arthurs, 1979). But, as it happens, neo-liberals are not the only ones to have discovered the potential of law in resolving boundary disputes between public and

private domains. Supporters of the public domain - no less than its critics - tend to look to law as well, and to put their faith in juridical strategies, especially those built around constitutional guarantees of social rights (Drummond, 1992; de Villiers, 1994; Samuel, 1997). Law, they imagine, is cheap, rational and fair; constitutional law is, in addition, definitive and, for all practical purposes, unchangeable. By contrast, they see social and political action as slow, costly, uncertain and ultimately unavailing. But, I will argue, these perceptions are based on a misapprehension of what law is and what law does. Especially in circumstances of neo-liberalism, globalization and post-modernity, legal strategies intended to preserve or extend the boundaries of the public domain are - ill-advised. Far better for advocates of the public domain, to proceed pragmatically and opportunistically; to gradually resuscitate politics; to mobilize the forces favouring social change; to use conventional juridical strategies only sparingly; and to put their faith in ambiguity and paradox.

### **A short history of the public domain through the lens of law**

The account that follows sweeps rather presumptuously across time, space and legal cultures, thus inviting readers to challenge its internal coherence, comprehensiveness and relevance. However, treated as allusion rather than as technical analysis - as a cautionary tale, in other words - this history of the public domain as seen through the lens of law may help us to better understand the overarching political metaphor of the public domain more generally.

*(a) The public domain as public property*

Since Roman times, the existence of *res publicae* - “inherently public property” - has been acknowledged by law. Indeed, since the term is the root of our word “republic”, the existence of public property is arguably an indispensable feature of modern democratic states. At different times, however, and under different legal regimes, this notion of public property has taken different forms. In the most rigorous conception of the “public domain”, all land not privately owned - unoccupied land as well as land used specifically for public works - was thought not only to be vested in the state but to be “inalienable”; it could not be bought and sold; it would remain forever public and vested in the sovereign, even if devolved under feudal tenures or leased to private parties for finite periods of time. But this rigorous position has never had much resonance with practical governments or aspiring magnates. More often, the public domain was treated merely as an asset which could be disposed of for politically expedient purposes. Thus, land grants were used by Roman, feudal and Imperial governments to secure the loyalty of troublesome warlords, reward faithful servants or pacify demobilized soldiers, just as they were used by modern states to endow their universities, subsidize their railways or populate areas of contested sovereignty. Today, the notion of the public domain signals no more than the existence of a general use-right. Under modern Anglo-American property law, for example, the community is entitled to access to highways, to the banks, beds and foreshore of navigable waters and, by extension, to public squares and parks - access which cannot be forestalled by neighbouring property owners (Butler, 1982; Rose, 1986). This, of course, is a

significant entitlement, but it speaks to a more attenuated understanding of the public domain than the original, rigorous conception.

In this gradation of legal meanings, we see a rough approximation of those which lend ambiguity to the notion of the “public domain” in the metaphoric and political sense in which we are using it in this volume. Is there an irreducible public domain of state functions, of entitlements to public goods, which no state can refuse to honour? This view was fashionable once. However, the decline of the state is viewed today with equanimity by post-modernists who can conceive of democratic “governance” advancing even as the state becomes less legitimate and effective (Hirst, 1997; Matlár, 1995), and with enthusiasm by neo-liberals who eagerly contemplate the ultimate retirement of even the arthritic night-watchman state. Or is the public domain whatever vestigial traces of the state sector remain at a given historical moment? This has been the pragmatic position of most contemporary centre and centre-left governments, it being accepted that the historical trend is in the direction of a smaller public domain rather than a larger one. Or is the issue of state ownership or state provision of public goods actually irrelevant? Is it, instead, the question of “use-rights” - the right to be included, to enjoy the fruits of civic participation - which ought to be the ultimate concern? If these can be provided by the market or by civil society, rather than by the state, no matter: what counts is that they are provided somehow. This may be the sense in which the public domain re-enters political discourse in this era of “post Washington consensus” (Higgott, 2000; Drache, 2000). However, while the “use-rights” metaphor has obvious appeal to enlightened financiers and pragmatic governments, it

is not quite enough to resolve the problem. Someone must ultimately address the problem of what to do when access to use-rights is obstructed and economic deprivation and social exclusion grow apace.

Given its variable meaning and generally diminishing power, some suggest that the idea of the public domain may have lost its salience in legal discourse (McLean, 1999); others fear that its abandonment may lead to destruction of the natural environment, inconvenience or economic ruin for public users, and the loss of the “civilizing and socializing” effects of public space and facilities (Rose, 1986). As this volume shows, similar controversy surrounds the utility of the public domain as what Drache has called a “heuristic” or “hosting metaphor” (Drache, 2000).

*(b) The “commons”: Early modern England*

The metaphor of the public domain often comes to us, in the Anglo-American tradition, through the oft-told “tragedy of the commons”. The “tragedy”, as it is conventionally understood, is that late-surviving mediaeval patterns of property-holding represented an obstacle to prosperity and modernity. Lands were held by villagers in common; cattle were grazed and grains were reaped in common; natural resources such as wood, peat, minerals, fish and game were exploited in common. Thus, no individual property owner had the incentive, the means or even the right to introduce new technologies, which might produce higher yields or more profitable rents. Moreover, since the customs governing common use were often unwritten, highly idiosyncratic and sometimes indistinguishable from the daily use routines themselves,

they effectively excluded strangers, discouraged investment, perpetuated backward mining or farming techniques, and in the end, denied these benighted, collectivist communities the moral and material rewards of integration into a mercantilist, then capitalist, progressive or modern economy. As a consequence - so the story runs - rising populations pressed ever more severely on a dwindling common resource base with the inevitable “tragedy” of declining living standards. Only with the shift to clearly-defined, legally enforceable, individual rights of private ownership was it possible to forestall this “tragedy”. This is the version of “the tragedy” favoured by Adam Smith and political economists of the late 18th century (Neeson, 1993), as well as their latter-day disciples in that other dismal science, biology (Hardin, 1968).

But there is another version of the tragedy of the commons. Edward Thompson, the brilliant English social historian, shows how the abolition of common use-rights deprived the common folk of rural England of the only property they knew; the only property that could sustain their way of life (Thompson, 1975, 1991). He recounts how the “commons” were diminished through encroachments and enclosures under laws forced through Parliament - before or after the fact - by private cliques of self-aggrandizing landowners, how judges criminalized all forms of resistance and subordinated the ancient “natural” and customary law, which had defined common rights to modern concepts of unambiguous property ownership.<sup>2</sup>

Thompson’s account of the demise of the commons in early modern England is but one of many. The same phenomenon was recorded again and again throughout the 18th century and on into the 19th, and right across the British Isles from the

“clearances” of the Scottish Highland peasantry to the dissolution of the “Stannary Court” of the Cornish tin miners to the enclosure of urban commons in the insalubrious new industrial towns of England and Wales (Arthurs, 1985). Again and again, in language whose echoes we can hear down to our own time, these accounts of the end of the “old” public domain are closely associated - whether as cause or effect - with a crisis of economy, politics, law and society (Perrot, 1990).

Yet the story is not entirely a pessimistic one. The communitarian traditions documented by Thompson were not entirely erased in the eighteenth century. They were resuscitated during the nineteenth century in various forms: by the introduction of allotment gardens for the working poor, by the emergent trade union, cooperative and workers’ education movements of Victorian England, by a few utopian colonies in the Americas and, by “gas and water” municipal socialists on both sides of the Atlantic. They even lingered on in the intellectual traditions and politic rhetoric of early twentieth century progressive and social democratic movements, especially in English-speaking countries (Rodgers, 1998). In that sense, they made their contribution to the survival of the idea of the public domain.

*(c) The frontier*

The “tragedy of the commons”, moreover, was not solely about the fate of 18th century plebian Celts or Britons. It was in fact rehearsed many times during the waves of exploration, colonization and globalized trade, which began earlier, lasted later and spread much further afield. According to some European jurists of the 17th to the 19th

century, if territory could be described - however inaccurately - as *terra nullius*, as belonging to no civilized state, it could be lawfully claimed by the first sovereign to stumble upon it and occupy it (Slattery, 1991; Simpson, 1993-94). As the aboriginal, itinerant peoples of America, Africa and Australia were to learn each in their turn, being the inhabitant of such a public domain was a distinct liability. To be sure, the doctrine of *terra nullius* had a corollary, at least in theory: if an indigenous monarch did claim the land, it was not available to European trade or colonization except by conquest, cession or treaty. But this corollary was at most an inconvenience; if some such claim were made, it could be easily swept aside. And usually was: the great movement across the western frontier lands of the Indian nations in the United States and Canada, and the subsequent settlement of the “open range”, shows that even if nature abhors a vacuum, aggressive railway entrepreneurs, ambitious land merchants and impoverished immigrants were quite willing to create one where none existed previously. Nor I suspect was the story much different in Siberia or Indonesia or India or Southern Africa or the Canadian Arctic.<sup>3</sup> Everywhere the European colonizers went, as soon as they were strong enough to do so, they brushed aside indigenous notions of common property and customary law or at most tolerated them to the extent that they could be fitted within the Procrustean bed of metropolitan law (Harrell-Bond & Burman, 1979). In the interim, it should be noted, they often instituted their own justice systems and improvised property regimes to protect trading, grazing, mining and water rights (Ellickson, 1991), which were absorbed into or displaced by more conventional systems of state law, which ultimately arrived with the army, the police, the railways and finance

capital.

The ancient dream of a public domain does survive here and there in the Americas. Aboriginal peoples have contested attempts to displace them from their common lands from the earliest moments of colonization down to the present era of globalization. Even though five hundred years of exploitation and resistance have bound the colonized and the colonizers together in societies, which are probably indissoluble, some aboriginal peoples on the periphery of development bravely persist in their efforts to preserve the last vestiges of communal property against the aggressive assertions of individual and corporate ownership. Ironically, globalization - their worst enemy - may also be the best hope aboriginal peoples have of preserving their ancient public domains of land, water and spirit. It is increasingly difficult for global or domestic capital to exploit natural resources without becoming vulnerable to the scrutiny of the media, social movements and NGOs, without exposure to potential boycotts by consumers, without pressure from governments sensitive to charges that they are collaborating in the abuse of the environment and human rights. This utterly unexpected outcome of globalization has, in fact, given some aboriginal peoples a new strategy, if not yet a new strength (Merry 1996).

Of course, the picture differs from place to place. In the United States, armed aboriginal resistance essentially ended a century or more ago. Today, Native American communities still attempt - with modest success - to recapture their dignity and distinctiveness, and to replicate their now-lost public domain, through strategies of litigation, institution-building and commercial enterprise. In Canada, by contrast, First

Nations have favoured constitutional strategies during recent decades, with much effort focused on proposals to establish a “third level of government” for aboriginal peoples within the Canadian state, and to reinvent the traditions and institutions which governed their ancient public domains.<sup>4</sup> No one who is skeptical about law and constitutions will easily accept that such proposals will do much in themselves to alter high rates of infant mortality, poverty, unemployment and incarceration. But as an important symbolic first step towards a change in the material and psychic conditions of aboriginal peoples, perhaps indeed new arrangements for self-government are worth trying (Royal Commission on Aboriginal Peoples, 1996).

*(d) The public domains of political liberalism: 19th and 20th century Europe and America*

By the 19th century, the legal public domain of England was not large. Land ownership and wealth were largely concentrated in the hands of a few favoured groups: the great landowners; the local gentry and clergy; and the new metropolitan class of manufacturers, bankers, merchants and railway lawyers. What remained as a metaphoric “public domain” was the prerogatives of British subjects and the right to participate in politics. But most people were excluded even from this public domain: most urban tradesmen, skilled workers and small property owners, almost all industrial and agricultural workers, and of course, all women. The history of the long 19th century - from 1789 to 1914- was written around the efforts of these excluded groups to participate in the public domain (Hobsbawm, 1987). They sought to make their own

particular “property” rights as workers or shopkeepers more secure and profitable, to be acknowledged as reputable and worthy members of the community, and to become political actors, first as individual citizens and subsequently as members of organized groups whose interests had to be accommodated in the fundamental structures of the polity, society and economy.

By no means was their progress inevitable, easy or complete. But gradually property laws and labour laws were changed; the political franchise was extended; the rudiments of the welfare state were established; the utter rigidity of the class system began to become brittle and break apart; and women ultimately won the right to hold property and vote. By, say, 1918, one could begin to describe the United Kingdom as something resembling a democracy, albeit one which was still imperfect and incomplete.

The chronology differed from continent to continent, from country to country, but in general the long 19th century was one of awakening democratic aspirations. Those aspirations were only imperfectly realized in many, arguably most, countries. They were often suppressed by reactionary forces, diverted into nationalist struggles, betrayed by corrupt, incompetent or sectarian governments. But by the inter-war period, in most countries in Western Europe and the Americas, even in some European colonies, it was beginning to be accepted that democracy was “normal”, that ordinary men - and later women - had the right to participate in and ultimately control the public domain of politics. Even monarchies, dictatorships, oligarchies and imperial elites in these countries usually felt compelled to borrow the language of democracy,

describing themselves as custodians of a “sacred trust” to act according to the people’s will or in the people’s interests, as the “true embodiment” of popular sentiment, as agents of a “transition” to democracy, as “defenders” of democracy against anarchic elements or foreign conspirators. Even in such perverse and obscene distortions of democracy, however, there was at least an implicit recognition that governments must govern if not with the consent of the governed, then at least in their behalf. In that sense, it could be said that we had arrived at a moment in history when it could no longer be questioned that the politics was unquestionably a public domain - “the things we have in common which cannot be bought or sold on the open market”.

But in this formulation of the public domain, there were many ironies. One is that who “we” are - who are stakeholders in the common enterprise of the nation, who can participate in the public domain of politics - has been ceaselessly contested across fault lines of gender, class, religion, race and ethnicity, with devastating consequences for the actual practice of democracy. A second is that political power has indeed often been “bought or sold on the open market” even - perhaps especially - in the country which regards itself as democratic tutor to the world. And a third is that debate over “what we have in common” is precisely what contemporary politics is all about. Is the public domain to be defined by our common participation in public processes - to vote, to hold public office, to be free from arbitrary constraints? Or is it to be measured by our common access to public goods - to education, health, dignity and justice?

*(e) Social democracy: mid-20th century advanced economies*

This emphasis on equitable access to public goods was at the heart of the transition in political discourse from 19th century liberalism to 20th century social democracy. That transition had apparently become irreversible after the depression of the 1930s, World War II and the reconstruction that followed these catastrophes. “We are all socialists now,” people used to say. Of course, “socialism” in this sense seldom involved plans to return all private property to the public domain whence it had been snatched over two hundred years of mercantilist and capitalist appropriation. Rather, in its social democratic incarnation, “socialism” consisted of a series of meliorative strategies designed to give everyone access to the full benefits of citizenship in what remained, at core, capitalist societies with strongly entrenched notions of private property. In most advanced democracies, these benefits included such public goods and services as reasonable prospects for employment and decent working conditions, health services, social insurance, education, public safety, the administration of justice, the infrastructure of transportation and communications and at least a modicum of amenity and culture.

In some key areas, to be sure, the state did not so much supply public goods and services as try to ensure that markets operated fairly honestly and with reasonably benign consequences. Hence, states with varying degrees of enthusiasm and diligence regulated interest and exchange rates, the securities market and the labour market, consumer and workplace relations, the use of land and other natural resources, import and export markets, and some oligopolies and monopolies such as public utilities, broadcasting, air transport and financial institutions. The interventionist state, in other

words, became the repository of common values, the engine of collective enterprise, the custodian of what we may call metaphorically “the public domain”.

It must be said immediately that the state’s custody of the public domain was in some ways less than successful. Some of the goods and services it provided were themselves the source of considerable problems - public housing and welfare being two cases in point; some of its regulatory interventions - in land and labour markets, for example - were either counter-productive or ineffectual; and the cost of the whole enterprise imposed burdens on taxpayers which they became increasingly unwilling to bear. But the activist state did not just falter of its own infirmities; it was driven back by two powerful forces: neo-liberalism and globalization. The first weakened our desire for public goods, the second the capacity of the state to deliver them. Thus, at the turn of the millennium, we seem to be abandoning the public domain of social democracy and returning to an earlier version of the public domain, the liberal version, built on the ideal of individual enterprise and opportunity but transposed from a local or national to a global scale.

And a final problem for social democracy: in conditions of post-modernity, understanding the “public domain” - even as a metaphor - has become increasingly difficult. After all, there is no more “public” - only constructed identities, multiple meanings and contested histories. And there is no more “domain” - no more common land with finite natural endowments, its boundaries and use-rights defined by immemorial custom - but a limitless, ever-changing, normatively indeterminate, enormously complex and sometimes “virtual” reality. In other words, the class- and

interest-based coalition which supported social democracy in most western countries has been dissolving; and the policy agenda which once united and disciplined that coalition not only seems unlikely to be re-established, but to be irrelevant or even undesirable - even to many social democrats (but see Hirst, 1997).

*f) The marketplace as public domain: millennial neo-liberalism*

At the end of the 20th century, ironically, the public domain which seems to be attracting the most attention is the marketplace. This is rather odd since, in a conventional sense, the marketplace seems to be not part of the public domain but its antithesis. It is, after all, where one buys and sells those things which we own privately rather than in common. However, the idea of the marketplace as a public domain is not altogether oxymoronic. It has long been understood that the public domain provides a context for the private activities of buying and selling. Public infrastructure is still used to transport goods, services and information to market; public agencies still stabilize interest rates and exchange rates; public security forces still prevent theft and fraud; public labour laws still maintain a quiescent work force. Moreover while the marketplace is certainly the venue for buying and selling private goods, many public goods which were formerly “free” are traded there as well: personal security, justice, civic amenity, education, health care, pensions and social insurance, access to nature and natural resources. The changing character of the marketplace argues for treating it as a public domain, if only to underline the ongoing need to regulate trade in these sometime public goods, even though they are no longer provided by public authorities.<sup>5</sup>

However, the problem is not so much whether at any given moment in the history of a mixed economy public goods are provided entirely or primarily within the public domain, or whether they can be purchased or sold in private market transactions; rather it is whether neo-liberals will concede that the marketplace, in fact, retains any public character at all. Amongst true believers at least, neo-liberalism is inconsistent with the notion that successful market economies depend upon the continuing - and in some ways increasing - vitality of the state. For them, faith in the unlimited potential of the marketplace is almost total, and free markets and democracy are inextricably linked. At the domestic level, they insist, the liberalization of local labour, capital and consumer markets leads to the liberalization of local politics. Productivity is the key to prosperity; and productivity requires the dismantling of artificial constraints - tariffs which shelter inefficient local producers, social customs which marginalize potentially productive citizens, political corruption and coercion which result in a mis-allocation of resources, and restrictive work practices which create inefficiencies in the labour market. As constraints are removed, as productivity rises, so too does consumer demand: a virtuous circle. And - the neo-liberal argument continues - with diminished state control, with increased consumer sovereignty, with a free market in goods and services comes increasing pluralism in ideas, social behaviours and relations and political options. For neo-liberals, the public domain - paradoxically - is invigorated by the elixir of private enterprise.

These effects are enhanced, moreover, when markets become global rather than local. First, globalization by ensuring a more logical division of labour based on

comparative advantage, force-feeds the gold goose of advanced capitalism, thereby ensuring a reliable supply of golden eggs for its citizens. Those golden eggs may include traditional “public goods”, whether supplied privately or by governments with increased tax revenues. Second, globalization encourages corporations from the advanced economies to become stakeholders in developing nations, thereby allowing them both to take advantage of local resources and to create expanding markets for their expanding productive capacities. Third, they point to the “CNN effect”: the scrutiny of global media discourages abuses by local authoritarian regimes and reinforces the efforts of local democratic forces. And finally, neo-liberals argue, all stakeholders in the global economy will ultimately come to accept that they are also stakeholders in a global system of mutually-assured stability and security.

These are rather extraordinary claims: that the marketplace is itself a public domain; that it generates not only private prosperity for the few, but ultimately public goods for the many; that amongst these public goods are honest government, democracy and peace; and that by implication, the more pervasive are marketplace values, institutions and processes, the more of these “public goods” they will create. However, these claims should be tested empirically, not just taken on faith; and I suggest that the empirical evidence, so far, does not support them very persuasively. Contrary to the optimistic predictions of neo-liberals, the public domain of the marketplace - like so many other public domains - seems to be plagued by extreme disparities of access, power, and rewards. As noted earlier, these inconvenient facts - and their destabilizing social and political consequences - have produced something of

a crisis of faith even amongst true believers. It is this crisis which may have brought us to the verge of a new era, the era of the post-Washington consensus.

*(g) The public domain of cyberspace and the information economy*

As it happens, the “public domain” has long been a term of art in one of the most dynamic of all marketplaces, the marketplace for intellectual property. In the law of patents, trademarks and copyrights, the public domain is a sort of Elysian fields, the ultimate resting place of intellectual property rights which were never claimed, have expired due to the effluxion of time or were abandoned by improvident owners (Litman, 1990). Here - in principle available for everyone’s benefit, profit or delight - are the books of Dickens, the music of Strauss, Edison’s first light bulb and Bayer’s still-useful, but now unprofitably generic, “aspirin”.

That at least was the original notion of the public domain in the law of intellectual property: the original creator of novel ideas, processes, signs or symbols would be granted exclusive rents for the material expression of his or her genius for a limited period of time; thereafter, anyone could freely take and use the property. But this is no longer the case, except in the most abstract sense. Intellectual property is central to the global economy. Its creation, dissemination, exploitation and defence is one of the main strategies by which corporations position themselves in the marketplace. Individual inventors, now seldom found in their garrets, are likely ensconced in well-equipped, very expensive corporate and university laboratories, creators of intellectual property are likely to work for, or on a short leash from, large entertainment, publishing,

advertising and software companies; and most important, intellectual property of any residual value is likely to be kept out of the public domain by clever defensive measures sanctioned by a world-wide system of laws which have been relentlessly revised over time to ensure that nothing of value escapes the grasp of its corporate owner for a very lengthy period. Much intellectual property - especially software, know-how and firm-specific manufacturing technologies - remains "proprietary", kept secret by its owners, not time-limited and not destined to pass into the public domain. And in Jeremy Rifkin's poignant phrase "the most intimate commons of all" - the human genome - "is being enclosed and reduced to private property that can be bought and sold on the global market" (Rifkin, 1998).<sup>6</sup>

This brings us to cyberspace, supposedly the newest and most intriguing of public domains, the great democratic *agora* where ordinary people are supposed to be free to exchange their goods and ideas (Tapscott, 1997; Alexander & Pal, 1998). Access to the infinite possibilities of cyberspace is essentially free and unconstrained: it requires only a modest investment in equipment; and it is essentially immune to regulation by governments or to any but nominal control by powerful commercial gatekeepers. There is some truth to these claims: one can find web sites for the *Zapatistas* of Chiapas, for small English Inns, for betting, smut and hate propaganda, for cars and houses, for books and art, for governments, corporations and law firms, for celebrities and cranks and college students. But cyberspace is not quite as democratic or as accessible as all that (Gutstein, 1999). As with all public domains, cyberspace is increasingly subject to preemptive claims. The Microsoft Explorer software used to gain

access to the Internet has been marketed aggressively and perhaps predatorily, and is the subject of an anti-trust proceeding in the United States. While it is easy enough to launch a new “dot.com” company, it is much harder to make one profitable. Significant start-up and running costs - advertising, promotion, back-room functions, security - seemingly create undue dependence on continued infusions of capital rather than cash flow. It may well turn out that only those with deep pockets will survive in the electronic marketplace. And Internet use is still largely concentrated in a small number of countries and constituencies; vast disparities of access result from wealth- and education-related inequalities as between North and South, and even within advanced economies.

*(h) The new public domains: the “global commons”*

Recently, however, we have been reintroduced to the public domain as a spatial concept. It has been proposed that parts of the world should be regarded as “a global commons” - the term has historical resonance - to be protected from private ownership and despoliation (Rifkin, 1991). Some of these new commons - the Antarctic and the Amazon - should be left undisturbed, inviolable sanctuaries for the preservation of their indigenous human populations, cultures, flora or fauna. Others - offshore fisheries, deep-sea mineral resources beyond territorial waters - should be held in trust for the general welfare of humanity, and specifically for the poor peoples of the world. Outer space and the unexplored planets should be regarded as a new public domain (World Commission on Environment and Development, 1987), so that all peoples may share in

the great drama of exploration and in whatever gains exploration might one day bring. Santos - a self-styled utopist - proposes that cultural and the natural environments should be viewed as the “common inheritance of mankind,” which will be protected by an emerging *jus humanitatus* which transcends national law (Santos, 1995).

Perhaps. These are all attractive ideas, in their way. They express values which speak to our noblest instincts or offer unconventional long-term solutions to some of our most intractable problems. Nonetheless, it is hard to believe that merely labeling the ocean depths or the Amazon rainforest or outer space as “public domains” will forestall a new “tragedy of the commons”, prevent the invocation of a new doctrine of *terra nullius* to dispossess aboriginals and other weak claimants, or deter a new rapacious appropriation of communal resources for private profit. At least there is not much in the history of public domains so far which ought to make us optimistic.

*(i) Public domains: from definition to prediction*

What does this long, impressionistic and largely sad account of public domains tell us? From the late mediaeval through the early modern period, many people understood the public domain as a form of communal property, which supported a way of life which was largely defined and regulated by indigenous laws and institutions. Some residue remains of this old property-based conception of the public domain: it animates efforts to ensure community access to natural amenities, to preserve the natural environment from destruction, and to reinvigorate communities of aboriginal peoples on the periphery of advanced economies. But for most of us, as citizens of

contemporary democratic states, the public domain has ceased to have corporeal significance. True, we have continued to be fascinated by “new frontiers” - intellectual property domains such as genetic engineering, information technology and pop music and domains of physical property such as the ocean depths and outer space. Like the “old frontiers” of nineteenth century America, these new frontiers are viewed as empty expanses available for private appropriation, as soon as their communally-minded aboriginal inhabitants can be subdued, and the necessary capital and technology mobilized to exploit them.

In the context of the debates which have given rise to this paper and others in this volume, however, the public domain is treated as metaphoric rather than as physical space. It conjures up the many venues in which public values are debated, public decisions are taken, public resources are deployed and public policies are implemented. The public domain, in this sense, is a political domain. But it is more than political: polity, society and economy are inextricably linked, and attempts to partition them into separate realms of discourse and action have come to be regarded as impracticable if not illicit. Hence, for much of the past hundred years, social democracy - hybridized into variants of corporatist, social-market and paternalistic capitalism - represented the moral equivalent of older concepts of the public domain. Free and equitable access to “public goods”, participation in civic institutions and a progressive tax system, it was once assumed, were an effective strategy for sharing the notional “commons” of wealth, opportunity and power.

However, in recent years, both the modalities of social democracy and the moral

impulse behind them seem to be exhausted, even anachronistic. “There is no such thing as society,” said Mrs. Thatcher; and most people seemed to agree. The public domain has had little resonance lately, except to the extent that it can be seen as a potential increment to the private domain. But this negative approach to the public domain may be running its course. Recent disasters and near-disasters have reminded us that the contraction of the public domain and the marketization of just about everything has the potential for some very negative consequences. We are being forced to recall that the unconstrained exploitation of nature and people for private profit may ultimately produce physical, social and financial catastrophes for investors in the core advanced economies no less than for workers in those at the periphery, for national elites no less than for international bankers and entrepreneurs. So, very tentatively, we are exploring how to reconstitute the public domain.

### **The (re)constitution of the new public domain**

This exploration, one might expect, would lead to a revisiting of the social democratic agenda, an agenda with an expansive view of the public domain. But this has not happened. Although social democratic governments have come to power in many western democracies, they have been at pains to identify themselves as “new” incarnations of old parties, to dissociate themselves from their own histories, alliances and ideologies and, in general, to adhere to the policies of their neo-liberal opponents. If their advent to office were in fact evidence of renewed concern for the public domain,

the relative passivity of these social democratic governments would itself have ignited political debate and triggered the formation of new political alignments. But again, this has not happened. People - especially in the advanced democracies - seem increasingly disillusioned with electoral politics and estranged from most other forms of civic participation (Putnam, 1995, 1996).

What has happened instead is that new social movements have appeared in both the North and the South, outside the traditional sphere of political life. These movements have acted with considerable imagination and energy to take up particular causes: women, the environment, ethnic minorities, the homeless, local cultures, human rights (Keck and Sikkink, 1998). In one sense, they have been quite successful. They have attracted sympathy and support not only from “the usual suspects” - leftists and liberals, moral entrepreneurs and crusading journalists - but from thoughtful conservatives, responsible business people and significant elements in civil society. And they have managed to win a number of battles, albeit few wars. Their successes, we might say, confirm the impression that there is considerable support for the reconstitution of the public domain. On the other hand, their media campaigns, direct actions and consumer boycotts have seldom been taken up by conventional political formations, mobilized permanent coalitions of support or yielded long-term state policies. Essentially, these social movements have each reclaimed only a small corner of the public domain, for a limited purpose and for a limited period of time; collectively they have not coalesced around an articulate, comprehensive and plausible vision of the whole.

However, in some countries at least, the rise of social movements has been closely associated with another development: an increased interest in constitutionalism. As some of these movements have come to realize, because their support is ephemeral and their campaigns episodic, their victories are less secure than they would prefer. Gradually, it seems, new social movements are coming to the conclusion that their hard-won gains in the public domain will only survive if they can be lodged in new institutions of effective governance, enshrined in law and, if possible, constitutionally entrenched. One can understand how this idea should have gained purchase. Litigation is always cheaper and sometimes quicker than social action and less abrasive and divisive than political agitation. Moreover it is, arguably, more definitive. A constitutional decree serves as a “silver bullet” which magically slays evil, intimidates backsliding governments and obviates the need continually to jog the memories of sympathizers with short attention spans.

And it is not only adherents of particular social movements who favour a strategy of constitutionalization as means of protecting the public domain. Respected public figures, scholars and editorialists have long urged that fundamental principles, which acknowledge humanity’s collective responsibility for its common fate, ought to be entrenched as the constitutional norms of nation states and transnational legal regimes (Beatty, 1995; Ackerman, 1997). Such a strategy, presumably, would ensure that the public domain is not laid waste by the politics of opportunism, alienation or greed.

In fact, this new, “constitutional” rights-based approach to the public domain

seems to be gaining support. At the transnational level, inter-state agreements and improvised transnational structures exist to protect the rights of labour, forbid the use of nuclear weapons and enable the prosecution of crimes against humanity; we have adopted conventions on global warming, the preservation of endangered species, and the protection of cultural property; and we have even created the rudiments of investor rights in the global marketplace by treaties which define the modalities of fair trade, safe navigation and international financial settlements. At the national level, an unprecedented number of countries are engaged in similar juridical strategies involving both adherence to existing international regimes and enactment of domestic laws and constitutions: charters of human rights and social and political freedoms; emancipatory legislation protecting workers, women, children and minorities; and state policies and practices which are supposed to ensure respect for the environment and cultural patrimonies. Even at the level of the global economy, optimists are able to point to the proliferation of codes of good corporate practice as evidence that respect for the public domain is being internalized - constitutionalized - by those who have often been most dismissive of it.

This gives rise to a difficult question: should the architecture of a reinvigorated public domain, of a new and less tragicomic “commons”, begin with the design of constitutional foundations on which can be constructed new institutions of effective governance?

To understand the significance of this question, one must appreciate its ironic implications. Constitutionalism, it transpires, is favoured not only not by enthusiasts for

a new public domain but by its opponents. Neo-liberals too are intrigued by the silver bullet. During the years of their ascendancy - from the advent to power of Prime Minister Thatcher and President Reagan down to the present - they tried in their own way to constitutionalize their particular vision of society and economy. Not for nothing has the WTO (and, briefly, the MAI) been called “the constitution of the global economy”. Regional trade regimes, such as the EU and NAFTA, limit the capacity of affiliated states to regulate markets (Schneiderman, 1996); to that extent, they reduce the range of social policies which can be supported in a given national context; and they thus ultimately function as a neo-liberal “conditioning framework” or super-ego for national governments (Grinspun and Kreklewich, 1994). Similarly, “balanced-budget” and “tax-reduction” provisions have been introduced into domestic legislation and constitutions, effectively precluding recourse to the Keynesian strategies which used to underpin social welfare programs in many states (Philipps, 1996). Other neo-liberal policies, which amended the conventions and institutions of social democracy, are designed to permanently diminish the public domain: the abolition of corporatist structures for consultation and consensus building; the radical reduction of trade union power and the disestablishment of cooperative institutions; the disempowering of local governments and specialized state agencies; the break-up and sell-off of long-established state-owned utilities, services and enterprises; the effective end of constitutionally-mandated affirmative action in education, employment and electoral arrangements; the introduction of significant user fees for health care, public housing and education; and the enhanced use of the criminal law to imprison (and, in the United

States, to execute) large numbers of poor people and members of minority groups.

In all of these cases constitutions, or some approximation or parody of constitutions, have been used to lengthen the list of things which can be “bought or sold on the open market”, to shorten the list of “things we hold in common”, even to redefine who “we” are, so that fewer of us share whatever is left of the public domain.

This is, to repeat, a considerable irony: both those who want to restore or expand the public domain and those who wish to retrench or diminish it look to constitutionalism as a means of redrawing its boundaries. They see law not only as a short-term tactic used to advance and legitimate their respective viewpoints, but as a long term strategy to constitutionalize their particular values and assumptions, so as to ensure that their partisan view of the public domain will persist despite the pendulum swings of democratic politics. Thus the juridical high ground, the realm of law and constitutionalism, is hotly contested.

But there is more irony yet. Adherents of both positions tend to overestimate the ability of legal and constitutional strategies and institutions either to achieve or to prevent the transformation of society, economy or polity. Law - especially constitutional law - can do much less than we think it can; its effects are variable and sometimes perverse; and political and social activism, for all their limitations, remain indispensable features of any effective strategy to alter the contours of the public domain.

### **The limits and uses of constitutionalism**

Conventional legal theory postulates that constitutions define and organize the governments of sovereign states whose legislative, judicial and executive branches in turn produce, adjudicate and administer law. In this sense, laws and constitutions - again, as conventionally understood - have been closely identified with the idea of state sovereignty. This close identification makes the constitution an improbable vehicle for advancing the project of a reinvigorated public domain. States today may or may not be “hollowed out”, disempowered, obsolescent or irrelevant, as much of the literature claims; but no one would deny that in every sense - except the purely formal - the capacity of most states to exercise their sovereignty has diminished. Sovereignty was never absolute, of course; its exercise was always compromised by *realpolitik* of both domestic and international provenance. However, today the exercise of sovereignty is also constrained by new and powerful forces - by the globalization of trade and communications, by universalistic norms of legality and propriety, by the debilitating insights of post-modernity. To this extent, national constitutions are no longer normative bedrock, no longer the ultimate standard against which the legality of government action is likely to be tested. Even enshrining a particular view of the public domain in a constitutional instrument will not spare it the indignity of having to pass muster under the terms of some international treaty or convention or - more humiliating yet - of winning the good opinion of bond traders and currency dealers.

Oddly, in light of its dwindling efficacy, constitutionalism - a central organizing concept of liberal democracy - has become more ubiquitous in political discourse, in legal-professional practice, even in popular culture. During the past half-century, it

seems, more constitutions have been written than perhaps at any time in history, as new states have come into being, and as old states have redefined themselves in the wake of war or civil strife. Many states without entrenched Bills of Rights have adopted them - or attorned to such regimes as the European Charter - and those with entrenched Bills have begun to use them more frequently. Nonetheless, despite the growing popularity of constitutional discourse, the successful practice of constitutional law and politics is very much in question. Claims made on behalf of the conventional "command model" of constitutions - the constitution speaks; citizens and officials obey - are being contested by legal theory and often disproved by legal science (Rosenberg, 1991). We know - those of us who have the luxury to be sceptical about them - that constitutions often engage the energies and serve the interests of political and legal elites, not of ordinary citizens; that they are sometimes used to deflect or defeat democratic initiatives; that they seldom translate into effective rules which shape actual societies and polities. We do not need hone our scepticism on, say, the 1936 Stalin Constitution of the former Soviet Union, or the other travesties passed off by repressive and lawless regimes as "constitutions". We need consider only the well-documented gap between constitutional aspiration and achievement in our own democratic countries, and in other countries which hold themselves out as exemplars of "the rule of law". Why then would we imagine that constitutions and laws have the power to extend or contract the boundaries of the public domain, to entrench neo-liberalism or to inoculate us against it permanently?

But imagine we do. Constitutionalism and the "rule of law" - core principles of

western democratic theory - have been awarded the ultimate accolade: they have come to be regarded as indispensable conditions of a free market economy. The post-Communist reformers of eastern Europe, George Soros and the other midwives of that great transformation, the visionaries of the World Bank, even the flinty-eyed negotiators of the IMF all seem to agree that successful capitalism is unthinkable without a democratic constitution. Does this represent a principled commitment to human freedom in all its dimensions? a propagandistic discrediting by the triumphalist west of Communist and kleptocratic regimes? a pragmatic calculation that democracy will reduce instability, and thereby create more favourable conditions for investment? No doubt all of the above, to some degree: but there is a further explanation for this sudden outburst of constitutionalism, this sudden infatuation with the rule of law. What appeals to many of its enthusiasts is that constitutionalism is in large measure about adjectival and institutional arrangements, not about substantive policy. The new constitutions and charters, for the most part, focus on individual rather than collective rights; they do not mandate state activism or a vibrant public sector; and of course, they cannot operate extraterritorially to reach foreign economic actors. This has led Santos to conclude that the paradigm, which informs the current wave of constitutionalism is “an efficient weak state suited to complement the efficient regulation of social and economic life by markets and the private sector” (Santos 2000). In such a paradigm, there is little room for an expansive view of the public domain.

And finally, a constitution is supposed to be imprinted with a nation’s DNA, the repository of its distinctive national experiences, symbols, myths and compromises, the

origin and expression of its unique political culture and legal institutions. It ought therefore, in principle, to offer compelling evidence as to how that nation conceives of and governs its public domain. This may have been true of revolutionary America or France, of fascist Spain or Italy or of Trudeau's Canada or Blair's United Kingdom. But it is less and less true that constitutions are unique. There seems to be a global trade in constitutionalism, a brisk after-market in specific constitutional technologies: charters of political, civil, social (and sometimes economic) rights; forums mandated to adjust the balance between dominant and subordinate communities; arrangements to ease the transition from a former to a future regime; and supreme courts or constitutional tribunals with responsibility for making the whole thing work (Choudhry 1999).

This tendency towards the generic presents us with a difficulty. If national constitutions no longer embody and express what is special about each country, what can they tell us about the governance of its public domain? Possibly, that many important decisions concerning governance are no longer made by national governments; that if minimal governance is the maximum ambition of a government, almost any constitutional arrangements will serve; that globalization has led to a convergence of national governance agendas and political cultures; that the hegemonic power of ideas about constitutions emanating from the most powerful nations - like ideas about economics or culture or technology - has caused a temporary short-circuit of the imagination, which will revive when a new paradigm of governance appears. Whichever explanation is true, they all point in one direction: to the extent that effective protection of the public domain is associated with the project of national identity,

constitutions no longer serve the purpose well.

This is not to say that constitutions, the laws enacted under them, or the institutions which they create have no relevance to our discussion. For one thing, all of these may offer us important insights into the world-view, the values, the power structures and the intellectual orientation of their authors. If the authors borrow, say, the model of French republicanism or German federalism, they presumably do so as an expression of respect for what they understand to be the political ethos of those countries. If they give disproportionate influence to specific populations or interest groups, they are either attempting to placate those groups by perpetuating existing power relations or to reassure them by introducing new protections. If they reproduce language from the UN Declaration of Human Rights, this signals a commitment to a particular kind of internationalist vision, or at least the desire to create the impression that one exists. In other words, all constitutional language, all constitutional conventions, have a political provenance, which in some way implicates particular understandings about the value and character of the public domain.

For another, constitutions acquire a kind of derivative or secondary significance. Constitutional language is typically vague and indeterminate. In principle, gaps in meaning are filled in over the years in various ways. Patterns of political behaviour may come to be accepted as constitutional customs or conventions; the parliamentary system of the United Kingdom is a case in point. Judicial interpretations, rendered in the context of constitutional litigation, speak to a particular view of law; the inflation of the interstate commerce and equal protection clauses of the U.S. constitution is a good

example (Rotunda & Nowak, 1999). And intra- or inter- governmental protocols help federal systems to redistribute responsibility and resources; Canada provides an instance with its tradition of “cooperative” or “executive” federalism. But even so constitutional indeterminacy persists, as it must if constitutions are to adapt over time to changing circumstances and new understandings.

This inescapable feature of constitutions gives rise to a peculiar dynamic, at least in countries which take their constitutions seriously. The mere threat to invoke the constitution - to challenge government action in litigation, to make adherence to a convention the focus of political debate, to press for a formal declaration clarifying or modifying previous interpretations - may trigger a sequence of unpredictable outcomes. Formal litigation outcomes are always difficult to predict, of course, but practical outcomes are even more so. For example, governments may try to avoid litigation in order to avoid costs and delays or possibly adverse precedential effects; exogenous political events may make it inconvenient for governments to deal with charges that they have violated basic understandings about constitutional practice; or governments may be reluctant to discuss constitutional change for fear of opening a Pandora's box. In each case, the resulting reconfiguration or reaffirmation of constitutional norms owes little to legal text. It is not just the words of the constitution which shape future governmental action, then, but the precedential, practical, cultural and political consequences of controversy over those words. And further questions arise: who speaks for the government and shapes its response to constitutional controversy? How does this allocation of functions affect the internal dynamic of governance? Which

groups or individuals can afford to use the constitution to attack the government? What public attitudes towards the state, the law and the courts does constitutional controversy engender? What does a high (or low) incidence of constitutional controversy tell us about the political culture of a country? Indeterminacy, even - especially! - on fundamental issues of constitutional normativity is what frustrates attempts to constitutionalize competing visions of the public domain (Arthurs, 1999).

## **Conclusion**

We are, it seems, moving beyond the Washington consensus, though how far beyond is as yet unclear. The new era is likely to be characterized by two important innovations: a somewhat more equitable distribution of social goods - a new emphasis on what we have called "the public domain"; and the strengthening of civil society, institutions of governance, democratic values and the rule of law - a new emphasis on what I have referred to as "constitutionalism". However, the extent and the efficacy of these innovations is by no means assured.

First, these innovations reflect fundamentally different concerns and are supported by fundamentally different constituencies. On the one side, there are those who believe in strengthening the public domain and constitutionalism as ends in themselves, on the other those who believe that these constitute a prudent investment in the creation of a more stable and profitable business environment. Those who embrace the former perspective are unlikely to be satisfied with modest measures;

those who embrace the latter will arrive much sooner at what they perceive to be the point of diminishing returns. Given these contradictions, it is easy to predict the next crisis of the post-Washington consensus era. The cost of resuscitating the public domain, the unpredictable behaviour of empowered communities and the interventionist tendencies of democratically elected governments is likely to collide with the desire of powerful economic actors for low taxes, open markets and acquiescent labour.

Second, both “the public domain” and “constitutionalism” are capacious, even contestable, terms. As we have seen, there have been many versions of the public domain, and many versions of constitutionalism. But of course, these do not exist in a vacuum; they are both shaped by the forces of political economy. In Drache’s diagrams (Drache, 2000), the public domain is consequential or residual space - space created by the dynamic tension between state and market forces, space which is not even coterminous with civil society, itself the site of contestation. Likewise constitutionalism. Its most salient features, as I have tried to show, are substantive ambiguity and procedural indeterminacy. Attempts to flesh out what we mean by “public domain” and “constitutionalism” are enormously valuable in exposing possibilities for the future of the global economy, national polities and local communities: but they should not be conflated with attempts to shape that future through economic interventions or political and social action.

Third, the public domain and constitutionalism, in all their versions, have to this point been closely associated with the nation state. A transnational public domain and transnational constitutional processes have emerged only in Europe, and even there

they are by no means comprehensive or secure. Indeed, the frailty of “social Europe” and the persistence of the EU’s “democratic deficit” arguably represent the Achilles’ heel of the whole European project. By contrast, the Washington consensus - even in its post-consensus incarnation - is essentially global in its concerns. Obviously nation states were the architects of the Washington consensus, the agents of its enforcement, the authors of its revision, and the focus of resistance to it. Obviously too, the Washington consensus is more closely identified with the ideology and interests of some states than of others. But that much said, the whole point of the consensus is to encourage or require states to abstain from being state-like, which is to say to avoid asserting their individual sovereignties and national interests so as to obstruct or encumber their own integration into a global economy. At the very least, we are far closer to achieving something that might be called a global economy than we are to defining a global public domain or global institutions of democratic governance.

Fourth, as my cautionary tales of the public domain have demonstrated, the two innovations of the post-consensus era will not be easily reconciled. The public domain in its many different manifestations - as commons, as frontier, as political liberalism, as social democracy, as “new frontier” - has more often than not found itself at odds with law. And when it has not, when its proponents have turned to constitutional strategies and institutions, they have often been sorely disappointed. In part, this historical record is a reflection of the intrinsic incapacity of law to achieve social transformation; in part, however, it is a reflection of the fact that constitutionalism - the rule of law - has often been used deliberately by the strong to deprive the weak of their rights and

entitlements. Enthusiasm for attempts to revise the Washington consensus in order both to resuscitate the public domain and to reinforce democratic values should therefore not be allowed to obscure the difficulty in reconciling these two ends with each other.

Are these concerns and contradictions the predicate of a dismal syllogism in which the public domain past and the constitutionalist present are so fraught with disappointment and ambiguity that neither offers hope for the future? Not at all. But neither is sufficient in itself, nor are the two in combination. Again, I will draw on history for my metaphor. The historic public domain was a place where inchoate but well-understood rights were, in E.P. Thompson's phrase, "imbricated" in the work-a-day activities of the common people, activities which gave those rights shape, effect and legitimacy. So too with our metaphoric public domain. It surely ought to be a place where ordinary citizens are more than observers, funders, passive beneficiaries or victims of legal manoeuvres; it ought to be a place where their activities - in politics, social action, workplace organization and community participation - stand at least some chance of shaping relations of power and processes of governance. In other words, the public domain will ultimately be reconstructed - if at all - from the ground up; and constitutionalism will - at best - legitimate and reinforce this grass-roots effort, not substitute for it.

## **Endnotes**

<sup>1</sup>Examples include the "natural" law of early modern common use rights, the law

merchant of 18th century insurers and traders, the customary law of 19th and 20th century colonies and pre- and post-colonial states, the traditions of religious communities, the trading rules of stock exchanges and the policy manuals of public bureaucracies.

<sup>2</sup>The advent of state law and its destructive implications for communal life were well understood. As an 18th century rhyme observed: “The law doth punish man or woman/That steals the goose from off the common/But lets the greater felon loose/Who steals the common from the goose.” And see generally Hoskins and Stamp, 1963.

<sup>3</sup>For example, the “Governor and Company of Adventurers trading into Hudson’s Bay”, was granted a Charter by the British Crown in 1670, together with the ownership of all adjacent lands “not now possessed by ...the subjects of any other Christian Prince or State”. The Hudson’s Bay Company ultimately claimed “ownership” of a quarter of the North American continent, which was ceded first to the British Crown, and ultimately to the new Canadian state, in the last quarter of the 19th century (Woodcock, 1970).

<sup>4</sup>In April, 1999, Nunavut in Canada’s eastern Arctic, became a self-governing homeland with territorial status, for some 26,000 Inuit. Nunuvut Act, Stat. Canada 1993, c. 28.

<sup>5</sup>An example: Ontario has created the first privately-owned electronic toll road, Highway 407, on which payment is enforced by denying non-payers renewal of their drivers’ licenses. However, recent reports have revealed that computer failures have led to billing errors and that the private owners have failed to provide any means of challenging these errors. The government has in effect enforced these illicit charges by threatening drivers with loss of their licenses. R.

Mackie, "Ontario won't seek money for erroneous highway bills", *The Globe and Mail*, Feb. 24, 2000, p. A26; R. Mackie, "407 toll outcry spurs reforms", *The Globe and Mail*, Feb. 25, 2000, p. A1.

<sup>6</sup>A belated attempt is being made by Pres. Bill Clinton and Prime Minister Tony Blair to ensure that knowledge of the human genome does not become the subject of private property, but remains available for use by research institutes, universities and laboratories which are willing to forego their right to patent products developed on the basis of knowledge of the genome. D. Henke, R. Evans, T. Radford, "Blair and Clinton push to stop gene patents", *The Observer*, Sept. 19, 1999; and see P. Quéau, "Defining world public property. Who owns knowledge?" *Le Monde Diplomatique*, January 2000; J. Martinson, "Gene research at risk. Private firm demands exclusive rights on human genetic code", *Guardian Weekly*, March 9-15, 2000. M Munro, "The Human Genome Project" *The National Post*, Mar. 13, 2000.

## **Bibliography**

Ackerman, Bruce (1997). "The Rise of World Constitutionalism". 83 *Virginia Law Review*. 771.

Alexander, Cynthia J. and Pal, Leslie A. (1998) *Digital Democracy: Policy and Politics in the Wired World*. Toronto: Oxford University Press.

Arthurs, Harry (1979). "Rethinking Administrative Law: A Slightly Dicey Business". 17 *Osgoode Hall Law Journal*. 1.

- Arthurs, Harry (1985). *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth Century England*. Toronto: University of Toronto Press.
- Arthurs, Harry (1999). "TINA x 2: Constitutionalizing Neo-conservatism and Regional Economic Integration" in Thomas Courchene (Ed.) *Room to Manoeuvre? Globalization and Policy Convergence*. Kingston: Queens University Centre for Economic Policy.
- Beatty, David M. (1995). *Constitutional Law in Theory and Practice*. Toronto: University of Toronto Press.
- Butler, Lynda (1982). "The Commons Concept: An Historical Concept with Modern Relevance". 23 *William & Mary Law Review* 835.
- Canada. Royal Commission on Aboriginal Peoples (1996). *Report of the Royal Commission on Aboriginal Peoples: Looking forward, looking back* (vol. 1). Ottawa: The Commission.
- Choudhry, Sujit (1999). "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation". 74 *Indiana Law Journal* 819.
- de Villiers, Bertus, Ed. (1994). *Birth of a Constitution*. Kenwyn: Juta & Co., Ltd.
- Drache, Daniel (2000). "The Return of the Public Domain after the Triumph of Markets: Revisiting the Most Basic of Fundamentals". (This volume)
- Drummond, Alison, (1992). *The Social Charter: evolution of the concept in recent constitutional negotiations*. Toronto: Ontario Legislative Library, Legislative Research Service.
- Ellickson, Robert C. (1991) *Order Without Law: How Neighbors Settle Disputes*.

Cambridge: Harvard University Press.

Grinspun, Ricardo and Kreklewich, Robert (1994) "Consolidating Neo-Liberal Reforms:

'Free Trade' as a Conditioning Framework. *Studies in Political Economy* 43.

Gutstein, Donald (1999). *E.con: How the Internet Undermines Democracy*. Toronto:

Stoddart.

Griffiths, John (1986). "What is Legal Pluralism?" 24 *Journal of Legal Pluralism* 1.

Harrell-Bond, Barbara and Burman, Sandra (Eds.) (1979). *The Imposition of Law*. New

York: Academic Press

Hardin, Garrett (1968) "The Tragedy of the Commons". 162 *Science* 1243.

Higgott, Richard (2000). "Justice Unbound? Globalization, States and the

Transformation of the Social Bond. (This volume)

Hirst, Paul (1997). *From Statism to Pluralism: Democracy, Civil Society, and Global*

*Politics*. London: UCL Press.

Hobsbawm, Eric (1987). *The Age of Empire 1875-1914*. London: Guild Publishing, esp.

c. 4 "The Politics of Democracy".

Hoskins, W.G. and Stamp, L. Dudley (1963). *The Common Lands of England & Wales*.

London: Collins.

Keck, Margaret E. and Sikkink, Kathryn (1998). *Activists Beyond Borders: Advocacy*

*Networks in International Politics*. Ithaca: Cornell University Press.

Litman, Jessica (1990). "The Public Domain". 39 *Emory Law Journal* 965.

Matlárý, Jaan Haaland (1995). "The Decline of the State as the Source of Political

Legitimation" in *Cooperation and Conflict*. London/Thousand Oaks/Delhi: Sage.

McLean, Janet (1999). "Property as Power and Resistance" in J. McLean (Ed.)

*Property and the Constitution*. Oxford: Hart Publishing.

Merry, Sally (1988). "Legal Pluralism". 22 *Law and Society Review*. 869.

Merry, Sally (1996). "Legal Pluralism and Transnational Culture" in R.A. Wilson (Ed.)  
*Human Rights, Culture and Context: Anthropological Perspectives*. London: Pluto  
Press.

Neeson, Jeanette (1993). *Commoners: common right, enclosure and social change in  
England 1700-1820*. Cambridge: Cambridge University Press.

Perrot, Michelle (ed.) (1990). *A History of Private Life: From the Fires of the Revolution  
to the Great War*. Cambridge/London: Belknap Press.

Philipps, Lisa (1996). "The Rise of Balanced Budget Laws in Canada: Legislating  
Fiscal (Ir)responsibility". 34 *Osgoode Hall Law Journal* 681.

Putnam, Robert D. (1995). "Bowling Alone: America's Declining Social Capital" 6:1  
*Journal of Democracy* 65.

Putnam, Robert D. (1996). "The Strange Disappearance of Civic America". 24  
*American Prospect* 34.

Rifkin, Jeremy (1998). *The Biotech Century*. New York: Jeremy P. Tarcher/Putnam.

Rifkin, Jeremy (1991). *Biosphere Politics: A New Consciousness for a New Century*.  
New York: Crown.

Rodgers, Daniel (1998). *Atlantic Crossings: Social Politics in a Progressive Age*.  
Cambridge/London: Belknap Press of Harvard University Press.

Rose, Carol (1986). "The Comedy of the Commons: Custom, Commerce and Inherently  
Public Property". 53 *University of Chicago Law Review* 711.

- Rosenberg, Gerald (1991). *The Hollow Hope: Can Courts Bring About Social Change?*  
Chicago: University of Chicago Press.
- Rotunda, Donald D. and John E. Nowak (1999). *Treatise on Constitutional Law: Substance and Procedure*, 3rd ed. St. Paul: West Group. See especially Interstate commerce power - volume 2; equal rights - volume 3.
- Samuel, Lenia (1997). *Fundamental Social Rights: Case Law of the European Social Charter*. Strasbourg: Council of Europe.
- Santos, Boaventura de Sousa (1995). *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York and London: Routledge.
- Santos, Boaventura de Sousa (2000). "Law and Democracy: (Mis)trusting the Global Reform of Courts" in Jane Jenson and Boaventura de Sousa Santos (eds.) *Globalizing Institutions: Case Studies in Regulation and Innovation*. London: Ashgate Publishing.
- Schneiderman, David (1996). "NAFTA's Takings Rule: American Constitutionalism Comes to Canada". 46 *University of Toronto Law Journal* 499.
- Simpson, Gerry (1993-94) "Mabo, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence". 19 *Melbourne Law Review* 195.
- Slattery, Brian (1991) "Aboriginal Sovereignty and Imperial Claims". 29 *Osgoode Hall Law Journal* 681.
- Soros, George (1998) *The Crisis of Global Capitalism*. New York: PublicAffairs.
- Tapscott, Don. (1997) *Growing Up Digital: The Rise of the Net Generation*. New York: McGraw-Hill.
- Teubner, Gunther (1992) "The Two Faces of Janus: Rethinking Legal Pluralism". 13

*Cardozo Law Review*. 1443.

Thompson, Edward (1975) *Whigs and Hunters*. Harmondsworth: Penguin Books.

Thompson Edward (1991) *Customs in Common*. New York: The New Press.

Wolfensohn, James (1998) *The Other Crisis*. Address to the World Bank Group, Oct. 6, 1998. [www.worldbank.org/cdf/cdf/cdf-text.htm](http://www.worldbank.org/cdf/cdf/cdf-text.htm)

Woodcock, George (1970). *The Hudson's Bay Company*. New York: Crowell-Collier Press.

World Bank (1997) *World Bank Development Report 1997: The State in a Changing World*. New York, Oxford University Press.

World Commission on Environment and Development (1987). *Our Common Future: Report of the World Commission on Environment and Development*. Oxford: Oxford University Press.