THE NEW GEOGRAPHY OF PUBLIC LAW:
PUBLIC LAW AND 'TECHNOLOGIES OF TERRITORY' IN A POST-WESTPHALIAN WORLD

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Public law has been defined as the law that governs "the activity of governing [the state]."[1] But states are not found, they are created. And the quintessential act in the creation of a state is the transformation of a materially and culturally heterogenous geographic and material space into a normatively homogeneous – ie, 'isotropic' – "territory". The issue of how this act of transformation affects the functional dynamics and possibilities of public law in the modern state is virtually unexplored (although it was, of course, a considerable concern during the 18th century, as reflected in the work of Montesquieu and the designers of the American Constitution of 1787). This oversight is becoming increasingly problematic as the present period of 'globalization' is itself drastically transforming the character of a state's territory, and how it is created and constituted, in ways that some claim are destabilizing the whole project of public law.[2]

The paper will first catalogue the various devices that states commonly use to transform space into territory, devices that I (following others) call 'technologies of territory' — exploring in the process how these various technologies relate to one another in the context of the 'traditional' Westphalian state; how they are conceptualized by public law. It will then explore how 'globalization' is reconfiguring how these various technologies contribute to the construction of territory within the context of the post-Westphalian state, and how– in turn – public law responds or can respond to such disruptions.

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[1] Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), 153.
[2] Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010), 464-465.

I. A BRIEF HISTORY OF THE STATE

The state is a quintessentially spatial phenomenon. Its *raison d'être* is to convert material geographic 'space' – which is innately and essentially variegated – into a normatively homogeneous, or 'isotropic', geographic space known as a 'territory'.

Perhaps the best way to show the foundationally spatial character of the state is to look at its history. The first territorial state is generally said to have been that of France, which emerged in the late 15th century. Prior to its emergence as a state, the Kingdom of France was a typically feudal construction, in which the King of France bestowed *dominium* – the right to rule a particular plot of land and its inhabitants – on vassals in exchange for particular obligations to the realm, such as in the form of military service – what was known as enfeoffment. Crucially, the dominium bestowed by the king was absolute: **'**A baron is emperor in his barony [*Baro in sua baronia est imperator*]' was the way *dominium* was described in France and Southern Italy during the later feudal period**.**[3] Vassals could also subenfeoff parts of their feoff to others, who would in turn enjoy dominium against both the King and his more direct overlord. Moveover, the holder of a fief could owe service to multiple overlords, including overlords outside the King's realm. In sum, the feudal kingdom was actually an extended patchwork of absolute rulers linked together by particular obligations to the King.

The first 'state' is generally considered to have emerged in France at the end of the 100-years war. It was responsible for France's ability to finally push the English out of France for good after some 115 years of contestation for the throne of France. What distinguished this state from the prior feudal kingdom of France was the degree to which it was able to centralize power and authority in the King's administration. Vassals were no longer absolute rulers in their enfeoffed realms, in crucial aspects of public administration, particularly taxation and military command, the became firmly subordinate to the King's administration.

This development is generally attributed to one or both of two factors. One is the invention of artillery.[4] Prior to the invention of artillery, the military defence of the realm consisted primarily of garrisoning key cities. A garrisoned, walled city was virtually impenetrable to invading armies, who would generally have to break off engagement with the garrison as they ran out of food. By the 15th century, however, new forms of artillery gave invading armies the capacity to breach city walls. Garrisoning a city was therefore no longer an effective strategy for defence of the realm. Invading armies had to be engaged in open field, before they could reach and besiege key cities. This was done by setting up a line of fortresses along the border of the kingdom. These fortresses served two purposes. First, they provided warning of the encroachment of an invading army. Second, they sufficiently impeded the progress of the invasion so as to give the sovereign time to raise an opposing army and meet the invaders before they could get to the heart of the kingdom.

The other factor that allowed France to finally expel the English from its realm was the ability to maintain and field a standing and professional army that could rapidly respond to English incursion.[5] This was accomplished by King Charles VII, and required significant augmentation of the King's fiscal resources. This he was able to do by centralizing taxation,

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[3] Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800* (translated by Lydia G. Cochrane) (Washington, D.C.: Catholic University of America Press, 1995), 159.

[4] See John H. Herz, "Rise and Demise of the Territorial State," *World Politics*, vol. 9(4) (1957): 473-493.

[5] See Charles Tilly, 'War Making and State Making as Organized Crime' in Peter Evans, Dietrich Rueschemeyer and Theda Skocpol (eds), *Bringing the State Back In* (Cambridge University Press, 1985).

gaining authority not simply to levy taxes across the realm directly, but also gaining control over ecclesiastical revenues.

Both of these developments are early examples of what are sometimes referred to as 'technologies of territory', in that each introduced a particular kind of spatial homogeneity to the Kingdom of France. From a military perspective, defending borders rather than simply key cites meant that the military must now focus on defending the material space of the realm *per se* rather than simply on primarily defending certain, particular sites within that space. Similarly, the centralization of taxation meant that every particular place within the space of the realm was subject to the same tax system. It would no longer be the case that each fiefdom within the kingdom collected taxes in its own way and for its own public use.

Such homogenizations gave the king's realm a kind of stability and coherence that it lacked under the older, feudal system. Most significantly, it caused the kingdom to start to become associated with a particular material space and not simply with the personal authority (*dominium*) of a particular king — a space delineated by increasingly permanent borders and corresponding projections of military superiority and centralized administrative authority and control. This made the full space of the realm significantly more resistant to transfer from one kingdom to another (either via conquest or enfeoffment). It made the position of king the locus of authority and power, reducing the threat of political fragmentation caused by fiscally and militarily autonomous vassals competing with the king and with each other for power.

In sum, the territorialisation of the feudal kingdom gave that kingdom evolutionary advantages over non-territorialized kingdoms. Territorialization became the principal focus of what today we call statecraft, but which at the time was being called the Reason of State, and which by the end of the 16th century had evolved to mean how to establish, maintain, and enlarge the state as a "firm empire over a people".[6] A good demonstration of this evolution can be seen in comparing two of Europe's most influential treatises on 'statecraft' during the 16th century, in which the territorial authority of Jean Bodin's 'republic'[7] would replace the personalized authority of Niccolò Machiavelli's 'the prince'[8] as the focus of statecraft.[9]

As time progressed, new technologies of territory were added to the state's repertoire. The Peace of Utrecht, which ended the War of the Spanish Succession in 1713, by requiring French claimants to the Spanish throne to renounce their claims to the French throne (basically saying that the territory of Spain was to be forever distinct from the territory of France) introduced (to continental Europe, at least)[10] an incipient conception of nationality as a technology of territory, further homogenizing territorial space by associating it was a common and distinct cultural identity (ie, being Spanish as distinct from being French). This was followed, for example, by the invention of 'popular sovereignty' by the Americans in the late 18th century; the invention of territorial codification of the state's law by the French in 1804; the invention of nationalism by the French in the mid-19th century; and later by the invention of social citizenship at the turn of the 20th century.

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[6] Maurizio Viroli, From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics 1250-1600 (Cambridge University Press, 1992), 252 (quoting from Giovanni Botero, *Della Ragion di Stato. Con tre libri delle cause della grandezza delle Città* (published 1589)

[7] *Les Six livres de la République* [*The Six Books of the Republic*] (1576).

[8] *Il Principe* [*The Prince*] (published in 1532, but written ca. 1513]

[9] This is a bit simplistic.

[10] Arguably, the English had begun to identify themselves as a distinct peoples even prior to this, but not in the service of territorializing the English kingdom.

II. THE STATE AS TERRITORY

A. Territory as a Normatively Homogeneous Space

The Montevideo Convention lists territorialisation as an essential characteristic of a modern state. But what is the nature of this thing called 'territory' as it operates in the context of the state. It was noted above that territory can be thought of as a distinctly homogenized material space – what geographers call 'isotropic' space. But material space – particularly national material space – is never really homogenized. For example, some parts of it are urban, other parts are rural. Some part are industrial, other parts commercial. Some regions are heavily populated, other regions significantly less so. Regions can also be distinguished by the amount of wealth they have access to (ie, their 'embedded capital'); by their political influence; by their financial influence; by their dominant language or dominant religion; or by their food preference[11].

So what does it mean to say that a state's territory represents a distinctly 'homogeneous' kind of material space? (Note that there may be kinds of territory that work to constitute things other than state, so in this section, we will focus specifically on the characteristics of the kinds of territories that constitute states, not on the nature of territoriality per se.) First, and most important, a state's 'territory' is a normative rather than (simply) material kind of space. By this, I mean it is homogeneous insofar as a particular set of norms are concerned: such as norms governing the response to military incursion, for example; or norms relating to the collection of public revenue; or ideational norms that seem to constitute a particular kind of (national) identity or culture.

Second, as intimated above, this normative homogeneity only manifests along particular sets of norms. One does not find states whose territorialisation involves the homogenization of preference for chocolate over vanilla. But beyond this, things get complex, because while some vectors of normative homogeneity are probably common to all states – such as monopolization of the legitimate use of force, and the existence of a corpus of distinctly 'national' laws that apply supremely and uniformly across the full space of the state – different states will nevertheless also often employ different vectors of normative homogeneity. In some states, such as Ireland, homogenization of religion is an important technology of territory, in others it is not. In some states, such as the Soviet Union, or the People's Republic of China prior to the 1980s, homogenization of state control of the economy is (was) regarded as an important territorial technology, others it is not. Japan associates their state identities with a distinctly homogeneous national culture; Canada associates its state identity with a distinct cultural diversity. France and Germany constructed their respective national homogeneities in part via construction of national codes of civil law; in the United States, by contrast, the contents of the civil law – eg, contract law, property law, torts, family law – is fragmented into 51 different legal systems.

This diversity in the deployment of technologies of territory probably is a reflection of the particular functionality of such technologies. As described above, the success (persistence) of a particular technology of territory depends on its ability to contribute to the persistence of a

[11] Michael Weiss, *The Clustering of America* (New York: Harper & Row, 1982), 129 (describing a "mayonnaise line" dividing the United States). See also Geographic Research, Inc. (GRI), 'Visualizing Brand Preference: Mayonnaise,' available at https://geographicresearch.com/simplymap/2016/05/10/visualizing-brand-preference-mayonnaise/ (accessed 5 Nov. 2018).

particular state as a coherent normative phenomenon. Seen in this light, technologies of territory can be regards as evolutionary and not simply normative phenomena. Territorial-based military defence ended up contributing the state's territorial homogeneity, but that was not its original purpose – its original purpose was simply to better defend the kingdom from hostile artillery-laden armies. And more importantly, the historical persistence of that particular technology has been due overwhelmingly to its pragmatic success in defending the state from such armies. Due to difference in history, in 'culture' (ie, the social meanings that attach to particular phenomenon),[12] even in national economies,[13] different populations can attach the collective identities upon which their self-construction of the existence of their particular state is based to different aspects of their social or even material world. The question of which particular social norms and ideas become 'territorial technologies' and which do not is can be due simply to whether or not that norm just happens to contribute to the identity of the state so as to allow the state to continue to persist as a distinct conceptual entity.

B. The 'Technologies of Territory': Organic vs Synthetic Territories

Above, I noted that the homogeneity that defines territoriality is normative, and not *simply* material. This qualifier here is important, however, because some kinds of territorial homogeneities can have a material basis. This leads us to an important distinction between what, following Richard Ford, we might call 'organic' territories vs. 'synthetic' territories.[14]

Simply put, an 'organic' territory is one whose homogenizing norm is links to some distinct material characteristic of that territorial space. A synthetic territory is one whose normative homogeneity is not linked to any material character of the space. An example of an organic territory would a political territory delineated by a common religion, or by a common market: a common religion or market can create shared patterns of behaviour innate to that space that the state can and often make use of in establishing its own normative coherence. An example of a 'synthetic' territory would be various administrative territories that different states have set up on Antarctica. There is nothing innate to these particular spaces that distinguish one from the other materially. Their territories are simply products of arbitrary imperial assertion (as is the case with regards to the Austrialian Antarctic Territory) or simply administrative convenience (such as the American McMurdo Station).

Note that some kinds of territory have both organic and synthetic aspects to them, in the sense that some of their homogenizing norms will be synergistic on some underlying material homogeneity, while others will not. One such kind of territory is that of the state. In other words, states are invariable territories that have both organic and synthetic aspects. In this sense, it probably makes more sense to distinguish, not between organic and synthetic territories per se, but between organic and synthetic technologies of territory. When a state constructs it normative homogeneity out of an underlying religious homogeneity, the territorial technology that converts that religious homogeneity into normative homogeneity – such as that of a state religion – would be a relatively organic technology. Technologies that promote state homogeneity by setting out

[12] See the 'ancient constitution' of pre-industrial England.
[13] Inglehart.
[14] Richard T. Ford, 'Law's Territory (a history of jurisdiction)' (1999) 97 *Michigan Law Review* 843-930. My use of this dichotomy differs somewhat from Ford's. Ford seems to regard this distinction as primarily one of social construction. Here, I will present this distinction as one that can actually have material elements, hence my changing 'jurisdictions' into 'technologies'.

local, purely administrative jurisdictions so as to facilitate national bureaucratic homogeneity, such as was famously the case with many colonial regimes in Africa, would be examples of more synthetic territorial technologies. Also, the organic-synthetic distinction is one of degree rather than kind – ie, it is more accurate to think of a particular territorial technology as being more or less organic, more or less synthetic. Figure 1 presents a chart of relative common territorial technologies of state-building ordered from most synthetic to most organic.

In the context of the state, different technologies of territory are associated with different kinds of public law structures. Figure 1 also lists some of the more common public law structures that correspond to particular technologies of territory:

Fig. 1: Territorial technologies organized according to synthetic-organic distinction:

Technology	Public Law Manifestation
[most synthetic]	
Establishing coercive monopoly	= Criminal law
Boundary-setting	= Jurisdiction
Imperium	= Legislation; rule of law
Standardization	= 'Seeing like a state'
Bureaucratization	= Bureaucratization
Technocratization	= The regulatory state; 'juristocracy'
Political Citizenship	= Civ and pol. rights
Infrastructural power	= Auditing
Economic integration	= Economic constitutionalism
Politics	= Political constitutionalism
Visibilization	= 'Political jurisprudence'
Legitimization	= Constitutionalization
Hegemonization / suasion	= (?)
Dominium / social citizenship	= Politics; econ and social rights
Mapping	= Federalism, devolution, subsidiarity
[most organic]	

Some observations about these territorial technologies:

- The state's *monopoly of coercion* is clearly synthetic – it's effectiveness is completely independent of the character of the territory which it looks to create.
- *Boundary setting* – ie, demarcating lines that delineate the limits of a territory, can be organic to the extent those lines correspond with some geographic distinction. But the frequently are wholly synthetic. The boundaries of states that were formerly colonies are frequently synthetic, as are boundaries of internal administrative subdivisions (like counties in the context of mid-western American states).
- '*Imperium'* is Terence Daintith's term for command, and includes commands that are in the form of legislation. Imperium is synthetic in the sense that the force and authority of a state command or law is not dependence on the character of the territory. But its effectiveness can be, which can give it some degree of organic functionality.
- *Standardization* can be seen as a particular form of imperium. The classic account of standardization as a technology of territory is found in James Scott's *Seeing Like a State*,[15] which describes the ways in which states standardizes physical and social space in ways that make it visible to remote regulators. This emphasis on remote regulation gives this technology a distinctly synthetic quality, as Scott himself explores.

[15] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the human Condition Have Failed* (Yale University Press, 1998)

- *Technocratization* refers to the use to technocratic knowledge to structure homogeneity. An example would be the regulatory state, which seeks to insulate technocratic regulatory endevours from corrupting 'politics' by creating politically 'independent' regulatory agencies (aka IRA's). Another example would be what Ran Hirschl termed 'juristocracy' (rule by judges), to the extend judges justify their decisions by claiming those decisions are dictated by 'the law'. Because their authority is derived from appeal to abstract principles whose validity is not specific to a particular geography, technocracy is largely synthetic. But at the same time, actual implementation of these principles can takes on a local character, which when it happens gives it a more organic cast.
- With *functional differentiation* is a higher order to technocratization, in that it seeks in integrate the interaction of different technocratic functions into a single institutional structure. The greater complexity of such integrated institutions causes them to be grounded somewhat more deeply into their local, due to their reliance on what Clifford Geertz termed 'local knowledge'.
- I see *political citizenship* is a largely synthetic technology. It's ideological precepts are largely cosmopolitan in character, and thus do not recognize the different material conditions that can underlie different geographies.
- *Infrastructural power* is a complex localization of functional differentiation. As introduced by the sociologies Michael Mann, it involves the routinization of complex administrative interactions, such as those generated by functional differentiation.[16] Routinization of interactions between institutions is a highly localized dynamic, one akin to what geographers call 'agglomeration' – the generation of complex knowledge spillovers from face-to-face interactions that are unique to a local geography. This makes it somewhat organic.
- With *economic integration* we move into a significantly more organic technology of territory. Economic integration homogenizes its territory by creating a dense web of economic interdependency that links people and their material ambitions to others within the territory to a degree they do not enjoy with persons outside their territory. A good example of the organic capacities of economic integration can be found in its effect on generating a 'political Europe' ca. 1952-1992 (as for what happened after 1992, see 'dominium' below).
- As the famous American politician Tip O'Neill famously said, "all politics is local" – which also makes it organic.
- *Visiblization* (my term for what results from what Michel Foucault famously referred to as 'a grid of intelligibility') is a process by which people gain a wholistic understanding of the workings of a particular system, not simply what its parts are, but how they interact to generate outcomes. In this sense, visibilization is similar to what Clifford Geertz famously called 'local knowledge', and as described by Geertz,[17] is therefore intrinsic to a particular geographical space, but because it is more generalized within a local community, it is even more tightly bound to national space than is infrastructural power,

[16] Michael Mann, 'The Autonomous Power of the State: Its Origins, Mechanisms and Results' (1984) 25 *European Journal of Sociology/Archives européennes de sociologie* 185-213.
My notion of infrastructural power differs somewhat from that of Mann, in that Mann associates it primarily with national control, whereas I associate it more with more localized administrative adaptation and agglomeration of national policy.
[17] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 2008).

in which local knowledge is limited to a particular bureaucratic structure and to smaller geographical entities.

- *Legitimation* is a higher stage of visibilization: once one gains a wholistic knowledge of a local system, they can go further and attach affectional allegiance to that system to the extent they regard it as a being a 'good' thing.
- *Hegemonization* (see Antonio Gramsci[18]) and *suasion* (see Karen Yeung[19]) refer to the tendency of a population to innately trust their government. It is like legitimation, except (1) its allegiance attaches to a particular political class rather than to a particular political system; and (2) it seems to be a more natural and spontaneous (unreflective) phenomenon, unlike legitimation, which seems to be more rational and reflective. The unreflective character of hegemonization / suason makes it more organic, since it makes it harder to detach such affections from the territory which gives rise to them.
- '*Dominium*' is Terence Daintith's term for the state's ability to redistribute wealth and resources within it territory and among the population within that territory. It is the next step beyond market integration, in that it is often used to compensate regions and populations who markets rendered more materially and politically peripheral, thus generating territorial allegiance from those portions of the territory and population that do not benefit as much (are who might be affirmatively harmed) from national market integration. The importance of dominium can be seen from the experience of post-Maastricht political Europe, which saw its political ambitions stagnate, if not regress, when it sought to undertake fiscal and currency homogeneity without putting in place policies to redistribute wealth in order to support those more peripheral countries of Europe that were (are) being left behind by that such homogenization.[20]
- *Mapping* refers to efforts to identify the spatial reach of particular kinds of material and social phenomena, so that territorial governance can take such spatial variegation into account in constructing more complex forms of territorial homogeneity by using what HLA Hart famously termed 'secondary rules' (the rules governing dominium would be an example of an effort to generate territorial homogeneity using secondary rules). Mapping is almost completely organic in character, because its whole *raison d'être* lies in identifying and locating material differences attached to local spaces. In a sense, it is the organic obverse to boundary-drawing.

III. GLOBALIZATION AND ITS IMPLICATIONS FOR THE STATE

A. The Synthetic-Organic Distinction as a Product of Industrialization: A Polanyian Explanation

Appreciating the difference between organic and synthetic territorial technologies, and how some of the more predominant technologies attach – tightly or loosely – to each category, allows us to make two important observations about the territorial character of the state that will prove crucial to our understanding about how transnationalization is effecting public law. The first of these is historical: simply put, when states first emerged in Europe and North America, they relied

[18] See Douglas Litowitz, 'Gramsci, Hegemony, and the Law' (2000) *Brigham Young University Law Review* 515.
[19] Karen Yeung, 'Government by Publicity Management: Sunlight or Spin?' (2005) 2 *Public Law* 360-383.
[20] See Michael Wilkinson in Dowdle and Wilkinson (eds.), *Constitutionalism Beyond Liberalism*.

primarily on the use of synthetic territorial technologies. More organic territorial technologies only become prominent features of state territorial homogenization with the onset of the 'long 19th century' (which dates from the French Revolution in 1789 to the beginning of the First World War in 1914). The sequencing is not absolute, mind you, but it is prominent enough to be significant. A second observation, which will turn out to be quite relevant to the first, is that the organic-synthetic distinction shows strong parallels with the distinction famously drawn by Karl Polanyi between commodified economies and socially-embedded economies[21]: there seems to be a distinct resonance between organic territorial technologies and social market embeddedness on the one hand and synthetic territorial technologies and commodification on the other. As we shall see, the confluence of these two observations lies in a hypothesis that the rise in the use of organic territorial technologies in bringing territorial homogeneity to the state was due to the onset of industrialization among the countries of the North Atlantic.

First, the use of organic territorial technologies to construct the state's territory seems to be a relatively recent discovery, although there are outliers. Prior to the 19th century, state territories were constructed primarily using synthetic technologies. As described above, monopolization of coercion, boundary drawing and imperium were the principal technologies used to construct the territory of the first, French state under Charles VII. According to James Scott's germinal study, *Seeing Like a State*, "efforts to simply or standardize measure recur like a leitmotif throughout French history."[22] England standardized the intrinsic value of the pound sterling in 1561 (which, as described by Fernand Braudel was essentially an act of economic nationalism).[23] Public bureaucracy emerges in the 16th century, "as a necessary corollary to the establishment of absolute sovereignty."[24] The use of technocracy as a state-building device can be dated at least back to the German Cameralists of the 18th century.[25]

When it comes to political citizenship, perhaps the first relatively organic territorial technology, T.H. Marshall famously sees it as emerging only in the early 19th century.[26] Michael Mann locates the emergence of infrastructural power in the mid-19th century. Braudel argues that the first truly national market had emerged in England by the early 18th century. But the first attempt to *consciously* construct a national market as a device for territorializing the state is, I would argue, found in the Commerce Clause of the American Constitution of 1789.[27]

Visibilization, in the form of what Martin Loughlin calls 'political jurisprudence', is an outlier, as Loughlin finds examples of this kind of territorialisation in Bodin's *Les Six livres*, which as we saw was written in the latter part of the 16th century. The modern discourse of constitutional legitimacy probably begins with the American Revolution, and in particular with the Declaration of Independence written in 1776. Nationalism is largely an invention of the 19th

[21] See Karl Polanyi, The Great Transformation: The Political and Economic Origins of our Time (*New York: Farrar & Rinehart Inc*., 1944).
[22] James C Scott, *Seeing Like a State*, 29.
[23] Fernand Braudel, *Civilization and Capitalism 15th-18th Century*, vol. 3: *The Perspective of the World* (Siân Reynolds tr, University of California Press 1992) 361-365.
[24] Tom Burns, 'Sovereignty, Interests and Bureaucracy in the Modern State,' *The British Journal of Sociology* 31(4) (1980): 491-506, at 419.
[25] See Martin Loughlin, *Foundations*, 417-422.
[26] T.H. Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950).
[27] Dowdle, 'Competition Law as Public Law'.

century.[28] And the use of dominium and redistribution to construct territorial identify, again as argued by T.H. Marshall, is basically a 20th century phenomenon.[29]

Second, the distinction between synthetic and organic territorial technologies seems structurally resonant with the famous distinction drawn by Karl Polanyi in *The Great Transformation* between 'commodity economies' and 'socially-embedded economies'. In elucidating this distinction, Polanyi starts by distinguishing different forms that an economy can take based on how they distribute resources rather than on how they produce goods. He defines an economy as "an instituted process of interaction between man and his environment which results in a continuous supply of want-satisfying material needs."[30] Viewed from this perspective, he argued, it is inaccurate to conflate all economic activity into acts of exchange driven by the profit motive, as does the orthodox study of economics. This is one way of distributing resources so as to supply 'want-satisfying material needs', but there are other ways as well, such as taking turns doing some particular form of work ('I cook dinner tonight, you cook tomorrow night'), or helping out a needy compatriot (perhaps with the understanding that she or some other compatriot will help you out when you are in need). All of these, according to Polanyi, constitute 'economic activity', although economic activity that is the product of a different kind of economic system than that which is the focus of orthodox economics.

In order to effect distributions that satisfy material needs, an economy must be embedded in social relations, in the form of operating through particular social institutions. Along these lines, Polanyi distinguishes between two broad kinds of 'economies'. One kind operates through social relationships that are already in society, institutions such as family and other forms of collective group membership. These are what Polanyi called 'socially-embedded economies.' The kinds of economies that are the subject of orthodox economics, by contrast, operate as socially-autonomous institutions in which "social relationships are embedded in the economic system"[31] rather than the other way around. These are the social relationships associated with the classical *homo economicus*, the methodologically-individualist, rational, profit driven creatures of modern capitalism. Polanyi refers to this kind of economy as a 'commodity economy', because it reduces social relationships to exchanges driven by impersonalized, monetarized values.

As a commodity economy commodifies ever greater swaths of social activity, it threatens a society's ability to perpetuate the particular non-commodified social relations that give it its utility and appeal. Society will then frequently respond by creating new forms of non-commodified social relationships that counteract the socially-destructive effects of commodification. This dynamic of (commodified) action - (societal) reaction is what Polanyi famously termed the 'double movement'.[32] For example, one of the more disruptive forms of commodification, according to Polanyi, was the commodification of labour, which destroyed the ability of societal relationships to generate 'fairer' distributions of the want-satisfying resources generated by work. Society then responded by creating new kinds of non-commodified social interactions – in the form, for example, of factory laws and, later, unionization – that restored the

[28] See E.J. Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge University Press, 1990).
[29] T.H. Marshall, *Citizenship*.
[30] Karl Polanyi, 'The Economy as Instituted Process', in Mark Granovetter and Richard Swedberg (eds.), *The Sociology of Economic Life* (Westview 1982), 33.
[31] Polanyi, *Great Transformation*, 57.
[32] See Eppo Maertens, 'Polanyi's Double Movement: A Critical Reappraisal' (2008) *Social Thought & Research* 129-153.

collective security in access to want-satisfying resources that many had lost when their labour had been commodified.

There is a distinctive structural resonance between synthetic territorial technologies and commodity economies, on the one hand, and organic territorial technologies and socially-embedded economies on the other. Like an economy, a territory is constituted out of structures of social relationships. It is just that in the context of territory, these structures serve to generate particular kinds of social homogeneity, rather that particular distributions of want-satisfying resources. Seen in this light, a 'territorial technology' is a particular structure of social relationships, in the same way that an economy is, in Polanyi's way of thinking, a particular structure of social relationships. Like the social relationships that construct socially-embedded economies, the social relationships that construct organic territorial technologies are linked to the underlying, pre-existing social structures of territorial society in some way. And like the social relationships that construct commodity economies, the social relationships that construct synthetic technologies are autonomous from those embedded in the society (or societies) of the territory.

Seen in this light, when a state seeks to territorialize using synthetic territorial technologies, the social relationships out of which these technologies are constructed can threaten to supplant those out of which at least some of the societies of the territory are constructed. To take a simple example, a centralizing command by the state to do something in a particular way (ie, an act of *imperium*) could well work to override alternative local ways of doing things that in turn disrupts that society's more traditional ways of sustaining itself[33] – such as by effectively distribute want-satisfying resources – in the same way that the commodification of labour creates particular social relationships that override a society's traditional ability to sustain itself by effectively distribute want-satisfying resources.

For this reason, deployment of synthetic technologies to construct territory are likely to provoke a double movement on the part of that territory's local societies. This double movement can take one of two forms. One way is where different local societies in the territory respond to the disruptions of state territorialization in different ways, resulting in a diversity of localized double movements throughout the state's territory. (An example of this is the different forms that populism took in different parts of the United States in response to early industrialization.) But this in effect means that every act of synthetic territorialization results in a counter-reaction of deterritorialization in some other aspect of social activity. This, in turn, constrains a state's ability to generate, sustain and empower itself through deployment of different processes of territorialization. (So, for example, the different forms of populism lead to regionalization and impeded the nationalization of the economy.)

Alternatively, the double movement provoked by deployment of synthetic territorial technologies can occur at the level of the state itself. This is done through the deployment of what we have been calling organic territorial technologies. Here, the state seeks to replicate at the national level the kinds of social relations that local societies use to sustain themselves, and which are being threatened by synthetic territorialization. Such a replication at a national level represents its own form of territorialization, and hence its own form of territorial technology. But because these technologies replicate *societal* relationships, these technologies are themselves socially-embedded, just as are Polanyi's 'socially-embedded economies'. And as we saw, it is this social embeddedness that give organic territorial technologies their distinguishing character.

[33] See James C. Scott, *Seeing Like a State.*

(Thus, in the United States in the early 20th century, we see regional-based countermovement of populism being superseded by the distinctly national countermovement of progressivism.)

Seeing how the relationship between synthetic and organic territorial technologies replicates the relationship between commodity and socially-embedded economies gives us a plausive explanation not only as to why state deployment of organic territorial technologies generally came later in the evolution of the state, but why it came at the particular time it did. Simply put, the state's need to deploy organic as opposed to synthetic territorial technologies was likely catalyzed by the industrial revolution. One of the effects of industrialization is that it geographically concentrates the production of wants-satisfying material resources. This had two significant consequences for the state. As well described by Polanyi himself, the first was to catalyze the virtually incessant expansion, both in terms of scope and scale, of commodity economies. The other was to cause these commodified economies to organize themselves at the nation level rather than at more local levels, resulting in the creation of what today we call 'national economies': ie, a coherent economic system, operating at the level of the nation state, whose modes of material production and systemic reproduction operate autonomously from the local economic dynamics that that national system subsumes.[34]

The catalyzation of commodity economies triggered by industrialization in turn catalyzed need for double-movement responses on the part of society. But because these new commodified economies were national in scale, more localized double movements were of decreasing effectiveness. For example, national commodification of labour could not be counter-balanced by local acts of unionization — labour-commodifying forms of production would simply relocate to some other locale in which unionization was unlikely to occur, thus leading to a regional 'race to the bottom' insofar as socially-restoring counter-movements to labour commodification are concerned. In order to counter-act the social dislocations caused by national-level industrialization, the counter-acting unionization has to also operate at a national level.

With this in mind, many of the public law devices that we above associated with more organic territorial technologies can be seen to be national-level double movements to social dislocations caused by national-level economic commodification. These include, most obviously, dominium, particularly as it is manifest in social citizenship and regional wealth transfers[35]; hegemony(as described by Gramsci) and 'economic nationalism'.[36] Other double movements to industrialization in the context of public law include bureaucratization of the central government; the growth of electoral forms of democracy (at least in the United States and UK),[37] and correspondingly visibilization (ie, 'transparency') as a legitimating ideal.[38]

As the organic aspect of the state's territoriality grows, it gave the state a distinctly "paradoxical" character. Although well recognized, this character has been given a number of different vocabularies. Michael Oakashott famously referred to it as a tension between the state as a device for insuring *equal* treatment and opportunity for its citizens, what he referred to as the

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[34] See Fernand Braudel, *The Perspective of the World*, 365-369.
[35] T.H. Marshall, *Citizenship*.
[36] Eric Helleiner, 'Economic Nationalism as a Challenge to Economic Liberalism? Lessons from the 19th Century' (2002) 46 *International Studies Quarterly* 307-329.
[37] See Michael W. Dowdle, 'Public Accountability in Alien Terrain: Exploring For Constitutional Accountability in the People's Republic of China,' in Michael W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2005).
[38] See Michael W. Dowdle, 'Public Accountability: Conceptual, Historical, and Epistemic Mappings' in Michael W. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2005).

state as a *societas*; and the state as a device for pursing a collective goal, what he referred to as the state as a *universitas*.[39] More recently, Martin Loughlin and Neil Walker have described this paradox as a paradox involving the state as a product of a constraining constitutional architecture (what they call 'constitutional form') and the state as a product of an emancipating public consciousness (what they call 'constituent power'),[40] a paradox that in the American context is famously been played out in the tension between commitment to 'popular sovereignty' and now entrenched practice of 'judicial review'. I also suspect that the public-private divide also emerged in response to the state's gaining an organic character. The public-private divide emerges in both the United Kingdom and more particularly, in the United State in the 19th century in significant response to the political dislocations of industrialization.[41]

This was also the time when the notion of a public law, as contrasted to private law', comes to be identified.[42] And I think there is good reason to believe that the modern understanding of public law arises out of an effort to 'regulate' the synthetic and organic aspects of the state so as to link them together into a social coherence (To me, this is the principal takeaway from Martin Loughlin's magisterial study of the intellectual history of public law, *Foundations of Public Law*). By 'regulate' in this sense, I mean not simply governance per se, as in the 'regulatory state', but the maintenance of balance and coherence among different and sometimes competing organizational logics, such as is the case with 'homeostatic' regulation[43] (what the French term *régulation* as distinguished from *réglement*).

B. The Effect of Globalization on the Organic Aspect of the State

Today, the archetypical vision of public law that emerged in order to make sense of that the industrial state as it emerged in the 19th century and achieved fruition in the 20th century remain our lode star in thinking about public law writ more generally. But as many have noted, the last 30 years in particular have witnessed a global evolution that runs against the orthodox conception of the state, and of the public law that visibilizes and perpetuates that kind of state. Simply put, the phenomenon of 'globalization' consists of processes that corrode the archetypical state's territoriality, and in particular, the *organic* aspects of that territoriality. These processes are also significantly disrupting our conceptualization of public law.

To review: we have explored how states are constructed out of bounded, contiguous physical spaces that are normatively homogeneous from a regulatory perspective. This regulatory homogeneity manifests across a number of dimensions, and includes both synthetic and organic forms of homogeneity. But physical space is only one kind of space. We can extend the notion of space to include social space – a 'space' defined, not by physical borders, but by social borders delineated by the presence or absence of particular social practices or relationships. These can include economic practices (see, eg, 'economic geography'), cultural practices (see, eg., 'cultural geography'), even spaces of conflict (see, eg, geographies of war).

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[39] Michael Oakeshott, *On Human Conduct* (Clarendon Press, 1975), 185-326.
[40] Martin Loughlin and Neil Walker, 'Introduction,' in Martin Loughlin and Neil Walker 9eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007)
[41] See, eg, E.P. Thompson, *The Making of the English Working Class* (Britain); see generally Morton J. Horwitz, 'History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.
[42] See Denis Barenger in Wilkinson and Dowdle, *Questioning the Foundations of Public Law*. This observation is problematic in the case of the US, where a distinctive constitutional jurisprudence emerges prior to industrialization.
[43] See generally Michael W. Dowdle, 'Competition Law as Public Law.

Moreover, these social spaces can also be made normatively homogeneous in one of more dimensions by regulation.

One way to conceptualize globalization is as the formation and strengthening of social spaces that are not constrained by the physical boundaries of states. Many of these spaces have become regulated, giving rise to the phenomena of 'transnational law'. As many have noted, the growth in transnational law impinges on the normative authority of the state, to the extent that transnational regulatory norms sometimes diverge from and end up contradicting national regulatory norms. This corrosion of the territorial authority of the state has been termed 'the hollowing out of the state',[44] and – according to some – is resulting in a 'post-Westphalian' transnational order in which state sovereignty is increasingly conditioned rather than absolute.[45] Others, on the other hand, regard such prognostications as overly hyperbolic, arguing that even in the face of globalization and transnational law, the autonomous state remains at the center of the international system, at least for the present.[46]

Obviously, this 'hollowing out of the state' – even if not as extreme as sometimes projected – would have significant implications for public law. But there is considerable disagreement about what those implications are. Some, such as Chris Thornhill and Mattias Kumm, are optimistic, believing that transnationalization can or can be used to promote state public-law protection of human rights and political liberalism.[47] Others, perhaps most notably Martin Loughlin and Michael Wilkinson, approach this development with distinct concern, fearing that transnationalization will upset public law's essential ability to regulate the boundary between the public and the private.

Here, it will be argued that looking at both transnational law and public law from the spatial perspective we developed above can give us new and more nuanced understandings about how globalization is likely to be impacting the state and the human project of public law.

Recall that the state's territoriality is constructed out of both synthetic and organic territorial technologies. But the synthetic-organic distinction is not unique to territories. Above, we noted that every regulatory space is identified by some or several dimensions of normative homogeneity. And this means that every regulatory space can be characterized as having synthetic and / or organic aspects, to the extent that its regulatory norms resonate with the particular social practices that delineate its social-regulatory space.

In order to better see this, we might deconstruct the process of globalization a bit. Somewhat simplistically put, globalization is being driven primarily by four dynamics – two structural, two ideological. These are:

- The globalization of economic activity, particularly in the areas of capital and trade: this is the most obvious driver of globalization. Examples of transnational regulatory frameworks generated by this dynamic include international arbitration, global trade law, the International Competition Network, and the International Financial Reporting Standards (IFRS) issued by the International Accounting Standards Board.
- Growth in transnational functional differentiation: the growing complexity of the transnational environment causes transnational regulation to increasingly disaggregate

[44] The term is most famously associated with Roderick Rhodes. See RAW Rhodes, 'The Hollowing out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 *The Political Quarterly* 138-151. But Rhodes actually deployed the term to describe a somewhat different dynamic.
[45] See Richard Falk, 'Revisiting Westphalia, Discovering Post-Westphalia' (2002) 6 *The Journal of Ethics* 311-352.
[46] See Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Harvard University Press, 1998).
[47]

into a diversity of functionally differentiated actors and regimes. The most prominent example of this is found in the growth of intergovernmental networks, transnational regulatory networks comprised of functionally equivalent governmental agencies and actors – including regulatory agencies, parliamentarians, judges – coordinating and standardizing regulatory activities across national border: examples include the International Competition Network (ICN) and INTERPOL.

- Political cosmopolitanization: This refers to a growing perception that the national or cultural distinctions that are used to differentiate populations are irrelevant to questions of how to best promote the human condition. Political cosmopolitanism is most commonly associated with the ideology of political liberalism and environmentalism, but there are other variants -- such as developmentalism (as an alternative to political liberalism) and (democratic) socialism.
- Neoliberalism (ie, economic cosmopolitanism): This refers to a belief in the existence of a 'natural' or 'perfect' market ideal type and that humanity will be better off, in terms of wealth generation at least, if transnational markets in particular conform as much as possible to that ideal type.

Each of these dynamics has a distinctly organic quality to it. Ideological dynamics are innately organic, since they derive from collective belief structures. Economic integration is organic in that it binds its participates into a material commonality of economic interdependence. Functional differentiation is organic in that it addressed an underlying functional commonality that defines its regulated community. Note that this is not to suggest that these dynamics are 'organic' with regards to *all* the populations that they significantly effect. The effect of neoliberalism on transnational labour activism is synthetic, even if neoliberalism is organic to transnational economic and financial policymakers. The point here is simply that transnational law tends to emerge out of the organic experiences of *some* significant transnational community.

But even with this last caveat, the innately organic quality of these dynamics argues that globalization primarily affects the more organic aspects of a state's territoriality. The state's organic territorial technologies are those that will be most directly challenged by the often contrary, organic dynamics of globalization, as schematized in Figure 2 below.

Fig. 2: Effect of Globalization on the Territorial Technologies of the State:

Technology	Disruption from Globalization
[most synthetic]	
Establishing coercive monopoly	= nil
Boundary-setting	= nil
* Imperium	= greater variegation makes rulemaking less effective
* Standardization	= greater variegation makes standardization more complex
Bureaucratization	= nil
Technocratization	= nil
Political Citizenship	= nil
Infrastructural power	= nil
*Economic integration	= neoliberalism impedes economic nationalism
Politics	= nil
*Visibilization	= greater complexity from transnational functional differentiation makes visibilization more difficult
*Legitimization	= greater ideological diversity underlying cosmopolitanism makes legitimation more difficult
*Hegemonization / suasion	= cosmopolitanism lessens state's hegemonic appeal
*Dominium / social citizenship	= greater dependency on transnational capital causes states to forego public spending
*Mapping	= greater complexity of transnationalization mapping more complex
[most organic]	

*** = Being significantly disrupted by globalization**

Some explication: Skeptics of 'post-Westphalianization' generally focus on the continued force of more synthetic aspects of the state's territorial power in justifying their scepticism. Most notably, they point to the fact that even insofar as transnational regulatory regimes are concerned, the states are ultimately the ones who decides whether or not the norms of these regimes will be enforced. This, of course, is a reference to the state's coercive monopoly, its powers of imperium, perhaps the most synthetic of the state's territorial technologies. And while acts of boundary setting are formally governed, at least in theory, by norms of public international law. Those norms have little impact on actual state practice, except perhaps where maritime boundaries are concerned. Issues of bureaucratic design (as opposed to bureaucratic

function) operate outside the reach or concern of the four globalizing dynamics identified above, and I see no evince of transnational regulatory systems having much impact on domestic institutional architecture. Technocratization may actually be catalysed by globalization, and in particular by neoliberal visions of the scientific character of economic decisionmaking. Similarly, practices of political citizenship – particularly where they already exist – may be catalysed by transnational ideologies of political cosmopolitanism. This is an example of a phenomenon that we will explore further below regarding how organic technologies operating and the transnational level can paradoxically promote the use of synthetic territorial technologies at the state level. The state's infrastructural power seems largely unaffected.

On the other hand, more organic territorial technologies seem to be significantly more effected by the dynamics of globalization, and these tend to be what post-Westphalian advocates focus on. Most particularly, they focus on the increased difficult states have in developing economic policies suited for their particular circumstances, due to their increasing structural need to conform to the expectations of international business. Visualization is compromised by transnational dynamics of functional differentiation – many have noted that the complexities of state involvement in intergovernmental networks compromise transparency. This compromise in transparency also compromises state legitimacy, as can the interpenetration of a diversity of political and economic ideologies introduced or catalysed by transnational political and economic cosmopolitanism. This diversity also compromises the state's power of suasion and hegemony, since it can cause popular ideational allegiances to migrate to outside ideas and institutions. As many have noted, powers of dominium and social citizenship have been significantly compromised by economic globalization. Global economic actors prefer to avoid spaces that have strong national redistribution regimes, since such regimes are generally result in a diminution of profits caused by higher taxes or other forms of extraction necessary to make such regimes work. Such actors thus gravitation to countries will less pronounce redistribution regimes, and this compels countries, who are increasingly dependent on transnational economic actors for their economic sustenance, to compete for these actors by reducing redistributive policies as much as they can. Social mapping is made more difficult by the greater territorial variegation and fragmentation that the complex diversity of transnational regulatory regimes introduces into a state's territorial space.

Two things to note. First, to say that transnationalized dynamics are organic in the context of transnational law is not to say that they are organic in the context of state public law. And related, to say that organic aspects of transnationalization are displacing organic elements of public law is not to say that they are replacing those elements with other kinds of organic regulation. The effect of the organic displacement is at the state level is the fragmentation of the state's territorial integrity. This is because the organic appeal of a particular transnational regulatory framework will very among different parts of the population. Those particular functional and social interests who find it attractive – business interests in the context of neoliberalization, for example – will gravitate to the transnational organic ordering and away from the state's own organic ordering. But not all such interests will be so attracted. Labour interests, for example, are unlikely to be attracted to neoliberalisation. What this means, in the context of public law, is that the public law's way of balancing these different interests into a organic territorial coherence – such as collective bargaining in the above example – will no longer be effective. In sum, globalization will cause the state will lose some of its organic coherence, but will not end up replacing that coherence with some other kind of organic coherence.

Equally important, we might note that there are a couple of outliers insofar as the effect of transnational law on the state's territoriality is concern. On the synthetic side, transnational law, in fragmenting state territory, renders rule of law less effective – the more fragmented a territory, the more likely it is that a particular abstract rule will have different social consequences in different locales. On the organic side, there is good reason to suspect that transnational fragmentation catalyzes politics – since politics is the principal way that a constitutional system addresses variegation that cannot be alleviated by other means. As we shall see, this has important implications for how public law might respond to the general loss of its organic territorial integrity.

Globalizations asymmetric impact on organic as opposed to synthetic territorial technologies as helps explains the different responses to the effect of globalization on public law, described above, as between Thornhill and Kumm on one hand and Loughlin and Wilkinson on the other. Thornhill and Kumm are political liberals. As we saw, political liberalism is a largely synthetic territorial technology, since it does not look to take account of material particulars in the state's territorial space. Since political liberalism is a synthetic territorial technology, it is not impeded by dynamics of globalization – in fact, it can be catalysed by globalization to the extent that political liberalism is seen by both these scholars as cosmopolitan in both its global appeal (Kumm) and its transnational normative reach (Thornhill).

Loughlin and Wilkinson, by contrast, focus more on the organic character of the state. For Loughlin, this is expressed in the emphasis he places on the critical role that politics, in the form of droit politique, plays in the construction and maintenance of the constitutional order. Similarly, Wilkinson also embraces politics, which he argues is as an essential counterbalance to the social dislocations caused by neoliberalism. As we saw above, in contrast to political liberalism, politics is a distinctly organic territorial technology, and one that runs against the cosmopolitanism that is promoted by globalization, which explains why Loughlin and Wilkinson are discourages by transnationalization, whereas Thornhill and Kumm are encouraged by it.

IV. IMPLICATIONS FOR THE FUTURE OF PUBLIC LAW

Exposed to the geographical disruptions of globalization, public law systems can respond in at least three ways. These responses, I suspect, are likely spontaneous in character. And these responses are likely to be shaped to significant extent by the geographic character of the public legal system's territory. Note also that a single domestic public law system make have different responses in different social applications.

A. Transnationalizing the Domestic Public Law System

One response we might call 'transnationalization'. This is a process in which the public law system uses on transnational norms and process for maintaining the organic coherence. An example of this is the 2013 Spanish case of *Aziz v Catalunyacaixa*.[48] The facts of the case, as described by Chantal Mak, are as follows:

> In order to finance the purchase of a family home, Mr Mohamed Aziz had concluded a loan agreement with the Catalunyacaixa bank, security for which was provided by a

[48] Case C-415/11 *Aziz v Catalunyacaixa*, CJEU 14 March 2013, nyr.

> mortgage on the house. When Aziz lost his job, got into financial problems and failed to pay the monthly instalments of the loan on a regular basis, the bank made use of its contractual option to terminate the contract earlier . . . and claim back the *total* amount of the loan. . . . Consequently, Aziz lost ownership of the house and was left with a remaining debt to the bank amounting to 40,000 euro. In order to put the bank in possession of the house, finally, the Aziz family was evicted from the property.[49]

The Spanish judge, José María Fernández Seijo, ruled for the bank, and then promptly referred the case to the Court of Justice of the European Union ('CJEU'), who ruled that the ruling, and the statute it was based on, infringed on Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

What is interesting about this case is that referring the case to the CJEU, Judge Seijo not only expected the CJEU to overrule his ruling, but was affirmatively wanting it to do so. He regarded the practice of Spanish banks along these lines to be unfair, and believed that a ruling from the CJEU along these lines would compel Spain to take steps to address this kind of practice:

> In an interview following his judgment in the Aziz case, judge José María Fernández Seijo . . . explained the reasons for referring a preliminary question to the CJEU. Firstly, according to the judge, between 2000 and 2009 banks did not sufficiently inform clients of the terms of mortgage contracts. Secondly, unlike many other European countries, Spanish law did not grant debtors a second chance, helping them to return to a normal financial situation.
>
> Since Spanish law offered no effective remedies to clients like Mr Aziz, who had accepted the bank's unfavourable terms, judge Fernández Seijo sought the help of the CJEU to overcome the impasse in national procedural law . . . . In the national judgment in the Aziz case, he then concluded that the general terms and conditions imposed on Aziz had to be declared null and void. Consequently, the Catalunyacaixa bank could not claim the full amount of the mortgage, but only the unpaid instalments plus interest.
>
> While the national judge in his judgment emphasises that his task was to assess the Aziz case on its legal merits, he is well aware of the economic, social and political context of the dispute.[50]

As described by Judge Seijo himself:

> Without a doubt, the dissemination of this Opinion and the CJEU's judgment of 14 March 2013 have given the proceedings a dimension that by far exceeds the scope of the present case insofar as it coincided with an intense public debate – of a political, legislative, social and economic nature – that has prompted a process of legislative reform that has not yet come to an end.[51]

This would be an example of what I am calling the transnationalization of public law. Spanish banking practices reflected the broader transnational neoliberalization of European economic space. In order to counteract that dynamic, Judge Seijo appealed to similarly transnational

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[49] Chantal Mak, 'On Beauty and Being Fair: The Interaction of National and Supranational Judiciaries in the Development of a European Law on Remedies,' Centre for the Study of European Contract Law Working Paper Series No. 2014-07; Amsterdam Law School Research Paper No. 2014-45. Available at SSRN: https://ssrn.com/abstract=2486458 (to appear in K. Purnhagen & P. Rott (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (2014)), at 3.

[50] Id at 9.

[51] Id at 10.

dynamics, review by the CJEU, to induce a double movement responding to the social disruptions caused by neoliberalization.

Chris Thornhill has detailed such transnationalizing public law responses at length in his recent book A *Sociology of Transnational Constitutions*. He presents this as a virtually universal phenonomenon, but here a wish to suggest it is likely to be significantly more limited than that. Specifically, in order to provide a surrogate device for promoting organic territorial integrity, the impacted territorial population must already have some significant degree of affective affinity for particular transnational regulatory regime being appealed to. This, in turn, would be affected by that territory's physical location with the larger space of the transnational regulatory institution, the degree to which the relevant cultural practices of that institution replicate those of the territory. In the context of Spain and the EU, Spain and the EU share an essentially civilian legal system, which makes the working of the EU fell familiar, and the Spanish population, both elite and plebeian, have generally supported the EU since joining in 1986, although that support has waned in the aftermath of the Global Financial Crisis of 2007-2008. But one suspects that such relationships between states and transnational regulatory institutions are relatively rare, and may be largely limited primarily to Western continental Europe in the context of the EU. There are some examples of public law transnationalization in South America, but I think one is much harder pressed to find similar examples in Asia (except Taiwan), Africa or North America.

B. Public Law Becoming More Synthetic

Alternatively, or in other circumstances, the public law system will forego it organic aspirations and become primarily synthetic. This process of become more synthetic and less organic gives the regulatory framework as somewhat more 'authoritarian' cast. Michael Wilkinson has well explored this in his work on 'authoritarian liberalism',[52] a term he has adopted from Hermann Heller's description of what was happening in Germany at the end of the Weimar Republic and the beginning of Nazi rule.[53] Authoritarian liberalism described a dynamic – principally in the context of the EU, in which transnational, neoliberal, juridical principles of free trade and market competition work to constrain a country's ability to respond to crises of solidarity caused by the increasing class stratifications brought about by transnational capitalism.[54] Authoritarian liberalism works by entrenching particular kinds of economic practices in the form of legal rights, which in turn removes them from political negotiations as to how to regulate a state's economic and financial environments. Removing these practices from domestic political discussion and modification is what gives them their authoritarian cast.

Transnational political liberalism can have the same effect, although it is not the focus of Wilkinson's investigations. Consider, along these lines, Jurgen Habermas's political-liberal efforts to develop the proper terms of political discourse. According to Habermas, political discourse should be public regarding: appeals to private material or religious concerns are to be regarded as illegitimate. Put for persons for whom their personal material or religious concerns

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[52] Michael A. Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2105) 21 *European Law Journal* 313-339; see also Wilkinson in Dowdle & Wilkinson (eds), *Constitutionalism beyond Liberalism* (2017).

[53] See Hermann. Heller, 'Authoritarian Liberalism?' (2015) 21 *European Law Journal* 295-301 (originally published 1933).

[54] See also Kanishka Jayasuriya, 'Authoritarian Liberalism, Governance and the Emergence of the Regulatory State in Post-Crisis Asia', in Richard Robison, Mark Beeson, Kanishka Jayasuriya and Hyuk-Rae Kim (eds.), *Politics and Markets in the Wake of the Asian Crisis* (Routlege, 2000), 315-330.

are critical for giving meaning to their lives, a synthetic principle the says that such concerns are politically meaningless could well be experienced as being authoritarian.

A similar observation has been advanced by Ran Hirschl in his exploration of what he calls 'juristocracy'— the growing involvement of courts, and juridical (ie, synthetic) forms of decisionmaking – in deciding issues that used to be considered appropriate for more political (ie, organic) forms of decisionmaking:

> The practice is equally problematic from a representative democracy point of view. The ever-accelerating reliance on courts for articulating and deciding matters of utmost political salience represents a large-scale abrogation of political responsibility, if not an abdication of power, by elected legislatures whose task is to make accountable political decisions. It may undermine the very essence of democratic politics as an enterprise involving a relatively open, at times controversial, but arguably informed and accountable deliberation by elected representatives. After all, the primary function that legislatures should fulfill is to confront and resolve problems, not to pass them on to others. By transferring political decision-making authority to the judiciary, these politicians manage to avoid making the difficult or potentially unpopular decisions concomitant with fulfilling the very public task they were elected to do--to make hard, principled, and accountable political and policy decisions, even if these decisions are not always popular with voters. By playing the "blame deflection" game, legislatures grant priority to their short-term interests (e.g., to gamer electoral support by avoiding tough and often unpopular decisions) at the expense of political accountability and responsibility.[55]

From our discussion above, when public law systems forego their concern about organic regulation in the modern capitalist era, it is likely to provoke a counter-movement from society. This counter-movement can take two forms. Populations that are more affectively embedded in transnational and cosmopolitan communities are more likely to look to those communities for the social embeddedness that they have lost by public law's retreat from the organic. Those populations who are less embedded in these communities are likely to look for social embeddedness at the local, subnational level. To the extent that the those of the former are predominant, then the public law system is likely to experience transnationalization, as per our discussion above. But the question as to whether a population is likely to respond to the syntheticization of public as in the former or in the latter manner can be strongly affected by its particular geographic position within the state and within its larger, transnational political-economic region.

Moreover, both kinds of populations / geographies can exist simultaneously within the same state. Brexit provides a good demonstration of this. As argued by Will Davis:

> [I]t seems unlikely that those in [the regions of Britain that voted for Brexit] (or Cornwall or other economically peripheral spaces) would feel 'grateful' to the EU for subsidies. Knowing that your business, farm, family or region is dependent on the beneficence of wealthy liberals is unlikely to be a recipe for satisfaction. . . . More bizarrely, it has since emerged that regions with the closest economic ties to the EU in general (and not just of the subsidised variety) were most likely to vote [to leave the EU].

[55] Ran Hirschl, 'The New Constitution and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 752. See generally Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2009).

> While it may be one thing for an investment banker to understand that they 'benefit from the EU' in regulatory terms, it is quite another to encourage poor and culturally marginalised people to feel grateful towards the elites that sustain them through handouts, month by month. Resentment develops not in spite of this generosity, but arguably because of it. This isn't to discredit what the EU does in terms of redistribution, but pointing to handouts is a psychologically and politically naïve basis on which to justify remaining in the EU.
>
> In this context, the slogan 'take back control' was a piece of political genius. It worked on every level between the macroeconomic and the psychoanalytic. Think of what it means on an individual level to rediscover control. To be a person without control (for instance to suffer incontinence or a facial tick) is to be the butt of cruel jokes, to be potentially embarrassed in public. It potentially reduces one's independence. What was so clever about the language of the Leave campaign was that it spoke directly to this feeling of inadequacy and embarrassment, then promised to eradicate it. The promise had nothing to do with economics or policy, but everything to do with the psychological allure of autonomy and self-respect. Farrage's political strategy was to take seriously communities who'd otherwise been taken for granted for much of the past 50 years.
>
> This doesn't necessarily have to translate into nationalistic pride or racism (although might well do), but does at the very least mean no longer being laughed at.[56]

The distinctly Polanyian character of Britain's bifurcated geographical response is well captured in a study done by Dominic Buxton:[57]

> What is not so easy to explain however is why much of the leave votes came from peripheral areas; areas which received the highest level of EU regional funding in the UK.[58] The answer, I contend, lies in relative exposure to EU markets.
>
> Despite inaccurate claims during the referendum campaign that the EU served to benefit the 'metropolitan elites' of London, the core area of the UK economy actually proves to be the least dependent region on EU markets.[59] London has levels of global connectivity more diverse than almost any other city on earth, and therefore its total percentage of exports accounted for by the EU fall 10% lower than any other region in the UK.[60] The city's specialisation tends to be in services, which falls outside of most EU markets that instead focus on manufacturing, agriculture and extraction.[61] London and the wider core areas of the UK have been winners from accelerated globalisation since the 1990's, whereas peripheral areas have experienced 'entrenched and increasing difficulties'.[62]

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[56] Will Davies. 'Thoughts on the Sociology of Brexit.' Political Economy Research Centre / Centre for Understanding of Sustainable Prosperity (June 24, 2016). Available at http://www.perc.org.uk/project_posts/thoughts-on-the-sociology-of-brexit/ (accessed 17 October 2018)

[57] Dominic Buxton, 'Mapping Brexit: A Geographical Explanation' (2017) (paper written for a seminar on 'Regulatory Geography' offered by the National University of Singapore School of Law).

[58] Bart Los, Bart, Philip McCann, John Springford and Mark Thissen, 'The Mismatch between Local Voting and the Local Economic Consequences of Brexit' (2017) 51 *Regional Studies* 786-799, at 789.

[59] Id.

[60] Philip McCann, *The UK Regional–national Economic Problem: Geography, Globalisation and Governance* (Routledge, 2016).

[61] Los et al., 'Mismatch', at 791

[62] Id.

> In contrast to London, peripheral areas have a lot of exposure to the EU market and to a large extent they are increasingly dependent upon it as the London market continues to disconnect itself from the rest of the UK economy.[63] Greater exposure to the market also means greater exposure to its disembedded nature. Demographically it has been shown that regions with larger shares of lower-skilled employment, low divisions of labour and high levels of unemployment were far more likely to vote leave.[64] . . . In summary, the peripheral areas of the UK felt the effects of the disembedded EU market far more than those in the core as their economies were far more integrated into it. Therefore, it makes undeniable sense that such areas would be more prone to voting to leave the EU due to nationalistic values formulated as a form of Polanyi's double movement.

C. Public Law becoming more 'Political'

We noted above how politics is one organic aspect of public law that that would not be significantly affected by globalization. For this reason, one way in which a public law system can restore its organic character in the face of globalization is by developing its more 'political' aspects, for example in the form of political constitutionalism or *droit politique*. Indeed, the idea of a 'political constitution' (as distinguished from a 'legal constitution') was advanced by JAG Griffith specifically as a means of insulating Britain from the public law disruptions he saw stemming from Europeanization.[65]

The politicization of public law is still a highly protean idea. Its principal conceptual advocate is probably Martin Loughlin, and while he extends its conceptual reach significantly beyond that advanced by Griffith, it still seems in his word to function more as a slogan (ie, '*droit politique*') than anything else. Here, I mean to refer to a process in which public law determinations are negotiated among the interested parties rather than extrapolated from principal by a neutral third party. Such negotiations, when constantly repeated, results in complex webs of interdependence that bind the regulated with the (national) regulator, and in this way bind these components of the nation itself together as an organic whole.

The politicization of public law involves two foundational shifts in the focus of public law. The first is shift in focus from what the state should not do to a focus on what the state should do. Second, it involves a shift from procedural measures of legitimacy to pragmatic or 'outcome' measures of legitimacy.

Politicization of public law (ie, 'political constitutionalism') can come about through a number of forms. Referral to parliaments in lieu of courts, Griffith's focus, in only one. Other forms, revolving around administration, include negotiated compliance and negotiated regulation. Even courts can participate in this dynamic. An example of this is found in the *Aziz v Catalunyacaixa* case discussed above, in which the decision by Judge Seijo was intended not so much to establish a legal resolution to the dispute as to provoke the Spanish parliament to examine the need for better consumer protection in mortgage contracts. Michael Dorf of Columbia Law School has detailed a growth in such 'judicial politics' in the American

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[63] Philip McCann, *The UK Regional–national Economic Problem*.

[64] Sascha O. Becker, Thiemo Fetzer, and Dennis Novy, 'Who Voted for Brexit? A Comprehensive District-level Analysis' (2017 32(92) *Economic Policy* 601-650.

[65] See J.A.G. Griffith, 'The Political Constitution' (1979) 42 *The Modern Law Review* 1-21. See also Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (undated) (on file with author).

constitutional and administrative case law.[66] The growth in judicial use of proportionality analysis can also be seen as part of this dynamic.[67]

A good demonstration of this dynamic is found in Tony Prosser's recent study of the evolution of Britain's public finance regime, particularly post Global Financial Crisis, in his monograph, *The Economic Constitution*.[68] In that book, Prosser details the response of the British constitutional system to the increasing complexity of England economic integration in and dependency with global financial markets. The key issue is with the growing complexity of these markets, caused by growth in functional differentiation. As described above, such growing complexity threatens visibilization and legitimacy of the public law system. And as described by Prosser, Britain's public law apparatus responded by developing, incrementally, increasingly complex political process for administering and overseeing Britain's engagement in these markets. What is interesting about these processes is that their complexity has become such that they defy legal classification or description. Nevertheless, by Prosser's account, political oversight has been able to evolve so as to keep pace. Although it is quite difficult, if not impossible, to develop a conceptual mapping of these processes sufficient to mobilize legal oversight, a shift to outcome-oriented modes of political accountability shows that the political oversight system as it has evolved has been admirably sufficient in generating accountability and public discipline within the system.

D. Developing New Organic Public Law Technologies

Finally, public law can respond to the loss of organic integrity occasioned by globalization by developing new organic, regulatory technologies that resist global corrosion. Here, I will examine one such technology, what I will call 'regulatory responsiveness'.

Regulatory responsiveness refers to the public law's ability to structure regulatory systems that are able to respond (or at least perceived as responding) quickly and effectively to disruptions in the social order.[69] Studies suggest that such responsive capacity can promote national organic solidarity.[70] Globalized regulatory systems cannot, on their own, respond well to such disruptions, even when the disruptions themselves stem from global forces.[71] Albeit perhaps not particularly successful examples of a public law system trying to restore organic integrity along these lines is the 'new public management' and 'risk management' movement

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[66] See Michael C. Dorf, 'Legal Indeterminacy and Institutional Design' (2003) 78 *New York University Law Review* 875. For an example in the context of Singapore, see Michael W. Dowdle and Kevin Y.L. Tan, 'Is Singapore's Constitution Best Considered a Legal Constitution or a Political Constitution?' in Jacklyn L. Neo (ed.), *Constitutional Interpretation in Singapore: Theory and Practice* 363 (discussing the judicial decision in *Lim Meng Suang and another v. Attorney-General* as an exercise in political constitutionalism).

[67] See Alec Stone Sweet, forthcoming.

[68] Tony Prosser, *The Economic Constitution* (Oxford, 2014).

[69] In this, it differs from – or at least expands upon – John Braithwaite's germinal conception of 'responsive regulation', which focuses more limitedly upon the crafting of a regulatory regime so that it responds appropriately to acts of noncompliance. See John Braithwaite, 'The Essence of Responsive Regulation (2011) 44 *University of British Columbia Law Review* 475-520. See generally Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1995).

[70] Kevin Y.L. Tan in Weitseng Chen (ed.), forthcoming; Dowdle in Frankenberg and Alviar (eds.), forthcoming.

[71] Michael Dowdle, 'Pushing against Globalization: Toward an Analytic Template,' in John Gillespie and Randall Peerenboom (eds), *Regulation in Asia: Pushing Back on Globalization* (Routledge, 2009).

that were particularly popular during the 1990s and first decade of the 21st century (particularly in Britain).[72] This may be an option available primarily to more wealthy geographies, however.

Perhaps a better demonstration of this responsive is found in the National Health Service [NHS] of Britain. There is no question but that the NHS has its problems, but its ability to provide health care to all citizens independent of income or costs does seem to engender organic support for the state.[73] When the supremely dysfunctional and ignorant current President of the United States (apologies for breaking the academic 'fourth wall') criticized the NHS in his efforts to assuage his own ego, the British populace spontaneously rallied to its defence.[74]

The British populace's response to the twitter comments of the American moron-in-chief (apologies again) shows the degree to which administrative responsiveness – in this case responsiveness to health care issues – can spontaneously mobilize a national populace. Of course, the NHS was founded in 1948, prior to the present age of globalization. But when they work, even marginally as in the case of the UK, they do seem to provide a source of national solidarity in the face of globalization. (One might also include the growing interest in 'universal basic income' as another example of this.) However, such a response may only be available primarily to more wealthy geographies.

How all this might translate into a more generalizable technology of public law I cannot yet say. As I understand it, the problem with New Public Management was that at the end of the day it was concerned *sub rosa* overwhelming with reducing costs to the government, and not particularly concerned with improving service delivery.[75] If this was indeed the case, then it would be unlike to provoke organic coherence. I simply do not have enough information at present to determine whether the NHS program represents a possible public-law step into the future, or the residual anomaly of a pre-globalized history.

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[72] See Patrick Dunleavy, Helen Margetts, Simon Bastow and Jane Tinkler, 'New Public Management Is Dead — Long Live Digital-Era Governance' (2006) 16 *Journal of Public Administration Research and Theory* 467-494; Peter Simon and David Hillson, *Practical Risk Management: The ATOM Methodology* 2nd ed. (Management Concepts, 2012).

[73] The King's Fund, 'What does the public think about the NHS' (16 Sept. 2017), https://www.kingsfund.org.uk/publications/what-does-public-think-about-nhs (accessed 15 November 2018).

[74] Washington Post, 'Trump thought the British were protesting their health service. They weren't' (5 February 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/02/05/trump-thought-the-british-were-protesting-against-their-health-service-they-werent/?utm_term=.747ac67568bd) (accessed 15 November 2015).

[75] Cf. Tony Prosser, *The Limits of Competition Law* (Oxford University Press, 2005) (making this observation in other areas of UK governmental regulation).