

For background purposes, Cornell Globalization and Ethics Conference September 2006.

This is an adapted pre-proof version of: 'Constitutionalizing Inequality & the Clash of Globalizations' International Studies Review, Vol. 4: 3 (2002) 47-65.

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Abstract:

Intensified inequalities, social dislocations and human insecurity have coincided with a redefinition of the political in the emerging world order. Part of this redefinition involves the emergence of what is called here "new constitutionalism". New constitutionalism limits democratic control over central elements of economic policy and regulation by locking in *future* governments to liberal frameworks of accumulation premised on freedom of enterprise. New political "limits of the possible" are also redefined by a "clash of globalizations" as new constitutionalism and more generally globalisation "from above" is contested "from below" by nationalists, populists and fundamentalists as well as diverse progressive movements in innovative forms of global political agency.

The central argument of this paper is intensified global inequalities have coincided with a redefinition of the political on a world scale. This entails the restructuring of political constraints and opportunities and reshaping of long-term frameworks designed, constitutionally, to lock in commitments to a neo-liberal path of development. However, this process is increasingly contested in a new global politics I call the "clash of globalizations".

In this context, an aim of this essay is to introduce the central concept of "new constitutionalism" and link it to emergent forms of global political agency and in so doing to highlight the nature of struggles over ethics and public policy on a world scale.

New constitutionalism is the political-judicial counterpart to "disciplinary neo-liberalism", whereas the latter is a discourse of political economy. Each are elements in a public policy framework that promotes the power of capital through extension and deepening of market values and disciplines in social life, under a regime of free enterprise (Gill, 1995). Disciplinary neo-liberalism is commensurate with interests of big corporate capital and dominant social forces in the G7, especially in the US. It involves political and legal reforms to redefine the political via a series of pre-commitment mechanisms. These include constitutions, laws, property rights and various institutional

arrangements, designed to have quasi-permanent status. A central objective of new constitutionalism is to *prevent future governments* from undoing commitments to a disciplinary neo-liberal pattern of accumulation. Thus new constitutionalism redefines the relationship between the ‘political’ and the ‘economic’ and helps to reconstruct the terms through which political action is possible in a capitalist society. Put differently, new constitutionalism redefines the political “limits of the possible” now and in the future and it entails efforts to contain challenges to the disciplinary neo-liberalism project through co-optation, domestication, neutralization and depoliticization of opposition.

In sum, new constitutionalism is the *political/juridical form* specific to neo-liberal processes of accumulation and to market civilization. It is in fact a combination of old and new and has a lineage stretching back to the bourgeois revolutions of the 17th and 18th centuries, i.e. a process where effective representation was unequal and that depends upon property.

So what follows is a series of sketches and propositions, rather than a fully justified and worked out thesis. And with the *longue durée* of bourgeois politics in mind we raise the following questions: How does neo-liberal constitutionalism serve to lock in tendencies towards greater social and political inequalities? What forms of institutionalization secure these commitments? How are these inequalities ethically sustained and justified – e.g. as commensurate with certain concepts of justice and efficiency? What are some of the key political challenges to disciplinary neo-liberalism and new constitutionalism?

The redefinition of the political and the end of history

My earlier work on this topic has explored how disciplinary neo-liberalism is part of a *political project* on behalf of large-scale corporate capital. This involved initiatives by what I have termed the globalizing élites to redefine the terrain of normal politics so as to “lock in” the power gains of capital and to “lock out” or depoliticize forces challenging these gains (e.g. nationalists; democratic forces) across a range of jurisdictions. Where oppositional forces were not resigned to accept there was no alternative to disciplinary neo-liberalism, other tactics were used to attempt to domesticate, co-opt or render ineffective diverse forms of opposition.

A key motto for the global hegemonic politics of the early 1990s was “the end of history.” The political economy framework of this effort to reconstitute hegemony was disciplinary neo-liberalism. In addition the constitutional political economy of Nobel Prize winners such as F.A. von Hayek and James Buchanan formed part of the frameworks of thought associated with the project of the globalising élites. Many endorsed Buchanan’s distinction between “constitutional politics” and “ordinary” or “normal politics” (Buchanan 1997). Constitutional politics was concerned with overarching frameworks of “quasi-permanent” rules to define parameters of “ordinary politics” in the long-term. Ordinary politics involved struggle and debate *within* these rules, rules that defined the limits of what was possible. So, in the case of European economic and monetary union, the first task was to create a new constitutional framework to separate economic institutions, such as a European central bank, from political influence of elected politicians and more generally the wider public, and so “depoliticize” the question of money. This, it was argued, was the best means to provide the “public goods” of sound money and macroeconomic stability. Once these had been achieved confidence of the “markets” could be won, leading to the construction of credible single “sound” money for Europe.

As I conducted research, I realized the scale of the historical experiment underway, particularly in the former East bloc and the former Soviet Union, and how this was associated with the new constitutionalism. It also was linked to the “great transformation” in the Third World, where, following the debt crisis, in many nations there was a shift away from state-mercantilist economic development towards what Latin Americans call *neoliberalismo*. Worldwide, new constitutions were being enacted and old constitutions were being amended. Often under the guidance of the IMF, the World Bank and other agencies of capitalist world economy, new institutional arrangements were being devised in ways similar to the European architecture of economic governance - to separate politics from economics. What was occurring was the gradual institutionalization of a framework of constitutional constraints theoretically designed to maximize the efficiency of a now potentially global capitalism.

In other words, what was being constructed in a range of contexts - national, regional and

international (e.g. through the IMF and World Bank and WTO) - was a *de facto* constitution for global capitalism.

As is amply documented (e.g. UNDP 1997) this process was accompanied by a significant and, at least in peacetime, unprecedented dislocation in the lives of ordinary people in the Former East Bloc. The forms of social protection were replaced with a more individualist, self-help system in which people stood naked in the context of the harsh new marketplace. The new society - and the eradication of the former “collectivist” order - was premised on a more commercial sense of the world and its motivations. To a greater or lesser extent, new forms of possessive individualism re-emerged world wide and social institutions were redefined to create an emergent market civilization - a monoculture of both social development and of the mind that is associated with a new political economy of disciplinary neo-liberalism (rather than a clash of civilizations as such – see below). The structure of this emerging civilizational form relies on the disciplinary power of market forces (rather than public authority as such) to shape social choice and social stratification. However, limits of market civilization soon became apparent as social atomization and inequality intensified, and as contradictions of a more crisis-prone form of global economic development became manifest. In turn, forms of political agency began to challenge globalization-from-above of the élites.

This social process accelerated after 1997, following the worst global economic crisis since the 1930s that worsened already obscene levels of economic inequality – a crisis that impoverished millions whilst enriching the few. The crisis called into question the brave new world of footloose capital and stewardship of the G7 in the world economy (Gill 1999a). However, new constraints on political agency appeared effective in so far as neo-liberalism served to discipline and to redefine many traditional forms of political action and the programmes of mainstream political parties, e.g. Social Democracy and other parties of the left. For example the bulk of the former Italian Communist Party (the part that became the Party of Democratic Socialism), the French and Spanish Socialist Parties, and important elements of the German SPD, all began to increasingly embrace, either willingly or otherwise, disciplinary neo-liberalism. The Labour Party in the UK under Tony Blair consummated this process. Blair, with President Clinton, sought to

redefine neo-liberalism as a Third Way involving market discipline and free enterprise, in combination with a new system of political rights and obligations premised on work fare for the recalcitrant and real citizenship rights for the prospering upper middle and wealthy classes. Writing from a fascist prison in the 1930s, Gramsci called such co-optation of opposition into dominant definitions of the political, *trasformismo*.

On the other hand, “end of history” constraints appeared much less effective in preventing the rise of new forms of political agency, especially in the South. Here workers movements, feminists, and environmentalists and others combined to construct a relatively common framework of analysis of problems associated with neo-liberal globalization. More to the point, they engaged in new discourses of politics. These forces operate locally and globally, and use innovative techniques of local and transnational political organization. They involve a combination of the old and the new, of pre-modern (e.g. peasant movements) modern and post-modern political agents and they seem to be creating different senses of the political. Such forces can be considered as a new fluid form of transnational political party -- but not one that is either institutionalized or under centralized control. They are a movement and a process that has a multiple and capillary form that combines Foucauldian and Gramscian understandings of power and hegemony. As an ethical and political moment they form a “post-modern Prince”, i.e. a new global form of collective political agency (Gill 2000).

In this regard, some of readers of this essay will recall the way that the conservative theorist of American power, Samuel P. Huntington characterized the global politics in the post-Cold War world, as a “clash of civilizations”. Specifically suggested is a coming struggle between “the west” and “the rest” as each “civilization” battles for supremacy in a new age of the crusades (Huntington 1993). Huntington is correct that in many respects world political struggles *are* about the nature and meaning of civilizations. However, the struggle is not about Islam versus Christendom as such, despite the effects of September 11th 2001 on the western, and especially American, political psyche. As Braudel (1994) has demonstrated, civilizations are more fluid, more complex and less singular than Huntington’s rigid Cold War style of realist thinking allows. In my view the central political struggles of the 21st century are taking place both within and across complexes

of civilizations, struggles mediated by the processes and mechanisms of globalization, and particularly by the intensified disciplines of capital. The power of capital and its institutionalization serves to both unite and divide the world in a deepening politics of inequality along lines of class, race and gender. So what is fundamentally at issue in the clash of globalizations at the start of the 21st century is what it means to be civilized. From the viewpoint of the new social forces, this depends on what form(s) of political economy allows for a diversity of civilizations to flourish. The forces of globalization from below ask whether a purely materialist and singular monoculture of the market is a civilizational oxymoron.

Of course there are also answers to this question from the political right, not only in the form of anti-modernist, often fundamentalist groups in the Third World, but also from the new populist xenophobic right in Western Europe, that exploits anxieties about law and order, immigration, and globalisation. Beyond this question there are worldwide concerns at the social dislocations and wider ecological consequences of intensified globalization. On the left, new progressive forces became more self-conscious and sought to challenge the constraints and disciplines and began to politicize redefined domains within which “ordinary politics” now took place.

So today’s “clash of globalizations” reflects a growing recognition by subordinate groups – including those on the right - that ordinary politics is now limited by not only national, but also global constraints. Forces from throughout the world have demonstrated (literally in the case of protests in Seattle in 1999 at the WTO Meetings) that these constraints need to be challenged and dealt with. Perhaps this explains why the new movements, especially on the left, increasingly focus on international financial institutions and organizations connected to the governance of the global political economy. Put differently, they go well beyond the politics of identity since they focus on specific material aspects of disciplinary neo-liberalism as well as the practices of new constitutionalism, which they perceive to be configured by structures of unequal representation.

New constitutionalism: justice and the “economic problem”

In this and the following sections we show how neo-liberals argue for the redefinition of the political to construct a “protected domain” to secure individual freedom against encroachments of the power of the state and pressures of the “tyranny of the majority” in democratic systems. In this context, neo-liberals argue that justice is secured to all on an equal basis through an effective Rule of Law. Neo-liberals oppose notions of “social justice” in the sense of positive commitments to social redistribution to compensate for the inherent tendency towards inequality of wealth and condition under market-based disciplines. In this view, the Rule of Law not only provides the most effective framework of justice, but also the basis for a productive solution to the “economic problem”.

According to liberals, fundamental to liberty is a protected domain of individual rights and freedoms, including a set of private property rights secured by the constitution and protected by the coercive capacity of the state. In this way, classic liberal pre-commitment mechanisms are not only Bills of Rights but also fiscal and monetary constitutions to avoid debasement of the currency and to finance a minimalist state. However, neo-liberals such as Hayek and Buchanan go even further than this since the constitutional constraints that they advocate are seen as a positive factor of efficient production in a thriving capitalist system of possessive individuals. In this context for liberals, justice is more than simply a value: it is a framework that regulates competing values, ends and indeed, social forces. Thus liberals argue against theories of justice (and equality) which are based on particular conceptions of human purposes or ends, for example as found in the writings of Aristotle (“the good society”), utilitarians (“the greatest happiness of the greatest number”) or socialists (“social justice”). Michael Sandel shows how this perspective is based on Kant’s position, i.e. that the basis of right is conceived as prior to the empirical world and outside of actual human nature.¹

¹ For Kant the basis of right resides in the possibility of a transcendental subject capable of an autonomous will and the capacity to be a free moral agent, as a subject prior to its ends. Thus for Kant, right is prior to the good, since any other arrangements would not recognize the capacity for individual choice and would make the active rational subject an object of someone or something else. Thus Kant’s notion of the subject is bound up

Moreover, in the liberal lexicon, democracy is not a *primary* political concept. For example, like Kant and Rawls, Hayek has argued, “Injustice is really the primary concept and the aim of rules of just conduct is to prevent unjust action ... [where] the injustice to be prevented is the infringement of the protected domain of one’s fellow men” (Hayek 1967: 166). These rules of just conduct need to be subjected to the Kantian tests of consistency and universal applicability. Hayek, inspired by the constitutional ideas of the Whigs and by James Madison, takes this argument further and applies it to social institutions and he specifically argues that “Liberalism is therefore inseparable from the institution of private property which is the name we usually given to the material part of this protected individual domain” (Hayek 1967: 165). The notion of protected domain is drawn from John Locke who defined property in the widest sense as “The life, liberty, and possessions of man”. In this way, Hayek argues that the law, in the sense of rules of justice, and the institution of private property are inseparable and both are necessary conditions for liberty.

This illustrates how liberal ethics assert the priority of rights, and how liberals seek principles of justice, which do not assume any specific conception of good. As Michael Sandel has put it “This is what Immanuel Kant means by the supremacy of moral law, and what John Rawls means when he writes “Justice is the first virtue of social institutions” (Sandel 1986: 82).

In the same vein, key neo-liberal intellectuals associate the key “economic problem” not with the problem of scarcity and choice within the context of externalities as does most of orthodox economic theory, but with the identification of the sets of binding rules and procedures - that is constitutions - that can facilitate market exchange and thus liberate the spontaneous potential of individuals to develop: As Buchanan puts it:

In ordinary or orthodox economics... analysis is concentrated on choices made

with the claim for the priority of right. A similar claim is made by John Rawls when he posits the “original position”, i.e. sets of arrangements we would choose if we were prior to society and empirical experience. Rawls suggests we would choose rules of just conduct since we would not know what we would become and we would rationally prefer rules that treat us with equal impartiality and fairness (Sandel, 1986).

within constraints... imposed exogenously... by nature, by history, by a sequence of past choices, by other persons, by laws and institutional arrangements, or even by custom and convention... Constitutional economics directs analytical attention to the *choice among constraints* (Buchanan 1991: 4-5, emphasis in the original).

To some extent, neo-liberals follow Adam Smith in their conception of economics. As Buchanan puts it, “the principle of spontaneous coordination of the market is *the* principle of economics” (Buchanan 1991: 28, his emphasis). However for those associated with the thinking of the influential Mont Pélèrin Society founded by Hayek in the 1940s, the economy “has no purpose, function or intent” since it is defined by structures, rules and institutions. These constrain choices of individuals in an interlinked chain, as a set of game-like interactions. Thus Buchanan argues for a shift in the paradigm of economics towards an emphasis to structure “as the exclusive and only appropriate object for reform”, based generally along principles of laissez-faire (Buchanan 1991: 28). Buchanan and Hayek argue for a redefinition of political economy away from teleological purpose towards an open ended process premised upon methodological individualism and rational action (*homo economicus*).

In so far as there has been a change in dominant ideas and institutions associated with the constitution of economic policy decisions since the 1970s, this change is partly linked to a redefinition of the economic paradigm towards what Hayek called “catallaxy”, that is the facilitation of spontaneous exchange processes and the effort to create what Polanyi called a self-regulating market order on a world scale. For Buchanan this is the key to the creation of “efficient social order” that is premised on individual choice (Buchanan 1991a). In this way, neo-liberal approaches - based on Constitutional Political Economy and Public Choice - advocate a form of structuralism founded upon methodological individualism as the basis for this “efficient social order”. Such an order requires constitutional constraints and binding rules on democratic life as a condition of its possibility. Catallaxy is thus the “economic” component of what Hayek calls, Following Oakeshott a *nomocratic* (law-governed) society (Hayek 1967).

Liberty, private property rights and fiscal and monetary constitutions

Buchanan and Hayek's understanding of liberty is generally negative - it means freedom from the arbitrary wills of others, and from arbitrary government interference in the private activities of individuals, who provide the basis for social innovation and the evolution of customary laws that help to sustain as well as to define a civilization. Hayek in effect argues for the Rule of Law understood as universal, but abstract rules of conduct.

Indeed for Hayek, democracy only is acceptable insofar as it is coupled with strictly limited government. *The Constitution of Liberty*, therefore, argues that the powers of any temporary majority must be limited by long-term principles, constrained by a constitution that limits the powers of government (Hayek 1972). The key condition of freedom, for Hayek, is the preservation of a private domain of action. In turn, this presupposes the institution of private property, as well as freedom of contract and freedom of choice of employment: "To the extent that a person genuinely owns property, in the legally protected sense, such a person is independent from the control of other persons, separately or collectively" (Buchanan 1997: 190).²

Thus what is crucial for neo-liberals is the strong protection of liberty and property rights, with particular emphasis on the power of the state to protect capital from expropriation and seizure or what is called in American jurisprudence "takings" through nationalization or socialization of the means of production. For example "supra-constitutionalism" associated with trade and investment agreements serve to protect capital from expropriation – either through nationalization or regulation. Thus much of the public regulation of trade and investment, for example bilateral investment treaties

² Buchanan's justification for private property draws metaphysical support from a papal encyclical issued under the auspices of Pope Leo XIII in 1893, *Rerum Novarum*. It argued socialists' endeavour to destroy private property was a way to preach the poor man's envy of the rich and deny the liberty and economic interest of every wage earner in bettering his condition in life. According to Leo XIII: "And to say that God has given the earth to the use and enjoyment of the universal human race is not to deny that there can be private property" (Buchanan, 1997).

and regional associations such as NAFTA and the European Union, as well as aspects of the Uruguay Round and trade serves such purposes. Laws and regulations made by democratically elected parliaments made to promote the public interest (e.g. in health or environment) may be challenged in administrative tribunals by private corporations as a “taking” if they can demonstrate that such laws/regulations *might* impact *future* expectations of profit, e.g. in the disputes resolution mechanisms of NAFTA (Schneiderman, 1996).³

Protection of property also includes protection of the value of capital through macroeconomic policies that will contain inflation – hence the argument made by neo-liberals for “fiscal and monetary constitutions”. By fiscal constitution Buchanan means specific measures to prevent deficit financing by government, such as balanced budget amendments or precise stipulations as to the size of budget deficits as in the Maastricht agreements of the European Union, since such deficits may be linked to inflation and erode the value of capital and assets of creditors. Buchanan argues that if only one of the former communist ruled nations could achieve the reforms required for a leap into genuine constitutional democracy, “the exemplar offered to other countries in this age of instantaneous communication would almost guarantee generalization to other settings” (Buchanan 1997a: 189).⁴ With regard to money and inflation, Buchanan argues that individuals can be made more secure and independent with a regime that “embodies predictability in the money-good exchange regime.” Thus during the 1990s many nations have moved not only to fully independent central banks but also to publicly specified inflation targeting as the centerpiece of monetary policy (as opposed to promotion of full employment), in many cases locking-in the anti-inflation bias by statute.

³ In addition there is a tendency of widening and deepening of the scope of trade agreements to encroach on many aspects of social life and government activity, traditionally considered to be of national jurisdiction and concern, a fact that helps explain many of the anti-WTO protests (Sinclair, 2000).

⁴ Buchanan expresses the hope that the Former East Bloc will replicate the first American constitutional model, and add weight to the social forces that diminish the appeal of what he consistently refers to as the “Hegelian” statist myth or mind-set that he claims dominated the twentieth century (Buchanan 1997a).

As we have noted, to support this argument Buchanan distinguishes between “constitutional politics” and the inter-play of forces within a constitutional framework that defines the terrain of “ordinary politics”. The first involves strategy: the design, construction, implementation and maintenance of the fundamental rules that define the parameters of ordinary politics. These are seen as important for ensuring the stability of expectations. Buchanan states “explicit constitutional limits on the intrusion of politics into the market have the further advantage of providing stability of expectations for persons and groups, internal and external, who might make long-term investments.” Thus “normal politics” is strictly a politics *within rules*, and for Buchanan constitutions should be considered to be *quasi-permanent* in order to become elements of “*genuine political capital*” (Buchanan 1997a: 184, 186, my emphasis). Whilst these rules can be created through democratic procedures or imposed from above, Buchanan stresses how there must be limits to the democratization of constitutional politics imposed by the necessary quasi-permanence of the rules.

In this context, both Hayek and public choice theorists use a procedural as opposed to an outcome or substantive criterion of justice and legitimacy, i.e. it assumes that a process can be constructed to assure fairness and impartiality in the rules of the game that emerge in really existing societies. Buchanan notes how his position contrasts with that of critical theorists such as Habermas. For Habermas, legitimate norms of politics are those that are inter-subjectively acknowledged because they embody some common interest that can be examined in practical discourse as equally good for each person (Buchanan 1991: 60).

It is thus entirely consistent for neo-liberals to have a narrow and procedural conception of the Rule of Law and to link this to a notion of equality - understood as equal right and protection under the law for life and private property- the protected domain.

Unequal representation and possessive individualism

In so far as we can demonstrate that these neo-liberal liberal notions of justice, equality, democracy and political economy are connected to the ideas, institutions and material potentials of the dominant elements in civil society (large holders of property) we can

sustain part of our thesis: new constitutionalism locks in systems unequal representation both within the state and in international organizations. In addition, we can also demonstrate that this rests on the lineage of the concept of *de jure* unequal representation of the propertied that emerged, for example, during the sixteenth century in revolutionary England.

Struggles between the Crown, the Gentry and the smaller propertied classes finally resulted in a restoration that subordinated the Crown to Parliament. The nation was ruled by a new alliance of the aristocracy and the emerging bourgeoisie but those without property were disenfranchised. This Glorious Revolution was reflected in Locke's *Second Treatise on Government* where the right of representation was linked to the possession of private property understood as a protected domain (Locke 1965). As such "new" constitutionalism harks back to the forms of representation associated with the pre-democratic age, i.e. to the three great bourgeois revolutions - England of 1688, and the French and American Revolutions at the end of the eighteenth century.

However, the world we live in is not the same as that of the eighteenth century. Its political economy is dominated by concentrations of capital in the form of giant monopolistic or oligopolistic corporations and institutional investors. In this context, the liberal constitutional separation of state and civil society seems to correspond to Locke's theory of the self-perpetuating sovereign (that is the supremacy of the propertied in civil society and the state). As we have noted, Locke (and James Madison) is a primary inspiration for Hayek and Buchanan. As C.B. Macpherson has argued persuasively, Locke's individualism was exemplary of the political theory of the emerging bourgeois society in the late eighteenth century. His possessive individualism consists in "making the individual the natural proprietor of his own person and capacities, owing nothing to society for them".

Despite Hayekian arguments to the contrary, this type of individualism is necessarily also a form of collectivism.⁵ This is because it asserts the supremacy of civil society over

⁵ As Hayek freely admits, he draws much of his philosophical and historical inspiration from the seventeenth century Whigs in England. Locke, and Adam Smith heavily influence his

every individual, whilst at the same time asserting that individuality is only fully realized in the accumulation of property. Such accumulation is of course a possibility open only to some and it takes place “at the expense of the individuality of the others”. In other words, these individuals become what Marx called “world-historical” individuals inscribed socially and interpellated by a complex division of labor. In a situation of *de facto* inequality sanctioned by laws of property, those individuals:

Who have the means to realize their personalities (that is, the propertied) do not need to reserve any rights as against civil society, since civil society is constructed by and for them, and run by it and for them. All they need to do is to insist that civil society, that is, the majority of themselves, is supreme over any government [as such it demands the supremacy of the state over the individual]... Locke’s constitutionalism is thus “essentially a defense of the supremacy of property... especially that of the man of substance to whom the security of unlimited accumulation was of the first importance (Macpherson 1962: 255-58).

Thus new constitutionalism does involve the “retreat of the state”, indeed some might call it a regression, from the idea of equal representation of the citizen in the state and equality of subjects before the law in modern liberal democracy - to a pre-democratic, seventeenth century conception of politics and civil society. At the same time, its political economy corresponds to the effort to construct politically what Karl Polanyi called the “stark utopia” of nineteenth century liberalism: a market society on a world scale (Polanyi 1975: 3), a universal system under the discipline of capital.

Law as a productive and constitutive aspect of bourgeois society

theoretical stance.

The final point to emphasis is not only that law should be understood as a set of constraints connected to the constitutional or rule-based limits on the exercise of the authority of the state in the political economy; but also, law is fundamentally a *productive* aspect of bourgeois society. It is central to the constitution of the power of capital, the nature of the state and its separation from civil society. This is because the liberal legal form serves to constitute the commodification of labor and of things, or more precisely the power to control the disposition of people relative to things, since private property rights are more accurately sets of rights connected to the behavior of people relative to things.⁶

Since legal discourse confers legal personality on abstract subjects, corporations become legal subjects and they have rights and duties under the law. Moreover, power is decentralized in a liberal society through the protection of private property rights under the constitution. What this means is that large private property holders have a great deal of autonomy relative to the state and the rest of civil society, that is to make decisions concerning their private property rights based on their foundations in contracts. This gives private corporations a number of powers: authority over workers because of the latter freely entering into the employment contract, and in effect, the right to make what Robé calls special “private” laws, the existence of which is accepted by the state since they derive from the overriding legal principles that guarantee private property rights. As such, the enterprise forms part of the liberal structure of the exercise of constitutional power. In this way, private firms are forms of private government since some of the legal rules they create are final and may not be reviewed by any public body (Robé 1996: 60).⁷

⁶ Property is a broad set of legal *relations* - a subset of social relations that encompasses a range of rights and freedoms, as well as certain limitations therein. Property rights are in fact aggregates of different sorts of rights, rights-correlatives and obligations (Oakes, 1981).

⁷ Corporations thus exercise economic *and* political decisions, including where to locate investments and decisions concerning the internal governance of the firm, including voting rights and systems of representation, the hierarchy of authority and chains of command, whether to change management, and ultimately rights over hiring and firing. This type of private governance cannot be fully controlled in a liberal capitalist system because of constitutional constraints imposed upon the state itself (see Robé 1996).

Thus insofar as there is a shift towards liberal constitutional models of the Lockean or Hayekian type; it constitutes a significant amplification of the power of capital on a world scale. This is why we need to look not only at domestic laws and changes to constitutional structures, but also to the quasi-constitutional effects of international agreements and other mechanisms of neo-liberal globalization.⁸

In sum, new constitutionalism legitimates and locks in the power gains of the propertied (capital) by constitutional amendment, international agreements or other juridical-political means. Public policy is thus made subordinate to dominant elements in civil society, particularly to corporations and investors freedoms. In this project, we suggest that the dominant political subject - or the effective sovereign - of the new constitutionalism is the investor, or the holder of large private property rights (capital).

Indeed, constitutional protection of private property rights is central to the American Constitution, which Karl Marx described as the first fully bourgeois republic. Marx was not the first to note this aspect of American constitutionalism. Indeed, as Adam Smith noted in 1776 at the birth of the American republic, “civil government, so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all” (Hill, 1980: 287), a sentiment shared by Polanyi (1975:129).

Conclusion: reflections on the clash of globalizations

Disciplinary neo-liberalism presupposes the constitutionalizing of inequality in systems and institutions of *de facto* and *de jure* unequal representation defined by concentrations of capital. Various mechanisms of pre-commitment (including constitutions) serve to protect this domain of the propertied on a world scale.

Nevertheless, new constitutionalism is a strategic political project, rather than a

⁸ For example by narrowing the descriptions of excluded sub-sectors where governments have made fewest commitments, and broadening descriptions where governments have taken the greatest commitments.

completed historical process. As such it has a contingent and contested character. Of course it may appear to be the case that the future configuration of world order will be an American-led hegemonic system of liberalizing capitalism. However, as Giovanni Arrighi and Beverly Silver have pointed out in their recent book, world hegemony involves both material expansion and social peace consolidated as “historic compromises”: political accommodation between established powers and newly empowered social groups struggling to expand their rights. However, as they point out, in periods of growing financialization of capital accumulation (e.g. the last 25 years) there are growing inequalities and this tends to intensify social conflict. They note that social polarization and “middle class” political alienation has characterized all declining hegemonic powers. In the late twentieth century the increasing polarization of wealth is producing similar effects on a world scale creating greater turbulence in world politics and in particular, the American middle classes are “squeezed and soured” (Arrighi and Silver 1999: 212), A new phase of systemic chaos attendant on hegemonic decline is anticipated (in both senses: in inter-state relations and in social relations). What they mean is as a situation of breakdown in the dominant forms of social organization develops, a political demand for ‘order’ arises. Some forces seek a return to the old order, some struggle for a new order, but nonetheless, the demands for “order” tend to become more and more universal among rulers, or among subjects, or both. As the history of the twentieth century shows the political demands for order can lead to reaction as well as progressive political projects.

With respect to the social basis of hegemony it seems clear that there is a great deal of middle class alienation throughout the world today, but in the USA at least, this seems to have been the case for much of the post-war period, however, some of this alienation is also accompanied by what J.K Galbraith has called the emergence of a “culture of contentment” and the development of self-protective strategies on the part of the “haves” of global society in an age of possessive individualism and self-help (Galbraith 1992).

Moreover, in an important sense we are in a new world social order in which there is increasingly both social and spatial concentration of affluence (for example gated communities) and poverty (growing ghettoization). According to demographic research

there is a new global politics of inequality where class lines are growing more socially and spatially rigid - a process in the past attributed mainly to race, obscuring its class dimensions (Massey 1996: 403-4).

The affluent are protected world wide by private security services and the institutional practices of enclavisation. As this process continues, the tax bases of poorer communities are eroded, and a vicious cycles ensues - the poor get worse and worse services, whilst the rich pay a smaller proportion of taxes but get much better services on a per capita basis than was the case when they lived in communities where rich and poor both lived. Increasingly, the rich never see or indeed ever meet or confront the poor. These developments in the USA have been connected to a new form of increasingly nihilistic, violent “social ecology” in many cities (Massey 1996).

We can link this analysis to our general theme of the clash of globalizations by noting that (a) the issues just noted cut across borders; they are local, national and global and (b) the issues are social and cultural, partly linked to the urbanization of the world and to ecological issues of long-term significance

The point of this excursus into demographics and the social question is to argue for us to broaden the scope of analysis in political economy not only to take account of juridical-political issues of globalization, but also to redefine its methodological postulate to both encompass and to go beyond “power” and “production” - that is the traditional matrix of understanding and explaining political economy. As feminist political economists such as Diane Elson, Brigitte Young and Isabella Bakker have demonstrated, we also need to add the dimension of social reproduction into our analysis.

Indeed this is vital to understanding what I call the emerging clash of globalizations and the politics of inequality today. This is because disciplinary neo-liberalism involves a new and more extensive stage in the exertion of the discipline of capital over greater aspects of social life as well as a new level of the socialization of capital (its institutionalization in laws, regulations, forms of planning) on a world scale. So, whilst disciplinary neo-liberalism goes with greater alienation and commodification it also calls into being ever more extensive forms of regulation and planning partly for reasons of

social order and control, and partly to try to manage the contradictions and dislocations of the new forms of capital accumulation.

These contradictions are bound up with a new politics globalization “from below” that is now moving from local resistance to a more global form of consciousness and action. The discipline of capital operates unevenly and hierarchically, crudely speaking at least three levels of society, and to a greater or lesser extent depending on the political jurisdiction. In each case it meets resistance, in ways that are commensurate with the following proposition: ‘the neo-liberal concept enshrines a stage of penetration of capital into its social and natural substratum which in the current period has led to exhaustion and new forms of resistance’ (Pijl 1998: 132).

Elsewhere I have tried to describe the emerging forms of political agency associated with struggles over the nature and direction of globalization as the “post-modern Prince” (Gill 2000d). This concept refers to a set of ‘post-modern’ conditions, which, like the concept of new constitutionalism involve the old and the radically new. Political, material, and ecological conditions are now giving rise to new forms of political agency whose defining myths are associated with the quest to ensure human and intergenerational security on and for the planet, as well as democratic human development and human rights. For example when I studied the protests that surrounded the 1999 World Trade Organization ministerial meeting in Seattle I noted how a series of contradictions were raised by the protest movements (Gill 2000d).

The first was that between big capital and democracy as we have defined the issue above in relation to new constitutionalism. A second set of contradictions are linked to intensification of discipline on labor and a rising rate of exploitation, in the context of cascading crises that have impoverished many millions; thus protests increasingly involve more radicalized organized labor for example the United States Teamsters, the Brazilian Workers Party. Third, as feminist political economy has demonstrated, the new discipline of capital intensifies a crisis of social reproduction, particularly since in an era of fiscal stringency, in many states social welfare, health, and educational provisions have been reduced or privatized and the socialization of risk has been reduced for a

growing proportion of the world's population as an ideology of self-help and work fare reconfigures social provisions (Bakker 1999). A final set of contradictions are linked to how socio-cultural and biological diversity are being replaced by a social and biological mono-culture under corporate domination, and how this is linked to a loss of food security and new forms of generalized health risks.⁹ Indeed, since Seattle this critique of the monoculture has been linked to politics and the mainstream media as the keepers of "official reality."

These contradictions seem to be increasingly linked to the idea of a transnational sense of a shared community of fate. They help explain why there is a new moment in the dialectic between capital and the social. In this context the World Economic Forum is a means of mobilization for the globalizing elites and capitalist classes. Indeed, whilst the World Economic Forum of Davos may constitute a new International of Capital, the recent protests in Seattle and the meetings in Porto Alegre have begun to demonstrate a counter-hegemonic and planetary challenge to capital.

At issue in this clash of globalizations are the mechanisms and consequences of neo-liberal globalization and in particular the role of international organizations, the G7 and globalizing élites. The latter are perceived as part of the solution to the problem of global inequality by Davos Man. By contrast they are seen as to be orchestrating policies and initiatives associated with the interests of dominant corporate capital by the people at Porto Alegre: that is they are part of the problem.

Thus, whilst the resistance to capital may have reactionary and regressive dimensions, there is a new form of progressive politics that is emerging on a world scale that is broader than proletarian vanguardism and that unites a wide range of popular forces around some of the issues that relate to the following proposition: "The issue is no longer that capitalism is showing signs of collapse and socialism is around the corner. What is failing today is not capital but the capacity of society and nature to support its discipline" (Pijl 1998: 49). Together, these contradictions contribute to what might be

⁹ Paul Hawken, 'The WTO: Inside, Outside, All Around The World', [<http://www.co-intelligence.org/WTOHawken.html>] (26 April 2000).

called a global or ‘organic crisis’ that links together diverse forces across and within nations, specifically to oppose the ideas, institutions, and material power of disciplinary neoliberalism.

The lack of legitimacy associated with neo-liberal globalization explains why the global struggle is now increasingly mediated by *trasformismo* - attempts by ruling classes and élites to co-opt and incorporate opposed political forces and their intellectual leaders in order to make their power more legitimate and sustain the prestige of their regimes.

Whether these strategies of *trasformismo* can succeed against a growing critical mass of forces mobilizing against new constitutionalism and disciplinary neo-liberalism is now an open question.¹⁰ However, it would be unwise to underestimate the scope and depth of the problem for the forces challenging the G7 nexus and disciplinary neo-liberalism: a wide series of “productive constraints” have been institutionalized.

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¹⁰ On the question of *trasformismo* and the World Bank’s approaches to governance and gender to incorporate women’s movements see Gill (1998a).

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