(DIS)EMBODIMENTS OF CONSTITUTIONAL AUTHORSHIP: GLOBAL TAX COMPETITION AND THE CRISIS OF CONSTITUTIONAL DEMOCRACY

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ABSTRACT

The initial onset of globalization generated optimism regarding the possible creation of a global legal universe capable of transcending the borders of demos-centered constitutional states. This optimism, however, remains unfulfilled. Constitutional democracy, meanwhile, as currently understood, is undergoing an institutional self-transformation. This Article rethinks the constitutional order in the age of globalization. The approach detailed here addresses legal globalization by inspecting the constitutional welfare state in light of contemporary global tax competition. This argument emphasizes that globalization in general, and global tax competition in particular, exposes the limits of the constitutional state's governing ability. Specifically, the institutional responses to global tax competition from constitutional states reveal the existential challenge to constitutional democracy created by globalization: the undermining of the legitimacy of constitutional order by the dissolution of "constitutional authorship." A closer inspection shows that intrinsic to those institutional responses is the common feature that the relationship between the governing authority and its citizens in these strategies inevitably dissolves. The resulting disembodiment of "constitutional authorship" has led to the current existential crisis of constitutional democracy.

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I. Introduction

Globalization blurs the internal/external distinction; foreign affairs and domestic policies are now inextricably intertwined. This blurring not only necessitates international cooperation to deal with transboundary regulatory issues, but it also exposes the limits of the constitutional state’s governing ability over traditional domestic affairs. As globalization continues to play a prominent role in the world economy, the question of the purpose and the fate of the modern state becomes an increasingly debated issue for academics and the media.

Paralleling this debate is a new discourse on the prospect of constitutional democracy in the global era. At its core, this new discourse envisions a form of constitutional democracy beyond the nation-state. Talks of “transnational constitutionalism,” “global constitutionalism,” and the “constitutionalization of international law”—each of which seeks to tame Hobbesian international relations through constitutionalism—have spread through academic circles. The relationship between constitutional states and international regulatory regimes has thus deviated from the traditional relationship between them; this new system is moving toward “a global administrative space,” from which a new global constitutional democracy best characterized as “legal pluralism” and “con-

1. See generally Anne-Marie Slaughter, A New World Order (2004) [hereinafter Slaughter, New World Order].


stitutional pluralism,”5 “multilevel governance,”6 “societal constitutionalism,”7 or “transnational government networks” may emerge.8 Viewed through the lens of transnational constitutional democracy, the issues involving the role of the modern state and its fate are irrelevant. Rather, the future of constitutional democracy, not the state, is at stake in the global era.

Charges of “legitimacy deficit” or “democracy deficit,” however, continue to haunt those transnational experiments on constitutional democracy.9 Addressing these charges, some scholars argue that these “deficits” are simply the beast of nationalism hiding in a democratic disguise.10 Once unmoored from specific democratic states, these commenters believe that the ideas of constitutional democracy can be projected onto a supranational, even global, legal universe.11 Other scholars address these concerns in a functional tone.12 On this view, the sole point of import here is whether an envisioned transnational constitutional polity can solve those issues that the state fails to address and thus undermine its legitimacy. Once policy challenges are resolved in the transnational experiments on constitutional democracy, the legitimacy questions surrounding this issue will dissolve.13

The notion of “democratic deficit” goes beyond nationalist rhetoric; it examines, instead, how legitimacy is conceived in a constitu-

7. See Gunther Teubner, Societal Constitutionalism: Alternatives to State-Centered Constitu-
tional Theory, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, supra note 3, at 3 [hereinafter Teubner, Societal Constitutionalism].
9. See, e.g., ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM 66 (2004); DIMITRIS N. CHRISSOCHOOU, DEMOCRACY IN THE EURO-
11. See id. at 114-15.
12. See, e.g., Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Admin-
13. See id. at 1495-96.
Whether the legitimacy question can be successfully dissolved into functionalism needs to be placed in the institutional framework of functional responses to regulatory issues. Among the issues that will shed light on the current debates surrounding the future of constitutional democracy—as well as the state—is global tax competition. Taxation is a core feature of the modern constitutional state. Global tax competition both fundamentally challenges the national tax structure and impacts the regime of social citizenship. An inspection of how constitutional states respond to global tax competition, therefore, will illuminate the fundamental challenges that globalization poses to constitutional states.

This Article rethinks the constitutional order in the age of globalization. The approach here addresses "legal globalization"—the concept of a borderless legal universe that emerges from globalization—by way of an inspection of the constitutional welfare state in the face of contemporary global tax competition. Specifically, this Article finds that globalization in general, and global tax competition in particular, exposes the limits of the constitutional state’s governing ability. The institutional responses to global tax competition from the constitutional state reveal the existential challenge of globalization to constitutional democracy: the undermining of the legitimacy of constitutional order by the dissolution of the idea of "constitutional authorship." While harmony and autonomy constitute the twin paradigms by which the constitutional state responds to global tax competition, their corresponding institutional models—transnational management and a (national) market—are still centered on the constitutional state, even if they seem to stand apart from the modern state. A closer look at the relationship between the government and the citizens—that is, citizenship—under the harmony and autonomy paradigms shows that “We the People,” as the self-validating authority of the constitutional order, no longer supports both institutional models. The disembodiment of the people puts the legitimacy of

15. See infra notes 97-100 and accompanying text.
16. See infra Part II.B.
18. See infra notes 258-61 and accompanying text.
19. See infra note 260 and accompanying text.
transnational institutional experiments in doubt, thereby creating an existential crisis for constitutional democracy.

This Article proceeds in the following order. Part II examines the question of social citizenship in the face of globalization and characterizes the manner in which the constitutional state addresses this issue. Observing the impacts of global tax competition on the constitutional welfare state, this Article investigates the paradigms—harmony and autonomy—by which the constitutional state responds to that challenge. After analyzing the architecture of the institutional responses to these challenges under both paradigms, this Article makes an interim conclusion that the state remains at the center of these institutional responses; thus, the Article proposes that to understand the impact of globalization on the future of constitutional democracy, the focus should shift from the state in transition to the transformation of citizenship. Part III discusses the relationship between citizens and the governing authority in the transnational management model, as well as in the (national) market model, to show the disembodiment of constitutional authorship. Part IV provides final conclusions.

II. AMID THE DELUGE OF GLOBAL TAX COMPETITION: CONSTITUTIONAL DEMOCRACY UNDER SIEGE AND ITS RESPONSES

This section begins with an explanation of how tax competition has resulted from globalization. The section then focuses on the strains that global tax competition places on the constitutional state’s fiscal capability and tax structure. Finally, the section concludes by describing the manner by which the constitutional state is addressing social citizenship in the face of looming fiscal crises.

A. The Rise of Global Tax Competition

Tax competition has diverse meanings. Some scholars define it as an activity within national borders; others focus on whether it results from intentional tax policies. This Article understands tax


competition to refer to "both the deliberate attempt by a taxing sovereign to offer tax advantages to mobile taxpayers in order to attract them to its jurisdiction, and the unintended creation of such attractions." Accordingly, tax competition—the use of providing tax incentives to attract investment—has existed well before the most recent wave of globalization. Given the nature of today's economic globalization, however, this competition has obviously intensified among different tax jurisdictions.

Tax competition exists in its current state because of the high mobility of capital in the global era. With the elimination of international trade barriers, restrictions on the investment of capital have been eased, and private enterprises have enjoyed increased liberty in deciding where to invest their money and build their factories. In addition to the acceleration of free direct investment, the mobility of capital has led to a diversification of investment options. The recent deregulation of the securities and banking markets has resulted in the emergence of various derivative commodities as well as enhanced the role of portfolio investment in collecting capital for companies. Furthermore, with accelerated advances in computer technology, rapid electronic transactions make great strides. Taken together, these factors indicate that private investors, rather than government regulators, are more powerful with respect to investment decisions in a particular jurisdiction.

Given the increasing autonomy of private investors, national governments are competing against each other to attract foreign capi-

22. Utz, supra note 21, at 770.
23. See id. (explaining that traditional (offshore) tax havens are pre-globalization examples of how jurisdictions used to use tax incentives to woo foreign investors and that deliberate tax competition was rarely seen among the more advanced industrial democracies at this time); see also Julia R. Blue, Note, The Celtic Tiger Roars Defiantly: Corporation Tax in Ireland and Competition within the European Union, 10 DUK. J. COMP. & INT'L L. 443, 455-59 (2000) (discussing Ireland's tax measures and its economic development since the 1950s).
25. See Avi-Yonah, Fiscal Crisis, supra note 24, at 1576.
26. "Portfolio investment" refers to the type of foreign investment that "individuals in one country purchase shares in foreign companies." See Michael J. Graetz & Alvin C. Warren, Jr., Income Tax Discrimination and the Political and Economic Integration of Europe, 115 YALE L.J. 1186, 1205 (2006).
27. See Richard L. Reinhold, Some Things That Multilateral Tax Treaties Might Usually Do, 57 TAX LAW. 661, 677-99 (2004); see also Avi-Yonah, Fiscal Crisis, supra note 24, at 1590.
tal while simultaneously working to keep their own domestic capital from flowing out. In addition to governmental regulatory reforms, different tax-reduction measures, such as tax exemptions and reduced tax rates, play a crucial role in attracting private investors.\(^\text{28}\) The United States is credited with starting the current wave of tax competition when it unilaterally abolished its 30 percent withholding tax on the interest from foreign residents' savings in 1984,\(^\text{29}\) thereby exempting from taxation the portfolio-interest income foreign residents earn from sources within the United States.\(^\text{30}\) Following this action, all major economies soon abolished their practice of withholding taxes on interest.\(^\text{31}\) In addition, due to the ease of avoiding the withholding taxes on dividends, this manner of income is effectively exempt from taxation as well.\(^\text{32}\) 

A residence-based tax is an impractical response because residence-countries lack the information necessary for taxing the income that their residents earn abroad. To obtain this information, they depend on the cooperation of source-countries.\(^\text{33}\) The administrative infeasibility regarding residence-based taxation is further complicated by traditional offshore tax havens.\(^\text{34}\) Since

\(^{28}\) See Deprez, supra note 20, at 551.


\(^{30}\) See Avi-Yonah, Fiscal Crisis, supra note 24, at 1579-80.

\(^{31}\) See id. at 1580-81.

\(^{32}\) See id. at 1582.

\(^{33}\) See id. at 1583-84.

\(^{34}\) According to its report to the 2000 ministerial council meeting, OECD lists thirty-five tax jurisdictions as tax havens: Andorra, Anguilla (United Kingdom), Antigua and Barbuda, Aruba (Netherlands), Bahamas, Bahrain, Barbados, Belize, British Virgin Islands (United Kingdom), Cook Islands (New Zealand), Dominica, Gibraltar (United Kingdom), Grenada, Guernsey/Sark/Alderney (United Kingdom), Isle of Man (United Kingdom), Jersey (United Kingdom), Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat (United Kingdom), Nauru, Netherlands Antilles (Netherlands), Niue (New Zealand), Panama, Samoa, Seychelles, St. Lucia, St. Christopher and Nevis, St. Vincent and Grenadines, Tonga, Turks and Caicos (United Kingdom), U.S. Virgin Islands (United States), and Vanuatu. See Org. for Econ. Cooperation & Dev. [OECD], Towards Global Cooperation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee of Fiscal Affairs 17 (2000), available at http://www.oecd.org/dataoecd/9/61/2090192.pdf. None of them is also currently listed as "uncooperative tax havens" by the OECD because each has made formal commitments to enhancing transparency and the effective exchange of information for tax purposes. See Organisation for Economic Cooperation and Development (OECD), List of Unco-operative Tax Havens, http://www.oecd.org/document/57/0,3343,en_2649_33745_30578809_1_1_1_1,00.html
traditional tax havens have no tax treaties with other countries, an investor can easily block the exchange of information between the source-country and the residence-country by "routing" the income through a tax haven, even if an exchange-of-information procedure exists between the source-country and the residence-country.35

Although all developed countries would benefit from the reintroduction of some taxation on interest, tax law scholar Reuven Avi-Yonah points out, "[t]he current situation [of the taxation of savings] resembles a multi-player assurance . . . game."36 Unsure of its competitor's next step, no country would willingly reinstate withholding taxes on interest for fear that its action would not be matched and would instead drive capital and investments elsewhere. Thus looms the "prisoner's dilemma"37: given the weight of portfolio investment in amassing capital for business, all developed countries understandably, therefore, refrain from imposing taxes on the savings of nonresidents.38

A second issue impacting the global flow of capital is the taxation of the corporate income of multinational enterprises (MNEs) resulting from the sale of goods and services across national borders.39 Theoretically, corporate income is taxable based on three types of tax jurisdictions: demand, supply, and residence.40 Yet, the corporate income of MNEs may be subject to virtually none of these tax jurisdictions. Under the current international tax regime, a seller's income is taxable in a demand jurisdiction only if it has a "physical presence"—a "permanent establishment" or a branch of the corporation—therein.41 With the acceleration of international free trade, however, an MNE can sell its goods or services without maintaining a physical presence in a demand jurisdic-

(last visited May 28, 2009). It should be noted, however, that the lukewarm implementation of the previous commitments by Switzerland and Liechtenstein prompted the recent proposal of a "gray list" of states failing to comply fully with standards on taxation and bank information disclosure established by the OECD; whether the new formal amendments from these traditional (offshore) tax havens would be more effective remains to be seen.


35. See ORG. FOR ECON. COOPERATION & DEV. [OECD], HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 21-25 (1998) [hereinafter OECD, HARMFUL TAX COMPETITION].
36. Avi-Yonah, Fiscal Crisis, supra note 24, at 1583.
37. See Roin, supra note 20, at 549-53.
38. See Avi-Yonah, Fiscal Crisis, supra note 24, at 1583.
39. See id. at 1586.
40. See id.
41. See id. at 1587; see also Reinhold, supra note 27, at 667-68.
tion. Traditionally, MNEs established a presence in demand jurisdictions to avoid tariff barriers.\textsuperscript{42} Given the General Agreement on Tariffs and Trade / World Trade Organization tariff reductions, however, MNEs have diminishing incentives to maintain a physical presence in demand jurisdictions, which was often utilized to avoid high tariffs and thus lower the sale prices.\textsuperscript{43} Moreover, with the rise of electronic commerce, corporations increasingly sell goods or provide services in demand jurisdictions without being physically present.\textsuperscript{44} Thus, although the demand jurisdiction is the most likely of the three tax jurisdictions to want to impose the international corporate income tax, the physical presence threshold often makes it difficult for a demand jurisdiction to claim the right to tax the corporate income of MNEs.\textsuperscript{45}

The second major type of tax jurisdiction on MNEs' corporate income is the supply jurisdiction—where taxes are levied based on where a good is produced or a service is supplied.\textsuperscript{46} Though supply jurisdictions supposedly are empowered to impose a tax on the income attributable to each product made in their jurisdiction, MNEs often avoid this tax by using "production tax havens," which are themselves a consequence of global tax competition. A production tax haven refers to a tax jurisdiction that "grants a 'tax holiday' to foreign production facilities located therein, but still levies income taxes on domestic corporations."\textsuperscript{47} In contrast to traditional (offshore) tax havens, production tax havens can afford to provide basic governmental services for foreign production investors even if only relatively immobile factors of production such as labor and land are taxed.\textsuperscript{48} Although supply jurisdictions are entitled to tax the corporate income of multinationals, they have been recently racing to transform themselves into production tax havens, or to, at least, grant some degree of tax holiday to attract potential foreign investors.\textsuperscript{49}

\textsuperscript{42} See Avi-Yonah, \textit{Fiscal Crisis}, supra note 24, at 1587.
\textsuperscript{43} See id.
\textsuperscript{44} See id.; see also Reinhold, \textit{supra} note 27, at 683-95.
\textsuperscript{45} See Avi-Yonah, \textit{Fiscal Crisis}, \textit{supra} note 24, at 1587-88.
\textsuperscript{46} \textit{Id.} at 1586-87.
\textsuperscript{47} \textit{Id.} at 1588.
\textsuperscript{48} While a production haven still levies income taxes on domestic corporations and individual residents, Avi-Yonah notes, "the traditional offshore tax haven . . . has no corporate income tax (and sometimes no significant tax at all)." See id.
\textsuperscript{49} According to Avi-Yonah, production tax havens include not only developing countries such as India and Malaysia, but also such developed countries as Belgium, Ireland, and Israel. \textit{Id.} In addition, Taiwan, South Korea, Singapore, and Hong Kong also grant different tax holidays to foreign investors. See id. at 1588-91.
Among the three types of tax jurisdictions entitled to tax the corporate income of MNEs, the right to tax in a residence jurisdiction is "residual": only when corporate income is not taxed at either the demand or supply source does the tax jurisdiction where the corporation is incorporated or managed have the right to tax.\textsuperscript{50} Yet, with the emerging new "headquarters tax havens," corporate residence jurisdictions in which MNEs' headquarters are located, or their parent corporations are incorporated, are unlikely to impose taxes on the corporate income of MNEs' foreign-source business activity.\textsuperscript{51} Traditional headquarters tax havens generally exist in developing countries, many of which are politically unstable or lack governmental services—for example, Liberia and Panama for shipping business and Bermuda for insurance.\textsuperscript{52} Generally, it is not a judicious choice for, say, U.S. MNEs to relocate their headquarters to Panama or the Cayman Islands.\textsuperscript{53} Yet recently, both for fear of the exit of incorporated companies to other jurisdictions with lower tax rates on corporate income and to attract foreign companies to (re-)incorporate therein, developed countries have joined the trend to turn themselves into headquarters tax havens.\textsuperscript{54} As Avi-Yonah notes, "[r]eincorporating in Panama or in the Cayman Islands may be a step most U.S. multinationals would be unwilling to take. But establishing the corporate headquarters and formal corporate residence in Belgium... would seem to carry little business risk."\textsuperscript{55}

Given this framework, most foreign savings and corporate income are subject to virtually no taxes because of economic globalization. No tax jurisdiction can find this inability to tax desirable. Nevertheless, to attract foreign investment and keep domestic capital at home, national governments find themselves in "a
race to the bottom" with regard to the taxation of savings and corporate income.\textsuperscript{56}

Tax competition transcends the North/South Divide in the world development—it is a global phenomenon. Despite their advanced economies, developed nations still want to entice foreign portfolio investments to enrich their domestic capital markets and enhance the ability of their companies to amass capital.\textsuperscript{57} For example, the United States’ decision to implement tax reductions on foreign portfolio investments led to its gain—and South America’s loss—of close to $300 billion in corporate business.\textsuperscript{58} Recognizing that companies may leave as quickly as they arrive, developed countries have also cut their taxes on corporate income.\textsuperscript{59} Developing countries have been just as enthusiastic as industrialized nations in the global tax competition, though they are often more appealing to MNEs because of their cheap labor and abundant natural resources.\textsuperscript{60} Conflicts also exist among developing countries. To bid for foreign production investments from Japan, South Korea, Europe, and the United States, for example, Thailand, Malaysia, China, and other developing Asian countries are proposing various enticing "tax holiday" packages.\textsuperscript{61} In addition, considering the close relationship between portfolio investments and direct investments, developing countries have fur-
ther implemented tax exemptions to promote foreign portfolio investment.62

B. The Besieged Constitutional State (?)

Global tax competition results in enormous governmental revenue losses.63 Its significance, however, can only be understood in light of the development of the modern state.64 An overview of how the modern state evolved into the constitutional welfare state is necessary to explain why the constitutional state is under siege because of global tax competition.

The constitutional welfare state arose in response to the “legitimation crisis” that emerged at the turn of the twentieth century.65 Generically speaking, the nation-state transformed into the constitutional welfare state to re-legitimize itself under the threat of societal disintegration brought about by industrialization and mass urbanization.66 Under the nation-state system, civil liberties, including property rights and freedom of contract, were the mechanism to adapt the relationship between the state and individuals to the rising bourgeois society.67 As the French Revolution later exemplified, this juridical structure was supplemented with a new political order in the form of mass mobilization and national military conscription, leading eventually to political citizenship as uni-

62. See generally Stephany Griffith-Jones & Barbara Stallings, New Global Financial Trends: Implications for Development, J. INTERAM. STUD. & WORLD AFF., Autumn 1995, at 59. While developing countries as a whole have enthusiastically joined the global tax competition, a caveat to this generic description of the global tax competition is needed. An obvious exception to the libertarian policy of tax competition is the recent rise of center-left parties and this rise’s impact on economic policies in Latin America. Whether this development points to a “third way” or is nothing but a transient deviation remains to be seen.


63. See Avi-Yonah, Bridging the North/South Divide, supra note 29, at 374-75; see also Littlewood, supra note 56, at 413-18.

64. See generally AGUSTÍN JOSÉ MENÉNDEZ, JUSTIFYING TAXES: SOME ELEMENTS FOR A GENERAL THEORY OF DEMOCRATIC TAX LAW 87-98 (2001) [hereinafter MENÉNDEZ, JUSTIFYING TAXES].

65. See RICHARD MÜNCH, NATION AND CITIZENSHIP IN THE GLOBAL AGE: FROM NATIONAL TO TRANSNATIONAL TIES AND IDENTITIES 77-78 (2001) (noting that Bismarck tried to keep the internal pressure of German masses under control with the welfare policies after industrialization while suppressing the labor movement); see also Ulrich K. Preuss, The Concept of Rights and the Welfare State, in DILEMMAS OF LAW IN THE WELFARE STATE 151, 152-53 (Günter Teubner ed., 1986).

66. See MÜNCH, supra note 65, at 186-88.

versal suffrage and the rise of the constitutional state. Later still, the state, when confronted with the social turmoil set off by tremendous industrialization, had to address the basic needs of social life. In addition to keeping civil and political citizenship alive, modern constitutional states introduced social citizenship, replacing or complementing the market, to sustain the social solidarity on which the political order depends.

The constitutional welfare state directly takes care of, in whole or in part, the social needs of citizens. The United States became a welfare state in the 1930s as it developed measures to address the severe economic and political crisis raised by the Great Depression. Despite their different policy choices, all developed countries have been moving in the direction of the welfare state, even if some are reluctant to adopt the label. For those developing countries still moving along this path, the ideal of the constitutional welfare state tends to stand as a political inspiration for the citizens of those nations.

68. See BOBBITT, supra note 2, at 151-78; see also LOUGHLIN, supra note 67, at 204.
69. See LOUGHLIN, supra note 67, at 204-05.
71. But cf. HANDLER & HASENFELD, supra note 70, at 133-34 (defining the welfare state along the line of means-tested programs, for instance, the programs for poor people, excluding the universal programs such as Social Security and Medicare or unemployment and disability pensions).
72. See id. at 74-75. The constituent measures of the United States as a welfare state include “employment-related benefits, social insurance, public assistance, taxation (incentives, credits, deductions), public funding of private organizations (both for profit and not for profit) and extensive regulation at all levels of government.” Id. at 74.
Well before the recent wave of economic globalization, the internal and external limitations of the constitutional state were apparent. The bureaucratization that accompanies the constitutional welfare state has been an enduring source of criticism for some time. Critics charge that the “juridification” of social relationships is at the core of social citizenship. In the Anglo-American tradition, in particular, society has made a moralistic distinction between paupers and the poor, which has haunted the policies of social citizenship. The able-bodied poor, namely, paupers, were deemed immoral because they were idle. They were, therefore, considered undeserving of governmental aid. As the presence of “poorhouses” and “poor farms” showed, these paupers were also regarded as labor reserves that might be recruited to further develop the capitalist economy.

Apart from such “internal” limitations, the “external” assumption of the welfare state has crumbled in the face of the challenges posed by the transformed industrial structure and the aging population. The social citizenship regime presumes the possibility of full employment. This does not mean that everyone of


76. See generally Antonie A.G. Peters, Law as Critical Discussion, in Dilemmas of Law in the Welfare State, supra note 65, at 250 (discussing the “bureaucratic entrapment” in the welfare state).

77. See Gunther Teubner, The Transformation of Law in the Welfare State, in Dilemmas of Law in the Welfare State, supra note 65, at 3, 3. See generally Jürgen Habermas, Law as Medium and Law as Institution, in Dilemmas of Law in the Welfare State, supra, note 65, at 203.

78. See Handler, Third Way, supra note 70, at 778.

79. See id.

80. See id. at 778-779.

81. Poorhouses and poor farms emerged in the nineteenth century in England and the United States as an alternative to “outdoor relief” with an eye to distinguishing the poor from the paupers by placing the latter in poorhouses or poor farms as the reserve of work force. See id. The Social Security Act of 1934, which marked the United States’ transition into a welfare state, is reminiscent of the traditional distinction between the poor and paupers. Id. at 784-85.

82. In contrast to the internal limitations identified within the legal regime of social citizenship, which involves judicial and administrative institutions, the political economic structure under which social citizenship is instituted is the “external” condition of social citizenship.

83. See generally id.

84. As the European prototype of the welfare state suggests, at the core of this presupposition is the notion that during economic booms, the welfare state can provide either support to those unable to work or supplement the wages to the working population to
working age is employed during economic booms; rather, it means that all "able" workers are effectively employed. Only in this manner are sufficient contributions to the social safety networks generated. Under the umbrella of social citizenship, disabled and unemployed workers are taken care of while the able working population provides for society. The state’s promise of social citizenship, however, breaks down when full employment for those able is no longer possible. The long-term cycle of a sluggish economy since the 1960s has led to increasing unemployment, and thus has helped to unravel the social citizenship regime built around work.

Further complicating matters, structural changes in the demographic landscape are expected to implode the welfare state’s work-centered social safety nets. With today’s longer life spans, the ratio between dependents and the working-age population has risen and is projected to reach the point that the government-sponsored pension funds can no longer meet their obligations. To accommodate the rising dependency ratio, modern states are left with few choices. It is not feasible to pass on the responsibility of elderly care to families, especially considering the ever-rising medical costs and the fact that most adults need to work full-time to support themselves and their families. Substituting lower-wage immigrant workers for native labor is also not a real option. This creates more problems than it solves, considering the social, ethical, and political tensions surrounding immigration. Thus, the state is the only viable candidate to assume the responsibility for elder care. The state, however, lacks the means to support this initiative because global tax competition effectively undermines its access to potential tax resources and generally constrains its policy choices through fiscal measures.

In the face of this global tax reduction race, both developed countries and developing countries are losing large amounts of tax help them prepare for periods of economic stagnation. Noticeably, while there is a complementing relationship between work-centered social insurance and social welfare in Europe, the result of the U.S. work-centered safety net is that higher work brings more insured social payback; lower work coincides with lower social welfare. See id. at 766.

85. See id. at 766-68; see also Hemerijck, supra note 75, at 142.
86. See Handler, Third Way, supra note 70, at 767-68.
87. The other causes of the increasing dependency ratio include falling birthrates, rising divorce, growing numbers of children with single mothers, and the increase of the nucleus family. See id. at 768.
88. See Bobbitt, supra note 2, at 722-23, 736-37, 748-50.
revenues while the untaxed portion of the world’s economic activities is growing.\textsuperscript{90} With respect to personal income tax,\textsuperscript{91} the total revenue loss for all developing countries between 1992 and 2000 was $300 billion, in addition to an additional estimated $15 billion per year since 2000.\textsuperscript{92} Estimates about the developed countries are rare. Yet, one study on lost revenues for the United States from the global tax reduction race puts the figure of personal capital flight in a two-year period at $250 billion.\textsuperscript{93} These losses are so great that even during periods of economic prosperity, the state will be unable to keep up its social safety net via tax revenues.\textsuperscript{94}

Most modern states are “tax states”; they rely on taxation for most of their revenues.\textsuperscript{95} In contrast to the public finance in the pre-taxation era,\textsuperscript{96} taxes in the modern era are presumably collected for the public benefit. The liability of individual taxpayers is independent of the personal utility they expect their contribution to add to the public good.\textsuperscript{97} The tax state emerged alongside the idea of equal citizenship: transforming individuals bound to feudal relations into equal citizens who are entitled to the protection and services of the state, no matter how much tax they actually pay for the state.\textsuperscript{98} When the state is compelled to restructure or even

\begin{itemize}
\item \textsuperscript{90} See id. at 1597-98.
\item \textsuperscript{91} Personal income tax has been regarded as the most progressive tax. See \textit{Bruce Ackerman \& Anne Alstott, The Stakeholder Society} 97-98 (1999). But cf. Michael J. Graetz, \textit{100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System}, 112 \textit{Yale L.J.} 261, 272 (2002) [hereinafter Graetz, \textit{Unnecessary Returns}].
\item \textsuperscript{92} See Avi-Yonah, \textit{Fiscal Crisis}, supra note 24, at 1599.
\item \textsuperscript{93} This study, which focused on the period between 1980 and 1982, was conducted before 1984, the year marking the beginning of the recent wave of tax competition. Given the rare data on the capital flow from the developed countries, this pre-1984 data still suggests the scale of the capital flow from developed countries as a result of global tax competition. See id.
\item \textsuperscript{94} What makes matters worse is that emerging social problems such as demographic migrations, unequal distribution of wealth, and steadily growing unemployment, to name just a few, are persistently battering the modern state. These problems are not alleviated but exacerbated by globalization. See \textit{generally Saskia Sassen, Globalization and Its Discontents: Essays on the New Mobility of People and Money} (1998) [hereinafter Sassen, \textit{Globalization and Its Discontents}].
\item \textsuperscript{95} According to Augustín Menéndez, tax states have two characteristics. First, most public revenue is obtained from taxes or public debt guaranteed through future tax revenue. Second, the constituency of taxpayers must be the same as that of those who benefit from the services provided by these public institutions. See \textit{Menéndez, Justifying Taxes}, supra note 64, at 19-20; see also Philipp Genschel, \textit{Globalization and the Transformation of the Tax State, in Transformations of the State?} 53, 53 (Stephan Leibfried \& Michael Zürn eds., 2005) (quoting Joseph A. Schumpeter, \textit{Die Krise des Steuerstaats} (1918)).
\item \textsuperscript{96} See \textit{Menéndez, Justifying Taxes}, supra note 64, at 87-91.
\item \textsuperscript{97} See Genschel, supra note 95.
\item \textsuperscript{98} See \textit{Ackerman \& Alstott}, supra note 91, at 187-88 (discussing the relationship between the function of tax and the construction of citizenship).
\end{itemize}
waive the main source of its revenue, it will be forced to reset its policy agenda, including the institutional configuration of social citizenship, calling the ideal of equal citizenship into question.99

While global tax competition has resulted in revenue loss, the loss of taxing capacity does not necessarily fatally undermine the state itself.100 The state can maintain its legitimation based on social citizenship by turning to non-tax revenues. Reliance on non-tax revenue such as profits from oil exportation and royalties for mining, however, exposes the state’s fiscal capability to more uncertainties.101 This framework tends to result in unbalanced finances.102 As a consequence, the state becomes less capable when risks materialize.103

As demonstrated in Section I.A above, global tax competition leads to an income tax exemption for the few at the top of the social pyramid because only they have the resources to “vote with their feet” by depositing their savings abroad and investing the capital where they can receive the best tax incentives. The rest of the citizenry is not exempt from the government taxation; they continue to pay taxes and contribute to public services.104 Thus col-

99. Although global tax competition causes the welfare state to lose its capacity for raising its national revenue by taxation, Japan stands as a counterexample. As one of the most heavily indebted countries in the developed world, Japan’s government tries to keep its health care system afloat by means of increasing taxes. Another alternative, increasing the national sales tax, is floated as well. See Ken Belson, Frugal Japanese Dig into Savings, N.Y. TIMES, May 31, 2003, at A8. Nevertheless, the problem is that an increase of sales tax would set off another economic recession, which has been the cause of contemporary Japan’s fiscal crisis. See id. As a Communiqué issued by the Heads of State at the 1996 G7 Lyon Summit explains, “globalization is creating new challenges in the field of tax policy. Tax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between states, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases.” OECD, HARMFUL TAX COMPETITION, supra note 35, at 7-8.

100. See Genschel, supra note 95, at 62-69; cf. Graetz, Unnecessary Returns, supra note 91, at 273 (“[T]he overall level of federal taxes is now at a post-World War II high.”).

101. Venezuela’s struggle in fulfilling its promises of social welfare programs and other policy goals as a consequence of the recent plunge in oil price illustrates the risk of excessively relying on revenues from natural resources to finance government policies. See Simon Romero, Chávez Lets West Make Oil Bids as Prices Plunge, N.Y. TIMES, Jan. 15, 2009, at A1.

102. See, e.g., Suresh Narayanan, Fiscal Reform in Malaysia: Behind a Successful Experience, 36 ASIAN SURV. 869, 873-75 (1996) (noting the relationship between Malaysia’s dependence on non-tax revenue (oil exportation) and its fiscal policy in disarray).

103. See id.

104. Of course, modern states remain capable of maintaining a social citizenship regime by shifting the tax burden from capital to labor, a practice which has been exemplified in the increase of payroll taxes in developed countries and the growth of consumption taxes in all countries. See Avi-Yonah, Fiscal Crisis, supra note 24, at 1620-22. Nevertheless, is it still social justice that a safety net is built around a regressive tax regime without re-
lapses the ideal of equal citizenship of the modern state. The impression that the state betrays the ideal of social citizenship by abandoning the redistributive part of its taxation fabric fundamentally compromises the constitutional state’s legitimacy.

To be sure, global tax competition does not necessarily lead to the state’s demise. Tax reduction does not immediately pose an existential challenge to the constitutional state’s fiscal capability. The tax competition race does, however, limit the constitutional state’s policy choices. The state may bid farewell to the ideal of social citizenship and return to its pre-social citizenship stage. Yet, this choice would amount to the de-legitimation of the constitutional state itself. The constitutional state in the global era seemingly has no alternative in the end but to abandon the egalitarian idea of citizenship, even in the face of societal disintegration and the increasing need for governmental support.

While the fiscal crisis of the state emerged before the recent wave of globalization, globalization in general and global tax competition in particular have put the constitutional welfare state at a crossroads: Either the constitutional state is compelled to address its social issues by means other than progressive tax policies, or the state must abandon the ideal of social citizenship. Whichever direction the constitutional welfare state will go, the taxing power long regarded as a core of state sovereignty has been substantially diminished. Whether this rings the death knell for state sovereignty and the constitutional state remains to be seen.

C. Paradigms of Proposed Responses: Harmony versus Autonomy

Whether a government embraces the welfare state system or not, it must address the issue currently besieging the constitutional state.

distributive effects? In a globalized world, labor is more immobile than capital, and the labor class assumes the side effects of globalization but enjoys no benefit of globalization. See OECD, HARMFUL TAX COMPETITION, supra note 35, at 14 (noting the tax burden shifting to the immobile factors).

105. See Genschel, supra note 95, at 67-69.

106. For example, former French Prime Minister Jean-Pierre Raffarin ties the survival of the French pension system with national vital interest: “[The plan to overhaul the pension system] is about the survival of the republic.” Mark Landler, West Europe Is Hard Hit by Strikes over Pension, N.Y. TIMES, June 4, 2003, at A9.

107. See Avi-Yonah, Fiscal Crisis, supra note 24, at 1619-25.


in the age of globalization: the intertwined problems of growing social inequality and the constitutional state’s diminishing ability to raise tax revenues because of global tax competition. In response to this conflict, constitutional states have adopted diverse policies to maintain the legitimacy of their political rule.110 Though these responses seek to deflect the doubt that the constitutional state is under siege, they nevertheless reveal common concerns about the constitutional state’s legitimacy.

Some countries are attempting to revamp their social citizenship regimes by trimming their overgrown social welfare systems.111 Other countries are working to counter the global trend of reducing taxes.112 Still another group of countries is embracing the status quo of the besieged constitutional state and regarding it as a signal of a new paradigm of the state.113 In contrast to their counterparts in the first two groups, the countries in the third group’s response to the alleged crisis of social citizenship does not attack the issue, but instead uses it as an opportunity to make the state more competitive. Regardless of which approach a state may favor, there is a common attitude at the center of all these reactions: both the social citizenship regime and tax competition must be considered when designing responsive strategies.114

110. See, e.g., NATIONAL TAX POLICY IN EUROPE: TO BE OR NOT TO BE? (Krister Andersson et al. eds., 2007); TAX COMPETITION: AN OPPORTUNITY FOR ICELAND? (Hannes H. Gissurarson & Thor Herbertson Trygvi eds., 2001).


112. See, e.g., Edward Taylor, Swiss Fight against Tax Cheats Aids Singapore’s Banking Quest, WALL ST. J., Feb. 6, 2006, at A1 (reporting the European Union’s effort to suppress harmful tax competition and the impact on Switzerland).


114. See, e.g., Peter S. Green, Poles Remain Divided after Endorsing Union, N.Y. TIMES, June 10, 2003, at A13 (noting the Polish government’s choice between reducing spending and cutting taxes in adaptation to the economic and social impact after acceding to the European Union); Larry Rohter, Brazil’s Leader Steps Gingerly Onto World Stage, N.Y. TIMES, May 31, 2003, at A3 (noting Brazilian President Luiz Inácio Lula da Silva’s fiscal reform pack-
Focusing on this central characteristic, these responses can be grouped under one of two paradigms: harmony or autonomy. The former resorts mainly to international or transnational harmony to address the issues regarding both the social welfare regime and tax policy. In contrast, the latter centers on the idea of national autonomy or sovereignty. Europe embodies the harmony paradigm; the United States is the chief example of the autonomy approach. Each is discussed below.

1. The Harmony Paradigm: Europe as the Emerging Prototype

For harmonists, the solution to the current situation lies in curbing the trend of tax competition. Since global tax competition arises out of a prisoner's dilemma situation in which state governments are stuck in the downward spiral of tax competition, resolution requires joint actions among countries.

International cooperation on taxation may take place in a formal transnational tax regime or in an informal network of intergovernmental information sharing. A transnational tax regime can allow countries to pursue a rational and acceptable taxation policy. Absent such a regime, harmony can nonetheless be pursued through informal networking. Lack of information sharing among countries and opaque banking regulations, especially in those traditional tax havens, have been blamed for helping capital flight, which includes the trimming of pension benefits and the increase of tax revenues among other things).

115. Methodologically, these two paradigms are similar to Max Weber's ideal types. See MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 323-26 (H.H. Gerth & C. Wright Mills eds. & trans., 1946). For the classification of policies in response to tax competition into the harmony and autonomy paradigms, see Graetz & Warren, supra note 26, at 1226-36.


118. See, e.g., Uitz, supra note 21, at 790-94; OECD, HARMFUL TAX COMPETITION, supra note 35, at 52-59; Tracy A. Kaye, European Tax Harmonization and the Implications for U.S. Tax Policy, 19 B.C. Int’l & Comp. L. Rev. 109 (1996). See also Avi-Yonah, Fiscal Crisis, supra note 24, at 1652-74 (discussing OECD’s and the European Union’s proposals on tax competition). It should be noted that whether a formal treaty regime or the informal networking is more desirable in terms of global tax coordination is not the focus of this Article. The point here is simply to reveal the "harmony" features under this type of response.

119. Cf. SLAUGHTER, NEW WORLD ORDER, supra note 1, at 19-20.
escape from taxation and thus for contributing to tax competition. Accordingly, an informal network composed of intergovernmental cooperation in information sharing and exchange could assuage the pressure of global tax competition.

Because the harmonized framework of tax policy settles the issues only on the "supply" side, to resolve the besieged constitutional welfare state, a similar framework on social citizenship policies needs to be considered. Harmonists, accordingly, seek to negotiate a common framework of social citizenship. Both aspects of the harmonization approach are epitomized by the policies of those Organisation for Economic Co-operation and Development (OECD) member states that also belong to the European Union club. The OECD indicated its official stance toward global tax competition in its 1998 official report, "Harmful Tax Competition: An Emerging Global Issue." In this report, the OECD notes that while globalization helps bring about positive changes in tax systems, it also contributes to the creation of tax havens, thereby resulting in harmful tax competition. Among the OECD responsive policies are: (1) the cooperation between OECD member countries and nonmember governments under the auspices of OECD’s Global Forum to develop international standards regarding transparency and effective exchange of information, and (2) the establishment of an Informal Contact Group to facilitate ongoing dialogues between OECD member countries and nonmember governments on the implementation of transparency policies and the effective exchange of information. In addition, OECD also considers enhanced harmonization approaches to confront harmful tax practices.

120. See Avi-Yonah, Fiscal Crisis, supra note 24, at 1583-85.
122. See Livingston, supra note 56, at 733 (suggesting research be done on "the interaction of tax and spending policies, such as health and welfare").
123. See Utz, supra note 21, at 790-94; Avi-Yonah, All of a Piece, supra note 29, at 335; Livingston, supra note 56, at 762; Kaye, supra note 118, at 110-12.
124. OECD, HARMFUL TAX COMPETITION, supra note 35.
125. See id. at 13-18.
127. Specifically, the OECD considers direct measures under its "Framework of Coordinated Defensive Measures (Defensive Framework)," aimed to neutralize the deleterious effects of harmful tax practices. Still, it recognizes the precedence of each participant’s
Following the OECD position, the E.U. member states that also belong to OECD have dealt with the harmful global tax competition by harmonizing their international tax regimes. In addition, the responses of the E.U. member states (especially OECD members) to the crisis of social citizenship in relation to global tax competition have developed against the backdrop of harmonization under the E.U. framework. While the regional integration that culminated in the birth of the European Union by the Maastricht Treaty (Treaty on European Union) in 1992 was economically driven, the European Union today increases its influence not only by enlarging its number of member states but by expanding its competence into subject matters beyond economic integration. Against this backdrop, although tax and social policies remain primarily in the hands of individual member states, there have been gradual efforts in the European Union to harmonize policies regarding taxation and social citizenship policies. Although the social dimension played no major role in the initial phase of European integration, the Preamble to the 1957 European Economic Community (EEC) Treaty incorporated social policy in its vision of the European integration. Later, the Paris Communiqué of 1972 instigated the turn to an interventionist approach to social policies as it proposed more effective institutional means to facilitate the harmonization of social policy. This interventionist approach received more attention with the establishment of an internal market among the EEC member states in the Single European Act (SEA) of 1986. The social dimension of the internal market became clearer in the agenda of the European integration when the EEC members signed the Community Char-
ter of Fundamental Social Rights of Workers in 1989. Moreover, as part of the negotiations that created the European Union, E.U. member states signed the so-called Social Policy Agreement and the Social Policy Protocol. This extended the competence of the European Community (EC), the successor to the EEC and other European communities, to further social policies.

To be clear, the harmonization of social policies under the E.U. framework remains incomplete. Also, a gap exists between the rhetoric and practice of the integrated European social citizenship regime. Regarding the implementation of social policies, the European Commission (the Commission)—the administrative/governing body of the European Union—has resorted to recommendations instead of impositions. It remains to be seen whether this “soft law” model will change if the European Court of Justice (ECJ) extends its robust jurisprudence regarding the principle of nondiscrimination based on nationality to the field of social citizenship. Nevertheless, as the extension of the European integration into social dimensions shows, social policy harmonization has become an inescapable issue in the project of European integration.

In contrast to the social citizenship regime, taxation is conventionally considered the core of state sovereignty. It has been excluded so far from the European integration project, save for

133. For the European Union’s increasing intervention in social affairs from the Preamble to the 1957 EEC Treaty to the Community Charter of Fundamental Social Rights of Workers in 1989, see Catherine Barnard, EC “Social” Policy, in THE EVOLUTION OF EU LAW 479, 479-84 (Paul Craig & Gráinne de Búrca eds., 1999).

134. See id. at 485-87.

135. See Elaine A. Whiteford, W(h)ither Social Policy?, in NEW LEGAL DYNAMICS OF EUROPEAN UNION 111, 115-14 (Jo Shaw & Gillian More eds., 1995). It should be noted that, conditioned by economic integration as the main policy goal of the project of European integration, the European Union’s effort to harmonize social policy has been conducted through the legal construction of the free movement of workers. See id.

136. See id. at 126-27; see also Pierson, supra note 131, at 50-51.


139. See supra notes 132-136 and accompanying text.
where it interferes with the integration of a single market. Yet, the European integration project architects have never lost sight of the ideal of complete harmonization of member state tax bases and rates. What characterizes the coordination of the tax policies in the European Union is the functional motive behind the coordination efforts: Tax regimes of member states are coordinated to prevent the unequal movement of capital, goods, services, and persons among member states resulting from uneven tax policies.

The prospect of harmonizing member states’ tax policies in the foreseeable future is far from promising. Given that the Council of Ministers (the Council), which functions as the main legislative body of the European Union, cannot act on income tax issues without unanimous agreement, harmonization of tax policies will likely be conducted in a more intergovernmental than supranational approach in the future, which will likely bring the mechanism of tax harmonization in the European Union closer to the traditional international tax regime. This goal, however, has not been completely abandoned; the pursuit of greater coordination among member states remains on the Commission’s agenda, although it exists “in a soft law format,” for instance, either through issuing “codes of conduct” or through searching for a negotiated solution via consensus in the tax policy field. Moreover, the recent ECJ jurisprudence applies the general prohibition of discrimination on account of nationality—one of the foundational principles of the

140. See Graetz & Warren, supra note 26, at 1193.
141. As early as 1961, the Commission established working groups to study tax harmonization. At the center of the resultant “Program for the Harmonization of Direct Taxes” was the goal of eliminating differences in taxation that affect the movement of capital. See id. at 1223-27 (citation omitted). In the 1970s, the Commission even identified a harmonized corporate income tax as a potential source of financing for European institutions. See Agustin José Menéndez, Taxing Europe: Two Cases for a European Power to Tax (With Some Comparative Observations), 10 COLUM. J. EUR. L. 297, 304-06 (2004).
142. See Graetz & Warren, supra note 26, at 1227.
143. See id. at 1228-36.
144. See id. at 1190-91. For the relationship between intergovernmentalism and supranationalism, see Alec Stone Sweet & Wayne Sandholtz, Integration, Supranational Governance, and the Institutionalization of the European Polity, in EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE, supra note 131, at 1. Cf. J.H.H. Weiler, European Models: Polity, People and System, in LAWMARKING IN THE EUROPEAN UNION, supra note 137, at 3, 10-15 (hereinafter Weiler, European Models) (noting that the “authentic” EC process is “supranational,” in which the primary legislative agenda of the community and principal harmonization measures are worked out, while issues with immediate political and electoral resonance in the European Union are addressed in accordance with “intergovernmentalism”).
145. See Graetz & Warren, supra note 26, at 1231 (citation omitted).
146. See id.
European integration—to taxation.  

How far the ECJ will progress in this direction is unclear. Against this backdrop looms the possibility of a “negative” tax harmonization among member states: all national competitive tax measures are to be struck down under the principle of nondiscrimination based on nationality.  

Taken as a whole, the E.U. member states that also belong to the OECD tend to favor international harmony as the means to resolve the crisis of the welfare state aggravated by global tax competition.  

Although both the social citizenship regime and taxation under the E.U. framework fall far short of complete harmonization, the intention to harmonize in both areas reflects a concern that the discrepant national social citizenship regimes would likely result in “welfare shopping” and “social dumping” among member states.  

This, in turn, would lead to the further erosion of the constitutional state.  

2. The Autonomy Paradigm: The United States and Beyond  

At the core of the autonomy paradigm is the nation-state’s quest for self-determination in all its policy choices. Taxing power is considered an integral part of national sovereignty and cannot be constrained by transnational regimes on any basis other than consent.  

Thus, even if global tax competition does harm a nation’s taxation regime, the solution resides in the traditional method of resolving international tax disputes: negotiated bilateral treaties.  

In contrast to international trade pacts that seek to reduce transaction costs, international tax policy focuses more on the distribution of benefits and the calculation of the welfare of individual states, which materialize only when various features of...
distinct tax regimes interact. Moreover, as game theory shows, in a multiparty context, it is easier for the minor players to align themselves in blocking the major party’s agenda. Thus, while bilateral treaties and multilateral conventions are modes of a state’s exercise of its sovereignty in foreign affairs, solving international tax issues bilaterally corresponds better with the pursuit of national interest by a superpower like the United States.

To autonomists—even in the context of globalization—the means of dealing with the harmful tax competition is centered on the idea of sovereignty. Thus, even if the states in bilateral negotiations generally encounter high failure risks in addressing harmful tax competition globally due to the enormous transaction costs, autonomists still hold onto bilateralism because it keeps state sovereignty intact better. Autonomists also see social citizenship as a domestic concern of determining the most effective way to maintain social solidarity given the state’s resources. They are willing to rethink social citizenship to control the threat of societal disintegration. Measures to prevent full-blown societal unrest are thus viewed as minimal versions of social citizenship from the autonomist perspective.

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157. To a superior power, bilateral bargaining in treaty negotiation reflects traits of national sovereignty to the extent that a sovereign state’s substantial leverage can be fully deployed over its negotiating opponent. See Walsh, *supra* note 153, at 271; Rixen & Rohlfing, *supra* note 154, at 17-18.

158. Cf. Graetz, *Tillinghast Lecture*, supra note 24, at 294 (rejecting the claim that “the simple formula of ‘national neutrality’ that suggests allowing only a deduction for foreign taxes is the best policy if the goal is to enhance national, rather than worldwide, welfare”).


Traditionally, the United States does not regard tax competition as bad in itself; rather, tax competition is viewed as an indispensable tool to facilitate its national interest. The convergence of the United States with other OECD countries on the exchange of information and banking transparency is based more on its desire to combat money laundering, international terrorism, tax evasion, and other criminal activities than on its attitude toward tax competition itself. Even if the United States continues to support the aspects of the OECD agreements that focus on the exchange of information and fiscal transparency, it will likely choose bilateral treaties over multilateral conventions to achieve those ends.

Free of any regional or international framework of integration, the development of a U.S. social citizenship regime in the age of globalization mainly reflects ideological shifts in domestic politics. Although the U.S.-style welfare state system that was set up in the 1930s is unlikely to be entirely dismantled, “welfare as we know it” ended in the Clinton Administration. At first blush, this change seems to converge with “The Third Way” of the European social welfare reforms of the past two decades. Individual responsibility, incentives to work, the role of nongovernmental social actors in welfare institutions, and the general public’s disenchantment with the government are common themes of social welfare reform on both sides of the Atlantic. The United States, however, unlike its European counterpart, did not adopt “The Third Way.” Instead, as the U.S. Personal Responsibility and Work

161. See, e.g., Graetz, Tillinghast Lecture, supra note 24, at 312. Whether the Obama Administration’s recent joining of the international effort to curb traditional (offshore) tax havens marks the fundamental change of the U.S. stance toward global tax competition is too early to tell. See Jackie Calmes & Edmund L. Andrews, Obama Calls for Curbs on Offshore Tax Havens, N.Y. TIMES, May 5, 2009, at A1.

162. See Walsh, supra note 153, at 269-89.

163. See id. at 267-68.


166. See Handler, Third Way, supra note 70, at 786-87 (noting the insistence on individual responsibility in the development of American social citizenship policies); Mark Freedland, The Marketization of Public Services, in CITIZENSHIP, MARKETS, AND THE STATE, supra note 75, at 90, 99-106 (discussing the changes of the British social citizenship regime).
Opportunity Reconciliation Act of 1996 suggests, welfare reform was explicitly debated in terms of "work versus welfare," which seems to return to a pre–New Deal discourse. Thus, while unemployment remains the central concern of the social citizenship regime, it is treated more as an individual work ethics problem rather than as a structural issue of social development.

The autonomy approach resonates with certain developing countries. For example, Caribbean and Pacific offshore tax havens have demonstrated a more defiant attitude toward the OECD project of reversing the trend in downward tax competition. These island nations argue against the OECD position from the standpoint of decolonization: Attracting foreign capital with their secret banking businesses is a viable alternative to receiving foreign aid from either their former colonial powers or new imperial hegemonies. Given their small populations, the revenue from excise taxes—together with the profit from their banking businesses and the fees from the companies with residence—provide enough financial resources to maintain social stability without causing social problems. Suppression of this secret banking business in the traditional offshore tax havens, therefore, would threaten the financial independence of these former colonies.

Moreover, the autonomist approach is popular with more developing countries than just small island nations. Malaysia, for exam-

168. See Handler, Third Way, supra note 70, at 794.
170. See Handler, Third Way, supra note 70, at 797.
ple, in addition to a number of other neo-liberal economic measures aimed to boost the economy, has changed its tax regime to attract foreign investment since Dr. Mahathir Mohamed became prime minister in 1981. 173 Most notable is the Promotion of Investment Act of 1986, under which Malaysia offered partial or complete relief from income and other taxes for new investors and existing corporations that were expanding. 174 Alongside his tax competition policy, Mahathir adopted a defiant attitude toward pressures from the Western powers to alter this decision in the name of sovereign autonomy. 175 Unlike neighboring states—Singapore and Taiwan, for example—nationalism plays an important role in Malaysia’s open policy to attract foreign investment. 176 As Dr. Jomo Kwame Sundaram, Assistant Secretary General for Economic Development for the United Nations’ Department of Economic and Social Affairs, argued in 1990, Malaysia aimed to “adopt a much more nationalist industrialization strategy.” 177 Specifically, “[s]uch a more ‘nationalist’ industrialization strategy must emphasize domestic linkages as well as the deepening of the domestic market, while not neglecting international competitiveness.” 178 In other words, as Malaysia was transforming into a neo-liberal economic society, it did not ignore the social dimension of the development policy, at the center of which are social services in rural areas. 179 Even if its tax revenue decreased, it could turn to the non-tax revenues—such as profits from its national petroleum company (Petronas)—to prevent its revenue from falling and thus keep expanding its federal expenditures. 180 Malaysia appealed to the idea of sovereign autonomy, putting forward an “authentically third world approach[ ]” to social citizenship by conceptualizing “development and material progress,” two conditions required to achieve sovereign autonomy, “as among the basic rights of humanity.” 181 While an unbalanced financial structure combined with other institutional factors led to its 1997 financial crisis, Malaysia continues to defy the World Bank and the International Monetary


174. See Narayanan, supra note 102, at 876.

175. See id.

176. See also Jomo, supra note 74, at 488.

177. See id.

178. Id.

179. See id. at 480.

180. See Narayanan, supra note 102, at 876.

181. See Jomo, supra note 74, at 490-91.
Fund and remains committed to the idea of sovereign autonomy to cope with the challenges of globalization.182

III. BEYOND HARMONY AND AUTONOMY: TOWARDS A NEW PERSPECTIVE ON THE CHALLENGES OF GLOBALIZATION

While harmony and autonomy represent the conceptual paradigms by which social citizenship in the constitutional state should be reconstructed in response to global tax competition, both paradigms center on the reconsideration of the institutional form and the state’s governing capacity. The corresponding institutions under both paradigms and their resulting impacts on the relationship between citizens and the governing authority, which constitutes the core of the idea of citizenship, require further analysis to get a better sense of how globalization in general and global tax competition in particular challenge constitutional democracy in a fundamental way.

This section examines how the national government, the institutional agent of the modern state,188 operates under each paradigm and their corresponding ideas of citizenship, respectively. While the harmony and autonomy approaches seem to stand in opposition, both paradigms reveal a desire to keep the government away from the policies in response to the issue of social citizenship resulting from global tax competition. Specifically, harmonists depart from the national government for a transnational management by technocrats, while autonomists suggest substituting the market for government. Nevertheless, both are supplements to, instead of replacements of, governments. Neither a transnational technocracy nor a national economy escapes the power and presence of the state, suggesting that the focus on the role of the state in the debate on the crisis of constitutional democracy in the face of global tax competition and other challenges from globalization is misplaced. A shift in focus from the state to citizenship is needed. Underneath both the harmony and autonomy paradigms lies the disembodiment of constitutional authorship, which is the underlying cause of the constitutional democracy crisis amid the deluge of global tax competition.

A. Looming from the Paradigms: Long Live the State

The discussion here first examines the institutional characteristics of the harmonist approach and the autonomist approach, respectively. Following these two sections, the discussion provides an explanation as to why these paradigms converge on the continuation of the state, and proffers a shift in focus in the prognosis of the challenges of constitutional democracy in the face of global tax competition as an interim conclusion.

1. From National Entitlement to Transnational Management

The main characteristic of the constitutional welfare state is that the recipients of governmental benefits are no longer at the mercy of the state because these benefits, which had been seen as "largess," have become "entitlements."184 Social citizenship in the constitutional welfare state is constructed around "rights talk."185 Like its elder siblings, civil and political citizenships, social citizenship is implemented ideally through a catalogue of judicially enforceable social or welfare rights.186

In contrast to the discretionary character of largess, a social citizenship regime built on a system of legal entitlements is rigid.187 When it becomes too costly for the state to provide all the services it attaches to social citizenship, this rigidity is viewed not as the protection shield for the recipients of social citizenship entitlements, but as a contributing factor to the rising cost of the social citizenship regime. As a result, the social citizenship regime has been conceptually reoriented toward reducing costs and control-


185. This Article borrows the term "rights talk" from Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

186. See Procacci, supra note 184, at 54; see also Preuss, supra note 65, at 155 ("[T]he welfare state is characterized by a great number of individual rights and legal regulations . . . "). Without provisions stipulating social rights in the U.S. Constitution, the attempts to constitutionalize social citizenship have focused on procedural safeguards. See Reich, supra note 184, at 783-85. Goldberg v. Kelly is regarded as implementing Charles Reich's "new property" theory, which based the entitlements of social welfare on the procedural protection of the due process of law in the Bill of Rights. See Goldberg v. Kelly, 397 U.S. 254 (1970).

187. For the critique that a social citizenship regime built on the rigidity of legal rights is ill-fitted to address personal needs, see Preuss, supra note 65, at 165-69. See also Habermas, supra note 77, at 216-17. For various ways of recognizing social rights in a constitution, see Mark Tushnet, Social Welfare Rights and the Forms of Judicial Review, 82 Tex. L. Rev. 1895, 1898-1908 (2004).
ling expenditures.\textsuperscript{188} Flowing from this, "the cost of rights" is now factored into the scope of social citizenship.\textsuperscript{189} Specifically, rights are viewed in light of their corresponding cost. Contextuality and flexibility play key roles in the calculation of social rights.\textsuperscript{190} As a result, while the judiciary is not excluded from the institutional dimension of the social citizenship regime, the role of the government's administrative arm is enhanced in this scenario.\textsuperscript{191}

In a transnational setting such as the European Union,\textsuperscript{192} where no single centralized government with comprehensive competences exists, social citizenship is subject to negotiated consensus or policy coordination.\textsuperscript{193} While politics plays a decisive role here, expertise, the backbone of managerialism, functions to resolve disagreements over social policies among member states.\textsuperscript{194} Under the harmony approach, managerial expertise or professionalism is the means to rescue the policy-making process from political decisions.\textsuperscript{195}

Under the transnational framework of policy coordination or harmonization, administrative bureaucrats distinguish themselves from mere politicians by their expertise and experience.\textsuperscript{196} Unlike traditional state affairs, contemporary policies regarding the social citizenship regime are highly technical and complex. Thus, even if professional diplomats and negotiators with the Department of
State or the Ministry of Foreign Affairs participate in negotiations with administrative bureaucrats, the latter play a more important role in these discussions. In the case of a formal transnational regime like the European Union, an independent army of transnational technocrats is deployed to supplement, or even supplant, its domestic counterpart.

Administrative bureaucrats in charge of particular areas are not the only ones who follow the rule of expertise and experience. In the complex institutional makeup of the European Union, the "infranational" mode of various committees empowers representatives of civil groups to help form and implement social policies. Noticeably, civilian players become "professionalized," whether they represent labor unions, health care providers, or social workers. These professional groups and activists from various countries tend to form transnational networks of social movements while sharing their experience and information. This growing transnational civil society has emerged as an informal network alongside the formal transnational technocratic regime and the quasi-formal coordinated framework of national government officials. Their common orientation toward a harmonized policy

197. Cf. id. at 764-70.
198. See GIANDOMENICO MAJONE, The European Commission as Regulator, in REGULATING EUROPE 61, 63 (1996); see also Shapiro, Democratic Politics, supra note 192, at 345-53.
199. "Infranationalism," coined by Joseph Weiler, suggests that the committees, which are intended to help implement regulatory policies on the E.U. level, turn out to be close to various interest groups within member states rather than to reflect the supranational ideal behind the new governance model called "comitology." See Weiler, European Models, supra note 144, at 15-17. These committees can be further divided into advisory, management, and regulatory committees, which jointly consist of the so-called "comitology governance" in the E.U. system. See Ellen Vos, EU Committees: The Evolution of Unforeseen Institutional Actors in European Product Regulation, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 19, 20-22 (Christian Joerges & Ellen Vos eds., 1999). But see Gráinne de Búrca, The Institutional Development of the EU: A Constitutional Analysis, in THE EVOLUTION OF EU LAW, supra note 133, at 55, 71-75 [hereinafter de Búrca, Institutional Development of the EU] (classifying committees according to their involvement in different stages of the EC legislative decision-making process and regarding only the preceding third type of committee that takes part in the stage of policy implementation as "comitology committees").
200. See Radaelli, supra note 194, at 767-70; see also Shapiro, Democratic Politics, supra note 192, at 354; cf. THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 127-74 (2004) (discussing the specialization of civic groups in the United States).
202. See Radaelli, supra note 194, at 764-70; de Búrca, Institutional Development of the EU, supra note 199, at 71-79.
shaped by their shared managerial professionalism helps bridge their different perspectives and experiences.\footnote{203}

Courts also play a role in the transnational management of social policies. A mature transnational social citizenship demands a judicial tribunal to enforce the agreements resulting from international negotiation.\footnote{204} For example, the ECJ may provide strong support for the social dimension of the “citizenship of the Union” (European citizenship) found in Article 12 of the European Union Treaty by reading petitioners’ claims to welfare entitlements in light of the nondiscrimination principle.\footnote{205} While the jurisprudence of this transnational judiciary is more teleologically oriented in its pursuit of a single market integration,\footnote{206} its organizational mentality resembles managerial professionalism.\footnote{207}

The move from entitlement to management in social citizenship regimes reflects a general tendency in public policy, and it brings the administration of social citizenship closer to tax policies. Because of the importance of macroeconomics and finance in calculating national revenue and expenditures, professionals and experts have long been involved in the formation of tax policies.\footnote{208} Mirroring developments on the part of social citizenship in the harmony approach, the construction of a transnational tax regime rests with the Ministry of Finance or the Department of Treasury instead of the Ministry of Foreign Affairs or the Department of State.\footnote{209} The role of the transnational judiciary offers another parallel in the field of taxation. As a transnational judiciary, the ECJ, in the context of the European Union, manages to interpret E.U. law and its relationship to the national tax systems of E.U. member


\footnote{204. \textit{See} Armin Haje, \textit{The Economic Constitution}, in \textit{Principles of European Constitutional Law}, supra note 138, at 591-94, 613-16. In this regard, courts are one of the expert venues to implement the negotiated results of social policy framework.}

\footnote{205. \textit{See generally} Kadelbach, supra note 138, at 484-87; Gráinne de Búrca, \textit{The Language of Rights and European Integration}, in \textit{New Legal Dynamics of European Union}, supra note 135, at 29, 47-49.}


\footnote{208. \textit{Cf.} Radaelli, supra note 194, at 766.}

\footnote{209. \textit{See} Graetz & Warren, supra note 26, at 1190-91.
states with an eye to deepening the integration of a single European market. In contrast to a possible full managerial role of technocrats in tax harmonization, the ECJ’s management of a harmonized E.U. tax policy is partial. While a full tax harmonization would involve positive and negative tax policies, for instance, coordinating, as opposed to striking down, the tax regimes of individual member states, the ECJ’s role in the integration of E.U. tax policies is negative.210 The ECJ’s main contribution to the harmonization of tax policies within the European Union has been to strike down various international income tax regulations of member states by broadly construing the meaning of “nondiscrimination.”211

The harmony paradigm, therefore, demonstrates a movement toward transnational management both in social citizenship and taxation regimes. Management suggests a turning away from the discredited “political” element of the state.212 Despite their different concerns and the possible conflicts in their policy preferences, administrative bureaucrats, civilian “professionals,” judges, and lawyers constitute a transnational management network under the harmony paradigm.213 All are bent on turning away from traditional politics.214

2. National Market versus (Nation-) State

Under the autonomist approach to global tax competition and its impact on social citizenship, the traditional national government remains the institutional protagonist. National governments under the autonomy paradigm, however, are undergoing a marketization as the trends of “privatization,” “outsourcing,” and “contracting out” demonstrate.215 This indicates that the nature of the state may be changing in the face of globalization.216

210. See id.
211. See id. 1198-1206. As for the polity-building implications of the ECJ’s robust invocation of the principle of no discrimination based on nationality, see Haltern, supra note 206, at 747-59.
212. This view of politics is illustrated in a technocratic vision of the European Union. See GIANDOMENICO MAJONE, Regulatory Legitimacy, in REGULATING EUROPE, supra note 198, at 284.
214. See Shapiro, Democratic Politics, supra note 192, at 354-56.
216. See Crouch et al., Introduction, supra note 159, at 9-10.
Attempts to substitute the market for the government have been made since the early 1980s. At first blush, the autonomy paradigm appears to oppose the marketization trend by favoring national sovereignty, centering on “government” as opposed to “governance.” This opposition dissolves on further examination, however.

Apart from their sovereignty-based attitude toward transboundary issues, autonomists view the constitutional state as more of a “political economy” than a body politic. To autonomists, what matters in their institutional choice is that the institutional design will contribute to the maintenance of the state’s autonomy. Whether it is the government or the market that implements policy is immaterial. Autonomists are not necessarily market sympathizers; theoretically, they may choose freely between the market and the government. The market-oriented autonomist approach seems simply to be the ideology of particular autonomists. Given the besieged situation the constitutional state is facing with global tax competition, however, the market, rather than the government, is the popular choice for the state to address the challenges that globalization raises.

For the autonomist, what matters is the government’s revenue in sum, not its structure. The state of the political economy is wholesome only insomuch as the constitutional state can meet its ends. The debates centering on tax revenue itself and how it is structured are misfocused. The only factor that matters to an autonomist...
mist is whether the needs of government expenditures can be funded by government revenue raised via taxes or other means.\textsuperscript{222}

Specifically, it is one thing to say that as a consequence of global tax competition, an enormous amount of corporate capital and private income around the globe is untaxed by any jurisdiction; it is quite another to say that this change of the international income tax regime could cripple the fiscal capability of the constitutional state. Under the autonomy paradigm, a thriving market boosted by tax competition is the best institutional means to maintain the level of government revenue, given global tax competition.\textsuperscript{223} Alongside the global free trade, which the removal of trade barriers has enabled, autonomists project that the United States' capital market will grow increasingly prosperous and that the U.S. MNEs will become more competitive because of global tax competition.\textsuperscript{224} The rise of personal and corporate income will result in increased consumption and increased capital investment in the domestic market, thereby expanding different tax bases.\textsuperscript{225} The loss of the international income tax, therefore, is expected to be offset by revenues from other tax bases.\textsuperscript{226} The core of the autonomy paradigm is to allow the market to determine tax revenue rather than trusting technocrats to redistribute social resources through the design of tax regimes.\textsuperscript{227}

The market also plays a pivotal role in the autonomist reconfiguration of social citizenship. Whether unemployment remains a "social" problem, as neo-social democrats argue, or is individual-

\begin{footnotesize}
\textsuperscript{222} See Avi-Yonah, \textit{Fiscal Crisis}, supra note 24, at 1616-25.
\textsuperscript{224} This sounds like a version of autonomy that is not shared by all autonomists; rather, it appears particular to the United States. Yet, given the actual challenges posed by globalization, this turns out to be the only working version of the autonomy approach. The United States, therefore, figures to be the prototype under the autonomy paradigm, even though the actual policies of the American government and the strategies of American businesses may not mesh perfectly with the autonomy approach as described above. \textit{See generally} Bobbitt, \textit{supra} note 2.
\textsuperscript{225} See also Avi-Yonah, \textit{Fiscal Crisis}, supra note 24, at 1616-25.
\textsuperscript{226} See \textit{id.}; see also Haque \& Mukherjee, \textit{supra} note 223.
\textsuperscript{227} Even if "socialist" proposals are floated in U.S. domestic policies without compromising its autonomist stand on foreign policy, the U.S. version of "socialism" remains very much market-oriented, which has taken roots in the United States since the 1980s. \textit{See} Nathan Glazer, \textit{What Happened to Socialism and Does It Matter?}, \textit{34 Am. Sociologist} 4, 4 (2003).
\end{footnotesize}
ized through a neo-liberal lens, the image of the activist state is clouded under the autonomy paradigm.228 The solution to social citizenship according to the autonomy paradigm again resides in market forces instead of government commands. Unemployment, the key issue in conceiving social solidarity, needs to be addressed by the market, not the government.229 The market provides the institutional solution to unemployment and also supplies the means, for instance, jobs, through which individual citizens can be incorporated into society.230 Reentering the job market and "pulling one's weight," so to speak, is a better way to achieve social solidarity than receiving the welfare state benefits, from the autonomists' point of view.231

Noticeably, autonomists acknowledge that uncertainty of employment is likely to result from the deregulation of the labor market and contribute to social unrest.232 Nevertheless, the issue of social unrest as a consequence of insecurity over employment must be reassessed in light of a thriving market. Uncertainty of employment reflects the normal fluctuations of the labor market, in which aspirants are surrounded by opportunities and will find jobs that meet their skills and fulfill their economic needs.233 Autonomists have not completely abandoned the idea of social citizenship associated with the traditional welfare state. Rather, the goal of social solidarity is converted into social stability, which is perceived to be institutionally achieved through the market.234

Taken together, the autonomist approach envisions an operational correspondence between tax policy and social citizenship by giving the market the power to solve the problem of the besieged constitutional welfare state. Under the autonomy approach, the market replaces the government as the state's main institution that manages the social citizenship regime. In contrast to the harmony paradigm, the market, rather than government technocrats, decides how much the government will gain from taxation; the market, rather than the technocratically administered welfare sys-
system, therefore, realizes the ideal of social citizenship. To autonomists, the market is the means, not the end. The market is the institutional tool the state uses to maintain its autonomy in pursuing its national interest.\textsuperscript{235} The constitutional state turns away from the technocratic governance model to that of the market to solve the challenges posed by globalization.\textsuperscript{236} The autonomist's chosen institution is the "national" market under the control of the constitutional state, not the market in general.

While the market may energize individuals and liberalize a society, it does not necessarily guarantee social solidarity or social stability. Should social unrest result from marketization, the government must maintain law and order. In this sense, social stability is a function of the entire social control system, including penology.\textsuperscript{237} Recently in advanced industrial countries, "neo-liberalism," "neo-social democracy," "communitarianism," and "criminalization" have merged together as strategic choices in the trend to marketize the social citizenship system.\textsuperscript{238} Thus, the "diminution of the social state" is usually tied to the "expansion of the penal state," while "social issues" are reconstituted as "questions of order and security."\textsuperscript{239} The assertive role of national sovereignty under the autonomy paradigm may also take hold in developing countries. In these countries, as Malaysia illustrates, the marketization process is conducted in accordance with a nationalist project. If marketization disrupts the traditional social relations and causes social unrest, the state will intervene.\textsuperscript{240}

What will materialize from the autonomist blending of a sovereign strategic end and an institutional means of marketization is contingent on individual countries' particular socio-economic situations and historicocultural backgrounds.\textsuperscript{241} To complicate mat-

\begin{itemize}
  \item \textsuperscript{235} See Bobbitt, supra note 2, at 283-342.
  \item \textsuperscript{236} See Cerny, Globalization and the Residual State, supra note 113, at 316-19; see also Cary Coglianese & David Lazer, Management-Based Regulation: Prescribing Private Management to Achieve Public Goals, 37 Law & Soc'y Rev. 691 (2003); cf. Bobbitt, supra note 2, at 254 (noting a more centralized but weaker government in a market-state).
  \item \textsuperscript{238} See Walters, supra note 228, at 62.
  \item \textsuperscript{239} See id. at 74.
  \item \textsuperscript{241} The image of the state under the autonomy paradigm may turn out to be different visions of the so-called "competition state," see Cerny, Paradoxes of Competition State, supra note 113, or any of the three types of what Phillip Bobbitt calls the "market-state." See
\end{itemize}
ters, the nation-state does not always accompany a rational market. Factors other than economic rationality or maximization of wealth may trump economic considerations.242 The idea of a “national” market denotes neither an integration of the market and the nation-state nor a perfect cooptation of each other. On the contrary, it suggests the autonomists’ fluctuation between the government, which is tied to the state, and the market, which is beyond national boundaries.243

3. Revolving around the Government? From the State in Transition to the Transformation of Citizenship

Both the harmony and autonomy paradigms attempt to depart from the state’s modern tradition, in which political power emanates from the government, to form a new type of institution that oversees and shapes the political life of the society. Upon closer inspection of these two institutional responses, however, it is clear that neither really breaks with the government machinery of the constitutional state.

Under the harmony paradigm, as the European Union’s tax harmonization experience suggests, transnational management, or rather, a transnational network of management, must turn to the intergovernmental body of national governments when different management units reach conflicting policies, even if they all are oriented toward the goal of harmonization.244 As argued above, the substitution of the (national) market for the government here is more rhetorical than real. The market never completely takes the place of the government in setting up the state’s strategic goals. Rather, the (national) market under the autonomy paradigm is fine-tuned to the interest of the state, which materializes in the political decisions made through the governmental decision-making mechanism as the constitution ordains.

That both the harmony paradigm and the autonomy paradigm ultimately resort to the national government—the institutional

BOBBITT, supra note 2, at 283 (noting three types of market state as mercantile, entrepreneurial, and managerial); see also Cerny, Globalization and the Residual State, supra note 113, at 321-22.


244. See Graetz & Warten, supra note 26, at 1190-91.
embodiment of the constitutional state—suggests the state’s resilience in the face of the challenges from globalization. Thus, the following questions arise: Why does the national government come to the fore even as the constitutional state seeks to solve its own besieged situation through institutional alternatives to traditional government? What is it that stands behind the focus on the national government as the institutional solution to the current crisis of the state and distinguishes the national government from transnational management and (national) markets as the principal institution of the state?

In the modern constitutional state, all political powers are organized around the constitutional order. On the one hand, the government authorities are detailed by the constitution. On the other, legislation and administrative regulations regarding social and economic conditions are subject to constitutional norms such as constitutionalized social and economic rights. The constitution stands as the lodestar for the direction of government policies, the effect of which materializes in everyday social life and thus influences society. This is why some scholars regard modern constitutions as “comprehensive,” while others even proclaim the coming of the age of “total constitution.” Under the project of the constitutional state, fundamental rights provisions in a constitution provide the frame of reference for different visionaries to make their case in the seemingly endless pursuit of justice. At the same time, the cause of justice is pursued by virtue of the constitutionally ordained powers that the government exercises. In the constitutional state, the exercise of power must be scrutinized through the lens of the constitution, which organizes and allocates

245. See Poggi, supra note 183, at 134-36.
249. See also Fiss, supra note 247, at 742; cf. Paul W. Kahn, Putting Liberalism in Its Place 135-36 (2004) [hereinafter Kahn, Putting Liberalism in] (discussing an expanding notion of human rights that is associated with the endless pursuit of being free of pain).
250. See Kahn, Putting Liberalism, supra note 249, at 265-79.
political power among the branches of the constitutional government as well as the different levels of the constitutional government.  

While the modern state is the prototype of the political community, it is also an organized human relationship in which public goods are delivered and the ideal of distributive justice is implemented. The relationship between citizens and the state plays the pivotal role in the functioning of the state's institutional mechanism and the effective exercise of the political power. This relationship lies at the core of the concept of legitimacy. Only when the institutional dimension of the state answers to legitimacy can the state survive as that which organizes society's political relations. Thus, the correspondence between the people's pursuit of justice and the government's constitutionally ordained power provides the key to the legitimacy of the constitutional state.

Taken as a whole, transnational management and (national) markets serve as contemporary self-transformation of the constitutional state necessary for it to survive the challenges of global tax competition. These two conceptual paradigms and their related institutional machineries reflect the state's resilience more than the decline of the nation-state. Moreover, the (re)turn to the national government, as the harmony and autonomy models have shown, suggests that the national government stands as the institutional formation that corresponds best to the relationship between citizens and the state, thereby answering the concern of legitimacy. Nevertheless, underneath the rosy picture of the resilient constitutional state remains a serious question: Is the relationship between citizens and the state in the model of traditional national government unaffected under the models of transnational government and (national) market? Put differently, do the relationships between the citizenry and the state power emerging from the two institutional prototypes correspond to the concept of legitimacy conceived in relation to the constitutional state? To investigate the

251. See e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

252. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 34 (1984) [hereinafter WALZER, SPHERES OF JUSTICE]. These issues constitute the core of what is called Staatslehre in German public law scholarship. See Martin Loughlin, In Defence of Staatslehre, 48 DER STAAT 1 (2009). In the Anglo-American world, it is political theory that addresses the same issues. For a comparison of the studies of these issues in Anglo-American and German scholarship, see KENNETH H.F. DYSON, THE STATE TRADITION IN WESTERN EUROPE: A STUDY OF AN IDEA AND INSTITUTION 107-17 (1980).

253. See POGGI, supra note 183, at 6-18; see also KAHN, LEGITIMACY AND HISTORY, supra note 14, at 210-24.
future of constitutional democracy in the age of globalization, a shift in focus on the proposition of the state in transition to the question of the transformation of citizenship is necessary.

B. Looking Underneath the Paradigms: The People Disembodied

As suggested above, the tendency to (re)turn to the national government as the institutional responses to global tax competition speaks to the constitutional monopoly of power, which is institutionally embodied in the government formation. It is one thing for the constitutional state's resilience to manifest itself in the transformation to a transnational management or (national) market; it is another to conclude that constitutional democracy remains intact under these two institutional models. The answer to the latter resides in the way legitimacy is conceived in terms of the constitutional monopoly of power. Fortunately, the constitution itself contains the hint.

"We the People" and its equivalents appear in so many national constitutions all over the world that "constitution" seems to have become a literary genre. These introductory phrases substantially organize discussions on the legitimacy of constitutional states. Specifically, "the functioning and use of 'we' (in 'We the People') as a self-designation of the sovereign people in proclamations of democratic rights" speaks to the importance of the constitution's self-validating authority in our political imagination of legitimacy. This is reflective of the legitimacy of constitutional democracy and the legal construction of citizenship centered on


255. See Etienne Balibar, We, the People of Europe? Reflections on Transnational Citizenship 184-85 (James Swenson trans., 2004) (2001). Most exemplary is the U.S. Constitution, which starts with "We the People of the United States of America." U.S. Const. pmbl. Other examples include Afghanistan ("We the People of Afghanistan" Afg. Const. 2004 pmbl.), Czech Republic ("We, the citizens of the Czech Republic (My, občan České republiky v Čechách)" Ústava CR pmbl.), India ("We, the People of India" India Const. pmbl.), Korea ("We, the People of Korea" S. Korea 1987 Const. pmbl.), South Africa ("We, the people of South Africa" S. Afr. Const. 1996 pmbl.), and so forth. For the English translation of the constitutions above mentioned, see http://www.servat.unibe.ch/law/icl/index.html (last visited Jan. 15, 2009).

256. See, e.g., de Bürca & Gerstenberg, supra note 132, at 246; Armin von Bogdandy, Constitutionalism in International Law: Comment on a Proposal from Germany, 47 Harv. Int'l L.J. 223, 233-36 (2006) (suggesting "We the People" as "the focal point of reference for all political and legal processes").

257. See Balibar, supra note 255, at 184-85.
"constitutional authorship."258 Behind the (re)turn to the government stands the idea of the "comprehensiveness" of the constitution;259 corresponding to the constitutional monopoly of power, "We the People" as the author of the constitutional order is conceived as having omnipotent "agency" in order to give legitimacy to a total constitution.260

This section goes beyond global tax competition to look into how "We the People" is (dis)embodied and citizenship is transformed underneath the harmony and autonomy paradigms in the broad context of globalization. To the extent that transnational management and (national) markets manage to transcend the state, neither overcomes the challenge of legitimacy conceived in constitutional authorship. On the one hand, "We the People" under the harmony paradigm is replaced by variegated "epistemic communities" as that which gives legitimacy to the constitutional order. On the other hand, the autonomy approach suggests the substitution of the nonhuman laws of the market for constitutional authorship. The disembodiment of "We the People" as illustrated in transnational management and (national) markets, both of which are investigated in order, is the underlying challenge to constitutional democracy in the age of globalization.

1. Exegetists or Authors: "We the People" Transfigured in "Epistemic Communities?"

The paradigmatic institutional feature of the harmonist transnational management is its aversion to political interference. Inspired and influenced by European systems theorists, harmonists

258. From the perspective of philosophical ethics, "authorship" refers to "a special relation . . . that a person has to his own projects and actions, a relation the person does not have to other people's projects and actions." Daniel Markovits, A Modern Legal Ethics: Adversary Advocacy in a Democratic Age 113-14 (2008). The central feature of authorship is the idea that a person who acts as a moral agent bears an especially close relationship to her certain actions and projects because she is their "author:" these actions and projects are peculiarly hers to the extent that they are attributed to her own ideals and ambitions. See id. Constitutional authorship refers to the idea that the legitimacy of the constitution is attributed to the people as the "author" of the constitution, which is embodied in the idea of citizenship. See generally Frank I. Michelman, Constitutional Authorship, in Constitutionalism: Philosophical Foundations 64 (Larry Alexander ed., 1998) [hereinafter Michelman, Authorship]; Ming-Sung Kuo, Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman's Presentist Critique of Constitutional Authorship, 7 Int'l J. Const. L. 683 (2009).

259. See Fiss, supra note 247, at 742.

260. See Hanna Fenichel Pitkin, The Idea of a Constitution, 37 J. Legal Educ. 167, 168 (1987) (noting that the idea of constitution is tied to humankind as a species capable of agency in Marxian "species being" and Aristotelian "political animal").
subscribe to their characterization of popular opinions regarding policy decisions as anachronistic in contemporary "risk society." 261 Central to the social systems theory is the idea that the increased complexity and specialization of knowledge and technology, as well as their important role in the governance of the society, fragments a society. 262 Furthermore, this may lead to a society becoming more susceptible to potentially unforeseeable risks from technology such that it grows into a "risk society." 263 Due to the fragmentation of the society, risk cannot be resolved by a grand, decisive plan. 264 Rather, it can only be managed and controlled through collaboration between experts equipped with knowledge and individual citizens familiar with the facts of the matter. 265 On this view, popular opinion is nothing short of bias, which would interfere with the functioning of subsystems in the "risk society." 266 Political mobilization will not illuminate reason but agitate passion instead. 267


264. Driven by the accompanying technological rationality, various areas of social life and natural environment in this "risk society" are becoming indifferent to and unknown to one another, portending potential disasters resulting from clashes between indifferent subsystems. See Ulrich Beck et al., Reflexive Modernization: Politics, Tradition, and Aesthetics in the Modern Social Order 5-6 (1994).

265. See Theresa Garvin, Analytical Paradigms: The Epistemological Distances between Scientists, Policy Makers and the Public, 21 RISK ANALYSIS 443, 448-54 (2001); see also Shapiro, Administrative Law Unbounded, supra note 218, at 369-74.


267. See Karl-Heinz Ladeur, Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION, supra note 218, at 89, 108-9 [hereinafter Ladeur, Polycentric Networks]. What is at stake, to harmonists and systems theorists, is neither the deviation of public policy from the public view nor the reliability of particular opinions. Rather, the public view in itself is considered a negative force. See also Shapiro, Administrative Law Unbounded, supra note 218, at 373 (noting the emergence of a paradox "when governance supplants government": "maximizing transparency and participation for the interested minimizes transparency and participation for the disinterested").
Thus, the distrust of politics brings professionals with different types of expertise together. In the first group are technocrats within national governments. The second group is composed of civic professionals. In addition to opinion leaders or experts of special societies such as the legal profession, this group includes grassroots activists with various social movements who tend to be "heavily-committed true believers" in their causes, such as non-governmental organizations (NGOs). With their increasing professionalization, these organizations have evolved from groups of individual citizens into "epistemic communities." Finally, there is a group of transnational bureaucrats, administrative and judicial. In the transnational context, transnational judicial bureaucrats, along with transnational administration, provide the driving force for further transnational harmonization.

At the core of the harmonist transnational management is a network in which transnational policies are negotiated and made. Noticeably, this network of expertise, which combines different experts, technocrats, and professionals, has no defined bounda-

268. See supra Part II.C.1; see also Shapiro, Administrative Law Unbounded, supra note 218, at 371.
269. See supra Part II.C.1.
271. See Shapiro, Administrative Law Unbounded, supra note 218, at 373-74; see also Piccioletto, supra note 52, at 462-63, 469; cf. Teubner, Societal Constitutionalism, supra note 7, at 26-27; Radaelli, supra note 194, at 759.
272. See Piccioletto, supra note 52, at 459; Shapiro, Administrative Law Unbounded, supra note 218, at 373-74; see also Skocpol, supra note 200, at 127-74 (noting specialization and professionalization as features of recent civic movements in the United States); Lindseth, supra note 261, at 150-51 (noting the specialization of interest groups in Europe).
273. See supra Part II.C.1. In the transnational context, the difference between administration and courts is somewhat obscured.
ries. Every interested group may gain access to the policy-making network, and therefore may play a role in the creation of policies. In contrast to traditional political participation, these component groups of the transnational management model share the insulation of the decision-making network from ordinary political processes. Reasoned analysis is the common language in the policy-making network.

As the E.U. comitology process shows, the concept of a policy-making network, which is perceived to defy boundaries, exemplifies how various needs can be "institutionally" addressed in today's society. As an institutional mechanism to facilitate the implementation of the delegated regulatory measures, the Council creates "an ad hoc committee—ad hoc in the sense that it is created solely to draft rules for one statute" to work with the Commission in co-drafting the implementing regulations. While the committees, the Commission, and the Council formally constitute a triangular relationship in spelling out the detailed regulatory rules, in practice, the technocratic Commission "interacts closely with the committees to achieve a mutually agreed outcome." Moreover, in addition to the committee members appointed by the Commission and the committee chair who is a representative from the Commission, the regulatory network formed in the comitology process encompasses specialized interests, or rather, expert groups, which are attached to committees.

On the model of the E.U. comitology process, the network functions as the "meta-institution" for the global legal regime.


278. See Lindseth, supra note 261, at 148-51; see also Cohen & Sabel, supra note 275, at 764-65, 778-82.


280. It should be noted that the Commission chooses these committee members. See Shapiro, Democratic Politics, supra note 192, at 346.

281. Formally, if the Commission agrees to the regulation drafted by the committee, it becomes law. If the Commission disagrees, the committee draft goes to the Council for a second look; if the Council approves it, the regulation drafted by the committee becomes law. See Shapiro, Administrative Law Unbounded, supra note 218, at 371; see also Lindseth, supra note 261, at 149.

282. See Lindseth, supra note 261, at 149-50.
Through formal as well as informal dialogues among official and civilian participants, different varieties of expertise play out in the institutionalized network. Through this, the public value underpinning public policies is identified.

Recurrent skirmishes in the network are no longer seen as a sign of institutional weakness; rather they are welcomed as indicators that the policy formation mechanism is open and responsive to the various needs of the society, which are channeled to the network through "rival expertise" represented by different expert groups.

In addition to claiming to resolve regulatory issues in different policy areas, this policy-making network noticeably does not base its legitimacy on constitutional authorship. Through the lens of transnational management, policy choices result from the function of institutional dialogues in response to social needs, which stands in stark contrast to the willed decisions of "We the People." Unlike authorial agents in "constitutional politics," those in the expert networks play the role of the "exegetists" of the "modi operandi," which evolve spontaneously in different areas of subjects through the exercise of reason and function as the fundamental norms for the new model of governance.

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283. See Ladeur, Polycentric Networks, supra note 267, at 93-97; cf. Lindseth, supra note 261, at 150.

284. See also Shapiro, Democratic Politics, supra note 192, at 347 ("If [interest groups] are told that [the earliest stages of the regulatory process] are technical, they are more than happy to offer their own technical experts to assist.").

285. See 1 Bruce Ackerman, We the People: Foundations (1990) (distinguishing between constitutional politics and normal politics). This Article uses the distinction between constitutional politics and normal politics in relation to the distinction between constitutional law and nonconstitutional norms instead of referring to what Ackerman identifying as the dual personality of democratic citizens. Thus, the legitimacy of nonconstitutional norms is determined by their consonance with the constitution. See Frank I. Michelman, Constitutional Legitimation for Political Acts, 66 MOD. L. REV. 1, 8-9 (2003) [hereinafter Michelman, Constitutional Legitimation].

286. The term "exegetist," which refers to the exegetical school of legal interpretation in France in the nineteenth century, is adopted here to indicate the role of the lawyers in articulating, as opposed to creating, the meanings of already existing legal norms. See Claire M. Germain, Approaches to Statutory Interpretation and Legislative History in France, 13 DUKE J. COMP. & INT'L L. 195, 198 (2003).

Transnational management also stands apart from traditional “ordinary politics.” According to constitutional authorship, the legitimacy of public policies is rooted in their consonance with constitutional norms. The legitimacy of public policies does not bear on their desirability in terms of policy science but rather on their constitutionality. The exact connotation of constitutionality varies among countries with their own constitutions. For example, some constitutions include the minimum requirement of social citizenship; others simply stipulate the procedures for legislation in general. Still, public policies are constitutionally legitimate only when constitutionally mandated institutions make them according to the constitutionally prescribed procedures and without violating the normative principle of the constitution.

In contrast, transnational management does not pin the legitimacy of policies on the consonance between the policies and superior norms. Given the novelty of the transnational nature of the issue itself and of the decision-making mechanism, some scholars argue that the constitution does not shed light on the institutional designing and policy results in that regard. Under this view, the place of deciding public policies in the transnational management model amounts to a democratic laboratory of public policy in which chosen decisions concerning social citizenship are not to be examined in terms of constitutionality. Rather, these policy choices are considered “experimental” and open to adjustments to suit the changing context. These “democratic experiments” with social citizenship are legitimate in that they are responsive to the functional needs of the social citizenship regime, which experts identify by virtue of reason.

288. See generally ACKERMAN, supra note 285 ( contrasting normal politics with constitutional politics).


291. See, e.g., GRUNDEGESETZ [GG] [Constitution] art. 28(1) (F.R.G.) (social state principle); S. Afr. Const. 1996 §§ 26 (right to housing), 27 (right to health care, food, water, and social security), 29 (right to education).

292. See, e.g., U.S. CONST. art. I.


294. See Lindseth, supra note 261, at 151; see also Ladeur, Legal Concept of the Network, supra note 276, at 158-62. For the concept of “democratic experimentalism,” see Dorf & Sabel, supra note 293.

295. See Cohen & Sabel, supra note 275, at 780.
Moreover, these networks are regarded as the quasi-institutional embodiment of civil society, which would not simply supplement, but rather supplant, formal institutions of constitutional democracy instead. From the harmonist point of view, the expertise-based dialogues within the network in the place of parliamentary debates and general discussion are deliberative rather than prejudiced. The ideal of deliberative democracy seems to find its institutional embodiment in the notion of network. For this reason, transnational management looks to embody the idea of legitimacy on the model of the law without constitutional authorship. The relationship between citizens and the political community here is a function of expert calculations made by the decision-making network.

Despite aspiring to a new vision of legitimacy characterized by the institutional features discussed above, the transnational management model continues to face a legitimacy deficit. If the transnational management model is to function as the source of self-legitimation by substituting the “acceptability” of policies for their constitutionality, the public at least needs to know the institution that makes decisions concerning the acceptability of policies. What lies under the name of network, however, is unclear. Take the E.U. comitology process, for example. Paralleling the formal committees, myriad “working groups” of experts or other equivalents are included in the network, all of which play a significant role in the lead-up deliberation on the making of policies. What makes the matter more complicated is that in this continuously networking process, even the number of committees, including subcommittees, is difficult to decide, not to mention how many


298. See Lindseth, supra note 261, at 150-51; see also Shapiro, Democratic Politics, supra note 192, at 350-51; cf. Cohen & Sabel, supra note 275, at 779-84 (“deliberative polyarchy”). For the criticism, see Weiler, Constitution of Europe, supra note 130, at 283-85.


300. See Lindseth, supra note 261, at 157-60.

301. See, e.g., Evans, supra note 299, at 267-75; see also Cohen & Sabel, supra note 275, at 782; cf. Esty, supra note 12, at 1497-98 (noting “informal workshops” and “networking” among other forms of supranational governance in the global context).
civic groups to get involved.\textsuperscript{302} Thus, the policy-making networks emerging from the global trend from government to governance are “amorphous.”\textsuperscript{303} As political scientist and administrative law scholar Martin Shapiro observes of this development, the committees, subcommittees, and various groups involved in the policy-making network “add up to a kind of big, soft pillow.”\textsuperscript{304} This makes it very hard for the public to make sense of the decision-making institution of the transitional management model.

In addition to the amorphousness rooted in the concept of and the operation of network, another feature of the transnational management model compromises the attempt to re-legitimize the political rule on the model other than constitutional authorship. As pointed out, the dialogue at the center of this networked governance is the channel in which policies are decided. In contrast to traditional types of dialogic politics,\textsuperscript{305} these dialogues are conducted among various groups of special knowledge, constituting separate “epistemic communities.” Given the prominence of reason and rationality in the making of “sound polic[ies]” in the transnational management model,\textsuperscript{306} these “epistemic communities” can be seen to include officials and civilians with “rival expertise.”\textsuperscript{307} In response to the calls for more transparency, the dialogues among these epistemic communities are becoming more accessible to the public.\textsuperscript{308} Yet, given the expertise-oriented nature of these deliberations, what is open to the citizenry in general turns out to be scientific rationales and data.\textsuperscript{309} As a consequence, the policy discourse among experts and professionals is rendered more

\begin{itemize}
  \item \textsuperscript{302} See Shapiro, Administrative Law Unbounded, supra note 218, at 371.
  \item \textsuperscript{303} See id. at 372; see also Lindseth, supra note 261, at 149-151.
  \item \textsuperscript{304} Shapiro, Democratic Politics, supra note 192, at 351.
  \item \textsuperscript{305} See generally Carlos Santiago Nino, The Constitution of Deliberative Democracy (1996).
  \item \textsuperscript{306} See Lindseth, supra note 261, at 148 (noting that participants in “[t]he process of ‘transnational’ deliberative interaction” concerning the making of public policies “must now justify their positions as ‘sound policy’”).
  \item \textsuperscript{307} Cf. Shapiro, Democratic Politics, supra note 192, at 343.
  \item \textsuperscript{308} See id. at 345-46.
  \item \textsuperscript{309} Cf. Lindseth, supra note 261, at 148-49. Issues that appear to be divisive but lie at the core of policy conflicts are kept from entering the process of deliberation in the network and relegated to more informal forums in search of negotiated compromise. This is what Shapiro observes of what has happened to the “comitology” process in the European Union as well as the “hybrid” rulemaking in the United States. See Shapiro, Administrative Law Unbounded, supra note 218, at 371-74.
\end{itemize}
elaborately technical and further beyond the comprehension of non-experts.\(^\text{310}\)

From the internal point of view of the harmonist transnational management model, the self-legitimating network composed of epistemic communities requires a twofold presumption in the transnational management model of legitimacy. To take the policy decisions resulting from the deliberation among epistemic committees as “legitimate,” a model rational citizenry that is equipped with sufficient scientific knowledge must be presumed. Such a citizenry dissolves the question of transparency to the extent that the highly expertise-oriented policy discourse will no longer lie beyond the comprehension of the public. Determining why an amorphous networked policy-making institution consisting of epistemic communities self-legitimates its own decisions,\(^\text{311}\) however, requires more than the accessibility and transparency of its policy deliberations to the citizenry. The correspondence of this amorphous policy-making network to the public’s concerns is also needed. A network of epistemic communities with neither boundary nor formal channels of participation self-legitimizes its decisions only insofar as the “heavily-committed true believers” sitting on the myriad epistemic communities can be considered the fiduciary of the general citizenry. Thus, on this rationalist model of legitimation, as opposed to constitutional authorship, is a presumed general personality of the citizenry: citizens assume a common personality of expert, albeit with many bodies, which is characterized by their heavily-committed true belief in the rational and reasonable solution to public issues, regardless of who makes the decision.\(^\text{312}\)

Under the twofold presumption of the rationalist citizenry, the harmony paradigm of transnational management still confronts the following questions: How do the different groups of experts and professionals with “rival expertise” negotiate the decision of public policies? Is there a hierarchy of expertise? Should a rights-

\(^{310}\) See Shapiro, Democratic Politics, supra note 192, at 343; cf. Weiler, Constitution of Europe, supra note 130, at 349 (identifying “a general sense of political alienation” with comitology).

\(^{311}\) Joshua Cohen and Charles Sabel reconceptualize legitimacy as accountability and notes “peer review” in the regulatory network as the embodiment of “dynamic accountability.” Cohen & Sabel, supra note 275, at 778-79.

oriented transnational tribunal be deferential to an efficiency-centered domestic agency or a movement-concerned intermediary group? These issues are not unprecedented. They simply echo the concerns about the reliability of scientific rationality and expertise in relation to the legitimacy of policy choices, which has come to the fore in discussions over "democratic administration" in traditional administrative law. In other words, "who governs and how," the central issues concerning the legitimacy and organization of power, still loom large in the harmonist attempt to self-legitimize.

The transnational management model, therefore, does not break new ground in rethinking legitimacy. Rather, through the lens of constitutional authorship, the legitimation mechanism that we encounter in the transnational management model of social citizenship looks like a networked "We the People." This networked "We the People" mirrors the abstraction and transformation of "We the People" into the values that are based on expertise, signaling "a natural push toward technocratic government under the camouflage of deliberation." Moreover, the rise of epistemic communities in the functionally specialized governing networks that do not correspond to traditional national boundaries makes the procedures for traditional decision-making more complex and uncertain. As a result, deliberative democracy on the transnational management model does not fulfill many globalists' promise of "democratic constitutionalism" alongside the development of "denationalization" in the global age. Rather, it comes close to Joseph Weiler's "infranationalism" in the postmodern modality of policy-making: Epistemic communities more resemble various

313. See Shapiro, Administrative Law Unbounded, supra note 218, at 375-76; see also Ulrich Everling, The European Union between Community and National Policies and Legal Orders, in Principles of European Constitutional Law, supra note 138, at 677, 683-84.

314. See Shapiro, Administrative Law Unbounded, supra note 218, at 377. In terms of the E.U. context, Ulrich Everling, a former judge of the European Court of Justice, notes that "[the measures to establish the common market] could be enforced . . . not in referring to technical rationality of market integration, but rather only by political decision overruling domestic resistance." Everling, supra note 313, at 684.

315. Shapiro, Democratic Politics, supra note 192, at 351; cf. Ladeur, Polycentric Networks, supra note 267, at 100-09.

316. See Shapiro, Administrative Law Unbounded, supra note 218, at 375.

interest groups within the E.U. member states than reflect the supranational democratic ideal behind the transnational new governance as the proponents of E.U. comitology contend.\footnote{318. See Weiler, European Models, supra note 144, at 15-17. For legal systems theorists who argue that networked governance implements, if not improves, the idea of deliberative democracy, see, for example, Ladeur, Polycentric Networks, supra note 267, at 104-08; Christian Joerges & Jürgen Neyer, From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology, 3 EUR. L.J. 273 (1997).}

In sum, under the harmonist view, at the core of the attempt to reconstruct the legitimacy of the law on a basis other than constitutional authorship lays the amorphous, networked deliberation. This is regarded as a process of “articulation” rather than “creation” of a global constitutionalism by uncovering and illuminating the operational laws of individual functional systems.\footnote{319. See also Harlow, supra note 276, at 213 (“The role of the ECJ as a constitution-maker responsible for the selection, creation and promulgation of overarching, general principles of law . . . .”) (emphasis added); cf. Shapiro, Administrative Law Unbounded, supra note 218, at 375-76 (“Many international law ‘rules’ [are] largely the creation of an epistemic community of human rights enthusiasts.”).} In terms of agency,\footnote{320. See Kuo, supra note 258 (analyzing the importance of agency in conceiving of the legitimacy of constitutional democracy); see also Pitkin, supra note 260, at 168.} what the transnational management model suggests turns out to be an amorphous institutional author, which figures as a corps of elitist experts and enthusiastic activists, operating under the shadow of an umbrella of networks.\footnote{321. See, e.g., Teubner, King’s Many Bodies, supra note 312; see also Shapiro, Administrative Law Unbounded, supra note 218, at 372-73.} Rather, what looms from the global legal regime conceived of by harmonists looks more like a polyarchical infranationalism, which borders on secrecy and professional arbitrariness.\footnote{322. See Shapiro, Democratic Politics, supra note 192, at 347-52; Shapiro, Administrative Law Unbounded, supra note 218, at 370.} The epistemic communities do not so much deliberate on the consonance of the chosen policy with the constitution as write the fundamental norms underpinning the transnational management model.\footnote{323. See Shapiro, Democratic Politics, supra note 192, at 348-51; Shapiro, Administrative Law Unbounded, supra note 218, at 373-75; see also J.H.H. Weiler, Epilogue: “Comitology” as Revolution—Infranationalism, Constitutionalism and Democracy, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS, supra note 199, at 339, 348 [hereinafter Weiler, “Comitology” as Revolution] (criticizing the networked governance as a modern example of “the inevitably elitist nature of all ‘philosophical king’ models of governance from Plato onwards . . . in which the model for ideal governance is a well conducted seminar”).} In other words, a laboratory of public policy to which the transnational management model aspires not only contains “democratic experiments” but also generates issues accompanying traditional constitutional democracy that require more than reason and expertise for their
solution. Under the harmony paradigm, "We the People" as the author of the constitutional order, disembodies in the assemblage of epistemic committees, putting the legitimacy of the transnational management model in doubt.

2. The Laws of the Market in Place of "We the People?"

_Homo Oeconomici_ in a Global Market

The autonomy approach does not abandon the state; rather it aims to situate the market as a national market to breathe new life into the state. The (national) market is taken as the central institution that calibrates national revenues and thus gives substance to social citizenship, the implementation of which still needs to undergo the scrutiny of constitutionality. For this reason, social citizenship grounded by the logic of market seems to suggest no deviation from the traditional model of lawmaking, the legitimacy of which centers on the idea of constitutional authorship. The (national) market model merely continues a Lockean legacy, which takes polity as a "political economy." On closer inspection, however, the conception of citizenship under the autonomy paradigm turns out to be distinct from that which centers on "We the People," suggesting a different model of legitimacy than constitutional authorship.

Grounded by the logic of the market, social citizenship amounts to the function of social interactions among individuals in the market. Under this view, individuals in the market consciously manage their lives in a social context in which human beings interact with one another and manifold human relations develop. The ideal rational actor in the market is not "atomized." Rather, she is sensible of various dimensions of the societal situation in which she resides—emotional, spiritual, and material. Economic rationalists take those intangible values into account. But, in the economic rationalist mind, all values are converted into economic variables.

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324. After arguing that "[j]ust as in the age of [traditional] government, who governs and how remains the central and pressing questions—both empirical and normative—in the [global] age of governance," Shapiro emphasizes that "[t]he answers, however, are likely to be more complex." Shapiro, _Administrative Law Unbounded_, supra note 218, at 377; see also Weiler, "Comitology" as Revolution, _supra_ note 323, at 343-49.

325. _See supra_ Part II.C.2.

326. _See_ Michelman, _Authorship_, _supra_ note 258, at 64.

327. "[T]he concept of a political economy is a mode of life in which society is conceived primarily as 'the economy.'" _Wolin, supra_ note 219, at 42 (emphasis added).

and thus equalized in the calculus of her best benefit.\textsuperscript{329} Moreover, driven by the dynamics and fluidity of a globalized market, the economic rationalists’ calculus is, strictly speaking, made in each transient moment. The past and the future are compressed into the present and stripped of meanings tied to their temporalities.\textsuperscript{330} A future-oriented, long-term plan is susceptible to constant alteration in response to the changing economic situation, while economic goals envisioned in the past do not put reins on market actors’ present decisions.\textsuperscript{331} If the past and the future mean anything in an economic rationalist’s mind, they factor into each particular calculus in the present tense.\textsuperscript{332} Thus, from the autonomist perspective, a marketized social citizenship is concerned primarily with the outcome of all economic calculi at each moment.\textsuperscript{333}

Noticeably, the presentism of economic rationalists stands in stark contrast to the sense of time in our constitutional tradition.\textsuperscript{334} Section II.B shows that social citizenship completes the ideal of equal citizenship,\textsuperscript{335} which embodies a temporally extended community of equals comprising “We the People.”\textsuperscript{336} A sense of us, for instance, a sense of who we are, is the essence of citizenship.\textsuperscript{337} The image of the citizen who makes law and policy is embedded in the development of a political community.\textsuperscript{338} Yet, this presump-

\textsuperscript{331} See id. at 27; see also William E. Scheuerman, Globalization and the Fate of Law, in Recrafting the Rule of Law: The Limits of Legal Order 244, 261-64 (David Dyzenhaus ed., 1999).
\textsuperscript{332} “The economic conception of rational action . . . is remorselessly present-oriented. To be sure . . . the concern of homo economicus with its future is fortuitous.” Rubenfeld, supra note 330, at 27.
\textsuperscript{333} This Article does not argue that in practice, social citizenship under the autonomy paradigm is instantly decided and prone to instability. Rather, this analysis teases out the logic that stands behind the autonomist view of social citizenship. Cf. Colin Crouch et al., Conclusions: The Future of Citizenship, in Citizenship, Markets, and the State, supra note 75, at 261, 263-65 [hereinafter Crouch et al., Conclusions].
\textsuperscript{334} See Rubenfeld, supra note 330, at 24-28.
\textsuperscript{335} See supra Part II.B.
\textsuperscript{336} For the relationship between extended temporality and the political community, see Paul W. Kahn, Political Time: Sovereignty and the Transient Community, 28 Cardozo L. Rev. 259 (2006).
tion is called into doubt by the rules of the market. Holders and designers of social citizenship in the autonomy approach are *homo oeconomici*—rational consumers in a market.\(^3\) Social integration, associated with the ideal of equal citizenship and the institution of social citizenship, is equated with equal opportunities in the market.\(^4\) Citizens are not members of a political community filled with history and memory; rather, they are voluntary economic actors who react instantly to transient market dynamics. As a consequence, "We the People" in the autonomy approach is reconfigured as the assembly of economic men and women, regardless of the continued existence of the nation-state as the banner-bearer of sovereignty.\(^5\)

Moreover, implicit in this autonomy paradigm is the understanding that the constitution has no bearing on the legitimacy of the social citizenship institution. While the legal institutions underpinning the market have to be constitutional, the laws of the market, namely, the social norms that *homo oeconomici* play by in their economic behaviors, are conceived in the dynamics of rational economic behaviors instead of constitutional values. In this sense, the market or the laws of the market take the place of citizens conceived in the image of "We the People" as the institutional agent in the autonomy approach. In other words, social citizenship conceptually is not even considered to be the implementation of equal citizenship, which is adjustable through policies according to changing social contexts. Rather, the laws of the market, instead of the constitution, bear decisively on social citizenship.\(^6\)

The (national) market not only defies the temporal dimension of the identity of "We the People," but it also poses a challenge to the bounded political community associated with "We the People."\(^7\) As the market logic suggests, no single states or individuals can change the performance of the globalized economy on their own, although particular economic actors may manage to succeed in global rent-seeking.\(^8\) It appears as if the interconnected eco-

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339. See Crouch et al., Conclusions, supra note 333, at 265-66.
340. See Walters, supra note 228.
341. See also Rubenfeld, supra note 330, at 103-44 (arguing that democratic politics should be analyzed in terms of rational actors maximizing their own self-interests).
343. See Walzer, Spheres of Justice, supra 252, at 34-39.
nomic network develops its own operational logic. Moreover, in a globalized economy, the geographical limits of the (national) market do not correspond to national borders; rather, they point to a borderless globe. Economic globalization has reconfigured the world into a “single market” to the extent that the market of the autonomy paradigm embraces the whole world. There is little difference between national borders and provincial or state boundaries. A so-called national market is just part and a function of the global market. Indeed, the (national) market model suggests that this global legal regime is rooted in the world economic system, despite being labeled as “national.” In the model of governance conceived in the market, there exists no jurisdictional boundary within which citizens relate to the political community as the author of its constitutional order.

The market, whether labeled as global or national, is a populated space. It is homo oeconomici that roam around the unbounded world market. On the autonomist view, however, human actors themselves do not reside at the center of the market. Rather, corporations and other component apparatuses are the protagonists in the market. Following this line of thought, the notion of “economic citizenship” that political sociologist Saskia Sassen proposes to serve as the protective shield against the unnecessary intervention of national governments in the global age is granted to corporations instead of homo oeconomici. While citizenship here may be

and institutions, especially in the field of international economic law, to “a transnational capitalist class”).

345. See generally Holton, supra note 2, at 52-67.
346. This raises the implications of economic globalization for new imperialism or colonialism. See Manfred B. Steger, From Market Globalism to Imperial Globalism: Ideology and American Power after 9/11, 2 Globalizations 31 (2005).
347. See Holton, supra note 2, at 50-79.
348. Through the lens of a globalized economy, the notion of national market is nothing less than a perception. See id. at 92-102.
349. Here emerges an irony to the autonomist. Despite a staunch adherent of national sovereignty, the (national) market model turns out to be unconsciously dependent on economic globalization, which the autonomist proclaims to pose an existential challenge to the nation-state. Cf. id. at 80-107. This is what Jed Rubenfeld observes of right-wing unilateralists’ inconsistency concerning the relationship between the U.S. Constitution and international economic law. See Jed Rubenfeld, Unilateralism and Constitutionalism, 79 N.Y.U. L. Rev. 1971, 2013-14 (2004).
350. This does not mean that there are no dividing legal jurisdictions in the world economy. Rather, this Article argues that in contrast to the rule of law as self-government, the market itself knows no limits.
351. See Saskia Sassen, Losing Control? Sovereignty in an Age of Globalization 31-58 (1996). Echoing Sassen’s appeal, Gunther Teubner builds on German legal sociologist Niklas Luhmann’s social systems theory, arguing that with the development of social network and the close connection of human agents and their social systems, they cannot
invoked only in a figurative sense, underlying the (national) market as autonomists' chosen institution are neither equal "citizen consumers" nor "citizen producers." Rather, the nonhuman laws of the market, instead of human actors, are looming from the (national) market model to replace "We the People" as the "agency" of a new global legal regime.

If the transformation resulting from the autonomy paradigm results in a transition from human agency to nonhuman laws, this will pose a fundamental challenge to the autonomy paradigm's legitimacy. Suppose that the fundamental norms, in light of which the laws in the juridical sense would be construed and applied, are as independent of human manipulation as the autonomist envisions. Still, the norms underpinning the market are a function of human transactions in particular social contexts. While they are hardly attributable to particular individuals, it is those who are participants in the dynamics of those transactions that co-determine the fundamental laws underpinning the operation of the market. Yet, not all citizens who help make the laws of the market are equal homo oeconomici. To be sure, from the autonomist perspective, we all are equalized as homo oeconomici in the sense that we have become rational "citizen consumers" in today's society. Only those who are capable of taking advantage of the global world economy can, however, be regarded as meaningful participants in the reflexive lawmaking process of the norms underpinning the global single market. Thus, while the image of homo oeconomici implies the unbounding of political communities and points to a

be distinguished from their communicative system. As a consequence, the system itself, consisting of human agents and the operational rules that are necessary for the system to function, should be deemed a "citizen" in the globalized society. On the other hand, borrowing French sociologist Bruno Latour's political ecology theory, Tubner argues that in view of the evolving independent communicative capability of electronic systems, they also become a legitimate holder of this global citizenship. See Gunther Teubner, Rights of Nonhumans? Electronic Agents and Animas as New Actors in Politics and Law, 33 J.L. & Soc'y 497, 505 (2006). 352. Cf. Lizabeth Cohen, A Consumers' Republic: The Politics of Mass Consumption in Post-War America 8-9 (2005) (outlining the changing views of citizens as consumers and/or producers).


355. See Cohen, supra note 352, at 13; see also Ackerman, supra note 285, at 231 (noting the image of perfect privatist in the modern citizenry).

liberated global market,\textsuperscript{357} it is far from a realm of liberty and freedom in which human beings become real world citizens and contribute equally to the evolution of the laws of the market.\textsuperscript{358}

While the global economic system is beyond the control of the national government, it does not mean that the economic world runs of its own accord as the market logic underpinning the autonomy approach suggests. Instead, as theories of political economy have shown, the market does not operate on the laws of its own making. The market runs on the institutional horizon pillared by various manmade laws and regulations, such as property, contract, and crediting and financing systems.\textsuperscript{359} Thus, it is one thing to say that the market logic underpinning the autonomy approach is not subject to manipulation by a single state or individual; it is quite another to say that the operational laws of the (national) market model are not human-made. The constitution of the (national) market model does have an author, although its identity is surely not “We the People” of a particular political community or its constitutionally ordained representative, the national government.

Taken together, when it comes to determining the power that writes the laws of the market into function, the (national) market model is confronted with the same challenges of legitimacy. Autonomists do not do away with authorship by turning to another model of legitimacy based on the nonhuman market logic. Rather, underneath the seemingly nonhuman laws of the market remains the fundamental issue of “who governs and how,” which needs to be addressed by focusing on the politico-juridical order conceived in the image of the market.\textsuperscript{360} The laws of the market speak to the disembodiment of “We the People.” The attempted autonomist solution to global tax competition based on the (national) market model illustrates the legitimacy challenges that globalization poses to constitutional democracy.

\textbf{IV. Conclusion}

Globalization brings exciting opportunities for a more free market, generates ideal movements for a more cosmopolitan legal uni-
verse, and raises hopes for a more democratic world. Calls for "legal and constitutional pluralism," "multilevel governance," "societal constitutionalism," and "transnational government networks" reflect optimistic aspirations for a global legal universe that would transcend the borders of demos-centered constitutional states and result in a global administration. As the rise of global tax competition shows, however, there exists a dark side of globalization. It remains to be seen whether global constitutionalism is coming of age. In the meantime, constitutional democracy as we know it is at stake in the constitutional state’s institutional self-transformation. Before the world’s citizens embrace this brave new world of legal globalization, they need to look underneath various new globalist paradigms and get a better sense of what these are and where they are going.

Global tax competition coupled with constitutional states’ response to it provides an excellent vehicle with which to grasp the direction in which constitutional democracy is moving. The response to this challenge is best grouped into two paradigms: harmony and autonomy. In terms of institutional changes, the harmony paradigm emerges as the model of transnational management, whereas the autonomy paradigm is inclined toward the (national) market. While both seem to distance themselves from the traditional model of the constitutional state, the organizational feature of which is the exercise of power by a constitutionally ordained government, they fall far shy of dispensing with the government. Thus, even if transnational management and the (national) market manage to go beyond the state, both harmony and autonomy paradigms only prove the resilience of the modern state.

This does not lead to the conclusion, however, that constitutional democracy is free from challenges in the age of globalization. Considering the indispensable role that the national government plays in both paradigms concerning the institutional responses to global tax competition, the core of the challenge that globalization poses to the constitutional state is the correspondence between the institution of political power and the relationship between citizens and the state. The thesis here is that neither transnational management nor the (national) market overcomes the challenge of legitimacy conceived in constitutional authorship. On the one hand, "We the People" under the harmony paradigm is

361. See supra notes 3-8 and accompanying text.
replaced by variegated "epistemic communities" as the author that gives legitimacy to the constitutional order. On the other hand, the autonomy approach suggests the substitution of the nonhuman laws of the market for constitutional authorship. That "We the People" is disembodied, as illustrated in transnational management and (national) markets, is the existential challenge to constitutional democracy.

In sum, globalization in general and global tax competition in particular question the (im)possibility of constitutional democracy as a political form of legitimate government in the global era. The relationship between the state and its citizenry, namely, the idea of citizenship, is conceived of in constitutional democracy and how this existential dimension of constitutional democracy corresponds to its institutional mechanism are the questions that need to be examined before a decision on whether to take the path to a new constitutional democracy reconstituted as a transcendent management or a "super market."

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