

# Hauser Globalization Colloquium Fall 2008: Global Governance and Legal Theory

NYU Law School

Professors Benedict Kingsbury and Richard Stewart  
Furman Hall 324, 245 Sullivan St. (unless otherwise noted)  
Wednesdays 2.15pm-4.05pm

*Provisional Semester Program - Attached Paper is shown in Bold*

- August 27- Teaching Session: Introductory Class (course instructors)  
September 3- No class (legislative Monday)  
September 10- Speaker: David Dyzenhaus, University of Toronto, NYU Global Law Professor  
Topic: The Concept of (Global) Administrative Law  
September 17- Panel Discussion on the September 2008 ECJ Decision in Kadi.  
Professors Stewart, Kingsbury, and members of the international law faculty.  
September 24- Speakers: Eyal Benvenisti (Tel Aviv/NYU) and George Downs (NYU)  
Topic: Toward Global Checks and Balances

- October 1- Speakers: Nico Krisch (LSE); and Euan MacDonald and Eran Shamir-Borer (NYU)**  
**Topics: Postnational Constitutionalism? - Krisch**  
Meeting the Challenges of Global Governance: Administrative and Constitutional Approaches - MacDonald/Shamir-Borer

*Friday October 3 - SPECIAL SESSION Furman Hall 310, 3pm-5pm*

- Speaker: Neil Walker, Edinburgh  
Topic: Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders  
*Background reading:* Constitutionalism Beyond the State
- October 8- Speaker: Meg Satterthwaite (NYU)  
Topic: Human Rights Indicators in Global Governance
- October 15- Speaker: Janet Levit, Dean, University of Tulsa College of Law  
Topic: Bottom-Up Law-Making Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit
- October 22- Speaker: Jack Goldsmith, Harvard Law School  
Topic: Law for States: International Law, Constitutional Law, Public Law (paper co-authored with Daryl Levinson)  
Guest Commentator: Prof Georges Abi-Saab, Geneva, former Chair of WTO Appellate Body
- October 29- [*The IILJ will convene jointly with JILP a conference on International Tribunals, on Wed Oct 29, 9am-6pm, at the Law School. Global governance issues will feature. Students should attend this conference during the regular Colloquium time slot, and are welcome to attend other parts of the conference also. See the IILJ Website for details.*]
- November 5- Speaker: Robert Keohane, Princeton and Kal Raustiala (UCLA)  
Topic: Toward a Post-Kyoto Climate Change Architecture: A Political Analysis
- November 12- Speaker: Jeremy Waldron (NYU)  
Topic: International Rule of Law
- November 19- Speaker: Benedict Kingsbury (NYU)  
Topic: Global Administrative Law: Conceptual and Theoretical Problems
- November 26- Student paper presentations [may be rescheduled, due to Thanksgiving break]
- December 3- Student paper presentations and wrap up.

Program and papers available at: <http://iilj.org/courses/2008HauserColloquium.asp>

# Postnational Constitutionalism?

*Nico Krisch\**

*Draft for discussion, August 2008*

*Comments welcome - no citation or distribution without consent by the author*

## I. Introduction

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 much 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 – sometimes radically – different from what we are familiar with. 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 conceptualisation 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. The legitimacy of international law was largely based on the consent of its subjects, the states, and it did not concern itself with the ways in which those subjects produced legitimacy internally. A thin, contractual notion of legitimacy on the international plane was thus complemented by thick conceptions in the national realm, whether they reflected liberal democratic, communist, theocratic or other political convictions. In that way, a range of thick (and mutually exclusive) notions of political legitimacy could be combined with a modest level of international coordination.

In times of globalising markets and a rise of institutional integration, through the growth of international regulatory institutions as well as government networks and private forms of governance, the domestic/international divide has lost much of its structuring force and is likely to fade further. International and transnational rule- and decision-making increasingly aim at domestic markets and affect individuals directly; they often appear as yet another exercise of public power, not categorically different from the exercise of public power by domestic governmental institutions.<sup>1</sup> On this background, it is tempting to have recourse to domestic models of political order, to try to extend them to capture the extended scope of politics. Otherwise, it seems, we will be unable to realise central political values in the new, modified political space we have come to inhabit.

This article explores the extension to the postnational space of one central concept of Western political orders, constitutionalism. It traces, in Part II, how the idea of constitutionalism has been taken up

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<sup>1</sup> GAL.

in the description and construction of postnational law, both on the European and global levels. In Part III, it addresses some of the methodological problems an effort at translating domestic concepts into the postnational context faces. On this basis it begins, in Part IV, to examine which notions of constitutionalism have a resonance in domestic traditions. This resonance is traced first by describing the historical contest of “limiting” and “foundational” conceptions of constitutionalism and the shift towards the foundational approach that took place in the course of the 20<sup>th</sup> century. The appeal of this latter approach is then analysed in greater detail in Part V, in order to discern more clearly which elements of the contemporary practice of constitutionalism form essential pillars for the translation exercise we are engaged in. Finally, in Part VI, the article returns to the postnational sphere and assesses the potential implications of using foundational constitutionalism, as the dominant domestic constitutionalist strand, for the construction of postnational governance. It concludes with a reflection on its limits as a model for a political space that is radically different from the one that brought the idea of constitutionalism about in the first place.

The article argues that, if we take seriously the implications of our domestic commitment to constitutionalism, our demands on postnational institutions will have to be much more radical than they are in most contemporary approaches. Many of those approaches soften the idea of constitutionalism significantly, others reinterpret it in ways that make it hardly recognisable. Yet it may not be clear that our visions of the postnational space should indeed follow the constitutionalist footprint. Contrary to what some contemporary scholarship wants us to believe, constitutionalism is not infinitely flexible; it is a historically very particular form of pursuing broader normative commitments such as popular sovereignty or individual liberty. This form is not necessarily adequate to the postnational space and the societal background on which postnational governance operates. Sharpening the particularity of constitutionalism may help us see its problems, step out of its shadow and broaden our imagination for alternative visions of postnational politics and law.

## **II. Models of Postnational Order**

Constitutionalism made a relatively late appearance as a model for the emerging structures of postnational governance, both in Europe and – later still – on the global level. For long, those new structures were dealt with in the classical prism of international order, requiring some modifications to the traditional framework but not challenging it categorically. As usual, old paradigms kept structuring our understanding of reality until they had become too obviously outdated, and the gradual character of European integration and globalisation helped to conceal the extent of the challenge for a long time. After the failure of grander European designs in the late 1940s, the old, intergovernmental paradigm seemed unrivalled in accounting for institutional change on the continent. And globally, the absence of large-scale institutional innovation, despite hopes after the end of both World Wars, also meant pressure on the classical model remained limited.

### *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. And even though the project of a formal constitution for Europe has stalled for the moment – and is replaced by a treaty in more classical international form and terminology – constitution and constitutionalisation have become indispensable terms of reference in the debate on the European project. Without any claim to comprehensiveness, three main understandings of “constitution” and “constitutionalism” seem to dominate this debate.

The first understanding is one that equates constitutionalisation with the increasing legalisation 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>2</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 effect, supremacy, horizontal effects etc.<sup>3</sup> This idea of constitutionalism also accounted for the widely-held view among commentators in the 1990s that Europe already had a constitution and did not necessarily need one.<sup>4</sup>

This understanding was, however, not alone in Stein’s account. For him, the making of a transnational constitution was not only about increasing legalisation, 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>5</sup> This aspect connected his account with later, broader visions of what constitutionalising 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>6</sup> In this account, a constitution could become a focus for collective self-determination and a stronger basis for the legitimacy of the increasingly demanding political structure of the EU than the classical intergovernmental, treaty-based model could provide. It was precisely this association that the eventual process towards the draft “Treaty for a Constitution for Europe” sought to evoke, and that may have contributed to its failure: critics were wary of the increased stability, autonomy and legitimacy a constitution might have afforded the EU, and of the ensuing threat to member state sovereignty.<sup>7</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 over their forms of association, as a contestation and recognition of difference rather than the formal selection (or imposition) of common values.<sup>8</sup> Other authors have taken this approach further, with notions of

<sup>2</sup> ECJ, Judgment of 23 April 1986, 294/83, *Parti écologiste “Les Verts” v European Parliament*, ECR 1986, 1339, para. 23.

<sup>3</sup> Stein 1981.

<sup>4</sup> Weiler [xx]; Pernice?? [xx]

<sup>5</sup> Stein 1981: 1.

<sup>6</sup> Habermas 2001 [New Left Review].

<sup>7</sup> [Grimm 1995??]

<sup>8</sup> Shaw 1999.

“constitutional pluralism” and “contrapunctual law” becoming increasingly prominent.<sup>9</sup> This vision of constitutionalism situates itself clearly in quite a different tradition of thought than the previous ones, and I will return to its origins below.

### *Global Analogues*

This survey of the European debate is obviously very brief, perhaps even simplistic, and it hardly captures the many nuances of the debate about “constitution” and “constitutionalism” in the EU context.<sup>10</sup> But it should suffice to bring out some of the main contrasts and differences in the conceptualisation of these terms and may therefore serve as a good background for situating the debate on the global level.

Unsurprisingly, it took constitutionalism much longer to gain prominence on the global level than it did in the EU. 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 to credibly interpret international politics in a constitutional vein. Early efforts to do so – such as the one by Alfred Verdross and Bruno Simma in their international law textbook of [1978xxx] – had only limited resonance<sup>11</sup>; overall, the description of the international realm as “anarchical” secured the continued dominance of analyses in intergovernmental terms and in clear distance from domestic models.<sup>12</sup>

This began to change in the 1990s, mainly for three reasons. One was the perception of a stronger convergence of political ideas after the end of the Cold War, leading to a rise of notions of an “international community” with common values and, possibly, some form of common constitutional framework.<sup>13</sup> The second factor was the increasing institutionalisation of international politics as new institutions such as the WTO appeared on the scene and old ones, such as the World Bank and the UN Security Council, were revitalised and strengthened<sup>14</sup>; along with this went a greater prominence of legal mechanisms of dispute settlement in various contexts – the WTO, the law of the sea, the International Criminal Court – allowing commentators to diagnose a progressive legalisation of the international sphere.<sup>15</sup> Finally, economic globalisation spurred an increasing awareness of the links between domestic and international politics and their various actors, pushing for a reconceptualisation of the dominant international, inter-state model.<sup>16</sup> Over time, though, countertendencies became more visible. The continuing force of hegemonic power and the growing fragmentation of the system<sup>17</sup> provided a serious challenge for constitutionalist thought, but they did not succeed in debasing it altogether.

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 centering on checks, structure, and discourse.

The first strand is characterised by an emphasis on the *checks* on law and power in the global realm. In part, this goes back to the above-mentioned diagnosis of an increasing convergence of values in the

<sup>9</sup> See Walker 2002; Maduro 2003; and the contributions to Weiler & Wind 2003.

<sup>10</sup> For broader accounts, see Möllers [xxx]; etc.

<sup>11</sup> Verdross & Simma [xxx]; [also Friedmann, *The Changing Structure of International Law*, 152-9?].

<sup>12</sup> See only Bull [19xx]; Waltz [xxx].

<sup>13</sup> See Simma 1994.

<sup>14</sup> See Alvarez 2006.

<sup>15</sup> See IO 2001.

<sup>16</sup> Held etc.; Zürn etc [xxx].

international community – 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, but other “fundamental norms” are also identified.<sup>18</sup> Yet constitutional checks are not only made out in substantive norms, but also in the mechanisms to enforce them. Here, the legalisation aspect that has been so prominent in the European debate comes in again, though it takes a different form in the decentralised legal and political order on the global level. The focus is not so much on shaping and limiting central institutions, but more on keeping the most powerful players – states – in check and thereby establish some elements of a rule of law in an international society in which law has long been seen to take second stage to politics.<sup>19</sup> This first strand focuses on particular, circumscribed elements that shape the existing system of international politics and that are sometimes characterised as “partial” constitutions.<sup>20</sup> This limited scope becomes nowhere clearer than in Gunther Teubner’s vision of “global civil constitutions”. Using ideas of “societal constitutionalism” as a starting point, Teubner departs from state-centred visions of constitutionalism and instead sees processes of constitutionalisation anchored in the various, autonomous subsystems of global society. Characterised by forms of juridification, hierarchy and human rights limits, he observes the emergence of “global digital constitutions” just as “global health constitutions”: checks and limitations on the operation of society and institutions in the many areas of international life.<sup>21</sup>

The second strand – I call it *structural* constitutionalism – operates on a grander scale. It sets its sights onto the global order as a whole, seeking to identify and conceive structures that would redeem constitutional promises on a global level. Partly, this is based on Luhmannian notions of constitution and merely looks for “structural couplings” between politics and law on the global level.<sup>22</sup> Most authors, though, use a more substantive vision of constitution; and some even see it in the process of being realised. This may be based on a redescription of the existing order: for example, attempts at describing the United Nations Charter as a “world constitution” – as laying out fundamental rules, creating institutions and placing itself at the top of the global hierarchy of norms – use the constitutional prism to make better sense of the ways in which the Charter actually operates and is interpreted by states, courts and other actors.<sup>23</sup> Other examples of this structural strand adopt a more openly normative 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, Jürgen Habermas or Iris Marion Young are, despite their differences, all informed by the domestic function of constitutions in shaping and delimiting the powers of different organs and levels of government and resolving conflicts between them.<sup>24</sup> A similarly federal-style “constitutionalist” vision is propounded among legal scholars by, for example, Matthias Kumm who erects a model for global institutions in which powers are distributed according to

<sup>17</sup> See Krisch 2005; Teubner & Fischer-Lescano [200x].

<sup>18</sup> See de Wet ICLQ 2006; LJIL 2006; Peters 2006. Petersmann?

<sup>19</sup> Petersmann?

<sup>20</sup> Walter 2001.

<sup>21</sup> Teubner, ZaöRV 2003. Also Fischer-Lescano?

<sup>22</sup> See Fischer-Lescano ZaöRV 2003.

<sup>23</sup> Fassbender.

<sup>24</sup> Held 199x; Habermas 2004; Young 2000.

norms such as subsidiarity and adequate participation of all in decisions that affect them<sup>25</sup>; or by Christian Tomuschat who sees the international legal order as 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>26</sup> Unlike in Europe, even such holistic approaches do not aim at an overarching constitutional document to structure the global polity, but their substance clearly goes into a similar direction: into the direction of a framework for politics based on reasoned principles and collective self-government, towering above our everyday, more mundane struggles.

As in the European debate, a third, *discursive* strand of constitutionalism has emerged as an alternative vision, drawing on quite different ideas of what a constitution is and ought to be. This is driven in part by authors who, like Neil Walker, see their theories for Europe only as a particular expression of broader trends in postnational law; accordingly, his ideas about constitutional pluralism, dialogue and process extend well beyond the realm of European politics.<sup>27</sup> Others have begun to follow this line<sup>28</sup>, but it is certainly less pronounced than in the European context.

### III. 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 mentioned above, this attempt responds to the changed circumstances of postnational governance that have undermined classical, intergovernmental models and call for new conceptualisations. Using domestic experiences is an obvious move, but not only have international lawyers and international relations scholars long been generally skeptical about domestic analogies<sup>29</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 to understand it as an effort in translation<sup>30</sup> and Neil Walker has sought to elucidate the methodological problems that we encounter in translating constitutionalism from the state to the postnational level.<sup>31</sup> Walker emphasizes the need for understanding both the source and the destination environments, and he points to the importance of defining the translated term at a level of abstraction that respects the requirements of both contextual-historical 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

<sup>25</sup> Kumm EJIL 2004.

<sup>26</sup> See Tomuschat RdC; on this vision, see Bogdandy HarvJIL 2006.

<sup>27</sup> Walker, Constitutional Pluralism piece.

<sup>28</sup> See Tsagourias, intro to Transnational Constitutionalism. [see also Joerges/Sand/Teubner: Transnational Governance and Constitutionalism] [Walker, Sovereignty in Transition] [Walker Paris]?

<sup>29</sup> [Book on world order and domestic analogies?]

<sup>30</sup> See only Weiler, Constitution of Europe, 270.

<sup>31</sup> Walker, “Postnational constitutionalism” [xx].

normative orientation.”<sup>32</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>33</sup>; at this level of generality, all the particular content of constitutionalism, all its connections to particular historical and social circumstances, are lost.

The general problem with Walker’s 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 18<sup>th</sup> century America into today’s changed society.<sup>34</sup> Like in Walker’s approach, his interpretive results are quite far removed from the original context and meaning (and probably 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>35</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>36</sup> Ronald Dworkin’s theory of interpretation (which at times he also describes as translation<sup>37</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>38</sup> Dworkin differs from Lessig by placing less emphasis on the “humility” of the translator<sup>39</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 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 to accept it as a valid

<sup>32</sup> Ibid., 42.

<sup>33</sup> Ibid., 53.

<sup>34</sup> Lessig, Fidelity and Constraint, Fordham LR 1997; see also Lessig 1993 [TexLR 71, 1165].

<sup>35</sup> Lessig 1997, 1374-1376.

<sup>36</sup> See also Lessig 1993, 1189-1214.

<sup>37</sup> Dworkin, Freedom’s Law, 8.

<sup>38</sup> Dworkin, Law’s Empire [xx]; Freedom’s Law.

<sup>39</sup> Lessig 1993, 1251-1261.



model or not – 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 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 wants to find out 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 comes with. For this purpose, we need to place particular 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 must be careful: the point of that second step is still mainly 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. And 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.

#### IV. Competing Constitutionalisms

Like most successful political concepts, constitutionalism comes in many guises, and pinning down its meaning is difficult not only in the postnational 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>40</sup> or as an “essentially contested concept”<sup>41</sup> – sometimes it denotes a mere description of the state of a society or of the operating rules and customs 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>42</sup> “Constitutionalism” hardly fares better: implying a movement towards a desirable goal, it embodies a strong normative component, but views diverge widely on what this normative component is. For some, it needs to be directed at a constitution in one of the two latter meanings mentioned above; for others it signifies a movement towards ideals of freedom, democracy and good governance more broadly,

<sup>40</sup> [Walker, Pluralism, 333].

<sup>41</sup> [Sabel, colloq paper]

<sup>42</sup> See Raz, Craig.

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 relations between individuals.<sup>43</sup>

### *Focusing the Inquiry*

Among those different interpretations, singling out the right one for all purposes is impossible; surely some will fit better in some contexts and discourses, some in others, and “constitution” and “constitutionalism” will derive their particular meanings from the understandings of those engaged in those discourses. In our case, the objective of the enquiry narrows down the range of options to consider and it focuses the analysis in two ways. First, as the debate on postnational constitutionalism seeks to tap into the legitimating potential of its domestic counterpart, we are only interested in normatively rich conceptions, not in those of mere analytical or descriptive value. For example, one main understanding of “constitution” throughout history – and probably the dominant one until early modernity – refers to the sum of rules and institutions that define the political system of a society.<sup>44</sup> Every polity has a constitution in this sense, but this also means that the term does not come with a normative connotation; having a constitution is not a positive attribute of a political system – it is an inevitable state of affairs. This applies in a similar way to Niklas Luhmann’s understanding of a constitution as the “structural coupling” of law and politics.<sup>45</sup> Even though for Luhmann a constitution is an “evolutionary achievement”<sup>46</sup> and is therefore not necessarily present in all societies, it is to be found in all societies in which the political and legal systems are sufficiently differentiated and have established institutions that connect them – that translate legal decisions into the political order and political ones into the legal order. Whether or not the terms of this translation are satisfactory or appealing is irrelevant for this conception, and it therefore cannot serve the goal of providing legitimacy for a political order that we are interested in here.

The context of our inquiry also defines the range of eligible conceptions in another way. As the postnational debate seeks to make use of the legitimating potential of constitutionalism, it needs to connect to those strands of domestic constitutionalism that have in fact provided legitimacy – those that over the last few centuries have proved appealing enough to make constitutionalism a central element of the social justification of Western political orders. This implies that, in our attempt at translation, we are not so much interested in fringe conceptions of constitutionalism which – though potentially holding great normative appeal – cannot account for the social impact constitutionalism has actually had and therefore are of little use for postnational conceptualisations that wish to tap into an *existing* legitimacy reservoir. We may think here, for example, of James Tully’s work on “common constitutionalism” which deliberately departs from the “modern constitutionalism” that has, in his view, captured our political imagination for too long.<sup>47</sup> His common constitutionalism harks back to earlier political practices that have operated through consent and mutual understanding rather than the imposition of rules he observes in most developed, constitutional states. His emphasis on cultural diversity and mutual recognition is certainly important, and his vision of a political order may well be preferable for the fragmented, diverse societies now characteristic of many parts of the world. It may be appropriate even – or perhaps particularly – for the global polity; I will return to that point later. However, when we are interested in

<sup>43</sup> See Craig.

<sup>44</sup> Grimm 1994, 102-103; McIlwain.

<sup>45</sup> Luhmann, *Das Recht der Gesellschaft*, [xx].

<sup>46</sup> Luhmann, *Verf als evolutionäre Errungenschaft*, [xx].

translating political concepts from the domestic to the postnational level, Tully's vision of constitutionalism hardly helps us – it simply cannot account for the *actual* appeal that constitutionalism (in, as Tully acknowledges, a very different form) has exerted for several centuries.

### *Constitutions as Limitation and Foundation*

Among normative visions of constitution and constitutionalism, the most enduring theme has probably 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>48</sup>

His claim applies to two-thousand years of political history and thus goes well beyond the scope of the present inquiry; but certainly in modern times it captures an important element of the most influential strands of constitutionalism. This is certainly true for England, where “constitution” was early understood as a limit to what the king could do<sup>49</sup>, in contrast to earlier uses of the term as a mere description of the political system of a society.<sup>50</sup> The term was increasingly used in this limitational sense in the 17<sup>th</sup> century, for example in the charges against Charles I in 1649 or against James II in 1688<sup>51</sup>, or in Locke's 120 “fundamental constitutions” of Carolina in 1669.<sup>52</sup> After the successful challenge of far-reaching royal prerogatives, constitutions were now regarded as rules whose violation could have serious consequences – and the idea that government was subject to legal limits was then given particularly clear expression in the Bill of Rights in [1689].

This idea naturally faced difficulties in countries with absolutist monarchs, but it found increasing reflection where power was less concentrated. Where 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 to their power. These agreements were called fundamental laws, agreements of government (*Herrschaftsverträge*), or electoral capitulations (*Wahlkapitulationen*), and they could not be unilaterally terminated by the ruler.<sup>53</sup> In a similar way as the “constitutions” in Britain, they established punctual limits to monarchical power; and they were part of positive law, quite unlike earlier constraints on rulers derived from natural law precepts.<sup>54</sup>

A broader vision of what a constitution could mean arose only with the American and French revolutions in the 18<sup>th</sup> century, though it had an important (if unsuccessful) predecessor in Cromwell's *Instrument of Government* of 1653. While the earlier understanding saw constitutions as a “limitation”,

<sup>47</sup> See Tully, *Strange Multiplicity*, [xx].

<sup>48</sup> McIlwain 1947, 22.

<sup>49</sup> See also McIlwain 1947, [xx].

<sup>50</sup> See Grimm 1994 [xx].

<sup>51</sup> Grimm 1994, 105.

<sup>52</sup> [xx].

<sup>53</sup> See Oestreich, “Vom Herrschaftsvertrag zur Verfassungsurkunde”, in *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze* (R. Vierhaus, ed., 1977) [xx]; Hofmann, “Zur Idee des Staatsgrundgesetzes”, in Hofmann, *Recht – Politik – Verfassung*, 1986 [xx]; Werner Näf, “Herrschaftsverträge und Lehre vom Herrschaftsvertrag”, *Schweizer Beiträge zur allgemeinen Geschichte* 7 (1949), 26 [xx]; André Lemaire, *Les lois fondamentales de la monarchie française d'après les théoriciens de l'ancien régime*, 1907 [xx]. [further references, Grimm, HdBSTr, Fn. 9]

<sup>54</sup> [xx]

the newer one regarded them as the “foundation” of government.<sup>55</sup> The main characteristic of the new type of constitution, pioneered in the United States, 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. Tom 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>56</sup>

After this, 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 punctual, historically formed rights which they wanted to see reinterpreted and enforced against what was seen as a corrupted monarchical system.<sup>57</sup> Only over time, as this route proved unsuccessful, did the focus shift and calls for new foundations of government arise. And even after American independence, it took a decade for the idea of constitutions as foundations of government to fully take hold. The state constitutions in the 1770s were still seen as granted by the legislatures; accordingly, state parliaments often amended them freely. 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 consequence, 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 stronger – than state legislatures.<sup>58</sup>

This prepared the ground for French developments; here it is Sieyes who formulates the foundational vision of a constitution most cogently: “tout gouvernement commis doit avoir sa constitution”.<sup>59</sup> The 1791 constitution reflects this by emphasising 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, nobody can claim to speak on behalf of the nation; extraconstitutional powers no longer exist.<sup>60</sup> And this is reinforced by the high procedural threshold established for constitutional amendments: even the National Assembly was unable to change constitutional provisions without going through a lengthy and burdensome process culminating in a decision of a particular “Assembly of Revision”. The power of the “people” to effect a revision itself remained explicitly untouched, though complemented by a cautionary note as to its exercise.<sup>61</sup> The constitutions of 1793 and 1795 followed this conception of a constitution in principle: the people, or the “citizens as a whole” in 1795, remained the

<sup>55</sup> On the centrality of the contest between these two variants, see Möllers, in *Eur VerfR* [xx]; see also Paolo Comanducci, ‘Ordre ou norme? Quelques idées de constitution au XVIIIe siècle’, in Troper & Jaume, 23-43.

<sup>56</sup> Thomas Paine, *The Rights of Man*, ++.

<sup>57</sup> See Gordon Wood [xx].

<sup>58</sup> [Reasons: Rakove].

<sup>59</sup> *Tiers Etat* [xx]. On Sieyes’s thought and influence on the revolutionary constitutions, see Pasquino, Sieyes.

<sup>60</sup> 1791 Constitution, Title III.

<sup>61</sup> 1791 Constitution, Title VII.

*pouvoir constituant*, and the constitution was not at the disposal of the legislature; it represented a higher law with a particular revision procedure and formed the foundation of all (delegated) public authority.<sup>62</sup>

### *Historical Contests*

The American and French revolutions, however, did not settle the meaning of “constitution” and “constitutionalism” instantaneously. In 1830, an influential German dictionary noted that no term was more closely related to central political movements than “constitution”, but also that none sparked stronger disagreement.<sup>63</sup> Throughout the 19<sup>th</sup> century, the contest between different visions of the terms remained at the core of political struggles all over Europe.

Britain, of course, never came to adhere to the broader, foundational vision; even after sovereignty had shifted from the crown to the crown-in-parliament, it remained “sovereignty”, not subject to an overarching rule defining its power or regarded as delegated from another subject. The idea of a *pouvoir constituant* behind the government, so central to French political thought since the revolution, did not gain much strength here; government was *for* the people, not necessarily exercised by or delegated from it.<sup>64</sup> But also in France, ambivalence over the meaning of constitution remained. This not so much because the people, the *pouvoir constituant*, was largely replaced by the parliament in the operation – and even revision – of most republican constitutions until the mid-twentieth century<sup>65</sup>; after all, “the people” formed the (at least virtual) source of the delegation of governmental powers in all constitutional documents since 1830. But before that date, the term “constitution” was also claimed for less than comprehensive documents, especially the *chartes constitutionnelles* of 1814 and 1830. Though following the revolutionary constitutions in form, the *charte* of 1814 was a mere royal grant on the grounds that “in France, all authority lies in the king” – thus ultimately confirming the king’s role above, not below the constitution<sup>66</sup>; and the 1830 charter, while more contractual in character, still presupposed a preexisting power of the monarch.<sup>67</sup>

Not all constitutional monarchies followed this path. In Belgium, for example, the constitution of [1831] maintained the monarchical system of government, yet it claimed a foundational role: as in the French constitution of 1791, the king was subject to it and the constitution became the vehicle for delegation by the nation from whom “all powers derive[d]”.<sup>68</sup> But in most constitutional monarchies, as in the French charter, the hierarchy was inverted: monarchical power came before the constitution. For the German states, this was even ratified by the Vienna Final Act of 1820, which confirmed the supreme authority of the monarch and allowed constitutions only to regulate aspects of the *exercice* of that

<sup>62</sup> [xx]. However, the recognition of a higher status did include an acceptance of constitutional review at this point; the status of the legislature led to the rejection of such proposals in 1795; see Pasquino, Sieyes, [xx].

<sup>63</sup> Quoted in Grimm 1994, 120.

<sup>64</sup> Loughlin, in Loughlin/Walker...

<sup>65</sup> This is the argument in Jaume 2007 [xx].

<sup>66</sup> [xx: [http://www.napoleon-series.org/research/government/legislation/c\\_charter.html](http://www.napoleon-series.org/research/government/legislation/c_charter.html)]. But see Rials, ‘Essai sur le concept de monarchie limitée’, in *Révolution et contre-révolution au XIXe siècle* (Paris, 1987), 88 [xx] (claiming this did not make the king the constituent power).

<sup>67</sup> [xx]; see Pasquino, Sieyes, 129-145.

<sup>68</sup> See Article 25 of the Belgian Constitution of 1831 [?]: “Tous les pouvoirs émanent de la nation. Ils sont exercés de la manière établie par la Constitution.” (quoted in Böckenförde, *Recht*, 279) [xx].

authority.<sup>69</sup> The king was thus thought of as prior to the constitution, as above it, and the constitution was his act of grace; as he did not derive his authority from the constitution, it remained possible for him to claim powers of an extraconstitutional nature, based on traditional royal privileges. Most of these constitutions were of a unilateral nature, granted by the monarch; some resembled the earlier contracts of government between monarch and estates and were concluded in contractual form or at least negotiated with the estates prior to their declaration by the king.<sup>70</sup> If they formed limitations on the king's exercise of power, they did not seem to affect the basis of those powers itself.<sup>71</sup>

In spite of this, the scope and character of these constitutions remained subject to contestation. After all, they had been largely established as a concession to the more liberal spirit of the times, by monarchs keen to preserve the legitimacy of their rule. Using the forms and rhetoric of constitution was a step towards the ideas of the French revolution, and though there was little revolutionary momentum in early 19<sup>th</sup>-century Germany, this movement lent itself to further exploitation by proponents of liberalism and democracy. The latter disputed the idea that constitutions could be mere grants that left intact the ultimate sovereignty of a king. Often inspired by social contract ideas, they insisted that those constitutions were transformative and, even if initially based on a unilateral grant, became the new and sole foundation of public authority.<sup>72</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 became a *pouvoir constitué* and could therefore not undo what he had created.<sup>73</sup>

This also meant that there could be no further recourse to extraconstitutional, tradition-based powers. In the prominent Prussian constitutional conflict of the 1860s, Eduard Lasker argued that the constitution had “clogged” the source of unconstrained, traditional powers; the king now only enjoyed those powers he had been granted by the constitution.<sup>74</sup> This conflict centred on whether the Prussian (royal) government could govern when the two houses of parliament failed to agree on a budget (the lower house had rejected a funding bid for a large-scale reform of the military). The government, headed by Otto von Bismarck, claimed it could resort to traditional royal prerogatives to fill “gaps” in the constitutional setting; the lower house of the parliament denied this possibility; and influential commentators at the time found that “constitutional law end[ed] here”.<sup>75</sup> The four-year stand-off was eventually resolved when Bismarck, after the successful wars against Denmark and Austria, asked the parliament to grant him indemnity, which he received.<sup>76</sup>

This ambiguous ending reflects quite well the undecided character of 19<sup>th</sup>-century constitutions in Germany (and beyond); the constitutional idea remained in abeyance between the limitational and

<sup>69</sup> [Art 57 Vienna Final Act]. See Grimm, *Verfassungsgeschichte*, 113-116; Böckenförde, *Recht, Staat, Freiheit*, 277. This was also the strategy in the French Charter of 1814, see [http://www.napoleon-series.org/research/government/legislation/c\\_charter.html](http://www.napoleon-series.org/research/government/legislation/c_charter.html).

<sup>70</sup> See Böckenförde, “Der deutsche Typ der konstitutionellen Monarchie im 19. Jahrhundert”, 281; Grimm, *Verfassungsgeschichte*, 110-113.

<sup>71</sup> See Schmitt, *Verfassungslehre*, 53-56.

<sup>72</sup> See Stolleis, vol II, 102.

<sup>73</sup> [Quoted in Grimm, 132].

<sup>74</sup> [Quoted in Grimm, 142].

<sup>75</sup> [Meyer & Anschütz, *Lehrbuch des deutschen Staatsrechts*, 7<sup>th</sup> ed., 1919, 906]

<sup>76</sup> See Grimm, *Verfassungsgeschichte*, 231-240; Wahl, *Verfassungsstaat*, 316-318; Böckenförde, *Recht, Staat, Freiheit*, 295.

foundational models I have described above.<sup>77</sup> This mirrors the problems of the concept of constitutional monarchy itself, which has often been described as an “in-between” state, easing the transition of the *ancien régime* to the modern, democratic state through a hybrid form, a constitutional compromise that helped conceal fundamental conflict.<sup>78</sup> A resolution of the underlying contest – and between the competing constitutional models – had to wait until the 20<sup>th</sup> century.

In Germany, the contest of constitutional visions was (provisionally) decided in favour of the foundational model in the Weimar Constitution in 1919<sup>79</sup> and then again in the *Grundgesetz* in 1949. Arguments about pre-constitutional powers reappeared, mainly based on an idea of the “state” preceding its constitutional form and thus endowed with certain original competences; but in the course of the 20<sup>th</sup> century such arguments became marginal, at least as regards their legal impact.<sup>80</sup> This shift reflects a much broader trend: if the 19<sup>th</sup> century was characterised by a competition between visions of constitutions as limitation or foundation, the 20<sup>th</sup> century saw a far-reaching convergence on the foundational model.

### *Contemporary Expansion*

[Here: expansion of foundational constitutionalism throughout 20<sup>th</sup> century – weakening of power-limiting alternative: limited to countries with strong claim to historical legitimacy (UK etc) – new legitimacy only from comprehensive cst – trace development, extended reach of existing constitutions, e.g. in emergency powers, supranational integration, etc]

## **V. The Appeal of Foundational Constitutionalism**

Foundational constitutionalism may have had the strongest historical appeal over at least the last century, and after my methodological remarks above, this already indicates that it is this vision of constitutionalism that should guide a translation to the postnational sphere. But to assess to what extent the foundational element is central (and not merely accidental) to contemporary political experience, we need to dig deeper into the factors that have made foundational constitutionalism so attractive. This involves both a historical reconstruction and an evaluation on the basis of contemporary constitutional theory.

### 1. The Historical Appeal: Constitutionalism and the Modern Political Project

Historically, the idea of a comprehensive formulation of the foundations of public power is obviously closely related to the political context in which it emerged – the modern constitution was born out of *revolutions*.<sup>81</sup> As indicated above, the political movements of the 18<sup>th</sup> century that eventually created the first constitutions, initially hoped to achieve their goals through reforms in the more classical form of punctual agreements with their rulers, which would, in principle, have left the existing political systems in

<sup>77</sup> But see also Schmitt, *Verfassungslehre*, 54-56, who regarded this abeyance as not only untenable but as inevitably resolved in real conflicts, such as the Prussian one which he saw as confirming the ultimate monarchical power.

<sup>78</sup> See Böckenförde, ‘Der deutsche Typ...’; Stolleis, vol. II, 104.

<sup>79</sup> Even though the supremacy of the constitution was still disputed; see Wahl, 138.

<sup>80</sup> See Möllers, *Staat als Argument*, especially 72-76, 264-267; for an example, see Isensee, ‘Staat und Verfassung’, HdBSr I [xx].

<sup>81</sup> See also Grimm, ‘Entstehungs- und Wirkungsbedingungen’, in *Zukunft*, 43-45.

place.<sup>82</sup> However, once their demands for reform had been rejected, the American opponents of British rule and the French third estate saw no hope for success but an outright revolution that would overturn colonial domination and the *ancien régime*. Only from this revolutionary situation then emerged the call for constitutions (as it had in 1653 with Cromwell's *Instrument of Government*); and only because of the success of the revolutions were the constitutions eventually adopted.

It was no accident that constitutions and revolutions were so closely intertwined. Constitutions were dependent on the revolutions – an innovation of that scale could not have been introduced without a drastic break with the past.<sup>83</sup> But the revolutions were also dependent on constitutions. Unlike most previous revolutions that had left the political system in place and merely exchanged rulers, the American and French revolutions had further-reaching goals: they sought to establish new systems of government, a new basis of legitimacy, and also fundamental changes of society – in the French case the abolition of the feudal system, in the American the establishment of a more virtuous, less corrupted polity.<sup>84</sup> Such sweeping goals required forms adequate to the task – forms that were not confined to limited, punctual changes, but allowed to restructure the entire political order. Constitutions were ideal instruments in this regard as they symbolised the emergence of a comprehensive new order – an order that did not allow remnants of the past, but promised to rebuild the political system entirely along the lines of the revolutionary project.<sup>85</sup>

Yet foundational constitutionalism was linked to the modern political project in a far broader way.<sup>86</sup> One such link was the idea of the *social contract*. In America, the prominence of social contractarian ideas was connected with a widespread sense that the rejection of British rule had left the colonies in something resembling a state of nature, in which there was neither an existing authority nor even the bonds of a larger society.<sup>87</sup> A social contract, in a Lockean understanding, appeared as the construct by which the colonies could overcome this situation and create sufficient societal bonds to justify the exercise of state power. Although obviously not contracts themselves, constitutional documents seemed close enough to that idea to evoke the association of such a justification.<sup>88</sup> The link was most prominent in the Massachusetts Constitution of 1780 which declared itself

“a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”<sup>89</sup>

The horizontal dimension of the social contract certainly seemed more fitting to the new constitutions than a conceptualisation in the classical terms of a pact between ruler and people that had been used for earlier limitations on public power, such as the Magna Carta. After all, the revolution had removed the pre-existing ruler and created a void that it was now for the people (and the people alone) to fill.<sup>90</sup>

<sup>82</sup> On America, see Wood, ch. 1; on France, Roberts, ch. 1.

<sup>83</sup> Grimm, ‘Entstehungs- und Wirkungsbedingungen’, in Zukunft, 43-45.

<sup>84</sup> See Roberts, 24-29; Wood, ch. 2 and 3.

<sup>85</sup> See Claude Klein, ‘Pourquoi écrit-on une constitution?’, in Troper & Jaume, 89-99, at 94-96.

<sup>86</sup> [See Tully, [xx], for a critique of modern constitutionalism precisely because of this link]

<sup>87</sup> See Wood, 285-289; Rakove, 21.

<sup>88</sup> See Wood, 282-291. On the remaining difference between the two concepts, see Grimm, ‘Entstehungs- und Wirkungsbedingungen’, in Zukunft, 43.

<sup>89</sup> Quoted in Wood, 289.

<sup>90</sup> Wood, 290.



In France, the strength of social contract ideas was largely inspired by Rousseau's *Contrat Social*, and in the National Assembly it was reflected most vividly in the work of the Abbé de Sieyes, widely regarded as the most influential theoretical mind behind the 1791 constitution. Sieyes conceived of the social contract in similar terms as Rousseau, but unlike him, he saw representation and delegation as key to a political order.<sup>91</sup> Because of this, the link between the general will of the people, united by the social contract, and its delegates – its representatives in the legislature and other holders of public power – became crucial, and the constitution came to provide this link. The *pouvoir constituant* and the *pouvoirs constitués* were connected by the terms of delegation spelled out in the constitutional document; and while constitution and social contract were not the same for Sieyes, the constitution was the necessary instrument to give the social contract effect.<sup>92</sup>

This relates directly to the second central link between the idea of a foundational constitution and modern political thought, the concept of *popular sovereignty*. It was obviously at the base of both Rousseau's and Sieyes' theories of the social contract: it was through the contract that a people found together and came to establish a political order. In the French case, this was closely connected with the rise of the idea of the "nation" in the 18<sup>th</sup> century: the nation as a unity, transcending differences of regional and social origin, had allowed for the imagination of a collective, acting subject, and it was this subject that could be understood to possess ultimate power. This made it possible for the French Third Estate to bolster its claim to supremacy over the other estates: being the entire nation itself and having constituted itself as the *Assemblée Nationale*, it was not bound by agreements with other social groups or with the monarch, and the constitution it eventually drew up was no longer a contractual instrument as in previous times, but merely the result of one will, that of the nation, the people.<sup>93</sup> And just as this made the idea of a unitarian, foundational constitution *possible*, it also made it *necessary* if one held – with Sieyes – that the nation was not able to conduct the business of governing itself but had to delegate it. On this basis, as mentioned above, a foundational, comprehensive constitution became necessary to set the terms of delegation, to establish public authorities and define the extent and limits of their powers.

The role of a constitution is weaker, though, if parliament comes to be identified with "the people" and the distinction between *pouvoir constituant* and *constitué* breaks down. French constitutional history after the revolution has indeed often identified parliament with a constitutional assembly free from constitutional constraints.<sup>94</sup> Likewise, in post-independence America, popular sovereignty and foundational constitutionalism initially did not go together.<sup>95</sup> Here, too, historical alternatives to popular sovereignty had been discredited in the 18<sup>th</sup> century, and "the people" had come to be imagined as a unity, no longer as an aggregation of different groups.<sup>96</sup> But popular sovereignty expressed itself initially through assemblies, through parliaments: sovereignty was that of the legislatures, there was no clear distinction between the people and its representatives, and there was consequently no need for a constitution to determine the link between them. All a constitution needed to do was to set out the limits

<sup>91</sup> See Sieyes, *Tiers Etat*, ch. V; B. Baczko, 'The Social Contract of the French: Sieyes and Rousseau', *Journal of Modern History* 60 (1988), S98-S125; [M. Forsyth, *Reason and Revolution: The Political Thought of the Abbé de Sieyes* [xx]].

<sup>92</sup> Sieyes, *ibid.* (p. 52); see also Pasquino, *Sieyes*, ch. II.

<sup>93</sup> Sieyes, *ibid.*, especially ch. I and ch. V; see also Pasquino, *Sieyes*, ch. III.

<sup>94</sup> See Jaume, in Loughlin & Walker, 76-79.

<sup>95</sup> On this and the following, see Wood, ch. 7 to 11.

<sup>96</sup> McCormick in Loughlin/Walker, [xx].

of *other* powers, but the assembly could comfortably retain the right to amend it. This changed as the distance between people and representatives became clearer, after what many contemporary observers regarded as abuses of power by the assemblies. As mentioned above, the 1780s shifted towards constitution-making through special conventions, seen as more closely related to the people and distinct from the assemblies conducting daily business. And it 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 the previous Articles of Confederation had not. As a result, the federal constitution not only founded the federal authorities, it could also credibly lay claim to supremacy over state constitutions.<sup>97</sup>

A final link with central tenets of the modern political project stems from the place of *reason and human agency* in foundational constitutionalism. Both concepts were central to Enlightenment thought, to the idea of a political and social order not merely based on history and tradition but shaped by humankind along rational lines. Existing authorities came under scrutiny; their historical bases of legitimacy were subjected to critique and could no longer be presupposed; and this also affected the older, limiting version of constitutionalism that had taken existing authorities for granted. Constructing limits to governmental powers was certainly rationalising their exercise, bringing them closer to the demands of reason, but it did not reach the source of those powers and thus fell short of the full Enlightenment promise. The radical shift that foundational constitutionalism effected was probably nowhere clearer than in Hegel’s dictum about the French revolution:

“The conception, the idea of right asserted its authority all at once, and the old framework of injustice could offer no resistance to its onslaught. A constitution, therefore, was established in harmony with the conception of right, and on this foundation all future legislation was to be based. Never since the sun had stood in the firmament and the planets revolved around it 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>98</sup>

This observation reflected the vision of the constitution-makers. Enlightenment thought was dominant in 18<sup>th</sup>-century France, and we can see Hegel’s comment mirrored, for example, in Sieyes’s critique of the English constitution, at the time frequently regarded as an example for a successful model of political order. For Sieyes, though, its closer analysis “would perhaps reveal that it is the product of chance and circumstance rather than of enlightened reason [lumières]”<sup>99</sup>; the French nation, instead, was free of historical obligations and constitutional ties and could remake the political order at its will.<sup>100</sup> In America, the constitutional debate was shaped more by historical experience than by abstract theorising<sup>101</sup>, though, as Jack Rakove notes, “[eighteenth-century American] thought and the Constitution it produced were expressions of the Enlightenment” too.<sup>102</sup> This is on display most clearly in the *Federalist Papers*: in their

<sup>97</sup> Rakove, 94-113; Wood, 532-536. This, however, did not prevent later dispute about the point; see Akhil Reed Amar, ‘Of Sovereignty and Federalism’, *Yale Law Journal* 96 (1987), 1425-1520, especially 1450-1455.

<sup>98</sup> [Hegel, *Vorlesungen zur Philosophie der Geschichte*, Ausg. Glockner, 3<sup>rd</sup> ed., Stuttgart 1949, 557 (The *Philosophy of History*, 1956 Dover ed., part 4, section 2, chapter 3)]

<sup>99</sup> Sieyes, *Tiers Etat*, Chap IV, para. VII [translation?].

<sup>100</sup> Sieyes, *Tiers Etat*, Chap V.

<sup>101</sup> See Wood, 3-10; Rakove, 18-19.

<sup>102</sup> Rakove, 18.

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>103</sup>

Quite obviously, a constitution with a foundational claim and comprehensive character was an ideal tool to put those Enlightenment ideals into practice. If all public power had to find its basis in a constitution, traditional privileges immediately came under scrutiny; unless rationally justified and positively accepted, they were swept away. In the constitutional document, the possibility of man-made change was both presupposed and symbolized, and it was taken to new levels. The constitution, being thought of as foundational and comprehensive, no longer knew any limits to what self-government and reason could achieve, and it thus allowed for the radical realization of that idea of agency, so central to the modern imagination.

## 2. The Theoretical Appeal: Constitutionalism between Liberalism and Republicanism

These historical remarks already bring into view some of the elements that account for the continuing appeal of constitutive constitutionalism. Here is not the place to engage in a comprehensive defence of that vision – in our effort at translating constitutionalism beyond its original state context, we are not centrally concerned with whether a particular understanding of constitutionalism is justified or right. Instead, we are trying to identify the elements of a historical and social practice that, because of both their practical importance and their normative appeal, can count as essential and will therefore have to retain a prominent place in any attempt at translation.

Constitutive constitutionalism appears attractive to all kinds of substantive visions of politics and justice already because it promises their realisation, via law, in the actual workings of a political and social order. If duly implemented, it seems a comprehensive, foundational constitution is the ideal tool to translate moral theory into practice, to act as a transmission belt for morality – after all, many constitutional texts use abstract concepts of justice and rights, and their interpretation often seems to require recourse to broader moral theories.<sup>104</sup> If a comprehensive constitution is an apt tool for revolutions, it is also one for realising whatever other broad vision one may have for society.

Beyond that, however, constitutive constitutionalism does not exert an equal appeal on all contemporary political theories, especially when compared with rival visions such as limiting constitutionalism. In order to get a clearer view of the differences, it might be useful to start from the two notions of liberty Isaiah Berlin has identified as the central poles of modern political thought – negative and positive liberty.<sup>105</sup> Negative liberty, usually associated with liberal and libertarian strands of thought, emphasises the need to secure the individual a space free from interference by others; it is in that space that the individual can flourish and lead a life according to her plans.<sup>106</sup> In such a political theory, constitutions can play an important role – classically, they serve to establish individual rights and protect them from state interference in whatever form, even through legislation. Yet it is obvious that this function can be fulfilled by very different types of constitutions; after all, bills of rights had long predated the revolutionary, constitutive constitutions of the late 18<sup>th</sup> century. For protecting negative liberty, then, constitutive constitutionalism does not come with an advantage over its power-limiting rival; in fact,

<sup>103</sup> Federalist No. 1.

<sup>104</sup> See only Dworkin, *Freedom's Law*.

<sup>105</sup> Isaiah Berlin, ‘Two Concepts of Liberty’, in I. Berlin, *Liberty* (ed. H. Hardy), Oxford, 2002, 166-217.

especially for libertarians with a general distrust of the state, its ambition to establish, organise and thereby legitimise public power may even seem suspicious.

On the other hand, constitutive constitutionalism's appeal for protagonists of positive liberty is not unambiguous either. Positive liberty, implying action governed by reasons or laws that one gives to oneself<sup>107</sup>, generally emphasises self-government, and as we have seen above, a foundational constitution often serves to symbolise (and sometimes actually realise) a central role of "we the people" in creating the framework of the polity. If it thus seems like a key tool for positive liberty, it also appears easily as a constraint on it – if a people opts for a certain course of action but is held back by constitutional norms, self-government seems in danger. We have already noted this problem in Rousseau's thought, and it is today highlighted, for example, by Jeremy Waldron and Richard Bellamy in their critiques of constitutional adjudication.<sup>108</sup> But we have also seen that the problem appears in a different light when the need for delegation in government is taken into account, as in Sieyès. In modern times, Bruce Ackerman has provided the most powerful defence of the constitution as a tool for popular self-government – as a way for the people to engage in a form of higher law-making on the most central questions of political life, thereby providing guidance for the conduct of ordinary politics.<sup>109</sup> Yet his vision of a "dualist democracy" still fails to solve intergenerational problems when the validity claim of a constitution conflicts with later attempts of a (now different) people to govern itself according to new rules. And Ackerman's attempt to resolve this tension, via the recognition of informal change through "constitutional moments", still creates problems: a constitution that is meant to constrain ordinary politics must always erect a hurdle – usually a high one – for efforts at changing it, and it thereby sets the framework for (and limits) popular self-government.<sup>110</sup> As a consequence, the broader the reach of the constitution – and that of a constitutive constitution is necessarily broader than that of its rivals – the greater are both its virtues and its problems for positive liberty.

However, most mainstream political theory (including Ackerman's) operates between the poles of negative and positive liberty and emphasises the interconnectedness of different forms of freedom, even if according them varying weights. It is in this space that the appeal of constitutive constitutionalism becomes most clearly visible. Let us consider a few examples, beginning with John Rawls's vision of political liberalism.<sup>111</sup> Rawls, in good liberal fashion, places much emphasis on rights, and even though in his political theory he stresses the diversity of reasonable views on their content and the concomitant need for settlement through constitutional consensus, this aspect would not require anything more than a bill of rights – much like in the picture of negative liberty discussed above. However, for Rawls, private autonomy (and rights) is not independent from, or superior to, public autonomy (and democracy). Instead, both forms of autonomy share the same moral roots and work in parallel.<sup>112</sup> As a result, individuals do not only need to find protection from particular interferences, but they are also – as part of the collective body

<sup>106</sup> Berlin, 169.

<sup>107</sup> Berlin, 178.

<sup>108</sup> See Jeremy Waldron, *Law and Disagreement*, ch. 13; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, CUP 2007 [1<sup>st</sup> fl – K3175 B43].

<sup>109</sup> Bruce Ackerman, *We the People: Foundations*, ch. [xx].

<sup>110</sup> See also Michelman, *Law's Republic*, 1517, on the tension between popular sovereignty and constitutional permanence.

<sup>111</sup> John Rawls, *Political Liberalism*, New York: Columbia University Press, 1996.

<sup>112</sup> John Rawls, 'Reply to Habermas', *ibid.*, 372-434, at 416-419.

of citizens – at the base of the public power exercised by the state and can claim a central role in defining its direction. 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>113</sup>

The need for constitutional agreement – or at least potential agreement – thus reaches far beyond punctual limitations but extends to a wide range of constitutional essentials also defining the structure and organisation of public power.<sup>114</sup> But a comprehensive constitution has, in Rawls’s account, two further virtues. First, in making visible agreement on essential features of a polity, it helps to move it beyond a mere *modus vivendi* and towards greater social unity on the basis of an overlapping consensus – a constitutional consensus may be formal and shallow, but it may facilitate a shift in citizens’ comprehensive doctrines and thus provide the ground for deeper modes of agreement.<sup>115</sup> Secondly, a comprehensive constitution may provide a focus for the exercise of public reason, central to Rawls’s idea of democratic citizenship. Rawls follows a dualist model of democracy, one in which a higher, constitutional law limits ordinary politics and statutory law as a particular, elevated expression of the will of the people.<sup>116</sup> This higher law also connects in two particular ways to the particular form of reason he calls “public”: it defines the scope in which public reason – as requiring political, other-regarding arguments – has to operate; and it allows for particular institutional forms to represent that public reason within daily politics, namely a constitutional court.<sup>117</sup>

Whether or not one agrees with this vision, it becomes clear that in Rawls’s theory, a comprehensive constitution has significant advantages over its main rivals, especially the merely power-limiting version of constitutionalism.<sup>118</sup> And because it insists on the interconnectedness of private and public autonomy, the problems facing proponents of positive liberty do not reappear here in the same way. Agreement on constitutional essentials becomes crucial for allowing citizens to act as a collective body despite their disagreements on what a good life and justice requires; without it – unlike in populist emphases on positive liberty – there is no legitimate collective subject that could impose its will on individuals.

These themes, and especially the connection between private and public autonomy, are taken further in the work of Jürgen Habermas, though on somewhat different foundations and with a more republican tinge. Habermas criticises Rawls for establishing this connection only in theory – in the virtual arrangements that lead to the philosopher’s formulation of acceptable constitutional rules – but not in practice; in his view, Rawls’s vision downplays the actual exercise of public reason by citizens, their practical role in determining the rules of their polity.<sup>119</sup> Whether or not one thinks this critique is justified<sup>120</sup>, Habermas’s own theory certainly places a particular emphasis on process in the realisation of

<sup>113</sup> PL, 137.

<sup>114</sup> PL, 227.

<sup>115</sup> PL, 158-168.

<sup>116</sup> PL, 231-233.

<sup>117</sup> PL, 214, 233-240.

<sup>118</sup> However, Rawls wants to leave it ultimately to the particular context to decide whether liberties ought to be codified in a constitution or not, see ‘Reply to Habermas’, 415.

<sup>119</sup> See J. Habermas, ‘Reconciliation through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism’, *Journal of Philosophy* 92 (1995), 109-131, at 128.

<sup>120</sup> See Rawls, ‘Reply to Habermas’, in PL, 396-409.

both individual rights and popular sovereignty. For him, private and public autonomy are co-original in the sense that they have both emerged in parallel from the decline of earlier metaphysics and now remain the sole, post-traditional sources of the legitimacy of law. Because of their co-originality, none of them is intrinsically superior to the other; instead, they are mutually dependent insofar as popular sovereignty can be realised only through the medium of law which presupposes a system of rights, while rights depend for their formulation and interpretation on a legal basis that can only be created through the exercise of popular sovereignty.<sup>121</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>122</sup>

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. For Habermas, popular sovereignty no longer resides in a particular, pre-existing subject that could exercise an actual will; instead, it is dematerialised and has moved into the discursive processes of society that gain the attribute of popular sovereignty if they meet the necessary procedural conditions.<sup>123</sup> A constitution then has to both reflect and specify those conditions, and it is necessary for giving them a real existence. In addition, the practical implementation of the constitution can help ensure that the deliberative processes of ordinary politics continue to meet those conditions; in that respect, Habermas’s views on the role of constitutional courts share much with “process-based”, “representation-reinforcing” approaches in the US debate.<sup>124</sup> And, for Habermas as for Rawls, a constitution also serves important functions for social integration: in modern, multicultural societies in which traditional factors of social unity, such as ethnicity, language or culture, are no longer commonly shared, a constitution and the values it embodies is one of the few sources that can provide a focus for allegiance and democratic citizenship.<sup>125</sup>

In his views on the role of constitutions as guardians of deliberative principles, Habermas is close to many modern republican theories, even though he does not share their typical foundation in a strong form of cultural and historical commonality among citizens.<sup>126</sup> Republicanism is a very varied field, with quite different foundational assumptions which I cannot discuss here in detail<sup>127</sup>; I will focus on one variety of republicanism that has been particularly influential in constitutional theory – the republican strand in US constitutional theory, of which Frank Michelman (among others, such as Cass Sunstein or Bruce Ackerman) has been a central proponent.<sup>128</sup> Michelman seeks to provide a modern theory of republicanism that abstracts from Aristotelian views on the intrinsic value of political engagement and also does not depend on strong, solidaristic views of society which do not reflect most modern, diverse

<sup>121</sup> Jürgen Habermas, *Between Facts and Norms* (transl. W. Rehg), Cambridge: Polity Press, 1996, ch. 3.

<sup>122</sup> *Between Facts and Norms*, 128.

<sup>123</sup> *Between Facts and Norms*, 135-136, 298.

<sup>124</sup> See *Between Facts and Norms*, 267-286.

<sup>125</sup> See only Habermas, ‘Citizenship and National Identity’, in *Between Facts and Norms*, 491-515, at 500.

<sup>126</sup> Habermas, *Between Facts and Norms*, 278-279.

<sup>127</sup> See only Kymlicka [xx] for an overview.

<sup>128</sup> See Frank Michelman, ‘Foreword: Traces of Self-Government’, *Harvard Law Review* 100 (1986), 4-77; ‘Law’s Republic’, *Yale Law Journal* 97 (1988), 1493-1537.

societies, and certainly not the United States today.<sup>129</sup> And unlike more radical emphases on positive liberty, he does not view popular self-government as the sole, or predominant goal of a republican theory; instead, for Michelman, the ideal of self-government is paralleled by (and in tension with) the ideal of a “government of laws” – the protection against abuse by arbitrary power.<sup>130</sup> Moreover, he emphasises modern republicanism’s attention to the preconditions, in the position of the individual, for meaningful participation in self-government, and this implies respect for a variety of strong individual rights.<sup>131</sup> It is this liberal inflection, coupled with a sober assessment of the potential of ordinary politics, that leads Michelman to grant a comprehensive constitution a far central, and less ambiguous, position than the theories of positive liberty mentioned above. Like Ackerman, Michelman sees the will of the people in ordinary politics not necessarily as an exercise of true self-government:

“[A] political process can validate a societal norm as self-given law only if ... (ii) there exists a set of prescriptive social and procedural conditions such that one’s undergoing, under those conditions, ... a dialogic modulation of one’s understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one’s identity or freedom...”<sup>132</sup>

As a consequence, a constitution becomes necessary to define those conditions and thus provide the basis on which popular sovereignty can be realised. As in Rawls’s and Habermas’s accounts, though on different foundations, public autonomy can only become effective through a constitution – a constitution that has to be conceived as foundational and comprehensive. In implementing and developing such a constitution “[t]he [Supreme] Court”, Michelman writes, “helps protect the republican state – that is, the citizens politically engaged – from lapsing into a politics of self-denial.”<sup>133</sup>

Other republican theories, such as Philip Pettit’s, are less explicit about the virtues of a comprehensive constitution. But in Pettit, too, the political exercise of freedom (of freedom as non-domination in his case) cannot be conceived as the exercise of will by a presupposed entity, the people; instead “the democratic process is designed to let the requirements of reason materialize and impose themselves”<sup>134</sup>, and this requires structuring rules for the deliberative interaction among individuals. These structuring rules then may not necessarily have to be contained in a comprehensive constitution<sup>135</sup>, but embodying them in this way certainly has the advantage of making them visible, more easily subject to deliberation themselves, and potentially more enforceable. Moreover, Pettit’s stress on freedom as non-domination, on the absence of domination through arbitrary power, gives pride of place to the rule of law – to what he calls “the empire-of-law condition”.<sup>136</sup> Punctual limits on governmental powers can achieve this only to some extent; comprehensive, foundational constitutions have at least a gradual advantage in this respect.

We could continue this exploration of different varieties of contemporary political constitutional theory, but the brief survey so far should already allow us to develop a clearer account of the theoretical

<sup>129</sup> See Michelman, ‘Law’s Republic’, 1495, 1504, 1526; still, he sees as common past, language, culture as indispensable: *ibid.*, 1513.

<sup>130</sup> Law’s Republic, 1499-1501.

<sup>131</sup> Law’s Republic, 1505.

<sup>132</sup> Law’s Republic, 1527.

<sup>133</sup> Law’s Republic, 1532.

<sup>134</sup> Republicanism, 201.

<sup>135</sup> Republicanism, 277.

<sup>136</sup> Republicanism, 174.

appeal of foundational constitutionalism. As we have seen, this appeal is not obvious when either negative or positive freedom is emphasised as a dominant or exclusive value – in the first case, a punctual, limiting constitution may provide similar functions; in the second, a comprehensive constitution might appear as a constraint rather than a catalyst. The primary appeal of a foundational constitution emerges when private and public autonomy are regarded as interconnected – as they are, in their different ways, in the theories of Rawls, Habermas, Michelman and Pettit sketched above.<sup>137</sup> 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 punctual 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 of 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. Only a foundational, comprehensive constitution would provide the locus for an enterprise of that scope.

Other virtues of a comprehensive constitution have been mentioned above. One has been its potential for extending the rule of law, and of public reason, to all exercises of public power, not just punctually to selected forms – it aims to remove all pockets of arbitrary, unjustified, merely historically sourced privileges and powers. Another prominent virtue has been the foundational constitution’s function in providing social unity and coherence in post-traditional societies in which other factors of social integration can no longer be taken for granted. This is less central to extreme liberal theories for whom social integration beyond the coordination of individual interests is secondary, or to republican accounts which still count on a pre-existing commonality in society, as Michelman does to some extent. But it is of serious concern to the approaches of Rawls and Habermas, both of which depend on processes of dialogue and understanding and require common background understandings for which a foundational constitution can provide both a reflection and a focus for transformation and potential convergence.

Much could be said to critique those theories, their foundations as well as the conclusions drawn for constitutional forms. But as I mentioned at the beginning of this section, my objective here is not to provide a full normative defence of foundational constitutionalism. In the context of the effort at translation I am engaged in, the only goal is instead to provide an “internal” reconstruction of the continuing appeal of this approach and thereby substantiate why, apart from historical reasons, it qualifies as the primary candidate for exploring constitutionalism beyond its original state context. It may well be that foundational constitutionalism is already wrong in that source context, and it may also be that it is wrong in the target context. But this discussion is for another time and place – what I have sought to establish here (and our exploration has provided a sound basis for it) is that foundational, comprehensive constitutionalism is indeed centrally connected to our modern social practices as well as to central strands of our theoretical universe. It is thus this constitutionalist vision, rather than rival approaches, that should form the basis of our attempts at making sense of constitutionalism in the postnational order.

<sup>137</sup> The list could be extended much further; think only of the liberal accounts of Waldron, note [xx] above; or Stephen Holmes, *Passions and Constraint*, 1995 [xx].



## VI. Foundational Constitutionalism in the Postnational Order?

Having gained a clearer understanding of what the object of our translation is, we can now return to our initial project. As we have seen in the previous sections, over time the foundational and comprehensive character have come to form essential elements of constitutions and constitutionalism; in large part, they account for the appeal of constitutionalism in both theory and practice; and today we would not be able to make full sense of the meaning and appeal of constitutionalism without them. But what would it mean to transfer them to the postnational sphere? What implications would foundational constitutionalism have there?

Quite obviously, foundational constitutionalism would pose high, perhaps even radical demands on the existing structure and institutions of postnational governance, and it would go further than most of the literature on postnational constitutionalism to date. We have seen in section II above that in this literature probably the most influential strands, as regards both the European and global contexts, emphasise the elements of legalisation, of institutional checks and normative limits to existing processes of law-making and -application.<sup>138</sup> These strands bear significant resemblance to the power-limiting approach to constitutionalism we have identified as prominent in the domestic context until the early 20<sup>th</sup> century, and in some countries up until today. But they fall short of foundational constitutionalism in their punctual character, and in their focus on limiting existing institutions and law-making processes rather than fully defining and organising 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 challenge of radically questioning, and (at least virtually) refounding, all exercises of public power, as the foundational vision demands. Likewise, the third group of approaches to postnational constitutionalism sketched in section II – the more discursive ones – visibly rely on alternative visions which, like that of James Tully, 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 channeled.

Closest to central tenets of foundational constitutionalism are then those approaches that take a more structural approach 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 federal-type way, not only by common principles and values but also by rules on the organisation and delimitation of public power in this realm.<sup>139</sup> But can they really redeem the promise of foundational constitutionalism? Or does the structure of the global sphere resist constitutionalisation, perhaps because, as Dieter Grimm claims, “the multiplicity of unconnected centres of governance” simply does not represent a suitable object for it?<sup>140</sup>

One may find Grimm’s point overstates 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 centralised, monopolistic state apparatus facilitated the task of the modern constitution significantly: realising 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

<sup>138</sup> See above [xx].

<sup>139</sup> See above [xx].

legitimate use.<sup>141</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 currently polycentric setting of global governance likely requires 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 characterised 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>142</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 descriptive vocabulary for the postnational space.<sup>143</sup>

Reordering this space in a way that would redeem foundational and comprehensive aspirations may not require the establishment of a world state with a centralised government<sup>144</sup>, but it would, at the very least, imply a set of rules that define the relationships between the different forms of existing public power and identify the conditions under which they can count as a product of legitimate collective self-government. As we have seen above, the idea of human agency behind the institutional structure does not necessarily entail – and historically has often not entailed – an actual act of recreation, but has always involved a claim to independently set the conditions under which public power is deemed to be exercised on behalf of “the people”.<sup>145</sup> One of the main challenges behind this task, however, is to clarify what self-government through a constitution can mean in a space such as the postnational in which there is no uncontested collective that could express its will in constitutional terms; one of the most prominent critiques of constitutionalism and democracy beyond the state is, of course, based on the alleged lack of a “demos”.<sup>146</sup> But the collective behind constitution-making, the “people”, has typically been an imagined unit in any case, and the *pouvoir constituant* probably even more so than nations in general<sup>147</sup>: after all, constitutions have often been central but early building-blocks in processes of nation-building. The current inexistence of anything resembling a “people” in the postnational sphere may thus not present an insurmountable obstacle, even if repeating the often forceful attempts at nation-building of former times would hardly be justifiable today.<sup>148</sup>

However, as we have seen in the previous section, contemporary theorising about collective self-government is typically not centered on the exercise of will by an actually existing entity. Instead, the subject of popular sovereignty has become increasingly dematerialised and linked to a process that, because of its deliberative qualities, merits the attribution of constitution- and law-making powers. But however low one’s requirements for this process domestically, they will be hardly fulfilled in the postnational space in which power and wealth differentials, language and culture barriers and the lack of identification with a common project render meaningful communication and deliberation beyond a

<sup>140</sup> See Grimm, *Ursprung und Wandel der Verfassung*, HdBStR, 3<sup>rd</sup> ed. [xx]

<sup>141</sup> Grimm, *Entstehungsbedingungen...* [xx]

<sup>142</sup> See Teubner & Fischer-Lescano, though exaggerated.

<sup>143</sup> Koskenniemi, *MLR piece...*

<sup>144</sup> Check Wendt piece.

<sup>145</sup> See above [xx].

<sup>146</sup> [xx]

<sup>147</sup> Anderson [xx].

<sup>148</sup> [Neus lit]

narrow elite very difficult.<sup>149</sup> Here again, modern constitutions may not all be the *result* of ideal forms of collective self-government – often they serve to first *define* the conditions for legitimate self-government – but if the distance from the ideal is too obvious and the chances for a realisation of actual self-government too slim, they will certainly fall short of the promise of foundational constitutionalism.

As a consequence, Jürgen Habermas, for example, discards hopes for the advent of foundational constitutionalism on the global level and settles for a form of power-limiting constitutionalism in which the legalisation of global governance is linked with stronger legitimacy, deliberative processes on the European level (and in similar regional contexts).<sup>150</sup> Given the obstacles to the realisation of private and public autonomy via a constitution under circumstances of global politics, this may be the only realistic option, and Habermas is explicit about the loss this involves and the limits it imposes. For him, global governance can only remain legitimate if based on agreement between the more fully justified regional political orders. This recreates the old distinction between domestic and international politics on a higher level, but it hardly satisfies the current needs for speedy and effective regulation beyond the regional sphere – after all, the current strong forms of delegation (as for instance in WTO dispute settlement), informal decision-making (as in the Basel Committee and other governmental networks) or private rule-making (as for example in ISO or ICANN) all respond, in part, to particular functional needs not satisfied by the classical, consensual modes of law-making. How these could be addressed in a structure based on consent by regional groups is far from clear, especially if these groups do not establish centralised, state-like structures of internal decision-making and thus themselves have to rely on cumbersome consensual forms, as most of them will.

One could take this exploration further, but already at this point the dilemma of postnational constitutionalism should have become clear enough. Connecting to the predominant domestic tradition of constitutionalism, foundational constitutionalism, would have radical implications for the postnational, and especially the global sphere: it would require a large-scale restructuring of the institutions and processes of global governance, which would probably involve a revolutionary break rather than the evolutionary development that has characterised this sphere so far. But it would also depend on corresponding social structures and preconditions for deliberation that seem far from being realised today. In these circumstances, it seems a vain hope to tap into the legitimacy reservoir of the tradition of foundational constitutionalism; theory and practice might just be too far apart.

Then to settle for a thinner version of constitutionalism – be it a power-limiting or discursive variant – may be understandable, but it comes at a high cost. For it seems to provide a link to domestic traditions but it can always only redeem their promise in small part: limiting global institutional power, for example, may be an important step towards safeguarding private and public autonomy, but it is a much smaller step than the attempt at realising self-government in the comprehensive way foundational constitutionalism implies. Using the language of constitutionalism in this thinner way helps to dissimulate a huge gap: a gap between the legitimacy practices we have become used to in domestic settings and those only emerging in the postnational sphere. It makes it seem as if we could connect the two relatively seamlessly, but it thereby hides from view the extent of the challenge we are faced with. Translating constitutionalism in this way may have some practical utility, but it conceals the difference between the

<sup>149</sup> [Delib democracy in global regulation: volume cited in MLR piece?]

<sup>150</sup> [xx]

source and the target contexts, and between the ambitions and potentials of “constitutionalism” in those two spheres.

## VII. 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 organise 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 globalisation and global governance.

As we have seen, though, this strategy largely fails. It fails on the one side because 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 emphasise processes of legalisation and limitation of postnational governance, but thereby hark back to a particular tradition of power-limiting constitutionalism which in the domestic context has been overshadowed since at least the 20<sup>th</sup> century by the more demanding and comprehensive strand of foundational constitutionalism. On the other hand, realising that latter vision in the postnational sphere has proved difficult because of its radical institutional implications and its demands on societal preconditions for deliberation and collective self-government. It appears that if we take the domestic constitutionalist tradition seriously, all remotely realistic avenues for change in global politics fall far short of its promise.

This may sound quite 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 might be misguided. After all, constitutionalism – especially its dominant domestic strand, foundational constitutionalism – is a historically very particular form through which to realise 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 realising a common good. After all, the modern constitutionalist project has emerged from Enlightenment thought, and it is today often regarded as a continuation of a Kantian political theory.<sup>151</sup>

In its particularity, though, constitutionalism may not be the ideal tool for the postnational space. Having emerged as especially suited for a “people” to govern itself, it might sit uneasily amidst 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 through a constitution may not only seem unachievable but also undesirable – respect for this diversity may require leaving those questions open, rather than closing the debate. In this regard, the shape of the postnational space may aggravate the problems modern constitutionalism has long faced in diverse societies. 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

<sup>151</sup> See Tully.

self-government.<sup>152</sup> And even if the critique does not go that far, a legal-constitutional “solution” of contested issues in society will often evoke challenges of arbitrariness and partiality – a political solution in a gradual process over time may then seem preferable in order to give expression to deep-seated contestation.<sup>153</sup>

Here is not the place to pursue these questions further.<sup>154</sup> What the foregoing remarks suggest, though, is that the difficulties of transplanting constitutionalism into the postnational sphere may not necessarily only be 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 constitutionalist nation-state. Just as the nation-state has long been a problematic political form, so has modern, foundational constitutionalism never been simply an unequivocal evolutionary achievement. Facing the difficulty of translating it should then not only sharpen our sense for the structural differences between national and transnational politics, but it should also liberate us from the intellectual straightjacket the quest for continuity with domestic concepts and traditions imposes. This should allow us to also explore radical critiques and alternative visions of politics – to risk a break with what we are familiar with and look beyond constitutionalism for guidance and inspiration.

<sup>152</sup> See Tully, in Loughlin/Walker; Hirschl; also Koskenniemi, MLR, for global politics.

<sup>153</sup> See Waldron, Law and Disagreement.

<sup>154</sup> For some attempts, see EJIL and MLR pieces.