

# Beyond Constitutionalism: The Pluralist Structure of Postnational Law

Nico Krisch



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## *The Promise and Perils of Postnational Constitutionalism*

We tend to fill voids with what we know. When we are thrown into unfamiliar spaces, we try to chart them with the maps we possess, construct them with the tools we already have. Working with analogies, extending and adapting existing concepts, seems usually preferable to the creation of ideas and structures from scratch, not only because of the risks involved in the latter, but also because of our limits of imagination.

When we try to imagine the postnational space, it is not surprising then that we turn for guidance first to the well known, the space of the national. The postnational, no doubt, is unfamiliar territory; the shape of its institutions, of allegiances and loyalties, of influence and power, submission and resistance is different—sometimes radically different—from what we are familiar with. As we have seen in the introductory chapter, one of the certainties that has disappeared with the rise of the postnational is the distinction between national and international politics, and between national and international law. This distinction used to be central to our conceptualization of the political and legal order: it allowed us to layer our normative and institutional demands, with only thin requirements for the international level and relatively thick requirements for domestic institutions. With the demise of the distinction, it has become tempting to have recourse to domestic models of political order, to try to extend them to capture the extended scope of politics, to compensate for domestic losses. Otherwise, it seems, we will be unable to realize central political values in the new, modified political space we have come to inhabit.

One such model is constitutionalism, and it is central to our inquiry because it embodies, apart from substantive values such as rights and democracy, a structural vision. This vision is intimately bound up with the rule of law: it is directed at a political order comprehensively shaped by law, one in which politics, passions, and power are tamed by the particular rationality of the legal system. In its clearest expression, it is geared towards a constitution as a framework that determines how political actors can pursue their causes.

Constitutionalism in this reading represents a strong candidate for guiding our inquiry about the structure of postnational law, if only because of its thick domestic pedigree. Alternative, especially pluralist approaches would have to show why we need a break with key national traditions; why the structural implications of constitutionalism cannot carry over into the postnational realm. Yet some would argue that this contrast is overdrawn in the first place—that constitutionalism makes more limited demands, substantive rather than formal ones, that might even allow for a combination with pluralist ideas. In this reading, constitutionalism would simply reference a set of values—democracy, rights, the rule of law—and would be thin enough to be translated into the postnational sphere.

In this chapter, I seek to shed light on the notion and prospects of postnational constitutionalism by inquiring into the core content of constitutionalism as a political tradition and into what of this content should and can guide us in the construction of the new, postnational political space. I approach the issue in three main steps. In Section I, I trace the debate about constitutionalism in the postnational order, and I try to illuminate how we should approach the conflict between the different visions apparent here. This involves an inquiry into the idea of translation from one context into another: how tightly should our usage of a concept in the postnational realm be tied to that in its source context, the domestic one? In Section II, I apply the methodological insights of this inquiry and take a closer look at domestic origins by examining which notions of constitutionalism resonate there, focusing primarily on the contest between ‘power-limiting’ and ‘foundational’ conceptions since the eighteenth century. From history I move on to normative theory and seek to discern more clearly which elements of the contemporary practice of constitutionalism form essential pillars rather than merely secondary features. I then return, in Section III, to the postnational sphere and assess the implications there of foundational constitutionalism (the dominant domestic constitutionalist strand) and its problems in the highly divided, postnational society. I conclude by sketching some of the consequences of the findings for the value of alternative, especially pluralist approaches in the construction of postnational governance.

### I. MODELS OF POSTNATIONAL ORDER

Constitutionalism made a relatively late appearance in postnational governance, both in Europe and—later still—on the global level.<sup>1</sup> For long, those new structures were dealt with through the classical prism of international

<sup>1</sup> For useful surveys, see N Walker, ‘Taking Constitutionalism Beyond the State’, *Political Studies* 56 (2008), 519–43; I Ley, ‘Kant versus Locke:

order, intergovernmentalism, with some modifications but without a categorical challenge. As usual, old paradigms kept structuring our understanding of reality until they had become too obviously outdated and, for long, the gradual development of European integration and globalization helped to conceal the extent of the challenge.

### 1. *The European Debate*

In the European context, this changed slowly as the supranational character of the European Communities became more pronounced from the 1960s onwards, but it took until the early 1980s for constitutionalism to become a main theme in the analysis of the EC's transformation. Since then, however, it has become omnipresent, not only in theoretical discourse but also in practical politics, resulting not least in the drafting of an explicitly 'constitutional' treaty.<sup>2</sup> This project may have stalled, but constitution and constitutionalization have become indispensable terms of reference in the debate on the European project.<sup>3</sup>

Three main understandings of 'constitution' and 'constitutionalism' dominate this debate. The first equates constitutionalization with the increasing legalization of the European political order, the gradual submission of politics to a process of law. It found its earliest prominent reflection in the 1986 judgment of the European Court of Justice (ECJ) in *Les Verts*, with its famous statement that the EC was a 'community based on the rule of law' as its institutions could not avoid a review of their acts on the basis of the 'constitutional charter', the treaty establishing the EC.<sup>4</sup> It also underlay Eric Stein's much-noted 1981 article on the 'making of a constitution for Europe', in which he recounts the process by which the ECJ, over time, had expanded the legal determination of the European political order by insisting on direct

Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 69 (2009), 317–45.

<sup>2</sup> Treaty establishing a Constitution for Europe, *Official Journal EU*, C 310/1, 16 December 2004.

<sup>3</sup> For analyses of the debate, see N Walker, 'European Constitutionalism in the State Constitutional Tradition', *Current Legal Problems* 59 (2006), 51–89 at 51–6; C Möllers, 'Verfassungsgebende Gewalt—Verfassung—Konstitutionalisierung' in A von Bogdandy & J Bast (eds), *Europäisches Verfassungsrecht*, 2nd edn, Berlin: Springer Verlag, 2009, 227–78.

<sup>4</sup> ECJ, Judgment of 23 April 1986, 294/83, *Parti écologiste 'Les Verts' v European Parliament*, ECR 1986, 1339, para 23.

effect, supremacy, horizontal effects etc.<sup>5</sup> In this vein, many commentators in the 1990s believed that Europe already had a constitution.<sup>6</sup>

This understanding, however, was not alone in Stein's account. For him, the making of a transnational constitution was not only about increasing legalization, but also about the creation of a unitary, hierarchically ordered political structure in Europe—a structure he regarded as 'federal-type' already at that point.<sup>7</sup> This aspect connected his account with later, broader visions of what constitutionalizing Europe meant: with ideas of a European constitution as determining the overall structure, process, and basic values of the continent's political edifice, as expounded for example by Jürgen Habermas.<sup>8</sup> In this account, a constitution could become a focus for collective self-determination and enhance the legitimacy of the increasingly demanding political structure of the EU. It was precisely this association that the process towards the Treaty for a Constitution for Europe sought to evoke.<sup>9</sup> In the end, it may have contributed to its failure: critics were wary of the increased stability, autonomy, and legitimacy of a constitutionalized Union and of the threat this would have posed to member state sovereignty.<sup>10</sup>

A third main strand of constitutionalist thinking, a more discursive one, has arisen mainly since the late 1990s. Dissatisfied with classical models of constitutionalism and their potential for European governance arrangements, some authors have sought to construct alternative visions, based on the idea of a constitution as process rather than as a particular institutional form or structure. Jo Shaw, for instance, has put forward a view of 'postnational constitutionalism' based on citizens' dialogue and discourse and on contestation and recognition of difference rather than the entrench-

<sup>5</sup> E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law* 75 (1981), 1–27.

<sup>6</sup> See, eg, G F Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review* 26 (1989), 595–614; also the survey in J H H Weiler, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, ch 6. Sometimes, this was explicitly linked to a contractual notion of constitution; see G Frankenberg, 'The Return of the Contract', *European Law Journal* 6 (2000), 257–76.

<sup>7</sup> Stein, 'Transnational Constitution', 1.

<sup>8</sup> J Habermas, 'Why Europe Needs a Constitution', *New Left Review* 11 (September–October 2001), 5–26.

<sup>9</sup> See J H H Weiler, 'On the Power of the Word: Europe's Constitutional Iconography', *International Journal of Constitutional Law* 3 (2005), 173–90.

<sup>10</sup> On underlying tensions in constitutionalist discourse around the constitutional treaty, see M Poiars Maduro, 'The importance of being called a constitution: Constitutional authority and the authority of constitutionalism', *International Journal of Constitutional Law* 3 (2005), 332–56.

ment of common values.<sup>11</sup> Other authors have taken this approach further, with notions of ‘constitutional pluralism’ and ‘contrapunctual law’ becoming increasingly prominent.<sup>12</sup> This vision of constitutionalism situates itself explicitly in a different tradition of thought than the previous ones, and I will return to its origins below.

## 2. Global Analogues

Unsurprisingly, it took constitutionalism much longer to gain prominence in the global context than it did in Europe.<sup>13</sup> The lack of a clear political centre or founding document, the variety of relatively disconnected regimes, the widespread weakness of law when faced with power politics—all these factors made it difficult credibly to interpret international politics in a constitutional vein. Early efforts to do so—such as the one by Alfred Verdross in 1926<sup>14</sup>—had only limited resonance; overall, the description of the international realm as ‘anarchical’<sup>15</sup> secured the continued dominance of an inter-governmental framework in clear distance from domestic models.

This began to change in the 1990s, mainly for three reasons. One was the perception of a convergence of political ideas after the end of the Cold War, encapsulated in the notion of an ‘international community’ with common values and a stronger common normative framework.<sup>16</sup> The second factor was the increasing institutionalization of international law and politics as new institutions such as the World Trade Organization (WTO) appeared on the scene and old ones, such as the World Bank and the UN Security Council, were revitalized and strengthened;<sup>17</sup> along with this went a greater

<sup>11</sup> J Shaw, ‘“Postnational Constitutionalism” in the European Union’, *Journal of European Public Policy* 6 (1999), 579–97.

<sup>12</sup> See, eg, N Walker, ‘The Idea of Constitutional Pluralism’, *Modern Law Review* 65 (2002), 317–59; and the contributions to J H H Weiler & M Wind (eds), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003.

<sup>13</sup> For a historical account, see B Fassbender, ‘The United Nations Charter as Constitution of the International Community’, *Columbia Journal of Transnational Law* 36 (1998), 529–619 at 538–51.

<sup>14</sup> A Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna: Springer Verlag, 1926.

<sup>15</sup> H Bull, *The Anarchical Society: A Study of Order in World Politics*, London: Macmillan, 1977.

<sup>16</sup> See B Simma, ‘From Bilateralism to Community Interest in International Law’, *Recueil des Cours de l’Académie de Droit International* 250 (1994-VI), 217–384.

<sup>17</sup> See J E Alvarez, ‘International Organizations: Then and Now’, *American Journal of International Law* 100 (2006), 324–47.

prominence of legal mechanisms of dispute settlement in various contexts—the WTO, the law of the sea, the International Criminal Court—that led commentators to diagnose a progressive legalization of the international sphere.<sup>18</sup> Finally, economic globalization spurred an increasing awareness of the links between domestic and international politics and their various actors, pushing for an emphasis on transnational rather than classical interstate structures.<sup>19</sup> Countertendencies, such as hegemonic action and the growing fragmentation of the system,<sup>20</sup> provided a challenge for constitutionalist thinking (though ultimately more of a trigger for reinforcing it).<sup>21</sup>

The main positions in the global constitutional debate show quite a few similarities with the European discussion; we can frame them—again, leaving out many nuances—as centring on checks, structure, and discourse.<sup>22</sup>

The first strand is characterized by an emphasis on *checks* in global politics. In part, this goes back to the diagnosis of an increasing convergence of values—values that now pose limits to classical international law because they have become enshrined in hierarchically superior norms, such as *ius cogens*, which states cannot deviate from by agreement. Much of the focus here is on human rights that operate as a check on politics in a similar form as in domestic constitutional settings. Yet constitutional checks are not only made out in substantive norms, but also in the mechanisms to enforce them. Here the legalization aspect, so prominent in the European debate, comes

<sup>18</sup> See J L Goldstein, M Kahler, RO Keohane, & A-M Slaughter (eds), *Legalization and World Politics*, Cambridge, MA: MIT Press, 2001.

<sup>19</sup> See, eg, M Zürn, *Regieren jenseits des Nationalstaats*, Frankfurt am Main: Suhrkamp Verlag, 1998.

<sup>20</sup> See N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', *European Journal of International Law* 16 (2005), 369–408; A Fischer-Lescano & G Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, Frankfurt am Main: Suhrkamp Verlag, 2006.

<sup>21</sup> See J Klabbers, 'Setting the Scene' in J Klabbers, A Peters, & G Ulfstein, *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2009, 1–44 at 18; J L Dunoff & J P Trachtman, 'A Functional Approach to International Constitutionalization' in J L Dunoff & J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, 3–35 at 5–9. On the importance of US hegemony for the related phenomenon of a liberal transformation of international law, see N Krisch, 'Amerikanische Hegemonie und liberale Revolution im Völkerrecht', *Der Staat* 43 (2004), 267–97.

<sup>22</sup> See the survey in Klabbers, 'Setting the Scene'; and the contributions to R S J Macdonald (ed), *Towards World Constitutionalism*, Leiden: Martinus Nijhoff, 2005; Dunoff & Trachtman, *Ruling the World?*; and the special issue on global constitutionalism, *Indiana Journal of Global Legal Studies* 16:2 (2008).

in again, though it takes a different form in the decentralized global order. The focus is not exclusively on shaping and limiting central institutions, but also on keeping the most powerful players—states—in check and thereby strengthening elements of a broader rule of law. Judicial review—of states in settings such as the WTO Dispute Settlement, of international institutions such as the Security Council often in more aspirational form—is a key component here.<sup>23</sup>

Such checks typically operate on the level of particular regimes, not the whole global order, and constitutionalism is directed often at constitutionalization, at gradual progress in hedging in politics and institutions.<sup>24</sup> This circumscribed character is reflected also in the terminology used: authors speak of ‘partial’ constitutions or of processes of ‘micro-constitutionalisation’.<sup>25</sup> And the regime-specific focus is brought out most clearly through conceptual multiplication: Gunter Teubner’s ‘societal constitutionalism’, for example, gives rise to ‘global digital constitutions’, ‘global health constitutions’ etc.<sup>26</sup>

The second strand, less pronounced than in the European debate,<sup>27</sup> operates on a grander scale and focuses on *structural* issues. It sets its sights on the global order as a whole, seeking to identify and conceive structures that would redeem more comprehensive constitutional promises.<sup>28</sup> This may be based on redescriptions of the existing order: for example, Bardo Fassbender’s portrayal of the UN Charter as a world constitution—as laying

<sup>23</sup> See, eg, E de Wet, ‘The International Constitutional Order’, *International & Comparative Law Quarterly* 55 (2006), 51–76; E-U Petersmann, ‘“Human Rights, Constitutionalism and the World Trade Organization”: Challenges for World Trade Organization Jurisprudence and Civil Society’, *Leiden Journal of International Law* 19 (2006), 633–67.

<sup>24</sup> See, eg, Klabbers, Peters, & Ulfstein, *Constitutionalization*; Dunoff & Trachtman, ‘Functional Approach’, 9–10.

<sup>25</sup> C Walter, ‘International Law in a Process of Constitutionalization’ in J Nijman & A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law*, Oxford: Oxford University Press, 2007, 191–215 at 195–8; A Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, *Leiden Journal of International Law* 19 (2006), 579–610 at 593–7.

<sup>26</sup> G Teubner, ‘Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 63 (2003), 1–28; G Teubner, ‘Fragmented Foundations: Societal Constitutionalism beyond the Nation State’ in M Loughlin & P Dobner (eds), *The Twilight of Constitutionalism?*, Oxford: Oxford University Press, 2010, 327–41.

<sup>27</sup> See Ley, ‘Kant versus Locke’, 340–4.

<sup>28</sup> See, eg, Peters, ‘Compensatory Constitutionalism’.

out fundamental rules, creating central institutions, and placing itself at the top of the global hierarchy of norms—uses the constitutional prism to make better sense of the ways in which the Charter already operates.<sup>29</sup> Christian Tomuschat sees the international legal order moving towards a structure that not only defines common values and processes but also the place of other institutions, namely the state, in the global order.<sup>30</sup> Other examples of this structural strand adopt a more openly prospective approach and develop models for restructuring global politics in a constitutional vein. This is common among political theorists—the global institutional visions of David Held, Iris Marion Young, or Jürgen Habermas build, for all their differences, on the domestic model of a constitution that shapes and delimits the powers of different organs and levels of government and frames conflicts between them.<sup>31</sup> Theirs is a quasi-federal project, popular also among lawyers,<sup>32</sup> in which powers are distributed among different levels of governance according to norms such as subsidiarity and inclusiveness. Unlike in Europe, even such holistic approaches do not aim at an overarching constitutional document, but their substance goes in a similar direction: towards a framework for politics based on reasoned principles and collective self-government, towering above our everyday, more mundane political struggles.

As in the European debate, a third, *discursive* strand of constitutionalism draws on quite different ideas of what a constitution is and ought to be. This is driven in part by authors who see their theories for Europe only

<sup>29</sup> Fassbender, ‘UN Charter as Constitution’.

<sup>30</sup> C Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, *Recueil des Cours de l’Académie de Droit International* 281 (1999), 9–438 at 72–90. For a discussion, see A von Bogdandy, ‘Constitutionalism in International Law: Comments on a Proposal from Germany’, *Harvard International Law Journal* 47 (2006), 223–42.

<sup>31</sup> D Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge: Polity Press, 1995; I M Young, *Inclusion and Democracy*, Oxford: Oxford University Press, 2000, ch 7; J Habermas, “‘Hat die Konstitutionalisierung’ des Völkerrechts noch eine Chance?” in J Habermas, *Der gespaltene Westen*, Frankfurt am Main: Suhrkamp Verlag, 2004, 113–93; see also the specification in J Habermas, ‘Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik’ in P Niesen & B Herborth (eds), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik*, Frankfurt am Main: Suhrkamp Verlag, 2007, 406–59 at 442–57.

<sup>32</sup> eg, M Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, *European Journal of International Law* 15 (2004), 907–31; M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Dunoff & Trachtman, *Ruling the World?*, 258–324.

as a particular expression of broader trends. Ideas about constitutional pluralism, dialogue, and process are then applied well beyond the realm of European politics.<sup>33</sup> Structural elements have an even weaker place in other approaches which, like Martti Koskenniemi's, regard constitutionalism as primarily an attitude, a quest for universality and impartiality, a 'mindset'. Koskenniemi grounds this view in Kantian thought, though in a reading of Kant that downplays many of the more institutionalist aspects of his work.<sup>34</sup>

### 3. Problems of Translation

The constitutionalist debate on both the European and global levels is a deliberate attempt to connect those spheres to existing models of order—models that in the framework of the nation-state have proved successful and attractive over a long period of time. As outlined in the first chapter, this reflects an attempt to respond through 'transfer' to the changed circumstances of postnational governance that have undermined classical, inter-governmental models and call for new conceptualizations. Using domestic experiences is an obvious move, but not only have international lawyers and international relations scholars long been wary of domestic analogies,<sup>35</sup> the above sketch of the current debate also reflects continuing uncertainty as to whether and how such analogies can be constructed.

One central challenge then is to define more precisely what it means to transfer those notions to another context. Many authors have suggested understanding it as an effort in translation,<sup>36</sup> but few have specified the implications further. Among them, Neil Walker's approach best captures what lies beneath the surface in many other writings.<sup>37</sup> Walker emphasizes the need for understanding both the source and the destination environments and points to the importance of defining the translated term at a level of abstraction that respects the requirements of both contextual-historical

<sup>33</sup> Walker, 'Idea of Constitutional Pluralism'. See also N Tsagourias, 'Introduction—Constitutionalism: A Theoretical Roadmap' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Models*, Cambridge: Cambridge University Press, 2007, 1–13.

<sup>34</sup> M Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about Law and Globalization', *Theoretical Inquiries in Law* 8 (2007), 9–36.

<sup>35</sup> See the account of the debate in H Suganami, *The Domestic Analogy and World Order Proposals*, Cambridge: Cambridge University Press, 1989.

<sup>36</sup> See only Weiler, *Constitution of Europe*, 270.

<sup>37</sup> N Walker, 'Postnational Constitutionalism and the Problem of Translation' in Weiler & Wind, *European Constitutionalism*, 27–54.

fit and general comprehensibility. Unfortunately, though, the balance and context-sensitivity of this general approach fades away when applied to the concrete case of constitutionalism. Suddenly Walker claims that

the value of the ‘constitutionally signified’ which provides the basis for translation is reduced to the extent that, for the sake of contextual ‘fit’, it is not of universal explanatory relevance across constitutional sites and does not speak to the deepest justificatory roots of constitutionalism’s normative orientation.<sup>38</sup>

This already presupposes that constitutionalism’s explanatory value and justificatory roots are indeed universal: that they are independent of its original context, namely state and nation, and that the transfer into another, supranational environment does not *a priori* pose significant problems. But this makes the argument circular: whether or not (and under which conditions) constitutionalism can be taken out of the state context should have been the result, not the starting point, of the translation effort—after all, we cannot be sure whether constitutionalism and the postnational sphere go together at all. As a result of this approach, Walker comes to define the concept in such an abstract way that the actual challenges of translation disappear; constitutionalism becomes a mere ‘symbolic and normative frame of reference’, and the elaboration of its content on the European level is only guided by the three elements of material well-being, social cohesion, and effective freedom. The fruit of the translation is then ‘a mere framing of some of the common questions which should inform and validate constitutional analysis across all sites of authority’;<sup>39</sup> at this level of generality, all the particular content of constitutionalism, all its connections to particular historical and social circumstances, are lost. Walker’s later work acknowledges this problem more openly and develops a greater sensitivity for the origins of the concept; but here, too, constitutionalism is assumed to be open enough for an ‘innovative understanding’ that makes it applicable in the postnational context.<sup>40</sup>

The general problem with such an approach to translation becomes clearer if we take a closer look at another use of translation in a legal-political context, that of Lawrence Lessig. Lessig inquires into guidelines for interpreting the US Constitution, and he understands this interpretation effort as one in translation from the context of eighteenth-century America

<sup>38</sup> Walker, ‘Postnational Constitutionalism’, 42.

<sup>39</sup> *ibid.*, 53.

<sup>40</sup> Walker, ‘European Constitutionalism’, 54; N Walker, ‘Beyond the Holistic Constitution?’ in Loughlin & Dobner, *Twilight*, 291–308 at 296.

into today's changed society.<sup>41</sup> As with Walker's approach, his interpretive results are quite far removed from the original context and meaning (and rightly so). But they are the result of a crucial choice Lessig makes—a choice about the ends of translation. As he explains, there is an important difference between translations that intend to carry meaning and guidance for the target context, and those that intend to let us travel back and understand the source context; he calls the first type *forward* and the second *backward* translation.<sup>42</sup> Interpreting the US Constitution, to him, requires 'forward translation'—unsurprisingly, as the constitution comes with a claim to validity for today's world and therefore requires not just understanding but *application* in changed circumstances.<sup>43</sup> Ronald Dworkin's theory of interpretation (which at times he also describes as translation<sup>44</sup>) is built on a similar intuition, namely that a two-step approach is required—that history, contextual 'fit', has to be complemented by an element of contemporary morality because, as participants and subjects to the validity claim of the law, we have to give it a meaning that can be justified overall.<sup>45</sup> Dworkin differs from Lessig by placing less emphasis on the 'humility' of the translator,<sup>46</sup> but both converge on the importance of the purpose of legal translation—application in today's world—for the methodological framework.

Yet when we translate constitutionalism into the postnational context, our goal is quite different, and so too has to be our method. Unlike in constitutional interpretation, constitutionalism in our context does not come with an established validity claim; it is merely an offer, and we can choose whether or not to accept it as a valid model—if we choose not to accept it, we may try to construct an entirely different type of order for postnational governance. Moreover, there is always the possibility that constitutionalism does not fit the target context: that it demands too much or is built on foundations that find too little resonance in the postnational order. In translation, this is a typical risk: it usually aims primarily at *understanding* terms from foreign languages and different contexts; and this can imply emphasizing their particularity, their interwovenness with practices that are and remain

<sup>41</sup> L Lessig, 'Fidelity and Constraint', *Fordham Law Review* 65 (1997), 1365–433; see also L Lessig, 'Fidelity in Translation', *Texas Law Review* 71 (1993), 1165–268.

<sup>42</sup> Lessig, 'Fidelity and Constraint', 1374–6.

<sup>43</sup> See also Lessig, 'Fidelity in Translation', 1189–214.

<sup>44</sup> R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, MA: Harvard University Press, 1996, 8.

<sup>45</sup> See R Dworkin, *Law's Empire*, Cambridge, MA: Harvard University Press, 1986, chs 2, 6, and 7. For applications, see Dworkin, *Freedom's Law*.

<sup>46</sup> Lessig, 'Fidelity in Translation', 1251–61.

foreign. And unlike in constitutional interpretation, we do not need to *apply* constitutionalism to postnational governance; the two may simply remain strangers.

This suggests that the type of translation adequate to our task is closer to the model of *backward* interpretation Lessig proposes. We seek to establish whether or not, under what conditions, and on which terms, constitutionalism is useful as a framework for the postnational context. Understanding its meaning in the source context is not the whole enterprise, but it is its largest part—after all, the translation effort mainly seeks to establish whether in the postnational sphere we can connect to that particular domestic model of order and therefore benefit from the high degree of legitimacy it carries. For this purpose, we need to place emphasis on Lessig’s first step of translation: on locating the original meaning in the source context of constitutionalism. This requires a detailed engagement with the history of the concept, with its different historical understandings and the varying degrees of appeal they have had over time. In a second step, we can then ask how this original meaning can be carried into our context; what the implications of central pillars of domestic constitutionalism would be in the postnational sphere.

But here we should be careful since the point of that second step is still largely to carry us back to the original context—if we want to connect to the legitimacy constitutionalism provides in domestic politics, we have to remain true to its central pillars. We may emphasize its aspirational value: in the postnational realm, constitutionalism might signify an objective, the end point of a potential process of transformation, and it might confront us with the imperfections of postnational reality when compared to the domestic ideal. Keeping the link with the domestic origins will then help us avoid the risks of a ‘forward’ translation: it prevents us from too easily adjusting the concept to what is possible in the circumstances of the target context.<sup>47</sup> For in the postnational realm, the conditions for realizing constitutionalism may not be fulfilled—perhaps not yet, perhaps they will never be. As in any translation, we have to retain the possibility of just being puzzled by the context-dependence, the potential lack of transferability of our object of translation. After all, it may turn out that constitutionalism is not made for the postnational context.

## II. COMPETING CONSTITUTIONALISMS

Like most successful political concepts, constitutionalism comes in many guises, and pinning down its meaning is difficult not only in the postnational

<sup>47</sup> For a realization of this risk, see S Besson, ‘Whose Constitution(s)? International Law, Constitutionalism, and Democracy’ in Dunoff & Trachtman, *Ruling the World?*, 381–407.

sphere but also in its traditional source context, domestic politics. Already the term ‘constitution’ is used in so many ways that some authors regard it as ‘increasingly polymorphic’<sup>48</sup> or as an ‘essentially contested concept’<sup>49</sup>—sometimes it denotes a mere description of the state of society or of the operating rules of its political system; sometimes it is taken to refer to particular limits to governmental powers, especially bills of rights; and sometimes it stands for the existence of a written instrument specifying the shape and limits of public power.<sup>50</sup> ‘Constitutionalism’ hardly fares better: it has a more obvious normative component than ‘constitution’, but views diverge widely on what this normative component is. For some, it needs to be directed at a constitution in one of the more substantial meanings mentioned above; for others it signifies a movement towards ideals of freedom, democracy, and good governance; and sometimes it is also taken to represent an expansion of such goals from the political system into wider strata of society, including private law and the relations between individuals.<sup>51</sup>

Among those different interpretations, singling out the right one for all purposes is impossible. Some will fit better in some contexts, some in others, and the terms will derive their particular meanings from the discourses that shape them. In our case, the objective of the inquiry focuses the analysis in two ways. First, as the debate on postnational constitutionalism seeks to tap into the *legitimizing* potential of its domestic counterpart, we are only interested in normatively rich conceptions, not in those of mere analytical or descriptive value. Some historically influential interpretations, for example, understand a constitution as the sum of the rules and institutions of a society’s political system.<sup>52</sup> They fall outside our focus. The same holds true for contemporary approaches such as Niklas Luhmann’s, which regards a constitution merely as the ‘structural coupling’ of law and politics.<sup>53</sup> However

<sup>48</sup> Walker, ‘Constitutional Pluralism’, 333.

<sup>49</sup> C Harvey, J Morison, & J Shaw, ‘Voices, Spaces, and Processes in Constitutionalism’, *Journal of Law and Society* 27 (2000), 1–3 at 3.

<sup>50</sup> See J Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in L Alexander (ed), *Constitutionalism: Philosophical Foundations*, Cambridge: Cambridge University Press, 2001, 152–93 at 153–4; P P Craig, ‘Constitutions, Constitutionalism, and the European Union’, *European Law Journal* 7 (2001), 125–50 at 126–7.

<sup>51</sup> See Craig, ‘Constitutions’, 127–8.

<sup>52</sup> Raz, ‘Authority and Interpretation of Constitutions’, 153; D Grimm, ‘Der Verfassungsbegriff in historischer Entwicklung’ in D Grimm, *Die Zukunft der Verfassung*, Frankfurt am Main: Suhrkamp Verlag, 1994, 101–55 at 102–3.

<sup>53</sup> N Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main: Suhrkamp Verlag, 1993, 468–81.

much such a coupling might be an ‘evolutionary achievement’,<sup>54</sup> it lacks a normative core and can hardly account for the legitimating power constitution and constitutionalism exert in contemporary societies.

A similar consideration applies to conceptions of constitutionalism that historically have not been at the centre of the concept’s societal impact. For example, James Tully’s notion of a ‘common constitutionalism’ harks back to political practices that preceded the ‘modern constitutionalism’ that in his view has captured our political imagination far too long.<sup>55</sup> But while his alternative with its emphasis on diversity and accommodation rather than unity and hierarchy holds promise for the postnational space (I will return to it in the next chapter), it can hardly provide the link with the tradition of constitutionalism that has been central to domestic political legitimacy over the last two centuries.

### 1. *Constitutions as Limitation and Foundation*

Among normative visions of constitution and constitutionalism, the most enduring theme has been the limitation of public power. As Charles McIlwain puts it in his classical study of the concept:

[T]he most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.<sup>56</sup>

In contrast to earlier, more descriptive uses, this limitational interpretation became increasingly influential in seventeenth-century England, for example in the charges against Charles I in 1649 or against James II in 1688, or in Locke’s ‘fundamental constitutions’ of Carolina in 1669.<sup>57</sup> After the successful challenge of royal prerogatives, constitutions were now regarded as rules the violation of which could have serious consequences—and the idea that government was subject to legal limits was given particularly clear expression in the Bill of Rights in 1689. It naturally faced difficulties in absolute monarchies but found increasing reflection where power was less concentrated. When rulers were weak or vulnerable, as in much of Germany at the time, the estates were often able to force them to agree on limitations

<sup>54</sup> N Luhmann, ‘Verfassung als evolutionäre Errungenschaft’, *Rechtshistorisches Journal* 9 (1990), 176–220.

<sup>55</sup> J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press, 1995.

<sup>56</sup> C H McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca, NY: Cornell University Press, 1940 (reprint: Clark: Lawbook Exchange, 2005), 24.

<sup>57</sup> Grimm, ‘Verfassungsbegriff’, 104–5.

to their power. These agreements were variously called fundamental laws, agreements of government (*Herrschaftsverträge*), or electoral capitulations (*Wahlkapitulationen*); they established limits to royal powers and could not be unilaterally terminated by the kings.<sup>58</sup>

### Revolutions

A broader vision of what ‘constitution’ could mean arose only with the American and French revolutions in the eighteenth century.<sup>59</sup> The new understanding came to see constitutions not only as a limitation of government, but as its very foundation.<sup>60</sup> The main characteristic of the new type of constitution was not so much its written nature—as mentioned, written fundamental laws existed before. It was rather the comprehensive ambition, the claim to ground the entire system of government and not only to shape it in one way or another. Thomas Paine summed this ambition up when he noted that ‘a constitution is a thing antecedent to a government, and a government is only the creature of a constitution’.<sup>61</sup> From then on, the justification of government increasingly depended on a formal constitution; governmental powers outside the constitutional framework—before taken for granted as based on divine right or other independent foundations—could no longer exist.

This comprehensive claim is clearly linked to the scope of revolutionary ambition it followed from, but neither in America nor in France did the revolutionaries set out with such far-reaching goals. Their initial arguments operated within the old scheme and relied on certain historically formed rights which they wanted to see reinterpreted and enforced against what

<sup>58</sup> See G Oestreich, ‘Vom Herrschaftsvertrag zur Verfassungsurkunde’ in R Vierhaus (ed), *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze*, Göttingen: Vandenhoeck & Ruprecht, 1977, 45–67; C Schmitt, *Verfassungslehre*, 9th edn, Berlin: Duncker & Humblot, [1928] 2003, 61–75; E-W Böckenförde, ‘Geschichtliche Entwicklung und Bedeutungswandel der Verfassung’ in E-W Böckenförde, *Staat, Verfassung, Demokratie*, Frankfurt am Main: Suhrkamp Verlag, 1991, 29–52 at 36–41.

<sup>59</sup> On the conceptual trajectory in the seventeenth and eighteenth centuries, see G Stourzh, ‘Staatsformenlehre und Fundamentalgesetze in England und Nordamerika im 17. und 18. Jahrhundert’ in Vierhaus, *Herrschaftsverträge*, 294–327.

<sup>60</sup> On the centrality of the contest between these two variants, see Möllers, ‘Verfassungsgebende Gewalt’, 229–40; see also P Comanducci, ‘Ordre ou norme? Quelques idées de constitution au XVIIIe siècle’ in M Troper & L Jaume (eds), *1789 et l’invention de la Constitution*, Paris: LGDJ-Bruylant, 1994, 23–43.

<sup>61</sup> T Paine, *Rights of Man*, Mineola, NY: Dover Thrift Editions, 1999, 33.

was seen as a corrupted monarchical system.<sup>62</sup> Only over time, as this route proved unsuccessful, did the focus shift and calls for new foundations of government arise.<sup>63</sup> And even after American independence, it took a decade for this idea fully to take hold. The state constitutions of the 1770s were still seen as granted by state parliaments and often freely amended by them. It was only when suspicion against the legislatures grew that constitutions came to be seen as a higher body of law, deriving from the people in a more direct way and therefore also grounding (and limiting) parliamentary power. As a result, new state constitutions in the 1780s came to be enacted by special constitutional conventions, and the US Constitution in 1787 followed this model, largely in order to give it a foundation independent from—and above—state legislatures.<sup>64</sup>

This prepared the ground for developments in France, where the foundational vision was formulated most cogently by the Abbé de Sieyès: ‘tout gouvernement commis doit avoir sa constitution’.<sup>65</sup> The 1791 constitution reflected this by emphasizing the delegated nature of public power—of the king, the legislature, and the judiciary—and by placing itself at the centre of the delegatory relationship. Without a basis in the constitution, no one could claim to speak on behalf of the nation; extraconstitutional powers no longer existed.<sup>66</sup> This was reinforced by the high procedural threshold established for constitutional amendments: while the power of the people to effect revision remained untouched, its delegates—including the National Assembly—could not change constitutional provisions without going through a lengthy and burdensome process, culminating in a decision of a distinct ‘Assembly of Revision’.<sup>67</sup>

### *Indecision*

The American and French revolutions, however, did not settle the meaning of ‘constitution’ instantaneously. In 1830, an influential German dictionary noted that no term was more closely related to central political movements

<sup>62</sup> See G Wood, *The Creation of the American Republic, 1776–1787*, Chapel Hill, NC: University of North Carolina Press, ch 1; J M Roberts, *The French Revolution*, 2nd edn, Oxford: Oxford University Press, 1997, ch 1.

<sup>63</sup> See H Arendt, *On Revolution*, London: Penguin Books, [1963] 1990, 147–50.

<sup>64</sup> Wood, *Creation*, ch 8; J N Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, New York: Knopf, 1996, ch 5.

<sup>65</sup> E-J Sieyès, *Qu’est-ce que le Tiers Etat?*, Paris: Alexandre Correard, 1822, ch 5, 158. On Sieyès’s thought and influence on the revolutionary constitutions, see P Pasquino, *Sieyès et l’invention de la constitution en France*, Paris: Odile Jacob, 1998.

<sup>66</sup> Constitution française (1791), Title III.

<sup>67</sup> *ibid*, Title VII.

and none sparked stronger disagreement.<sup>68</sup> Throughout the nineteenth century, the contest between different interpretations of the term remained at the core of political struggles all over Europe. France itself was a prime example of this contest. Its post-Napoleonic *chartes constitutionnelles*, followed the revolutionary constitutions only in form: the *charte* of 1814 was a mere royal grant, based on the notion that ‘in France, all authority lies in the king’—thus ultimately confirming the king’s role above, not below the constitution.<sup>69</sup> The 1830 charter, while more contractual in character, still presupposed a pre-existing power of the monarch.<sup>70</sup> And ambivalence over the meaning of constitution continued to reign in the French republics. Here the people, though again recognized as the *pouvoir constituant*, was in practice largely replaced by parliament in the operation—and even revision—of most constitutions until the mid-twentieth century.<sup>71</sup>

Perhaps the most heated nineteenth-century battles over the constitutional idea were fought in Germany.<sup>72</sup> This was conditioned in part by the 1820 Vienna Final Act, which confirmed the supreme authority of the monarch and allowed constitutions only to regulate aspects of the *exercise* of that authority. The king was thus thought of as prior to the constitution, as above it, and the constitution was his act of grace. Most German constitutions of the time were thus unilaterally granted, but their scope and character remained subject to contestation. Liberals insisted that, even though initially based on a unilateral grant, they had become the new and sole foundation of public authority.<sup>73</sup> As a prominent liberal voice, Carl von Rotteck, put it in 1836, the monarch may have acted as *pouvoir constituant* in enacting a constitution, but through the constitution he had turned into a *pouvoir constitué* and could no longer undo his creation.<sup>74</sup> The conceptual contestation also found

<sup>68</sup> Quoted in Grimm, ‘Verfassungsbegriff’, 120–1.

<sup>69</sup> Preamble of the *Charte constitutionnelle* (1814). The quoted translation follows L Jaume, ‘Constituent Power in France: The Revolution and its Consequences’ in M Loughlin & N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford: Oxford University Press, 2007, 67–85 at 76.

<sup>70</sup> *Charte constitutionnelle* (1830); see Pasquino, *Sieyès*, 129–45.

<sup>71</sup> See Jaume, ‘Constituent Power’.

<sup>72</sup> See D Grimm, *Deutsche Verfassungsgeschichte 1776–1866*, Frankfurt am Main: Suhrkamp Verlag, 1988; E-W Böckenförde, ‘Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert’ in E-W Böckenförde, *Recht, Staat, Freiheit*, Frankfurt am Main: Suhrkamp Verlag, 1991, 273–305.

<sup>73</sup> On the competing visions, see M Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol II, Munich: C H Beck, 1992, 102.

<sup>74</sup> Quoted in Grimm, ‘Verfassungsbegriff’, 132.

reflection in political disputes such as the Prussian constitutional conflict of the 1860s, in which the royal government's recourse to extraconstitutional powers met with serious resistance in parliament. The conflict's eventual resolution remained ambiguous—a reflection of the undecided character of nineteenth-century constitutions where the constitutional idea remained in abeyance between the limitational and foundational models.<sup>75</sup>

In Germany, the contest of constitutional visions was (provisionally) decided in favour of the foundational model in the Weimar Constitution in 1919<sup>76</sup> and then again in the *Grundgesetz* in 1949. Arguments about pre-constitutional powers reappeared, mainly based on the notion that the state preceded its constitutional form and thus retained certain preconstitutional competences; but in the course of the twentieth century such arguments became marginal, at least as regards their legal impact.<sup>77</sup>

#### *Settlement*

This shift reflects a much broader trend: if the nineteenth century was characterized by a competition between constitutional visions, the twentieth century saw a far-reaching convergence on the foundational model, reflected in the almost worldwide spread of written constitutions.<sup>78</sup> In several waves constitution-making swept the globe, and few states have defied the trend—key among them, of course, the United Kingdom. As in other states without a unified, written constitution (such as Israel and New Zealand), the political system of the United Kingdom relies on alternative sources of authority sufficiently strong to obviate the need for a constitutional document, or for reliance on the people as a *pouvoir constituant*.<sup>79</sup> In most states, though, such sources are unavailable, and reliance on a constitution has become crucial to legitimating the political

<sup>75</sup> See Grimm, *Verfassungsgeschichte*, 231–40; Böckenförde, 'Der deutsche Typ', 295–9. But see also Schmitt, *Verfassungslehre*, 54–6, who saw the outcome as confirming ultimate monarchical power.

<sup>76</sup> On the continuing dispute about the supremacy of the constitution, see R Wahl, 'Verfassungsstaatlichkeit im Konstitutionalismus und in der Weimarer Zeit' in R Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung*, Frankfurt am Main: Suhrkamp Verlag, 2003, 331–7.

<sup>77</sup> See C Möllers, *Staat als Argument*, Munich: C H Beck, 1999, especially 72–6, 264–7.

<sup>78</sup> See, eg, J-E Lane, *Constitutions and Political Theory*, Manchester: Manchester University Press, 1996, 6.

<sup>79</sup> On the latter point, see M Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Loughlin & Walker, *Paradox of Constitutionalism*, 27–48.

order. Constitutions have also become increasingly robust: most of them are now enforceable through mechanisms of judicial review (albeit with varying degrees of effectiveness).<sup>80</sup>

Written constitutions do not *necessarily* reflect a foundational vision, but most contemporary ones do so in fact. This can be gauged, for example, from the way they treat the most typical kind of extraconstitutional powers: emergency powers. For long, these seemed unamenable to constitutional definition; some thought they eluded legal regulation altogether.<sup>81</sup> But contemporary constitutionalism has extended its reach to them too. Most constitutions now contain provisions on the transfer of power between state organs in emergency situations, and typically they also regulate the extent to which fundamental rights can exceptionally be interfered with. Some only regulate certain aspects, or contain no explicit provisions at all. But even then, this is usually not taken to allow for a recourse to extraconstitutional powers that would set aside the constitutional framework.<sup>82</sup> Instead, it is assumed that the standard norms on the separation of powers and the protection of rights provide sufficient latitude for dealing with particular threats—because of the flexibility of the proportionality test in fundamental rights jurisprudence and because legislatures can grant the executive defined additional powers. This latter (‘legislative’) avenue, which keeps the constitutional settlement intact, seems to have become the most common way for tackling emergency situations in recent decades.<sup>83</sup> It has also come to dominate the US response to the terrorist attacks of 11 September 2001 once the Supreme Court had barred recourse to special, largely unfettered

<sup>80</sup> See T Ginsburg, ‘The Global Spread of Constitutional Review’ in K Whittington, R D Keleman, & G A Caldeira (eds), *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, 2008, 81–98.

<sup>81</sup> C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (G Schwab, trans), Chicago, IL: Chicago University Press, 2005, 6–7 and *passim*. For a discussion, see O Gross, ‘The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy’, *Cardozo Law Review* 21 (2000), 1825–68.

<sup>82</sup> See European Commission for Democracy through Law (Venice Commission), *Emergency Powers*, Council of Europe Doc CDL-STD(1995)012, <[http://www.venice.coe.int/docs/1995/CDL-STD\(1995\)012-e.asp](http://www.venice.coe.int/docs/1995/CDL-STD(1995)012-e.asp)>; see also O Gross & F Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge: Cambridge University Press, 2006, ch 1. Switzerland appears to constitute an exception.

<sup>83</sup> J Ferejohn & P Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’, *International Journal of Constitutional Law* 2 (2004), 210–39 at 215–20.

executive powers<sup>84</sup>—even though a number of commentators had advocated a recourse to extralegal means.<sup>85</sup>

Twentieth-century constitutionalism has transcended boundaries also in other respects, for example as regards federal orders. In previous times, as sovereignty was often regarded as divided between levels of government, the scope of federal constitutional settlements was typically limited.<sup>86</sup> With sovereignty undecided, federal constitutions could provide no more than a partial framework, situated alongside constitutions on the state level—for lack of a clear hierarchy, conflicts between both could not be resolved by reference to either of the layers. Carl Schmitt even regarded this indecision as the hallmark of true federalism,<sup>87</sup> and conceptualizations of the European Union today have taken up this strand of thought.<sup>88</sup> But in domestic constitutional orders, this ambiguity has largely disappeared. In the US, this was due in part to the victory of the Union in the civil war; in Europe, accounts of composite orders changed as sovereignty was increasingly seen in a binary fashion—and the resulting entities as either confederal (ie, international) or federal (ie, statist) in character. Either way, sovereignty and with it the supremacy of the constitution belonged to one level, and one level alone.<sup>89</sup>

<sup>84</sup> See US Supreme Court, Judgment of 28 June 2004, *Hamdi v Rumsfeld* 542 US 507 (2004).

<sup>85</sup> See, eg, O Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?’, *Yale Law Journal* 112 (2003), 1011–34; M Tushnet, ‘Emergencies and the Idea of Constitutionalism’ in M Tushnet (ed), *The Constitution in Wartime: Beyond Alarmism and Complacency*, Durham, NC: Duke University Press, 2005, 39–54.

<sup>86</sup> See on the US, A R Amar, ‘Of Sovereignty and Federalism’, *Yale Law Journal* 96 (1987), 1425–520; R Schütze, ‘Federalism as Constitutional Pluralism: “Letter from America”’ in M Avbelj & J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart Publishing, forthcoming, 2010. On Germany, see S Oeter, ‘Souveränität und Demokratie als Probleme in der “Verfassungsentwicklung” der Europäischen Union’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 55 (1995), 659–707 at 664–76.

<sup>87</sup> Schmitt, *Verfassungslehre*, 371–5.

<sup>88</sup> See, eg, N MacCormick, ‘Beyond the Sovereign State’, *Modern Law Review* 56 (1993), 1–18; R Schütze, ‘On “Federal” Ground: The European Union as an (Inter)national Phenomenon’, *Common Market Law Review* 46 (2009), 1069–105. See also the discussion in Chapter 3, I and Chapter 5, II.3.

<sup>89</sup> See R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: Oxford University Press, 2009, 15–40. For critiques and alternative conceptions, see *ibid*; O Beaud, *Théorie de la Fédération*, Paris: Presses Universitaires de France, 2007; C Schönberger, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht*, Tübingen: Mohr Siebeck, 2005, 124–7.

This framework later became central also to the conceptualization of supra-national integration, especially the European Union: for constitutional courts and domestic constitution-makers, sovereignty continued to reside on the national level, and it was for the national constitution that they claimed the ultimate say on the basis and limits of integrating processes.<sup>90</sup>

Over two centuries thus, foundational constitutionalism has come to dominate the domestic tradition of constitutionalism. As McIlwain put it in 1940:

Whatever we may think of it theoretically, Paine's notion that the only true constitution is one consciously constructed, and that a nation's government is only the creature of this constitution, conforms probably more closely than any other to the actual development in the world since the opening of the nineteenth century. . . . Written constitutions creating, defining, and limiting governments since then have been the general rule in almost the whole of the constitutional world.<sup>91</sup>

## 2. Foundational Constitutionalism and the Modern Political Project

The emergence of foundational constitutionalism was in some sense a contingent event, and this might raise doubts as to whether it is indeed this tradition that should guide us when translating constitutionalism to the postnational level. It was born out of the very particular revolutionary projects of the late eighteenth century, and this link was not accidental: comprehensive constitutions were dependent on revolutions—an innovation of that scale could not have been introduced without a drastic break with the past.<sup>92</sup> And the revolutions were dependent on constitutions. They sought to establish new systems of government, a new basis of legitimacy, and also effect fundamental changes in society—in the French case the abolition of the feudal system, in the American the establishment of a more virtuous, less corrupted polity.<sup>93</sup> Constitutions were the perfect instruments for this: they symbolized the emergence of a new order that did not allow remnants of the past, and they promised to rebuild the political system entirely along the lines of the revolutionary ideals.<sup>94</sup>

<sup>90</sup> Schütze, 'On "Federal" Ground', 1092–9.

<sup>91</sup> McIlwain, *Constitutionalism*, 16.

<sup>92</sup> D Grimm, 'Entstehungs- und Wirkungsbedingungen des modernen Konstitutionalismus' in Grimm, *Zukunft der Verfassung*, 31–66 at 43–5.

<sup>93</sup> See Roberts, *French Revolution*, 24–9; Wood, *Creation*, chs 2 and 3.

<sup>94</sup> Arendt, *On Revolution*, 125–6; C Klein, 'Pourquoi écrit-on une constitution?' in M Troper & L Jaume, *1789 et l'invention de la Constitution*, 89–99 at 94–6.

Yet the spread of foundational constitutionalism over the last two centuries signals a much broader appeal that goes well beyond revolutionary situations. It signals an intimate connection, the modern political project as such, especially a link with Enlightenment thought, with the idea of a political and social order not based on history and tradition but shaped by humankind along rational lines. Power-limiting constitutionalism had been a step in this direction, but it left large parts of the old, traditional orders (and especially their foundations) untouched. Comprehensive constitutionalization brought these, too, under scrutiny and set out to construct a new, rational basis of the political system. The radicality of this shift was probably nowhere clearer than in Hegel's dictum about the French revolution that never before 'had it been perceived that man's existence centres in his head, i.e. in thought, inspired by which he builds up the world of reality'.<sup>95</sup>

Hegel's comments mirrored the perspective of constitution-makers. For Sieyès the contrast between old and new became clearest when the English constitution was taken into view. At the time frequently seen as a model, to Sieyès it appeared as a 'product of chance and circumstance rather than of enlightened reason [lumières]'.<sup>96</sup> The French nation, in contrast, was free of historical obligations and constitutional ties and could remake the political order at its will. In America, the constitutional debate was shaped more by historical experience than by abstract theorizing,<sup>97</sup> though, as Jack Rakove notes, '[eighteenth-century American] thought and the Constitution it produced were expressions of the Enlightenment' too.<sup>98</sup> This is on display most clearly in the *Federalist Papers*: in their very first paragraph, Alexander Hamilton framed the constitutional project as an attempt at 'establishing good government from reflection and choice' as against the old dependence on 'accident and force'.<sup>99</sup>

Enlightenment's human agency found its reflection in the political sphere in the insistence on popular sovereignty. In France, this was reinforced by the rise of the idea of the 'nation' throughout the eighteenth century: the nation as a unity transcended social and regional differences and made it possible to think of a collective, acting subject as the true author of a constitution. It did not have to rely on agreements with other actors, as had been the case

<sup>95</sup> G W F Hegel, *The Philosophy of History* (J Sibree, transl), Buffalo, NY: Prometheus Books, 1991, 447 (Part IV, Section III, ch III).

<sup>96</sup> Sieyès, *Tiers Etat*, ch IV, para VII, 146.

<sup>97</sup> See Wood, *Creation*, 3–10; Rakove, *Original Meanings*, 18–19.

<sup>98</sup> Rakove, *Original Meanings*, 18.

<sup>99</sup> A Hamilton, J Madison, & J Jay, *The Federalist Papers* (L Goldman, ed), Oxford: Oxford University Press, 2008, 11 (A Hamilton, *Federalist* no 1).

previously, for these other actors were no longer equals—they had become part of (and therefore subject to) the nation.<sup>100</sup> In America too, historical alternatives to popular sovereignty had been discredited in the eighteenth century, and ‘the people’ had come to be imagined as a unity, no longer as an aggregation of different groups.<sup>101</sup>

Popular sovereignty initially seemed antithetical to comprehensive constitutions that imposed constraints even on parliament, but this changed once awareness of the distance between the people and its representatives grew. This happened in America, as I have already mentioned, with a series of scandals in the 1780s. These entailed a shift towards constitution-making through special conventions, endowed with a higher legitimacy than the legislatures, and culminated in the federal constitution of 1787 which, precisely because of its ratification through popular conventions, could make the claim to derive from ‘we the people’ in a way that trumped resistance by state parliaments and became a higher law.<sup>102</sup>

In France, a similar move was associated with a shift from Rousseauian thought to the political ideas of Sieyès. Because Sieyès saw representation and delegation as key to political order, the link between the will of the people and its delegates—its representatives in the legislature and other holders of public power—became crucial, and the constitution came to provide this link.<sup>103</sup> The *pouvoir constituant* and the *pouvoirs constitués* were connected by the terms of delegation spelled out in the constitutional document.

A constitution thus became the necessary instrument to give the idea of a social contract effect.<sup>104</sup> It symbolized and took to new levels the possibility of man-made change. The constitution, being thought of as foundational and comprehensive, no longer knew any limits to what self-government and reason could achieve; it allowed for the radical realization of the idea of agency, so central to the modern imagination.

<sup>100</sup> Sieyès, *Tiers Etat*, especially chs I and V; see also Pasquino, *Sieyès*, ch III.

<sup>101</sup> See J P McCormick, ‘People and Elites in Republican Constitutions, Traditional and Modern’ in Loughlin & Walker, *Paradox of Constitutionalism*, 107–25 at 124.

<sup>102</sup> Rakove, *Original Meanings*, 94–113; Wood, *Creation*, 532–6. It also allowed for a claim of supremacy over state constitutions, which, however, did not prevent later dispute about the point; see Amar, ‘Of Sovereignty and Federalism’, especially 1450–5.

<sup>103</sup> See Sieyès, *Tiers Etat*, ch V; B Baczko, ‘The Social Contract of the French: Sieyes and Rousseau’, *Journal of Modern History* 60 (1988), S98—S125; N Urbinati, *Representative Democracy*, Chicago, IL: University of Chicago Press, 2006, ch 4.

<sup>104</sup> See Pasquino, *Sieyès*, ch II.

3. *Foundational Constitutionalism's Contemporary Appeal*

The historical attraction of foundational constitutionalism, its tight link with the modern political project, carries over into the contemporary world only in part. Ideals of agency and popular sovereignty remain central to political thought, and comprehensive constitutions also continue to be prime tools to translate moral ideals into institutional practice.<sup>105</sup> Yet other aspects have become more problematic, and especially the tension between constitutional constraint and democratic expression provides a continuing challenge.<sup>106</sup> On the other hand, under some influential conceptions of liberty, comprehensive constitutions hardly appear as more attractive than their power-limiting alternative,<sup>107</sup> at worst they help legitimize a public power better seen with sceptical eyes.

The contemporary appeal of foundational constitutions comes into clearer view through a focus on the interlinkages between liberal and republican approaches, or the rule of law and popular sovereignty. In their complementarities and tensions, both provide the reference points of most contemporary constitutional theory,<sup>108</sup> and the mutual dependence of their ideational bases has been at the heart of various strands of political thought. It is most explicit in Jürgen Habermas's conceptualization of a 'co-originality' of private and public autonomy. Because of this co-originality—their parallel emergence from the decline of earlier metaphysics as the sole post-traditional sources of law's legitimacy—none of them is intrinsically superior to the other; instead, they are mutually dependent. Popular sovereignty can be realized only through the medium of law which presupposes a system of rights; but rights depend for their formulation and interpretation on a legal basis that can only be created through the exercise of popular sovereignty.<sup>109</sup> As Habermas puts it:

In the constitution-making acts of a legally binding interpretation of the system of rights, citizens make an originary use of a civic autonomy that thereby constitutes itself in a performatively self-referential manner.<sup>110</sup>

<sup>105</sup> See, eg, Dworkin, *Freedom's Law*.

<sup>106</sup> See, eg, J Waldron, *Law and Disagreement*, Oxford: Clarendon Press, 1999; R Bellamy, *Political Constitutionalism*, Cambridge: Cambridge University Press, 2007.

<sup>107</sup> See the discussions of constitutionalism in F A Hayek, *The Constitution of Liberty*, Abingdon: Routledge, [1960] 2006, chs 12 and 14; P Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press, 1997, 276–8.

<sup>108</sup> F Michelman, 'Law's Republic', *Yale Law Journal* 97 (1998), 1493–537 at 1499–501.

<sup>109</sup> J Habermas, *Between Facts and Norms* (W Rehg, trans), Cambridge: Polity Press, 1996, ch 3.

<sup>110</sup> *ibid*, 128.

In this framework, a constitution becomes foundational in a particularly radical sense—it is the act in which private and public autonomy are not only exercised but in fact constituted. Popular sovereignty then no longer resides in a particular, pre-existing subject that could exercise an actual will; instead, it is dematerialized and has moved into the discursive processes of society that gain the attribute of popular sovereignty if they meet the necessary procedural conditions.<sup>111</sup> A constitution then has to both reflect and specify those conditions, and it is necessary for giving them a real existence.

Despite Habermas's claims to the contrary,<sup>112</sup> this position is in principle shared by other main strands of contemporary theory, both liberal and republican. In Philip Pettit's republican approach, for example, popular sovereignty is no longer distinct from rights and reason as 'there is no suggestion that the people in some collective incarnation, or via some collective representation, are voluntaristically supreme'. Instead, for Pettit, 'the democratic process is designed to let the requirements of reason materialize and impose themselves; it is not a process that gives any particular place to will'.<sup>113</sup> And public and private autonomy are also drawn together in core liberal conceptions, such as that of John Rawls. For Rawls, too, both forms of autonomy share—and have shared in much of liberal thought—the same moral roots and operate in parallel.<sup>114</sup> Both join forces when citizens select 'principles of justice to specify the scheme of (basic) liberties which best protect and further citizens' fundamental interests and which they then concede to one another',<sup>115</sup> and they are at the root of public power exercised by the state. As Rawls puts it,

our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.<sup>116</sup>

<sup>111</sup> *ibid.*, 135–6, 298. See also J Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory* 29 (2001), 766–81.

<sup>112</sup> J Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism', *Journal of Philosophy* 92 (1995), 109–31 at 127–8.

<sup>113</sup> Pettit, *Republicanism*, 201. See also, eg, Michelman, 'Law's Republic', 1526–7.

<sup>114</sup> J Rawls, 'Reply to Habermas' in J Rawls, *Political Liberalism*, New York: Columbia University Press, 1996, 372–434 at 416–19.

<sup>115</sup> *ibid.*, 413.

<sup>116</sup> Rawls, *Political Liberalism*, 137.

Rawls claims to be agnostic about the precise shape a constitution should take,<sup>117</sup> but a comprehensive, foundational constitutional settlement is clearly key to realizing the two forms of autonomy jointly. Such a settlement can provide the focus for the specification of the principles of private autonomy in an exercise of popular sovereignty—a popular sovereignty that is itself proceduralized. In the dualist democracy Rawls favours, it can raise principled agreement above the level of daily politics and structure the field in which public reason is exercised.<sup>118</sup>

Other arguments may support foundational constitutionalism in contemporary political theory,<sup>119</sup> but its distinctive appeal emerges most vividly from the interlinkage of private and public autonomy that, as we have seen, characterizes key strands of contemporary political thought. If the two are connected and mutually dependent—when, to use a simplified formula, the formulation of rights depends on democratic processes, and democratic processes depend on rights—then a foundational constitution gains centrality as a focus for the self-referential formulation of the principles on both sides. A constitution that consists only of circumscribed limitations of existing governmental powers would not be able to reach far enough into the structuring of the political process to provide the basis for either rights or democracy. And it certainly would not provide for the very constitution of popular sovereignty that, in all the accounts discussed, no longer lies in the will of a pre-existing, material subject, but has either become dependent on stringent procedural conditions or has moved into society's discursive processes themselves.<sup>120</sup> Only a foundational, comprehensive constitution can provide the locus for an enterprise of that scope.

### III. FOUNDATIONAL CONSTITUTIONALISM IN THE POSTNATIONAL ORDER

#### 1. *Constitutionalism's Implications*

The implications of the discussion in the previous section are potentially far-reaching. They suggest that, if we want to tap into constitutionalism's

<sup>117</sup> *ibid.*, 415–16.

<sup>118</sup> Rawls, *Political Liberalism*, 214, 231–40.

<sup>119</sup> See, eg, the emphasis on integration and constitutional patriotism in J Habermas, 'Citizenship and National Identity' in Habermas, *Between Facts and Norms*, 491–515 at 500; Rawls, *Political Liberalism*, 158–68; D Grimm, 'Integration by Constitution', *International Journal of Constitutional Law* 3 (2005), 193–208.

<sup>120</sup> See also A Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', *Constellations* 12 (2005), 223–44 at 234–9.

legitimate potential for the postnational sphere, we need to connect with the foundational tradition—the tradition that, because of its historical dominance and appeal, has come to shape the domestic constitutionalist imagination for the last two centuries.<sup>121</sup>

Yet foundational constitutionalism would pose high, perhaps radical demands on the existing structure and institutions of postnational governance, and it would go further than most proposals of postnational constitutionalism to date. We have seen above that in this literature the most prominent strands, as regards both the European and global contexts, emphasize elements of legalization, of institutional checks and normative limits to existing processes of law-making and -application.<sup>122</sup> These strands bear significant resemblance to the power-limiting approach to constitutionalism that has been prominent in the domestic context until the early twentieth century, and in some countries up until today. But they fall short of foundational constitutionalism in their circumscribed character and in their focus on limiting existing institutions and law-making processes rather than fully defining and organizing them. After all, establishing human rights limits for Security Council action or enforcing constraints on unilateral uses of force is a far cry from the aspiration radically to scrutinize and refound all exercises of public power, as the foundational vision demands. Likewise, the third group of approaches to postnational constitutionalism sketched in the first section—the ‘discursive’ ones—explicitly relies on alternative visions that only find limited expression in the contemporary practice of domestic constitutionalism. The distance from foundational constitutionalism here is deliberate: it involves a rejection of the modern hope to frame a society by means of an overarching legal structure or document, and instead relies on the discursive, societal processes by which power can be checked and channelled.

Closest to central tenets of foundational constitutionalism are then the more structural approaches to the postnational order—those that imagine a European constitution as comprehensively determining the structure, process, and values of the European polity, or envision a global order held together, in a quasi-federal style, not only by common principles and values but also by rules on the organization and delimitation of public power in this realm. But can they really redeem the promise of foundational constitutionalism? Or does the structure of the global sphere resist constitutionalization,

<sup>121</sup> See also Besson, ‘Whose Constitution(s)?’, 387.

<sup>122</sup> See text at nn 4 and 23 above.

perhaps because, as Dieter Grimm claims, the multiplicity of unconnected centres of governance simply does not represent a suitable object for it?<sup>123</sup>

Grimm's point may overstate the requirements even of a demanding conception of constitutionalism, but it certainly sharpens our sense for the extent of the challenge. For it reminds us that the existence of a centralized, monopolistic state apparatus facilitated the task of the modern constitution significantly: realizing both individual liberties and collective self-government could be achieved by focusing on that particular object, by (merely) redefining the conditions for its establishment and legitimate use.<sup>124</sup> The comprehensive ambition of the absolutist state thus paved the way for a comprehensive reach of the constitution. Achieving the same goals in the current polycentric setting of global governance would require a far greater institutional transformation. Similar to the polycentricity of medieval polities, and to some extent still the structures of the early modern state, global governance today is characterized by forms of organic growth which are not steered by a definable centre but determined by the rationalities of social subsystems and the interests and position of particular actors.<sup>125</sup> Many of the institutions interact with one another in undefined—sometimes cooperative, sometimes conflictive—ways, and it is unsurprising that 'fragmentation' has come to occupy a central place in our vocabulary for describing the postnational space.<sup>126</sup>

Reordering this space so as to redeem foundational aspirations may not involve a world state with a centralized government,<sup>127</sup> but it would, at the very least, require rules to define the relationships between the different forms of existing public power,<sup>128</sup> and it would have to extend to other

<sup>123</sup> See D Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Loughlin & Dobner, *Twilight*, 3–22 at 17–19; see also D Grimm, 'The Constitution in the Process of Denationalization', *Constellations* 12 (2005), 447–63.

<sup>124</sup> Grimm, 'Entstehungs- und Wirkungsbedingungen', 37–8.

<sup>125</sup> See the (somewhat exaggerated) account in Fischer-Lescano & Teubner, *Regime-Kollisionen*.

<sup>126</sup> See, eg, International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', *Report of the International Law Commission on its Fifty-eighth Session*, UN Doc A/61/10, 251; M Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review* 70 (2007), 1–30 at 4–9.

<sup>127</sup> But see A Wendt, 'Why a World State is Inevitable', *European Journal of International Relations* 9 (2003), 491–542.

<sup>128</sup> Grimm, 'Constitution and Denationalization', 460.

forms of power public institutions are unable to tame at present.<sup>129</sup> It would not content itself with ‘constitutionalizing’ particular regimes or institutions, such as the WTO or the UN. As laudable as it might be to infuse these regimes with human rights ideas—as long as a regime’s relation with the outside, its position in the wider landscape of global governance, is left undefined, the constitutional promise is diluted.<sup>130</sup> The current ‘multiplicity of unconnected centres of governance’ may then represent not so much a bar to pursuing constitutionalism in the postnational sphere as an indicator of the extent of the challenge.

If this signals the size (and perhaps utopian character) of the constitutional ambition when it comes to *institutional* change, the challenge is hardly smaller as regards the transformation of postnational *society*. As we have seen, realizing foundational constitutionalism does not merely imply the creation of a unified set of rules about the exercise of public power, but this set of rules also has to explicate the conditions under which public power can be regarded as an exercise of public and private autonomy.<sup>131</sup> One of the main challenges behind this task is to clarify what self-government through a constitution could mean in a space such as the postnational in which there is no uncontested collective that could express its will in constitutional terms.<sup>132</sup> After all, one of the most prominent challenges of constitutionalism and democracy beyond the state is based on the alleged lack of a common ‘demos’.<sup>133</sup> This challenge is overstated: the collective behind

<sup>129</sup> See the critique in D Kennedy, ‘The Mystery of Global Governance’ in Dunoff & Trachtman, *Ruling the World?*, 37–68 at 58.

<sup>130</sup> For a related argument in the trade context, see J L Dunoff, ‘Constitutional Conceits: The WTO’s “Constitution” and the Discipline of International Law’, *European Journal of International Law* 17 (2006), 647–75 at 661–5.

<sup>131</sup> See above, Section II.3.

<sup>132</sup> On the related problems for constitutions’ *Sinndimension*, their role as a repository of a collective self-understanding, see U Haltern, ‘Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende’, *Archiv des öffentlichen Rechts* 128 (2003), 511–57.

<sup>133</sup> See, eg, P Kirchhof, ‘Die Identität der Verfassung’ in J Isensee & P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol II, 3rd edn, Heidelberg: C F Müller Verlag, 2004, 261–316 at 288–93; E-W Böckenförde, ‘Die Zukunft politischer Autonomie’ in E-W Böckenförde, *Staat, Nation, Europa*, Frankfurt am Main: Suhrkamp Verlag, 1999, 103–26. For a trenchant critique, see J H H Weiler, ‘The State “über alles”: Demos, Telos and the German Maastricht Decision’, *Jean Monnet Working Papers* 6/95.

constitution-making, the ‘people’, has typically been imagined anyway,<sup>134</sup> and the *pouvoir constituant* probably even more so than ‘the nation’ in general: constitutions are often part of processes in which a collective self-constitutes itself.<sup>135</sup> And as we have seen in the previous section, they are best understood as reflecting an understanding in which the subject of popular sovereignty has become dematerialized and linked to a process that, because of its deliberative qualities, merits the attribution of constitution- and law-making powers.

This may alleviate concerns about a lacking, identifiable ‘demos’, but it may not reduce the broader challenge much: for however low one’s requirements for a proceduralized popular sovereignty in the domestic realm may be, they will hardly be fulfilled in a postnational space where power and wealth differentials, language and culture barriers, and the lack of identification with a common project render meaningful communication and deliberation beyond a narrow elite very difficult.<sup>136</sup> This does not rule out postnational constitutionalism from the start—after all, modern constitutions have rarely been the result of ideal forms of collective self-government<sup>137</sup>—but it indicates the size of the challenge. Creating the conditions for a meaningful exercise of public autonomy in the postnational space may not have to follow domestic patterns and may be able to draw on inspirations from polycentric and contestatory models of democracy.<sup>138</sup> This may be easier in Europe than in the global context, but it remains a huge task.

<sup>134</sup> Cf B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London: Verso, 1983.

<sup>135</sup> See H Lindahl, ‘Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood’ in Loughlin & Walker, *Paradox of Constitutionalism*, 9–24; U K Preuß, ‘Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?’ in Loughlin & Dobner, *Twilight*, 23–46 at 40–2.

<sup>136</sup> J Habermas, *Die postnationale Konstellation*, Frankfurt am Main: Suhrkamp Verlag, 1998, 160–7; but see also Habermas, ‘Kommunikative Rationalität’, 447–59, for a more optimistic take, also as regards processes of change in postnational society. See also Preuß, ‘Disconnecting’, 44–6, on the prospect of the international community constituting itself as a viable actor through constitutionalization.

<sup>137</sup> See J Elster, ‘Deliberation and Constitution Making’ in J Elster (ed), *Deliberative Democracy*, Cambridge: Cambridge University Press, 1998, 97–122.

<sup>138</sup> See, eg, J Dryzek, *Deliberative Global Politics*, Cambridge: Polity Press, 2006; J Bohman, *Democracy across Borders*, Cambridge, MA: MIT Press, 2007; P Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (A Goldhammer, trans), Cambridge: Cambridge University Press, 2008.

Postnational constitutionalism thus has radical implications for the transformation of institutions and society beyond the nation-state; it has a distinctly utopian flavour. This might make it less suited for projects that seek to formulate practically relevant proposals and achieve change in the short or mid-term. Here, a more limited ambition is more adequate, and undertakings such as that of a 'Global Administrative Law' have self-consciously adopted such a more circumscribed approach.<sup>139</sup> Problematic, though, is a tendency to start from current constraints and feasibility considerations to reformulate the constitutionalist project. Habermas, for example, discards hopes for the advent of foundational constitutionalism on the global level as unrealistic and settles for a form of power-limiting constitutionalism in which the legalization of global governance is linked with stronger legitimacy, deliberative processes on the regional level.<sup>140</sup> He is explicit about the distinct intellectual tradition this invokes, yet even so, presenting a 'constitutionalist' project in these terms runs the risk of short-selling fundamental elements of domestic political practice and of legitimating what ought to be critiqued. For it suggests that the progressive legalization of postnational politics could be a continuation of the domestic tradition of constitutionalism, duly translated into a new context, and that this tradition does not have further-reaching implications there. This risk is even more present in the great majority of proposals for global constitutionalism that gloss over the differences in domestic analogues entirely. They may well reflect progressive intentions, such as strengthening rule-of-law standards in Security Council decision-making. But they are forms of 'constitutionalism lite':<sup>141</sup> their limited ambition is in stark contrast with the comprehensiveness typically associated with the use of the constitutionalist framework.<sup>142</sup> This association may eventually provide legitimacy for highly deficient structures, and it may dilute the critical edge inherent in the constitutional idea.

Some authors respond to such concerns by adopting a rhetoric of 'constitutionalization' rather than constitutionalism, highlighting the unfinished character, the element of process.<sup>143</sup> This might be adequate to highlight the

<sup>139</sup> N Krisch, 'Global Administrative Law and the Constitutional Ambition' in Loughlin & Dobner, *Twilight*, 245–66 at 255–8. On the GAL project in general, see B Kingsbury, N Krisch, & R B Stewart, 'The Emergence of Global Administrative Law', *Law & Contemporary Problems* 68:3 (2005), 15–61.

<sup>140</sup> Habermas, 'Konstitutionalisierung', 133–42; see also Habermas, 'Kommunikative Rationalität', 442–7.

<sup>141</sup> To borrow the term from J Klabbers, 'Constitutionalism Lite', *International Organizations Law Review* 1 (2004), 31–58.

<sup>142</sup> See also Grimm, 'Achievement of Constitutionalism', 21.

<sup>143</sup> See n 24 above.

distance from constitutionalist ideals and the many steps necessary on the way. Yet most such approaches do not reflect this at all. They instead present constitutionalization as directed at hedging in certain forms of public power through a number of procedural and substantive limits; in essence as working towards a power-limiting form of constitutionalism in the long run.<sup>144</sup> However pragmatic this might be, it represents a capitulation to contemporary circumstances when we should instead denounce the gap between our political ideals and what can be currently achieved. Only by naming that gap can we retain a sense for the challenge that constitutionalism, in its foundational reading, poses for the postnational space.

## 2. Foundational Constitutionalism in Postnational Society

Drawing on the domestic tradition of constitutionalism for the postnational order is ambitious, but it also comes with an ample promise—a promise to disregard the vagaries of the current, path-dependent, often accidental shape of global governance and to realize human agency in the construction of common institutions. It is this appeal David Held seeks to capture when he contrasts his well-ordered model of global politics with one in which the distribution of powers among institutions is left ‘to powerful geopolitical interests (dominant states) or market based organizations to resolve’.<sup>145</sup> In good constitutionalist fashion, a principled construction of the global institutional order appears as an antidote to power, history, and chance.

That such a project might be somewhat utopian need not deter us, though it might extend the timeframe for its realization. Greater doubt arises from concerns about its adequacy in a postnational society that is—and is likely to remain—quite radically different from most domestic ones. Iris Young, for example, defends a principled framework for common global institutions, but she acknowledges that, as attractive as such a vision might be in the abstract, it stands in tension with the allegiances of individuals to their particular, mostly national, communities and their ensuing claims for self-determination.<sup>146</sup>

<sup>144</sup> See the analysis in M Loughlin, ‘What is Constitutionalisation?’ in Dobner & Loughlin, *Twilight*, 47–69.

<sup>145</sup> D Held, ‘Democratic Accountability and Effectiveness from a Cosmopolitan Perspective’, *Government & Opposition* 39 (2004), 365–91 at 382.

<sup>146</sup> Young, *Inclusion and Democracy*, 250–65. Young seeks to respond to this through a federal-style model that is ‘jurisdictionally open’; I will return to this theme in the next chapter.

The divided character of the global polity appears indeed as the single greatest challenge to the globalization of constitutionalism. After all, international society is characterized by a high degree of diversity and contestation, and even the small signs of increasing convergence that we can observe are by no means unambiguous. Diversity may today not be as radical as it was in the 1970s, when Hedley Bull's vision of an anarchical society within a pluralist international order appeared plausible, given the deep-seated frictions between West and East and North and South.<sup>147</sup> Today, we can find indications of a stronger solidaristic, perhaps even cosmopolitan turn in greater agreement on fundamental principles and a higher degree of institutionalized policy- and law-making beyond the state.<sup>148</sup> Whether this warrants the diagnosis of an emerging 'international community', however, is questionable,<sup>149</sup> and it certainly is if we think of such a community as one that its members rank supreme over other communities of a regional, national, or subnational kind. Allegiance to national communities may have been complemented by those of a local, religious, ideological nature, some of which with a clear transnational, perhaps even cosmopolitan tinge, and this may have led to a world of multiple rather than exclusive loyalties, and to a variety of foundational discourses competing for dominance.<sup>150</sup> But cultural and political diversity remains strong and is often coupled with an insistence on ultimate authority on the national level—reflecting a vision of the international order as one of intergovernmental negotiation and exchange rather than an expression of a deeper common project.<sup>151</sup> Even in the European Union, where diversity is clearly weaker than in a global context, allegiance to national communities still trumps that to Europe by a large margin.<sup>152</sup> And identities seem to become more rather than less

<sup>147</sup> H Bull, *The Anarchical Society*, London: Macmillan, 1977.

<sup>148</sup> See A Hurrell, *On Global Order*, Oxford: Oxford University Press, 2007, chs 3 and 4.

<sup>149</sup> See A Paulus, *Die internationale Gemeinschaft im Völkerrecht*, Munich: C H Beck, 2001.

<sup>150</sup> M J Sandel, *Democracy's Discontent*, Cambridge, MA: Harvard University Press, 1996, 338–51; Dryzek, *Deliberative Global Politics*, ch 1; see also Bohman, *Democracy across Borders*, 28–36.

<sup>151</sup> See Hurrell, *On Global Order*, ch 5.

<sup>152</sup> See N Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe*, Oxford: Oxford University Press, 2008, ch 5; J A Caporaso & M Kim, 'The Dual Nature of European Identity: Subjective Awareness and Coherence', *Journal of European Public Policy* 16 (2009), 19–42 at 23–30.

fragmented as European integration proceeds. As Peter Katzenstein and Jeffrey Checkel note:

The number of unambiguously committed Europeans (10—15% of the total population) is simply too small for the emergence of a strong cultural European sense of belonging. The number of committed nationalists (40—50% of the total) is also too small for a hegemonic reassertion of nationalist sentiments. The remaining part of the population (35—40% of the total) holds to primarily national identifications that also permit an element of European identification.<sup>153</sup>

All this may not be fatal to the postnational constitutionalist project; after all, just as attempts have been undertaken to move from democracy to ‘demoicracy’,<sup>154</sup> we might come to imagine a constitutionalism on a plurinational basis.<sup>155</sup> But such an undertaking faces serious challenges based on critiques that have for long highlighted the difficulties of modern constitutionalism in diverse societies. James Tully’s is perhaps the most prominent among them. For Tully, modern constitutionalism as it has emerged with the American and French revolutions—and has framed much of political thought ever since—cannot cope with serious social and cultural diversity because of its strong link to ideas of impartiality and uniformity.<sup>156</sup> Given its roots in the Enlightenment, it seeks to erect a regular, well-structured framework of government based on reason and distinct from the irregular, historically grown structures that characterized previous eras. In this uniformity, however, it fails to reflect the different customs and culturally grounded ideas of particular groups in society; and this even more so if these groups do not subscribe to the liberal vision of a ‘modern’, free individual, able and willing to transcend her history and culture and ready to engage with all others in unconditional deliberation over the course of the common polity. The impartiality sought through such mechanisms as Rawls’s veil of ignorance or Habermas’s adoption of the interlocutor’s perspective only makes sense if individuals are ready to

<sup>153</sup> P J Katzenstein & J T Checkel, ‘Conclusion—European Identity in Context’ in J T Checkel & P J Katzenstein (eds), *European Identity*, Cambridge, Cambridge University Press, 2009, 213–27 at 215–16. For a very similar assessment, see Fligstein, *Euroclash*, 250.

<sup>154</sup> eg, Bohman, *Democracy across Borders*; K Nicolaïdis, ‘We, the Peoples of Europe . . .’, *Foreign Affairs* 83:6 (2004), 97–110; see also U K Preuß, ‘The Constitution of a European Democracy and the Role of the Nation State’, *Ratio Juris* 12 (1999), 417–28.

<sup>155</sup> eg, S Tierney, *Constitutional Law and National Pluralism*, Oxford: Oxford University Press, 2004.

<sup>156</sup> Tully, *Strange Multiplicity*, chs 2 and 3.

leave particular allegiances behind; for all others, it means exclusion from the supposedly neutral frame.<sup>157</sup>

For Tully then, the integrationist, universalizing tendencies of foundational constitutionalism sit uneasily with the diverse identities of individuals in divided societies; the emphasis on common values and self-government by a shared, overarching collective stands in tension with their diverging allegiances. Historically, the tension may have been resolved by policies of nation-building which, over time, succeeded in overcoming linguistic and cultural divides. But these involved measures of forced assimilation that today would be regarded as grave violations of human rights, and such forcible integration would in any event be hardly conceivable in a European or international context. For constitutionalism to remain attractive as a model for the postnational polity, it has to find other ways to cope with that polity's deep diversity.

### 3. *Constitutionalism vs Diversity?*

Tully accuses modern constitutionalism of creating an 'empire of uniformity', but this downplays the many ways in which the constitutional project has come to respond to the challenge of divided societies. It may embody the quest for a reasoned, uniform order, and as we have seen, much of its appeal derives from this aspiration. Also today, many constitutional states pursue integrationist aims, build common institutions, and seek to 'privatize' diversity, relying on individual rights to accommodate differences in ways of life.<sup>158</sup> But while this is often seen as a suitable solution in societies that are characterized by crosscutting cleavages, it is more problematic where the divides are stable and fairly unidimensional and lead to structural minorities with little hope for sharing power in common institutions. Responses to such situations typically eschew strong integrationist ideals and seek to deal with diversity through accommodation, mainly in the form of consociationalism and/or devolution.<sup>159</sup> It is such a multicultural constitutionalism that

<sup>157</sup> For related critiques, see, eg, M J Sandel, 'The Procedural Republic and the Unencumbered Self', *Political Theory* 12 (1984), 81–96; C Taylor, 'The Politics of Recognition' in C Taylor, *Philosophical Arguments*, Cambridge, MA: Harvard University Press, 1995, 225–56.

<sup>158</sup> For a theoretical defence, see B Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Cambridge, MA: Harvard University Press, 2002.

<sup>159</sup> See the survey of the debate in J McGarry, B O'Leary, & R Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation' in S Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?*, Oxford: Oxford University Press, 2008, 41–88; see also Tierney, *Constitutional Law*.

we might be able to draw on for translation beyond the state. As we shall see, though, even such a vision faces trade-offs and limits in its accommodation of diversity, and these raise doubts as to its suitability in the radically diverse postnational context.

### *Options*

Consociationalism is characterized by an insistence on common decision-making: prominent in a number of smaller European countries especially in the postwar period and later adopted in several other settings, consociationalism seeks to manage deep disagreement through executive power-sharing and the creation of veto positions for minority groups.<sup>160</sup> These force all actors to reach common ground rather than impose their views; none of the constituencies enjoys formal primacy. Societal groups are not only granted autonomy rights for their own cultural and linguistic affairs but also enjoy a particular, protected position in central decision-making structures. Otherwise, consociationalists believe, those groups would be at a permanent disadvantage in the struggle over common policies, and ever greater antagonism and conflict would likely ensue.<sup>161</sup>

Federalist responses, on the other hand, focus less on central decision-making; they emphasize the need to devolve as many state functions as possible to the groups that make up society. This can occur in the form of territorial pluralism in which those functions are exercised by federal units along the lines of inter-group boundaries, potentially in an asymmetrical way.<sup>162</sup> Such an approach can be combined with consociationalist, co-decision arrangements at the federal level, but it is feasible only if the relevant groups are territorially concentrated. Otherwise, devolution has to follow personal rather than territorial lines and is accordingly more limited in its extent; it typically focuses on group rights to govern cultural and educational affairs.

On the postnational level, as most divides follow territorial lines, both consociationalism and territorial federalism, or a combination of both, may provide resources for the accommodation of diversity. This may alleviate

<sup>160</sup> See A Lijphart, *Democracy in Plural Societies*, New Haven, CT: Yale University Press, 1978; A Lijphart, *Thinking About Democracy: Power Sharing and Majority Rule in Theory and Practice*, London: Routledge, 2008.

<sup>161</sup> But see also the critiques, eg, D Horowitz, 'Constitutional Design: Proposals Versus Processes' in A Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*, Oxford: Oxford University Press, 2002, 15–36; B Barry, 'Political Accommodation and Consociational Democracy', *British Journal of Political Science* 5 (1975), 477–505.

<sup>162</sup> See, eg, the discussion in McGarry et al, 'Integration or Accommodation?', 63–7.

some of Tully's concerns about uniformity, but it might also dilute the appeal of the constitutionalist project which has originally drawn precisely on the virtues of reason, order, and collective decision-making.

#### *Trade-Offs*

Among such trade-offs, the most obvious one concerns the integrative, stabilizing force of constitutionalism. Foundational constitutionalism is typically regarded as a potent tool to integrate society, by creating a common framework as an expression of both common values and collective decision-making processes. The need to find common solutions typically leads to an attenuation of diversity, while accommodationist approaches help entrench the boundaries between different groups and are often seen as widening, rather than closing the gaps in society, thus creating greater instability and potentially leading to secession or break-up.<sup>163</sup> Yet in deeply divided societies, integrationist policies are rarely an option; minority groups are not ready to agree to them for fear of losing out to the majority. And if integration is pursued despite such opposition, it will typically lead to greater friction, resistance, and instability of the overall constitutional structure. Accommodation may not come with the full stabilizing promise of the original, more unitary strain of foundational constitutionalism, but there is little alternative to it when divisions run deep.<sup>164</sup>

The second trade-off concerns the effectiveness of collective decision-making. As I have sketched above, constitutionalism draws much of its appeal from the realization of agency against forces of history and chance. But by many, accommodation is seen precisely as a surrender to such forces. Even if normatively justified,<sup>165</sup> it often appears as a respect for difference based on historically grown, passion-based allegiances quite in contrast with detached, reasoned construction. And accommodationist approaches may dilute the promise of public autonomy on yet another level. Because consociationalism emphasizes the commonality of decision-making and, as a result, veto rights of minority groups, it runs the risk of institutionalizing blockade: it might lead to a 'joint-decision trap'.<sup>166</sup> For the greater the number

<sup>163</sup> See, eg, R H Pildes, 'Ethnic Identity and Democratic Institutions: A Dynamic Perspective' in Choudhry, *Constitutional Design*, 173–201.

<sup>164</sup> McGarry et al, 'Integration or Accommodation?', 85–7.

<sup>165</sup> For normative defences of group rights, see W Kymlicka, *Multicultural Citizenship*, Oxford: Clarendon Press, 1995; N Torbisco Casals, *Group Rights as Human Rights: A Liberal Approach to Multiculturalism*, Dordrecht: Springer Verlag, 2006.

<sup>166</sup> F Scharpf, 'Die Politikverflechtungsfalle: Europäische Integration und deutscher Föderalismus im Vergleich', *Politische Vierteljahresschrift* 26 (1985) 323–56 at 346–50.

of groups in society (and in postnational society the number is bound to be high), the greater the risk that collective negotiations collapse.<sup>167</sup> And if unanimity is to be achieved, policies need to be pareto-optimal—they have to benefit each and every group, but this severely reduces the range of possible options and limits prospects of, for example, distributive justice.<sup>168</sup>

A third challenge consociationalism poses to the ideal of public autonomy lies in the extent of individual participation in government.<sup>169</sup> It relies, to a large extent, on the cooperation of *elites*: because genuine consensus will often be elusive, problem-solving requires bargaining, package deals, logrolling among the different groups. This can only be achieved by elites that stand in constant contact with each other and are socialized into cooperation. Stronger participation of a broader public in the various groups renders this cooperation difficult because it is usually focused only on a particular decision, not the whole of the deal struck. Accordingly, as Arend Lijphart stresses, '[i]t is . . . helpful if [leaders] possess considerable independent power and a secure position of leadership'.<sup>170</sup> Even though this is not incompatible with public participation in general, it considerably limits its scope.<sup>171</sup>

#### *Limits*

Yet even with such trade-offs, the accommodation of diversity in foundational constitutionalism has limits. After all, if it wants to retain its central promise—to create a comprehensive framework for all public power in a given polity under the rule of law—constitutionalism has ultimately to resolve the tension between the sovereignty claims of the federal and the group level, if only by defining rules for constitutional amendment and hierarchies between the different levels of law. Visions of a federalism with 'suspended' ultimate authority, influential until the late nineteenth century, are in conflict with this comprehensive ambition and find little reflection in contemporary federal orders.<sup>172</sup> This leaves foundational constitutionalism with two options: either it resolves the sovereignty question in favour of the groups, and their interaction remains a non-constitutionalist affair;

<sup>167</sup> Accordingly, also for Lijphart consociational orders ideally operate with no more than four main groups; see Lijphart, *Democracy in Plural Societies*, 56.

<sup>168</sup> On such problems in the EU context see, eg, F Scharpf, 'The Joint-Decision Trap Revisited', *Journal of Common Market Studies* 44 (2006), 845–64 at 851.

<sup>169</sup> See, eg, Dryzek, *Deliberative Global Politics*, 50–1.

<sup>170</sup> Lijphart, *Democracy in Plural Societies*, 50.

<sup>171</sup> For a nuanced account, see McGarry et al, 'Integration or Accommodation?', 82–4.

<sup>172</sup> See text at n 86 above.

it is that of a federation under international law. Or it resolves it in favour of the federal level (for example, by denying group vetos in amendment processes); it can then realize the constitutionalist promise to some extent, but this realization might remain formal as long as some groups actively contest the solution. One may only think of the Canadian constitutional crisis in the 1980s and 1990s, provoked by Québec's insistence on a unilateral right to secede. The federal claim to define the rules for constitutional amendment (including the framework for secession) and thus to regulate the relationship with its constituent units, remained fragile in the face of resistance by a powerful minority—in fact, it antagonized this minority only further.<sup>173</sup> Unless the constitutionalist ambition to create a comprehensive framework meets matching societal conditions, such fragility is bound to continue, and the hope to create a constitutional framework *for* politics keeps being called into question by its dependence *on* politics.<sup>174</sup>

One may seek a way out of this problem by keeping constitutional norms on contested issues relatively open—by interpreting them in minimalist terms, as Cass Sunstein suggests,<sup>175</sup> or along lines proposed by Jeremy Waldron, by entrusting their interpretation to the political process that might reflect dissonance or convergence, as the case may be.<sup>176</sup> The more open the norms and processes, though, the more constitutionalism gives up on one of its key aspirations: to found and structure a polity through a higher law. For such openness, as desirable as it might be, simply moves crucial questions back into everyday political debate.

In divided societies, constitutionalism thus finds itself in a dilemma. It can retain its purity, pursue the integration of society, and seek to level difference, but this is often normatively problematic and practically impossible; it may enflame tensions rather than calm them. The alternative—accommodation—also comes at a high cost: as we have seen, it

<sup>173</sup> S Choudhry, 'Does the World need more Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory' in Choudhry, *Constitutional Design*, 141–72 at 159–71.

<sup>174</sup> On the fragility of constitutions in the face of external factors, see F Schauer, 'Amending the Presuppositions of a Constitution' in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton, NJ: Princeton University Press, 1995, 145–61.

<sup>175</sup> C R Sunstein, *Legal Reasoning and Political Conflict*, Oxford: Oxford University Press, 1996; C R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Cambridge, MA: Harvard University Press, 1999; but see also C R Sunstein, 'Beyond Judicial Minimalism', *Harvard Public Law Working Paper* No 08–40, <<http://ssrn.com/abstract=1274200>>.

<sup>176</sup> Waldron, *Law and Disagreement*, ch 13.

diminishes the constitutionalist promise as regards the potential for long-term social stability, for public autonomy, and often enough also for the rule of law. After all, in order to remain true to its core, constitutionalism has to maintain the idea of a comprehensive framework that assigns different organs and groups their places. And this requires hierarchies that all too often stand in tension with the (diverging) claims of different parts of society.

This element of hierarchy brings me back to Tully's critique. This critique seems overdrawn in its attack on constitutionalism's 'empire of uniformity'—constitutionalist thought and practice know more ways of accommodating difference than Tully gives credit for. But he is right in pointing to the fact that the supposed commonality of the constitutional project requires members of the 'nation' to recognize it as the *primary* political framework, taking precedence over whatever other structures might exist in sub-groups. It presupposes the acceptance of a priority of the common over the particular (typically within limits of human rights)—an acceptance we might not find among distinct cultural groups within states, and certainly not among states vis-à-vis the 'common' European or global realm. This emphasis on the collective, the common framework, poses not only normative problems from the perspective of minority groups, but it may also aggravate tensions within society and create less rather than more stability. Sovereign authority is simply too precious, and the quest for it typically attracts pernicious contest and drives competing groups further apart.<sup>177</sup> A constitution that needs to settle fundamental questions (to some extent) then risks becoming an imperial instrument. In a radically diverse society, a constitution may then easily come to be seen, not as a reasoned common framework, but as a hegemonic tool for one part of society to lock in its preferred institutional structure.<sup>178</sup>

Such a dynamic may be difficult to avoid in the binary, hierarchical structure of foundational constitutionalism. We may thus want to look for alternatives that allow us to work around societal divides in a more pragmatic fashion. As John Dryzek puts it, in some circumstances '[t]he peace is disturbed only by philosophers who believe a constitutional solution is required'.<sup>179</sup> If this is true in domestic societies with high degrees of diversity, it will be even more so in the postnational context.

<sup>177</sup> Dryzek, *Deliberative Global Politics*, ch 3.

<sup>178</sup> See Tully, *Strange Multiplicity*, chs 2 and 3; R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, MA: Harvard University Press, 2004.

<sup>179</sup> Dryzek, *Deliberative Global Politics*, 64.

#### IV. CONCLUSION: BEYOND CONSTITUTIONALISM?

Visions of postnational constitutionalism respond to a widespread anxiety, to a lack of certainty about the foundations and structures of the new, strange, still largely unknown space of the postnational. They promise to tame this space, to organize it in a rational way, to hedge it in along lines we have come to know (and value) in domestic politics over centuries. Postnational constitutionalism is an attempt to establish continuity with central political concepts and domestic traditions; it tries to avoid the normative rupture often feared in discussions of globalization and global governance.

As we have seen, this strategy runs into obstacles. Most approaches to postnational constitutionalism are too thin to redeem the full promise of the domestic constitutionalist tradition and therefore cannot provide the continuity they seek. They emphasize processes of legalization and limitation of postnational governance, but thereby hark back to a particular tradition of power-limiting constitutionalism which in the domestic context has been marginalized by the more demanding and comprehensive strand of foundational constitutionalism. Yet realizing the latter vision in the postnational sphere would have radical implications: it would require massive social and institutional change. A postnational constitutionalism of this kind would not only have utopian overtones; it would also sit uneasily with major—and likely persistent—features of European and global societies. Responding to their diversity may force it into trade-offs as regards its integrative, stabilizing capacity as well as its potential to realize agency and public autonomy. And yet, if the constitutionalist project seeks to redeem a minimum of its foundational aspirations it needs to define (some) principled hierarchies, which in a divided society may well exacerbate tensions further.

This may sound gloomy, but perhaps it is not. So far we had assumed that in the postnational realm we did indeed want to connect to the domestic tradition, that the postnational *ought* to be structured in a way that continued on the constitutionalist path, if perhaps somehow adapted to environmental conditions. But this assumption may well be misguided. After all, constitutionalism—especially its dominant domestic strand, foundational constitutionalism—is a historically very particular form through which to realize central political values, individual liberty, and collective self-government. It embodies a peculiarly modern trust in the ability of humankind to rationally govern itself, in the power of reason in the design of political institutions, and in the strength of those institutions in realizing a common good. After all, the modern constitutionalist project has emerged from Enlightenment

thought, and it is today often regarded as a continuation of Kantian political theory.<sup>180</sup>

In its particularity, though, constitutionalism may not be the ideal framework for the postnational space. Having emerged as especially apt for a ‘people’ to govern itself, it might provide some promise in the European context but will be less suited for the radical diversity that marks the global populace. The ideological divisions of the Cold War might have withered away, but outlooks on life, politics, religion, and justice in the world continue to differ enormously. In these circumstances, the idea of settling the central questions of a polity in constitutionalist form may not only seem unachievable but also undesirable—respect for this diversity may require leaving those questions open, rather than closing the debate. The greater the distance between different groups in a population, the easier a constitutional settlement may appear as imposed by one group on the other, as an imperial tool rather than an expression of common self-government—and this risk becomes particularly acute in the highly diverse context of the postnational.<sup>181</sup>

Yet these difficulties of realizing constitutionalism in the postnational sphere may not be merely evidence of a loss, of a deficit of global politics that we should acknowledge with a melancholic longing for the good old times of the constitutional state. It is a loss, too. But just as the nation-state has long been a problematic political form, so has modern, foundational constitutionalism never been simply an unequivocal ‘evolutionary achievement’;<sup>182</sup> it has come to sit uneasily already with the diversity, social differentiation and increased regulatory expectations in late modern societies.<sup>183</sup> Facing the difficulty of translating it should sharpen our sense for how the move from national to postnational politics exacerbates such problems, and it should liberate us from the intellectual straightjacket that accompanies the quest for continuity with domestic concepts and traditions. This should allow us to explore alternative visions of politics—to risk a break with what we are familiar with and look beyond constitutionalism for guidance and inspiration.

<sup>180</sup> See, eg, Habermas, ‘Konstitutionalisierung’.

<sup>181</sup> See Koskeniemi, ‘Fate of Public International Law’, 19; Walker, ‘Holistic Constitution’, 305.

<sup>182</sup> But see Luhmann, ‘Verfassung als evolutionäre Errungenschaft’.

<sup>183</sup> See n 178 above; K-H Ladeur, ‘Postmoderne Verfassungstheorie’ in U K Preuß (ed), *Zum Begriff der Verfassung: Die Ordnung des Politischen*, Frankfurt am Main: Fischer, 1994, 304–31; D Grimm, ‘Die Zukunft der Verfassung’ in Grimm, *Zukunft der Verfassung*, 399–439.