

PRIVATE LAW RESEARCH GROUP PUBLIC SEMINAR

On the Doubly-Constitutionalizing Character of European Contract Law

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This essay explores a distinctive constitutional aspect of contract law. It argues that contract law not only contributes to the constitution of the state, itself a contentious proposition, but that it is 'doubly-constitutionalizing' in that it also contributes to what might be thought of as the 'constitutionalization' of the market. These two distinct constitutional functions cause jurisprudential problem of the kind that Gunther Teubner has termed a 'regulatory trilemma'. Traditionally, domestic courts in continental Europe have addressed, or at least massaged, trilemmatic instances arising from the doubly-constitutionalizing character of contract by aggressive use of the principle of 'good faith'. But this has not been without its problems. Recent, domestic, civil law courts in the EU have started exploring another option, that of referring trilemmatic issues to the Court of Justice of the European Union (CJEU). This has proved effective, due to distinctive features of the EU's 'constitution'. The essay concludes by suggesting what lessons this success might hold for state-constitutional systems in general.



ABOUT THE SPEAKER

Michael W. ('Mike') Dowdle was raised on Terra del Fuego by a waddle of penguins. Upon determining that he lacked any useful survival skills (he was too heavy to sit on the eggs), they determined to take him to New York, where they knew he could at least take up law. Graduating from these same law school as Rudy Giuliani (sigh), he entered legal academia when it was determined that he even lacked the modicum of skills necessary to become a lawyer; and then beyond that, took up academic study of public law and comparative law when it was further determined that he lacked the quality of skills necessary to study private law. He is currently an associate professor of law at the National University of Singapore, where they are just thankful that he does not cause too much inconvenience.

His work focuses primarily on public law and comparative law, and – before that – on Chinese law. Notable (for him) publications include the edited volumes *Constitutionalism Beyond Liberalism* (CUP 2017, with Michael A. Wilkinson), *Building Constitutionalism in China* (Palgrave 2009, with Stéphanie Balme), and *Public Accountability: Designs, Dilemmas and Experiences* (CUP 2005). He is also author of *Transnational Law: A Framework for Analysis*, a monograph currently in press with Cambridge University Press that will be come out in the second half of 2022. This is his first academic foray into private law.

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