



Webpapers on
Constitutionalism & Governance
beyond the State

Year 2001 | No 6

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Dead On Democracy?

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ISSN: 1756-7556

conWEB – webpapers on Constitutionalism and Governance beyond the State

www.bath.ac.uk/esml/conWEB

Constitutionalising Governance: Democratic Dead End or Dead On Democracy?

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The discussion about globalisation is closely associated, both in its genealogy and application, with another concept, governance. Both are seen to capture and contribute to processes that challenge the state's monopoly of political authority. The concepts gain currency at roughly the same time in the period since the late 1980s, and both are applied to a wide areas of social, political, economic and cultural life. It seems that globalisation, with its compression of time and space, and its capacity to highlight the porosity of national boundaries has fuelled the need to find a way to think of "governing without government". Governance, in turn, provides a way to begin to think and conceptualise politics without the state as the political epicenter; and to open up the possibility to think in terms of organizing political power across and within many different levels. Moreover, governance opens the discussion of governing to a renewed focus on civil society and to rethinking traditional binaries such as public and private, state and market. This has helped generate arguments about the democratic possibilities afforded by governance.

The aim of this paper is to examine closely some of the tensions that may emerge by shifting attention to notions of governance. It will focus on particular interpretations of governance, especially those that have emphasized notions of "good governance", which come largely from work done on development, and "multi-level" governance, which are found mainly in the work on European integration. It will argue that governance arguments have opened a number of useful and important avenues of research into informal sites of politics and into a wide range of actors outside formal political institutions. However, there is an underlying normative element to many governance arguments. There is an assumption that governing outside the state, as it is polycentric and non-hierarchical, will be more likely to lead to democratic outcomes. The paper challenges this assumption and argues that an emphasis on governance alone may raise some serious democratic deficits. In particular, it will argue that one of the strengths of governance, its flexibility and informality, might be an obstacle to deepening democracy. Many governance arguments, including those that look at the European Union, fail to deal with fundamental questions about power and its

legitimate use. Attempts at reform in the EU, such as the Commission's White Paper on Governance, will have few of the intended democratic outcomes as they run into the problems of trying to constitutionalist governance.

The first part of the discussion will examine briefly some of the governance arguments, with an emphasis on the claims they make about producing democratic outcomes by governing beyond the state. The second section will illustrate some of the tensions between constitutionalism and governance by looking at recent debates about institutional and constitutional change in the EU.

Globalisation and Governance

Governance arguments begin with the assumption that there has been a displacement – largely but not exclusively brought about by globalisation – of the political authority that rested with the modern national state.¹ Its monopoly is now challenged on a number of fronts: from other levels of formal government, from parts of civil society (especially markets), and by regulatory agencies that may be created or recognized by the state but are not part of the state.² The discussion about governance, then, is best understood as part of a wider debate about globalisation, and its possible consequences for political authority. The processes embodied by globalisation highlight the importance of non-state actors. Moreover, the epicenters of politics may no longer have a territorial base as the symmetry between territorial boundaries and political authority that defined politics in the modern era is being undermined

Globalisation has contributed to the growing emphasis on the notion of that decisions that affect the lives of individuals and communities are no longer primarily the reserve of formal governmental institutions. Increasingly, there is a growing concern with governing without government, or *governance*.³ Elements of governance arguments may be found in work from a range of fields, from corporate structures and behavior to international relations to development policies for industrializing societies.⁴ Not surprisingly, they have generated a range of interpretations of what constitutes governance. There is agreement that there is a style of governing emerging that blurs the boundaries between public and private authority. An important contribution to the popular use of the term was made by the United Nations' Commission on Global Governance report, which defined governance as:

Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse

¹ Jon Pierre, "Introduction: Understanding Governance", in Jon Pierre, ed. *Debating Governance* (Oxford: Oxford University Press, 2000), p.1.

² Global Challenges and Opportunities Network, *Canada 2005: Global Challenges and Opportunities* (Ottawa, February 1997), Chapter 11, p. 1.

³ James Rosenau and Ernst Czempiel (eds.), *Governance without Government: Order And Change In World Politics* (Cambridge: Cambridge University Press, 1992).

⁴ UNDP, *Reconceptualising Governance*, Discussion Paper no. 2 (New York: UNDP, 1997); Morten Balling et al. (eds.), *Corporate Governance, Financial Markets and Global Convergence* (Dordrecht: Kluwer, 1998).

interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.⁵

While reference is made to formal institutions that have the capacity to enforce decisions, the emphasis is on ways of creating order and structuring collective action that do rest on co-operation, mutual interest and accommodation.⁶ Governance arguments are about finding modes of regulating social life without the authority and the capacity for control by the state. They emphasize the processes and networks that are formed to solve problems, less than the structures of economic, social and political power.

Paul Hirst argues calls this a “post-political” search for regulation and accountability in that it is a move away from the processes and institutions that have defined politics in the modern era, namely the state.⁷ It is found both on the left and the right of the political spectrum, with the former looking to various but ill-defined parts of civil society, while the latter favors market forces and a limited state action. It is often not clear in some of the governance arguments of what is being proposed is description or prescription; but in almost all cases there is an end to thinking about politics as a distinct social activity capable of generating a form of legitimacy for authority and control. In this way, governance may be applied to different forms of regulation without any great distinction. For instance, Hirst identifies five versions of governance, from governance of economic development to corporate governance to international regimes to what he calls “negotiated social governance” (p.18). What identifies each of these incarnations is an attempt to have governing without politics as they have been defined in the modern era; that is, without struggles for power mediated, shaped or resolved by the political authority of the state.

Governance arguments are concerned with challenges to the three constitutive and related elements of the modern state: territory, population and sovereignty. Territory is given secondary importance, if any, in the governance literature as it is more concerned with finding the boundaries of particular issues or networks of relations. These may or may not be bound by territory, but this is incidental to the broader issues of finding appropriate regulatory mechanisms. This may involve territorial units, such as national states or local and regional governments; but these are just one option amongst others. This is most apparent, for instance, in debates about the governing of the Internet; but could also be seen in discussions about regulating highly mobile capital. There also is no clearly identifiable, permanent political community in governance arguments. They challenge the notion that the *demos* is a permanent community defined by territory, and which shapes the public private

⁵ Commission on Global Governance, *Our Global Neighborhood*, url: <http://www.cgg.ch/CHAP1.html#The Concept of Global Governance>.

⁶ Gerry Stoker, “Governance As Theory: Five Propositions,” *International Social Science Journal*, 155 (March 1998): 17-18.

⁷ Paul Hirst, “Democracy and Governance”, in Jon Pierre, ed. *Debating Governance* (Oxford: Oxford University Press, 2000), p.13.

domains over wide areas of social life. The relevant political community changes constantly, and individuals are not constrained by an exclusive membership. Rather, the “networks” that are the basis for many governance arguments are fluid, flexible and mobile. They promote the idea of the individual belonging to many different *demos*, sometimes overlapping and even possibly conflicting. As the territoriality of the state breaks down, so does the symmetry between its boundaries and that of the relevant political community. This is most apparent when we begin to think about transnational social movements whose basis goes beyond belonging to an exclusive group.

It is, perhaps, the sovereignty of the national state that faces the strongest challenges from governance arguments. This applies just as much to sovereignty seen with respect to other states as it does to the capacity for autonomous action within its own borders; and related to this, the notion that the state is the supreme legal and legitimate political authority. What governance arguments point to is a multiplicity of sites, from corporate boardrooms to international financial markets to local housing co-operatives, outside the reach of the political authority of the state. They emphasize that large parts of regulation can now be carried out by a range of new actors in new sites that do not fit in well with the hierarchical organization of political power that associated sovereignty with the national state. The formal political institutions that have characterized the modern liberal democratic state are ill-equipped to deal with social regulation where political authority is so fragmented it often seems non-existent.

In response to this challenge to conventional forms of government, there has emerged a large body of literature on “good governance” that has made strong claims about how governing beyond the state has the possibility for more democratic outcomes. For instance, the UNDP prescription for good governance has a long menu that emphasizes objectives such as gender equality, tolerance of diversity, sustainable development, participation, transparency and legitimacy. From the World Bank to the Ford Foundation, it is pointed out how the end of the monopoly of the authority of the national state creates more opportunities for decisions that affect people’s lives to be more responsive and representative. What is significant in these arguments is not the absence of structures, but that they are relatively benign. For instance, the Novartis Foundation recipe for good governance claims that, “[H]istorical burdens, adverse economic conditions, such as falling raw material prices or other external factors, though important do not have a decisive impact on the achievement of a higher quality of life in the countries concerned.”⁸

The governance literature, on the other hand, in announcing the decline of the state and the displacement of authority to multiple centers is less concerned with structures. Its emphasis is on relationships, processes, networks and organization of collective action. Governance is not about

⁸ Novartis Foundation for Sustainable Development, *Sustainable Development and Good Governance*, http://www.foundation.novartis.com/sustainable_development_governance_htm

structures but about practice.⁹ It is not that governance arguments do not identify important structures involved in decision making; but that the emphasis is on the complex web of relationships, and the processes that define them, that develop alongside the diffusion of power. Governance, then, looks to flexibility that often escapes formal government structures, and it is about looking beyond dichotomies that have defined politics in the modern era: public-private, state-civil society, states-markets.¹⁰

The good governance arguments make a compelling case for the ways in which governing beyond the state may result in democratic outcomes. However, a closer examination reveals that they have not addressed many of the fundamental challenges to all forms of governing; and that they may, in fact, lead to serious questions about forms of democratic rule. Bob Jessop points out four dilemmas for governance that also may be seen as the challenges to try to find a way to constitutionalist governance.¹¹

a) Co-operation versus competition

One theme that runs through all the proponents of governance is that the multi-level regime creates many centers that can compete for decision-making authority. This is not simply a claim made by public choice theorists but it is a result of ending the monopoly of the national state. As individuals can now look to different ways of organizing themselves, unencumbered by the constraints of territory or belonging to an exclusive political community, they can choose which authority can best meet their needs and interests. Competition may then result, with high costs for those authorities that are not responsive and representative of demands being generated in civil society. It is in this way that there is an emphasis on individuals not as citizens but as consumers of services or taxpayers.

However, there is a challenge to ensure that competition is not entirely destructive, either for decision-making authorities or for individuals or the communities they live in. For instance, there needs to be some sort of minimum standards to ensure that different jurisdictions, in their attempt to outbid each other, do not create conditions where the exercise of any authority becomes tenuous or impossible. In the absence of some form of hierarchical structure, the way to avoid this form of destructive competition is to create structures, processes or rules that will guarantee or encourage co-operation. For instance, the environmental and labor protocols in the North American Free Trade Agreement or the Social Chapter of the Treaty on European Union might be seen as attempts to ensure that there are limits to the downward pressure of regulatory competition. However, co-operation may have its limits and there is a question about what kind of mechanism or authority is

⁹ Bob Jessop, "The Rise Of Governance And The Risks Of Failure: The Case Of Economic Development," *International Social Science Journal*, 155 (March 1998): 29-32.

¹⁰ Renate Mayntz, "Governing Failures and the Problem of Governability: Some Comments on a Theoretical Framework," in Jan Kooiman (ed.), *Modern Governance* (London: Sage, 1993): 10-11.

¹¹ Bob Jessop, "The Rise Of Governance And The Risks Of Failure: The Case Of Economic Development."

needed to enforce decisions. In other words, one can ask whether, in the absence of the monopoly of political authority of the national state, co-operation is enough to ensure that competition does not become destructive for communities or individuals.

One way to address this question is to examine Paul Hirst's interesting and convincing case for pluralism and competing decision-making authorities.¹² He points to a pluralism of forces in civil society that have questioned, from both the left and the right of the political spectrum, an interventionist state. His call for a prominent role for associations, alongside the state and market, is seen as a way of ensuring participatory forms of governance.¹³ Self-governing associations governed largely at the local level by citizens who voluntarily choose them will replace the post-war state, with its emphasis on universality. For instance, health care will not be in the hands of a national health service that provides a set menu of services across a country. Rather, decisions will be made and controlled by self-governing bodies with direct participation of concerned citizens who will make choices such as those between hospital beds and home care. Hirst contends that recent changes in civil society will no longer tolerate a universal, monolithic state that provides the same set of goods and services that emanates from the center.¹⁴

However, Hirst does not see the state disappearing in the near future nor does he expect that it will be replaced as the primary source of governance. In fact, the state will retain a number of essential duties, including collecting revenues to pay for the services that will be provided by associations. Taxpayers will, according to Hirst's prescription, be allowed to choose a set number of associations to which the state will direct a portion of their income taxes. The state will serve as an intermediary, channeling funds from citizens to the associations of their choice, but its role in the delivery of most services will stop there.¹⁵

Hirst provides a compelling argument that illustrates some of the ways in which the authority of the state has been displaced and some of the long-term consequences that may result. However, as with many of the governance proponents, he does not address the question at which point the state will have lost so many of its responsibilities that there will be questions about its legitimacy. For instance, a state that serves to collect taxes but is not responsible for providing services will have a difficult time in either limiting itself to that role or in maintaining the legitimacy to be a revenue collector. Hirst ignores that tax collecting, along with waging war, was one of the functions that helped create the modern state. While there may be a plurality of authorities and forms of governance emerging, with more avenues for participation, it also may be the case that citizens will not view all the multiple centers of power equally. If the state is going to continue to be the tax collector, we can assume two outcomes. As it has greater control of the purse strings, it will be seen as having greater authority. On the other hand, as it is responsible for taking money from individuals but is not seen

¹² Paul Hirst, *From Statism to Pluralism* (London: UCL Press, 1997).

¹³ Paul Hirst, *Associative Democracy* (Amherst, MA: University of Massachusetts Press, 1994).

¹⁴ Paul Hirst, *From Statism To Pluralism*, p. 29.

delivering the services they feel are important, the state's legitimacy may be questioned. Hirst's argument illustrates the tension that the state decline proponents face when they point out the sources of the erosion of state authority yet claim that the state will remain a central governing site. His argument is interesting in that he at least makes a case for the type of democracy – associative democracy – that may emerge in a politics without a center.

The discussion of the Hirst prescription for associative democracy points out that the problem of how to find the right balance between fostering competition and ensuring that there are minimum conditions that can be guaranteed. It is not clear how co-operation can be secured without some form of authority that can ultimately be a reference point in the case of disputes. For instance, federalism might be seen as a form of government that more closely resembles the emphasis on competition. However, the essence of federalism is a constitutional settlement that defines a political community and provides it with an ultimate reference point – that is, the constitution – that resolves disputes. This implies, however, a state with the legitimacy to impose its final decisions, and therefore, formal and possibly hierarchical structures.

b) Governability and flexibility

Robert Dahl identified the classic problem of governing as having to find the balance between “system effectiveness” and guaranteeing greater and greater levels of participation and representation in decision-making.¹⁶ In the discussion of governance, this tension may be seen as that between governability and flexibility. The former refers not only to the capacity to make decisions, but also to implement them. In the literature on state capacity, this often referred to the extent to which the state was able to transform decisions into outcomes. In conventional arguments, the greater concentration of decision-making and implementing capacity in the executive levels of government, as opposed to the representative levels, the greater the potential for enhanced state capacity.

This tension is particularly pronounced in many governance arguments, especially so in those that look to market forces to play a more prominent role in social regulation. The use of the term “flexibility” is found in many governance approaches, from those that emphasize “reinventing” government and new management techniques to those look to micro-credit structures as a basis for economic growth. At the center of flexibility arguments are an attempt to put the individual as the agent of social, economic and political life. The obstacles to flexibility include not simply government regulation but also collective bargaining, parts of the welfare state and formal government structures. The essence of flexibility in governance is its emphasis on informal structures and processes that have a capacity to constitute and re-constitute themselves often and easily. For instance, lending circles are relatively easy to establish in comparison to financial institutions licensed

¹⁵ Ibid., pp. 32-40.

¹⁶ Robert Dahl, “A Democratic Dilemma: System Effectiveness and Citizen Participation,” *Political Science Quarterly*, 109:2 (1994), pp.23-34.

by the state. They can make their own rules and can get credit to their borrowers without being encumbered by formal processes and rules. However, while the examples of the Grameen bank and other forms of micro-credit present a picture of how less formal and more flexible lending mechanisms get loans to those who normally would not have access to credit, we should not ignore other examples. For instance, loan sharking and other usurious practices are also forms of micro-credit that are informal and flexible. They point to the fact that the state's capacity to enforce its rules, in this instance those that protect borrowers, may be limited by flexible practices and networks; and that greater access to more decision-makers by individuals in less formal structures does not mean more power for them.

This leads to one of the major challenges faced by policy makers and scholars of multilevel governance. The move away from institutions of government leads to the question of trying to balance the flexibility that comes with diffusion with the need for order and structures that are necessary to achieve minimum goals such as transparency and accountability. Formal institutions have clearly identifiable centers; loose, informal, or at least non-constitutional, networks, make it hard to identify responsibility for decisions that affect people's lives.¹⁷ The result is that, quite often, ultimate responsibility resorts back to the most identifiable center, the state. For instance, citizens still turn to the state to deal with such consequences of globalisation as unemployment and regional development even if authority may rest elsewhere. However, the state does not have the authority to respond like it once did precisely because the pressures of globalisation have hollowed it out.

c) Openness versus closure

The contrasting examples of forms of micro-credit lead the discussion of governance to questions about levels of accessibility to decision-making structures, and about who is to be included in the flexible and changing networks. One of the marks about the informality found in governance is that, on the surface, it seems to promote greater levels of inclusiveness than the narrow constraints of the conventional nation-state and other territorial units of governing. Almost all governance arguments, from the World Bank to NGOs, stress the importance of participation. The Ford Foundation says that the loss of the state's monopoly of political authority has meant greater opportunities for citizen participation; and that democracy requires a "level of public participation that gives everyone a stake and a share in success".¹⁸ Governance suggests a level of openness and participation that is determined largely by who is affected by decisions rather than some seemingly objective criteria that defines a community. What creates a sense of cohesion is a shared interest amongst the various stakeholders to achieve a desired outcome. The structures are incidental to the role of shared interests in forging the boundaries of this particular group.

¹⁷ Andrew Dunsire, "Modes of Governance," in Jan Kooiman (ed.), *Modern Governance* (London: Sage, 1993): 22-3.

¹⁸ Ford Foundation, *Governance* (April 2000), <http://futurepositive.org/governance.pdf>.

On the other hand, governance arguments must also address the question of how to ensure that what seems like openness may, in fact, be closing off access. In many ways, some of the critique of this aspect of governance is similar to that of classic interest group pluralism. It assumes that all individuals will have access to the same amount of resources that will allow them to participate with the same degree of influence on outcomes. It does not take into consideration that there may be systematic or structural constraints that operate on a broader social, and not individual, level. Moreover, as it is interests and not structure that defines participation, it may be harder to define who is in and who is out, and on what basis they may participate. For instance, the debate about citizenship in multi-level governance is perhaps most advanced in the EU. There seems to be some difficulty in trying to find a way to define belonging beyond membership in the member states of the EU. If being a citizen of a member state is only one of level of belonging in this multi-tiered polity, how do we define who belongs and on what basis in the other tiers? There are many residents in the EU who are not citizens of one of the member states yet are very much part of governance in the EU. Can, and should, they be included?

This highlights a more general question about governance without an identifiable center of political authority: it is not clear how and who will define the terms of membership and access to these different levels. For instance, a small amount of money can give anyone access to financial markets by buying a few shares in a publicly traded company. Theoretically, this will make them a stakeholder but it does not guarantee that they will be equal members with other shareholders. Moreover, it says little about the access to this level of decision making by the unnamed stakeholders, such as local and distant communities or employees, who are affected by its actions.

d) Efficiency versus accountability

Finding the balance between providing cohesive, timely responses to demands and ensuring that those decisions are held accountable is a challenge that is not unique to governance. Nor is it one that governance arguments deny as they all speak of transparency and accountability. There are, however, two related problems that may be more prevalent in governance arguments. First, complex, informal networks are hard to hold accountable as their very strength is the fact that they blur boundaries and can change rapidly to meet changing conditions.

The case of independent central banks provides a useful example to illustrate the second tension in trying to balance efficiency and accountability; that is, the blurring of the public and private often means that centers of decision-making are simply removed from the public sphere. One of the requirements for entry in the new currency in the European Union was that prospective member states establish independent central banks because independent central banks were seen to provide a better guarantee against a loose monetary policy and inflation. This was also seen as a necessary first step in the establishment of the European Central Bank, which would eventually govern the euro and EU monetary policy. There may very well sound economic efficiency arguments for insulating central

banks from political control and accountability, but the result is certainly not a more democratic outcome. Any attempt to make central banks accountable to liberal democratic institutions in the conventional sense, especially elected assemblies, would mean that they were anything but independent. Monetary policy has shifted to another level, with the commitment that it will not be open and accessible to forces coming from civil society.

While there are ways in which governance arguments have provided a critical examination of the structures and construction of power, there are strands in the literature that take us in a very different direction.¹⁹ Arguments about “reinventing government”, “best practices”, “partnerships”, and so on remove the discourse from governing; and change the terms of the discussion about its legitimacy. In blurring the lines between public and private spheres of government, the citizen has disappeared. For instance, the World Bank Governance and Anti-Corruption Center claims that, “‘Reinventing government’ by treating the public as clients and tailoring services directly to their needs and expectations has emerged as a powerful concept in the past decade.”²⁰ It describes the “diagnostic survey instruments” that identify the “best practices” that can ensure good governance. Governing is a technical exercise that brings the most results to its clients if the right survey instruments are used. These diagnostics might be able to provide clients with information about school test results, the regulatory “burden” and the enforceability of contracts.²¹ But they do not address issues such as equity, distribution of power and wealth, social justice and access to power. Moreover, the emphasis on “technical” solutions to what are fundamentally political issues may mean that they become less accountable to political communities.

These arguments point to the claim that “good governance” is fundamentally determined by endogenous factors.²² If democracy does not emerge and is not consolidated, it is due to “corrupt” practices by local elites or an interventionist state that gives too much power to bureaucrats. If the push to liberalize economies and give greater space to market forces does not result in economic growth, or leads to financial crisis, it is due to local factors such as “state capture” by local oligarchs or a lack of a commitment to true liberalization.²³ There is no room in this account for the role of internal or external structures such as the role of financial markets, international trade regimes, or the international division of labor or the gendered basis of social relations. The balance between efficiency and accountability is assured by market mechanisms that put individual agents at the center

¹⁹ Cynthia Hewitt de Alacantha, “Uses and abuses of the concept of governance”, *International Social Science Journal*, 50:1 (March 1998), pp. 105-114.

²⁰ Url: <http://www.worldbank.org/wbi/governance/overview.htm>

²¹ Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobaton, “Governance Matters”, World Bank Institute Working Paper, August 1999: http://www.worldbank.org/wbi/governance/working_papers.htm.

²² Jo Ritzen, William Easterly and Michael Woolcock, “On “Good Politicians and “Bad” Policies: Social Cohesion, Institutions and Growth”, World Bank Policy Research Working Paper (September 2000), <http://www.worldbank.org/wbi/governance/pdf/wps2448.pdf>.

²³ Joel Hellman, Geraint Jones and Daniel Kaufman, “Seize the State, Seize the Day: State Capture, Corruption and Influence in Transition”, World Bank Policy Research Working Paper (September 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=240555

of this potentially democratic universe. However, these arguments seem strangely similar to earlier modernization arguments.

Good governance, then, is fundamentally agnostic about politics and power. Decision-making is seen as a technical exercise that does not require definite statements about who gets what, where and how. It is seen as a way to deal with the dissipation of political power, but it is also an approach to governing that facilitates it. In doing so, it makes it less clear to citizens who is responsible for the decisions that affect their lives; and what are the instruments that they have available to control those very decisions. Governance may seem more participatory and inclusive, with its attempt to create networks, and with its discourse emphasizing flexibility, civil society and openness; but on its own may not provide a basis for legitimate democratic rule.

Constitutionalizing Governance

An important element in the evolution of liberal democracy in the modern period has been the process by which citizens are defined as being part of a political community; and defining the rights and duties that come with citizenship. This process may be defined as constitutionalism, a process that has been linked to state-building in the modern era. Constitutions define and identify the locus of political authority; they lay out the rules and locate political sites for governing. The challenge is to try to arrive at this kind of definition when authority is being displaced and diffused, and may not reside in any center. The governance literature, then, has been useful in pointing out the erosion of formal institutions, especially the state, and the new processes that reflect the diffusion of political authority. However, this literature faces challenges in trying to provide a constitutional basis to governing without the constituent elements of the state: territory, population and locating authority in a central political site.

A first tension is how to find ways to constitutionalist – that is, give formal, legal recognition to – processes whose strength rests with flexibility and informality.²⁴ This implies the question of how to ensure participation in networks that are often based on technical knowledge, as is the case of financial markets. Second, governance arguments have not addressed the question of the continued importance of the state. Because it is hard to constitutionalist the diffusion of the state's authority, the state remains the only identifiable center in which all political and social groups can participate. Moreover, the state has to create the conditions and respond to the consequences of diffusion. The result is that while the state is hollowing out it must also provide effective decision making that promotes the economic and social conditions of globalisation. The resulting paradox is that the state may seem more effective precisely when it is losing its authority.

²⁴ Antje Weiner and Vincent Della Sala, "Constitution-Making and Citizenship Practice: Bridging the Democracy Gap in the EU?," *Journal of Common Market Studies*, 35, no. 4 (December 1997): 595-614.

It is difficult to devise constitutional means to establish transparency, accountability and representativeness of political authority when there are no clearly identifiable political sites. Governance arguments have not been able to spell out where decisions are going to be made, how and by whom. Indeed, the emphasis on flexibility and informality implies that these cannot be defined *a priori*, while constitutionalism aims to locate authority in order to devise mechanisms to control it and hold it accountable. The classic works of constitutionalism, such as M.J.C. Vile's *Constitutionalism and the Separation of Power*, have as their fundamental concern finding ways in which to site political authority in order to provide a check on the exercise of political power and to grant access for citizens.²⁵ Yet, instances of governance cannot seem to provide the same prescriptions. For instance, in the European Union, despite attempts to spell out in treaty and constitutional language the organization of political power, the sites of decision-making remain elusive. They often emerge from a complex web of sites that include supranational institutions, national states, regional and local governments, and parts of civil society. Citizens might be able to look to the European Union to provide new rules on issues ranging from genetically modified organisms to transportation policy, but no one or site can be identified as responsible for them. As the white paper on European governance states, "Many people do not know the difference between the Institutions. They do not understand the who takes the decisions that affect them and do not feel the Institutions act as an effective channel for their views and concerns."²⁶ This is a claim that may be made not only of the EU, and may reflect the growing unease in

A second problem with constitutionalising governance is that it is not entirely clear what form it is going to, or can, take beyond the state. This includes what Stephen Gill called as the "new constitutionalism", or may be called "silent" constitutionalism.²⁷ The multiplication of sites of political authority is part of a programme that shifts a great deal of the rules that place limits on political power outside the public realm and beyond politics. This takes place without a debate about who is to be part of the political community, and how are they going to place limits on the exercise of political power. It is based on the assumption that many policy areas – such as monetary and macroeconomic policy - are "technical" and not political issues so should be dealt with by non-political agencies. Of course, this assumption is fundamentally political in nature; but one of its consequences is to remove from the reach of democratic institutions a wide range of decisions. This might shed light on how the state may have its capacity enhanced in some areas, such as internal security and ability to monitor citizens; but at the same time it is being hollowed out as many areas are placed beyond the reach of formal institutions and constitutional rules.

²⁵ M.J.C. Vile's *Constitutionalism and the Separation of Power* (Indianapolis: Liberty Fund, 1998).

²⁶ Commission of the European Union. *European Governance – A White Paper*. Com (2001) 428, Brussels, 25 July 2001, p.7.

²⁷ Stephen Gill, "The Emerging World Order and European Change: The Political Economy of European Union, in Ralph Miliband and Leo Panitch, eds., *The Socialist Register, 1992* (London: Merlin Press, 1992); Mauro Calise, *La costituzione silenziosa: Geografia dei nuovi poteri* (Roma: Laterza, 1998).

Constitutionalising Governance in the European Union

The European Union provides, perhaps, the best example of a discussion about trying to create a constitutional basis for governance, or more specifically, multi-level governance. Arguments about multi-level governance center on governing beyond the boundaries of the states, with different levels of government and non-governmental actors. The complex network of European institutions, member states, regional and local governments, civil society actors at all levels, are just a few of the components that have created decision-making processes very similar to those found in governance arguments. Moreover, multi-level governance also is consistent with the governance emphasis with process and outputs, which have been the basis for legitimacy for the EU. However, there is a growing unease about these processes as perhaps contributing to a growing popular malaise about the EU's future direction.

It is, perhaps, a coincidence that a lively debate has emerged around the question of providing a formal constitutional basis for the European Union at roughly the same time as one of the four priorities of the Commission headed by Romano Prodi is to produce a white paper on governance. The Commission's definition of governance encompasses elements from that put forward by the United Nations and also found in the good governance prescriptions. It claims that governance includes, "the rules, processes and behavior that affect the way in which powers are exercised at European [sic] level, particularly as regards accountability, clarity, transparency, coherence, efficiency and effectiveness."²⁸ It is noteworthy that the Commission states very clearly that the debate about institutional reform in the EU is intrinsically linked to that of governance, and that these cannot be separated from questions of enhancing the democratic legitimacy of the EU.

The White Paper on governance and the discussion about a European constitution, started under the Portuguese presidency of the Council in the first half of 2000 and highlighted in a speech by German Foreign Minister Joschka Fischer in May 2000, are rooted in two sources. First, there is a sense that the existing institutions are not adequate instruments to provide timely, coherent decision-making structure for an increasingly complex polity. This inadequacy is compounded by the hope to enlarge membership to as many 27 or 28 member states in the next decade. The discussions about governance and constitutionalism in this sense are about delineating a division of powers between the member states and EU institutions, the balance of power between the EU institutions and their possible reorganization. The second source for the emphasis on new forms of governance and constitutionalism is the recognition, and admission by EU and national leaders, that there is a disconnection between the policy-making reach of the EU and the sense of belonging to a democratic party by European citizens affected by those decisions. The challenge here is to temper a sense of

²⁸ Commission of the European Communities. *White Paper on European Governance – Enhancing Democracy in the European Union*. Work Programme. Brussels, 11 October 2000. url: [//europa.eu.int/comm/governance/work/en.pdf](http://europa.eu.int/comm/governance/work/en.pdf), p.4.

alienation amongst EU citizens, and to create democratic structures and processes that will allow people to “feel on top of how the Union is run” and “debating directions of its policies”.²⁹

The Commission’s definition of governance and the attempts to create a European constitution, face the tensions in the concept of governance highlighted by Jessop. The challenge of trying to reconcile co-operation and competition, governability and flexibility, openness and closure, and efficiency and accountability, in the EU seems like a puzzle that is difficult to resolve without some reference to where exactly political authority is to rest. The Commission itself states that the present system, with its obscure decision-making structures, has contributed to popular dissatisfaction with the EU as people, “fail to understand the Union’s objectives and are often unable to put names and faces to tasks.”³⁰ European citizens have not been able to identify a clear locus of political authority that will respond to their demand to know who is responsible for decisions taken that shape their lives. The Commission’s objective seems to be saying precisely that the fluidity and flexibility that have characterized multi-level governance is at the root of the problem. On the other hand, its working plan for the white paper is based entirely on entrenching multi-level governance, with references to features such as vertical and horizontal decentralization, a “networked” Europe.

The use of the concept of governance in Europe is understandable when the aim of establishing a political union with a clear locus of power is not shared by all. However, without a clear consensus that addresses questions of who has power, where and how – the very essence of a political union - any attempt at trying to find a constitutional settlement becomes problematic. Let us turn to some of the tensions discussed earlier to illustrate how it will be difficult to constitutionalist multi-governance in the EU. The debate about a European constitutional order and multi-level governance is very much about openness and closure. This is reflected in its most simplest form in the discussion about enlargement. On the one hand, a constitutional order has to set limits on the borders of legitimate political rule, and has to say who is in and why. On the other hand, governance arguments emphasize a set of “technical” criteria such as administrative and legal capacity to implement the *acquis communautaire*, and level of economic development. Citizens in the present 15 member states will be asked to recognize new members of their political community primarily because they have met a set of technical criteria. Moreover, there is little means for them to decide directly whether they want new members or not.

The openness and closure tension has another dimension that may be more revealing about the limits to governance. For instance, the white paper on European governance emphasizes a great deal the role of subnational governments and civil society in European governance.³¹ While it is easy to identify the subnational governments because these are defined by the constitutions of the member states, civil society remains ambiguous and amorphous in its composition and role. Moreover, this

²⁹ *Ibid.*, p.5

³⁰ *Ibid.*, p.5.

³¹ Commission of the European Union. *European Governance – A White Paper*.

ambiguity does not enhance the legitimacy of the constitution-building process. Certainly, a constitution requires the expertise of legal scholars and their networks, as well as inputs from various organized groups. But a constitution requires that all who are governed by it recognize themselves and feel the process to be legitimate. Revisions to the European treaties, when put to referendum in Denmark, France and Ireland, suggest that the agreements reached by a more narrow circle face difficulties when opened to wider scrutiny and deliberation. A constitutional process, which is open to only a selected part of civil society, will be subject to criticism that it is trying to create a closed European Union. On the other hand, any attempt to say that all citizens should take part as Europeans implies that there is a consensus about what is Europe and who are Europeans. It is hard to claim that this consensus is present in the EU, either amongst the wider public or amongst political leaders.

The lack of clarity about who is in and who is out, and about what it means, carries over into the tension between co-operation and competition in multi-level governance. For instance, a number of member states would like to see integration go forward at a much faster pace, and for a deepening of the institutions of a political union; while others are struggling to accept the present level of integration. This has led to a discussion about “enhanced co-operation” within the EU.³² It is the latest term used to the desire for some, possibly a majority of, member states to move in a direction that is not shared by all. A Europe of “variable geometry” or “a la carte” shares with enhanced co-operation the flexibility of governance but it is not entirely clear if it makes the EU more governable. Rather, it could be the case that not only does it make the EU a much more complex structure; but it clouds lines of responsibility and accountability for citizens. It also establishes different rules for who is in and who is out of different arrangements, and presumably, then, different terms of membership for citizens. According to the amendments proposed in the Treaty of Nice, enhanced co-operation must be consistent with reinforcing integration within the EU, and at the same time must not be a barrier to competition.³³ However, it is hard to see how integration might be reinforced if citizens in one part of the Union are subject to particular integrating pressures while others may not.

The constitutional process in motion in Europe has, for the most part, avoided making any definitive statement to resolve some of these tensions. For instance, the draft prepared by the Robert Schuman Center at the European University Institute, at the request of the European Commission, presents one attempt to move the constitutional debate further ahead.³⁴ The process has involved a number of legal and constitutional experts who have looked to ways in which to restructure the existing treaties so that they can become the legitimate basis for governing in Europe. It states quite

³² Conference of the Permanent Representatives of the Member States. *IGC 2000: Enhanced cooperation – Position Paper from Germany and Italy*, 4 October 2000, Confer 4783/00. Url: [//db.consilium.eu.int/cigdocs/EN/4783en.pdf](http://db.consilium.eu.int/cigdocs/EN/4783en.pdf).

³³ Treaty of Nice, Article 11.

³⁴ Url: <http://www.iue.it/RSC/Treaties.html>.

clearly that its objective is to, “clarify a complex body of rules for the benefit of citizens”.³⁵ This document would not only make the functioning of the EU more understandable to citizens, but it also would have a symbolic and identity-creating value”. But the draft constitution also wants to create more flexibility in EU institutions, with an eye to an EU of 25 or more members. This means addressing unanimity provisions and national ratification procedures that have proven to be cumbersome.

The objectives of the draft constitution is a step forward in that it recognizes that the EU needs a political and constitutional basis. However, it is not entirely clear that it has provided any greater clarity to constitutionalism without the state. First, the draft treaty enshrines the independence of the European Central Bank and of the European System of Central Banks. In doing so, it accepts the division between policy, or at least some types of policy, and politics that is so central to governance arguments. But in doing so, it makes it much harder to establish transparency, accountability and responsibility necessary to achieve minimum standards of democracy. This reflects the "silent constitutionalism" of the EU, where important power is transferred to independent agencies that are consistent with governance structures but perhaps not with the democratic requisites of transparency and accountability. It goes one step further in entrenching a particular macroeconomic regime when it says that member states must comply with the principles of stable prices, sound public finances and monetary conditions and a sustainable balance of payments. It wants to take out of the realm of political debate perhaps the most important policy areas for deciding the allocation of resources in society.

Second, the document does not state clearly what is the source of legitimacy of the European Union. For instance, the American constitution claims that sovereignty rests with the people and its legitimacy is expressed in the Constitution itself. The British constitutional tradition places legitimacy clearly in Parliament; or in its Canadian variation, in a combination of the legislature and the constitution. However, most discussion about European constitutionalism and governance does not address the question, and does not even attempt to provide a form of government for the EU. It often claims that the EU is a unique structure and, therefore, does not conform to conventional forms of government that site political authority in level or other, or one branch of government or other. One might argue that the founders of the American Republic also thought they were creating something new but they made clear statements about where political authority was to rest in a democracy.

Third, the draft constitution does not provide a basis for a division of powers between the constituent units of the polity. One of the central features of a constitution is that it delineates where sovereignty rests, both in general terms, and with respect to jurisdiction over different policy areas. Like much of the discussion on a European constitution, it accepts that there are areas of common

³⁵ Commission of the European Communities. Basic Treaty of the European Union. May 2000, url:

policy, such as transport, agriculture and a rudimentary foreign policy; but there is no talk of sovereignty, jurisdiction or power. This does not resolve the problem raised by the Commission of putting "names and faces" to who is responsible for policies. Fourth, there is little talk of the role of actors other than member states or EU institutions, or those recognized by either of these, in the constitutional process. If the constitution is to be an identity-building instrument, there must be a way for broad, wider participation in the constitution-building process. It cannot be a top-down approach that considers public meetings of EU or member state committees "participation"; or networks of experts as forms of building an identity. This reflects, once again, the problem of openness and closure of the governance approach. The challenge that EU constitution-building faces, indeed all constitutionalism beyond the state, is to find a mechanism that is both inclusive and participatory to secure a degree of legitimacy; yet at the same time needs to be able to arrive at decisions.

The speech by the German Foreign Minister Joschka Fischer in May 2000 was significant because it broke from trying to root constitutionalism in governance arguments. In contrast to the process-oriented approach of governance, he called his talk, "From Confederacy to Federation: Thoughts on the finality of European integration."³⁶ The first part of the title places the constitution in a form of government, a federation, and not in the ambiguous process-centered emphasis of governance. We can have a discussion of what kind of federation can be created, and where to put the emphasis amongst the constituent units. But, at the very least, we have an idea of who is to govern and on what terms. Second, Fischer talks of finality and this can be interpreted as integration having reached its highest and final stage; or a finality as an objective. The point here is that it means making a clear statement about what is Europe beyond being a process to solve common policy concerns. Fischer's speech is full of political challenges that, while they may point to governing beyond the state, are very much pointed at identifying the legitimacy of government - in this case European - in governing. He speaks explicitly of a European government, and of delineating a division of powers between the constituent parts of the federation. The contrast between his speech and the spirit of the draft constitution is striking.³⁷ The fact that it has not been met with a rush of support, and that the Commission working program for its white paper on governance is pointed in a different direction, does not indicate a radical shift away from multi-level governance.

Concluding Remarks

<http://www.iue.it/RSC/pdf/Report-Treaties.pdf>, p.4.

³⁶ Joschka Fischer, "From Confederacy to Federation - Thoughts on the finality of European integration", Speech at the Humboldt University, Berlin, 12 May 2000. Url: [//www.german-embassy.org.uk/speech_of_foreign_minister_fis.html](http://www.german-embassy.org.uk/speech_of_foreign_minister_fis.html).

³⁷ French President Jacques Chirac was not very supportive of Fischer's approach in his speech to the German Bundestag on 27 June 2000.

Constitutionalism is fundamentally about politics as it is concerned with controlling political power.³⁸ It defines who has the right to use political power, when and how; it defines who has the legitimate right to govern and on what basis. Governance argues that political power may have shifted outside the state and may be dissipated and diffused. In doing so, it becomes hard to see what kinds of constitutional structures can be created that will be able to control political power that may be increasingly in private hands. An emphasis on process and outcomes makes this an even harder task. Constitutionalising governance may first require a definition of adequate structures that can control this multi-site, multi-actor universe. This may mean that governing that has now spilled beyond the state needs to be brought back within some other framework. Joschka Fischer's speech suggest that we may find a solution by looking to federalism as a way of trying to understand ways in which we can provide constitutional forms for governing beyond the state. Until that is done, the faith in civil society as a locus of governance may generate new social relations and launch new political actors. But it will also mean transferring more and more areas of unaccountable political power to parts of civil society that will remain further outside democratic control. In this way, governance does not provide us with a way of trying find democratic solutions to governing beyond the state. Perhaps a solution may rest with the foundations of constitutionalism: identifying who belongs in the political community and on what basis; where political power is to rest and how it is to be exercised; and placing limits on the use of political power through institutions that citizens find accessible, transparent and accountable.

³⁸ Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Cambridge, MA: Harvard University Press, 1999).