Three Constitutionalist Responses to Globalization

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This essay describes and evaluates three paradigmatic constitutionalist responses to increased global interdependence and integration. In recent years in debates on globalization constitutionalism in general has created surprisingly high hopes and astonishingly deep anxieties: some have presented the constitutionalization of international law as a kind of last 'realistic utopia'; others have been profoundly troubled precisely by the threat which international law and global governance supposedly pose to the project of constitutional self-government. A sober assessment of constitutionalism's potential and limits in the circumstances of globalization – rather than another constitutionalist proposal – is what I seek to provide in this chapter.

The three responses I have in mind all take constitutionalism seriously as a complex normative concept; they either seek to protect constitutionalism from whatever happens in the realm beyond the nation-state or argue, on the contrary, that constitutionalism needs to be extended in order to generate new normative constraints and capacities in the absence of statehood – both in the sense of protecting existing states from supranational non-state institutions, and of strengthening such institutions vis-à-vis states. I should stress that I am concerned here with normative ideals, not with what

¹ I am grateful to the audiences at the Princeton conference on 'The Limits of Constitutionalism' and at Stanford's Political Theory workshop for questions and suggestions. Particular thanks to Stephen Macedo and Jeffrey Tullis for comments on the chapter.

² See for instance Jürgen Habermas, *Der gespaltene Westen* (Frankfurt: Suhrkamp, 2004).

³ See above all Jeremy A. Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton: Princeton UP, 2005).

Walter Murphy has suggested we call 'constitutionism', that is the adherence to the rules and even spirit of an order that is fixed by a written constitution (or an unwritten one), without any reference to specific substantive values.⁴ Such constitutionism might have intermittently existed in a world that in some sense has been globalized for a long time.

The three paradigmatic responses I have in mind are the following: first, what one might call 'constitutional closure', based on an argument about the national democratic legitimation of state-based constitutions; second, an approach that one might term 'limited mutual constitutional opening' or also 'constitutional tolerance' in the circumstances of dense supranational cooperation or even a free-standing supranational constitutionalism (with the EU and its de facto supranational constitution as the prime example)⁵; and, finally, a global constitution proper as the prima facie most consistent response to the fact of global interdependence. This last response, I suggest, comes in two different versions: on the one hand, a relatively conventional idea that international law, including customary international law, as well as international bodies, especially regulatory agencies, ought to be constitutionalized (again, with the EU as the most plausible prototype at the regional level). But there is also the more radical notion that the *object* of a global constitutionalism no longer is, broadly speaking, states or political and legal institutions conventionally understood at all, but dynamic social and economic

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⁴ Walter Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: Johns Hopkins University Press, 2006), 15-16.

⁵ J. H. H. Weiler, 'Federalism Without Constitutionalism: Europe's *Sonderweg*', in: Kalypso Nicolaïdis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford UP, 2001), 54-70; here 64.

processes summed up with concepts such as 'digitalization, privatization, and global networks' (much more about this below).

Before discussing these three constitutionalist responses, let me set out a number criteria for evaluating them. These are not hard and fast, but tentative normative and empirical standards which might reasonably be applied to such emerging normative theories. The criteria I propose are: first, do we find consistent standards for the national and the international (or supranational)? Whatever normative and empirical frameworks inform an account of the domestic context should also hold in areas outside the nationstate. Of course this is not to say that these realms have to be described as absolutely identical – in many ways it would be strange and surprising if they were. But if there is a claim why these two realms are fundamentally different (normatively and/or empirically), that claim must be made explicit and justified. If for instance, an ideal-typical (or outright idealized) vision of a united democratic will is presented at the domestic level as the sole foundation of political legitimacy, then the question about the possible existence of such a will above nation-states cannot be answered with reference to today's messy realities of global administrative law, but would have to involve a similar idealization. Conversely, if, as often happens in the European context, the vision of a supranational multiculturalism among a persistent plurality of peoples is presented as a normative justification for the EU, the question must be asked whether such a normative vision is actually at all plausible within the EU's Member States. The point, I hope, is obvious enough: idealizations must go both ways, as must consciously 'realist' descriptions. It

⁶ Gunther Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie', in: Marcelo Neves and Rüdiger Voigt (eds.), *Die Staaten der Weltgesellschaft: Niklas Luhmanns Staatsverständnis* (Baden-Baden: Nomos, 2007), 118.

seems also obvious to me, however, that there is a great deal of bad faith precisely when it comes to contrasts between what is within and what is outside the nation-state.

Second, the question of normative dependency, and in particular a question about the background notion of constitutionalism that is at work in the theories under consideration: in other words, what larger normative background theory informs or even drives the account we are given, and, above all, what particular understanding of constitutionalism as a normative ideal do we find at work? 'Constitutionalism', while perhaps not being an essentially contested concept, nevertheless has allowed for many conceptions that derive from radically different theories concerning justice, the nature of modern societies, etc. Partially following recent theorizations by Neil Walker, one might see the following as plausible elements (or 'dimensions', or 'frames') of constitutionalism⁸: first, a public order element (including a normative ideal of 'legal orderliness') that allows for the linkage of law and politics, as well as the determination of a specialized system of political rule (above all, the specification of political institutions and the distribution/separation of power), and in particular provisions for limiting and checking public power; second, mechanisms for protecting the rights and dignity of individuals, thereby also limiting government; third – and already more controversially – the grounding in (and determination of) a constituent power, or, put differently, an element of democratic self-authorization; fourth – and also controversially: a social integrative claim⁹, or, put differently, the possibility of fostering of a civic identity that can be defined, revised and furthered through public debates in a

⁷ For the idea of normative dependence, see Rainer Forst, *Toleranz im Konflikt: Geschichte, Gehalt und Gegenwart eines umstrittenen Begriffs* (Frankfurt/Main: Suhrkamp, 2003), 48-52.

⁸ See the exceptionally rich theoretical framework developed in Neil Walker, 'Taking Constitutionalism Beyond the State', *RECON Online Working Paper* 2007/05.

⁹ See also Dieter Grimm, 'Integration by constitution', in: *I-CON*, Vol. 3, No. 2/3 (2005), 193-208.

constitutionalist register; and, fifth – and perhaps also controversially: an explicit, specific and self-reflexive constitutionalist discourse, or, in Walker's words, 'constitution talk', which clearly is closely related to the fourth element. ¹⁰

Now, different notions of constitutionalism will include only some of these elements or add others that have not been mentioned here; moreover, they will also link individual elements in quite different ways. What one assumes about constitutionalism in general will obviously be crucial when it comes to the rejection or endorsement of the very possibility and desirability of having it outside the nation-state. Consequently, the normative background theories behind the positions I will be analyzing should be made as explicit as possible; in particular, when constitutionalism is projected beyond the nation-state, it has to be explained and justified *how* and *why* elements of constitutionalism might be detached from traditional notions of statehood and democratic self-authorization. If conversely, the very possibility of post-state or non-state constitutionalism is denied, or its normative desirability is rejected, the question is what version of constitutionalism can plausibly ground such judgments.¹¹

Third, there is – very simply put -- a question about the likely *efficacy* of the responses to interdependence proposed – and in particular whether constitutionalism in the absence of statehood and democratic self-authorization can nevertheless fulfill at least some of the functions conventionally associated with having a constitution within a democratic state – such as the ones just mentioned in connection with the second criterion.

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¹⁰ Walker, Taking Constitutionalism Beyond the State', 11.

¹¹ One might add that while dependence on a highly eccentric or controversial background theory does not doom a constitutional theory, it makes it prima facile less attractive if one holds that public justifiability remains a crucial requirement of any normative theory.

Constitutional Closure

Constitutional closure, it has to be said right away, is only an option for the very powerful or for the very weak. The very weak have little capacity to engage international markets, international institutions, etc. – and if they have anything resembling constitutionalism at all, they might claim that it needs no reinforcement from the outside, that their traditional practices would not be benefit from, but be corrupted by, an engagement with the global 'rule of law industry' that attempts to standardize conceptions of the *Rechtsstaat* across very different societies. But clearly such isolationism is much more likely among states that are illiberal in the first place and seek to do without any constitutionalism. And there is no question at all here about building constitutionalism outwards from such weak polities.

The very powerful face a completely different situation: they can try to resist foreign entanglements, moods, fashions, and fads, and be selective in their engagement with international law, cultivate a sense of exceptionalism and practical 'exemptionalism' (Michael Ignatieff) – and hope not to suffer significant negative consequences. However, even the very powerful, it seems, are increasingly under normative pressure both from inside and from outside explicitly to justify what one might call 'normative nonengagement'. In the case of liberal democracies, they might try to justify that nonengagement by pointing to a sense of confidence that domestic constitutionalism has a long track record of actually protecting individual rights and effectively limiting

government, whereas possible constitutionalist devices beyond the nation-state might yet have to prove their capacity to do so. In particular, they might say that the poor quality of the processes of forming international law suggests a presumption against treating international law as a significant constraint on nation-states -- at least as far as what some analysts have called 'raw international law' is concerned, i. e. law that has not been specifically incorporated into domestic law through legislation. ¹²

More likely, they will claim that constitutions are, above all, 'depositories of values' (Joseph Weiler) – specific values, that is, of a particular nation that has given itself a particular constitution with constraints and protections that reflect these values (and not ones that are just about similar) in a highly specific manner. Thus even when constitutionalist devices beyond the nation-state might at first sight appear to strengthen constitutionalism inside a country (for instance, by reinforcing individual rights protection), it is imperative not to have the differences between constitutional and international law blurred: the constitution is, in this view, ultimately the emanation of a kind of *Volksgeist*, or at least the expression of a clearly defined and normatively unique social unity that seeks to give itself a political form and resolve to master its fate collectively. This, it seems, is the best rationalization for what Frank Michelman has termed 'integrity anxiety' -- the concern that a highly specific tradition of constitutionalist thought will become weakened and corrupted through the importation of foreign materials and a blanket acceptance of international law, customary international law in particular. 13 One might even be tempted to say that constitutional closure is the

¹² See John O. McGinnis and Ilya Somin, 'Should International Law Be Part of Our Law?', in; *Stanford Law Review*, Vol. 59 (2007), 1175-1247.

¹³ Frank I. Michelman, 'Integrity-Anxiety?', in: Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton: Princeton UP, 2005), 241-76.

logical corollary of a properly understood constitutional patriotism. Precisely because *we* so much believe in *our* laws as expressions of *our* values, we must ignore the laws of others (and laws partly made by others), unless they have been incorporated or in some other way mediated by national institutions.¹⁴

How plausible is an advocacy of constitutional closure, given the criteria I suggested above? First, one frequently finds what can only be dubbed double standards: the domestic realm is usually described as one characterized by a single 'national culture', of which the constitution and a particular form of constitutionalism are an outgrowth; the domestic realm is also invested with passionate political commitment and displays a unique density of political power, i.e. the state, which makes it plausible that, in an all-or-nothing fashion, only the state can be an object of constitutionalism. In short, very specific descriptions of the state and what happens within it leaves constitutionalism beyond the state as both a normative and empirical impossibility.

Yet these descriptions are based on highly implausible abstractions and one-way idealizations: the existence of a single self-authorizing nation or demos as the *actual* author of the constitution and constitutionalist provisions; the existence of a single, sealed-off national constitutionalist tradition deeply colored by the 'national culture'; a vision of the political world in which by definition only the nation calls forth true personal investment in the form of tears, sweat and, at the limit, blood ¹⁵; and a state that monopolizes not just the legitimate means of violence, but allegedly concentrates power in a way that makes other potential objects of constitutionalist constraints fade from the

¹⁴ As Jeremy Rabkin puts it in rejecting 'global governance': 'Global governance requires us to acknowledge that "we" – the constituents of a particular legislative authority – do not have different interests from the others, so we don't really need distinct institutions to define these interests'. See Rabkin, *Law without Nations?*, 43.

¹⁵ Paul W. Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton UP, 2005)

picture. Put differently: there is a one-way idealization here of what democracy, 'peoplehood' and statehood mean inside nation-states.

Second, an advocacy of constitutional closure is likely to be normatively dependent on a background theory of nationalism – most likely liberal nationalism, but not necessarily so. Liberal nationalism, however, comes with a set of both empirical/sociological and normative assumptions that are highly implausible. Alas, this is not the moment to rehearse criticism of these. ¹⁶

Third, is closure actually likely to lead to something like constitutional success? In one sense clearly no: it would not allow countries adopting constitutional democracy to further 'lock in' their democratic and human rights commitments at supranational level (in the way that, for instance, countries acceding to the European Council try to do); it would also not allow references in a constitution to foreign and international law as normative commitment signals in the way that, for example, the South African constitution famously does.¹⁷ But it might strengthen the role a constitution plays in social integration – if, and only if, it is plausible that constitutions will be more likely to persist and successfully function the more they can be presented as a particular *national* project.

Having said that: not all opposition to the very possibility of constitutionalism beyond the state has to be grounded in a one-way idealization or a normatively dubious theory of liberal nationalism. Some skeptics have argued on purely conceptual, as opposed to normative, grounds. In particular, they have claimed that constitutionalism *necessarily* has to have a state as its object, sometimes adding the further requirement of

¹⁶ I can only gesture towards my Constitutional Patriotism (Princeton: Princeton UP, 2007)

¹⁷ Cf. Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework for Analysis', in: *European Journal of International Law*, Vol. 15 (2004), 907-31; here 919.

genuine democratic self-authorization.¹⁸ More subtly, they claim that a constitution, as primary and comprehensive higher law of the land, presupposes clear demarcations between inside and outside, and between public and private. Dieter Grimm, for instance, has argued that while there has undoubtedly been a great deal of 'juridification' beyond the nation-state, such juridification does not amount to constitutionalization. As he puts it:

....not all juridification merits the name of constitutionalization, Rather, constitutionalization has shown itself to be a special form of the juridification of rule that presupposes the concentration of all ruling authority within a territory, and is distinguished by a certain standard of juridification. This standard includes a democratic origin, supremacy, and comprehensiveness. ¹⁹

Is saying this merely a matter of more or less arbitrary conceptual stipulation? Grimm clearly holds that constitutionalism ought only to designate a specific constellation of elements that emerged, roughly speaking, in the eighteenth century, a specialized system of exercising public power and democratic self-authorization in a clearly bounded space in particular. Another way of saying this is that beyond a certain point constitutionalism cannot be further disaggregated without losing its core normative meaning, and it makes no sense then to transfer some fragments of constitutionalism to the realm beyond the

¹⁸ Dieter Grimm, 'The constitution in the process of denationalization', in: *Constellations*, Vol. 12 (2005), 447-63.

¹⁹ *Ibid.*, 458.

state and pretend that one has exported the whole package. Constitutionalism is a matter of all or nothing.²⁰

This skeptical position does not so obviously involve a one-way idealization, and it is not grounded in any dubious assumptions about 'national culture'. Nevertheless, it seems somewhat arbitrary to idealize a particular constellation of constitutionalist elements in time and deny that at least processes of constitutionalization – short of leading to regional or global states – must be ruled out on conceptual grounds. After all, 'the state' as a locus for concentrating public power is not *one* thing. In particular, it is not obvious why partial supranational extensions of the modern administrative state as it has evolved in the twentieth century in particular could not be subject to entrenched limits on power – either to constrain the exercise of public power by supranational agencies, or to limit the exercise of public power by states, or possibly a combination of both. Of course, whether entrenchments actually exist and go beyond any simple juridification has to be determined in individual cases; it will be to a considerable degree an empirical question. The experience of the EU as commonly interpreted by European politicians, jurists and academics at least suggests that de facto constitutionalization is possible in the absence of direct democratic self-authorization, the establishment of a comprehensive legal order, civic identity and an explicit widespread constitutionalist discourse. This, after all, is the accomplishment of the European Court of Justice in the 1950s and 1960s. Similar observations seem to me plausible, as far as the European Convention of Human Rights and the specific role of the European Court of Human Rights are concerned. I'll say more about these institutions now.

 $^{^{\}rm 20}$ See also Walker, 'Taking Constitutionalism Beyond the State'.

The second response to interdependence is what I shall call, following Joseph Weiler, 'constitutional tolerance' within the framework of regional supranational cooperation.

The prime, perhaps the only, example is the European Union. As has often been pointed out, the EU has acted as a pioneer in transforming an organization based on international treaties into an 'unidentified political object' (former Commission President Jacques Delors) which boasts a form of supranational constitutionalism *without* having become a supranational state. Weiler has spoken of Europe's 'special path', or *Sonderweg*, in having federal law without being a federal state. It is worth retracing that *Sonderweg* for just a moment.

The starting point had not been any concern about socio-economic interdependence as such, but the imperative to avoid large-scale political violence. European integration was one part of a wider European 'constitutionalist ethos' which developed after the Second World War; it contained a deep distrust of popular sovereignty (or, put differently, unrestricted parliamentary supremacy), which was seen as complicit in the cycles of war and aggression in twentieth-century Europe. ²¹ Specifically, European states sought to delegate powers to unelected actors domestically and also to supranational bodies in order to 'lock in' liberal-democratic arrangements and to prevent a back-sliding towards authoritarianism. ²² They actively searched for – and

²¹ Peter Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920-1950s', in: *Yale Law Journal*, Vol. 113 (2004), 1341-1415.

²² See Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', in: *International Organization*, Vol. 54 (2000), 217-252.

created -- 'co-guardians' of human rights beyond their own boundaries.²³ Supranational constitutionalism was thus a direct response to the fragile liberalism of existing nation-state democracies.

The decisive moment in creating supranational EU constitutionalism occurred when the European Court of Justice had more or less bootstrapped itself into a position of extraordinary judicial power -- and was, for the most part, accepted as possessing that power both by national courts and by national governments, which recognized the supremacy and direct effect of EC law. Arguably, however, national governments would not have put up with the emergence of a transnational legal order that went considerably beyond international law if they had not de facto retained a veto power over legislation. The creation of 'hard' European law (or what has sometimes been called 'normative supranationalism') on the one hand and, on the other, intergovernmentalism, which allowed individual states to promote or at least protect their interests, went hand in hand, rather than one being opposed to each other: 'integration through law' and high-level politics balanced out.²⁴

The Court itself explicitly kept promoting the view that the Community was not merely a matter of international treaties – but that the European treaties had over time become constitutionalized; the Court even spoke of the founding treaties as the Community's 'Basic Constitutional Charter' Thus constitutionalist discourse clearly also served the purposes of the Court as a kind of supranational norm entrepreneur who, among

²³ I take this expression from Jamie Mayerfeld, 'A Madisonian Argument for Strengthening International Human Rights Institutions: Lessons from Europe' (on file with author).

²⁴ J. H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge: Cambridge UP, 1999) and Ulrich Haltern, *Europarecht: Dogmatik im Kontext* (Tübingen: Mohr Siebeck, 2006).

²⁵ Les Verts-Parti Ecologiste v Parliament, Case 294/83.

other things, was promoting new constraints and capacities – with, not least, the effect of increasing its own power. Over decades, then, the European Community was slowly constitutionalized, but there was no single foundational -- or constitutional – normative moment; and for sure there was no single *pouvoir constituant* and comprehensive act of democratic self-authorization. In fact the process appeared as a kind of supranational and quasi-secret 'serial constitutionalism'.²⁶

However, with the acceleration of European integration beginning in the late 1980s – and the increase in majority voting in particular, i.e. the decrease in occasions for vetoing to protect core national interests – the balance between normative supranationalism and intergovernmentalism appeared to be upset. Outvoted Member States now face the question whether they are willing to give loser's consent ever more often – and, if so, whether they should do so in the absence of a sense of being part of a single overall political community.

It is at this juncture that advocates for a specifically *pluralist* transnational constitutionalism have entered the conversation about the nature of the EU. According to Weiler and others, the EU is precisely *not* on the way to statehood, or 'complete Union' – rather, Europeans constitute a 'People of Others', a plurality of peoples who seek to respect and preserve their differences, while cooperating closely in a number of policy areas, engaging in mutual learning.²⁷ In particular, Member States conform to the notion of an 'open constitutional state', as they add provisions in their constitutions about furthering the

²⁶ Gráinne de Burca, 'The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?', in: *Washington and Lee Law Review*, Vol. 61 (2004), 555-583; here 558.

²⁷ See Weiler, 'Europe's *Sonderweg*', Kalypso Nicolaïdis, 'Our European Demoi-cracy', in: Stephen Weatherill and Kalypso Nicolaïdis (eds.), *Whose Europe? National Models and Constitution of the European* Union (Oxford: Oxford UP, 2003), 137-52 and Kalypso Nicolaïdis, 'The New Constitution as European "Demoi-cracy"?' in: *Critical Review of International Social and Political Philosophy*, Vol. 7 (2004), 76-93.

process of European integration and respecting European law. But at the same time – and this is crucial — they respect each other's various forms of 'integrity anxiety' and grant each other willingly vetoes, reservations, special arrangements, and opt-outs. Flexibility serves to alleviate a political-constitutional integrity anxiety that prima facie is considered legitimate. Thus Europe has developed a number of specific practices that embody constitutional tolerance: the principle of mutual recognition and the doctrine of margin of appreciation, which take the values of different constitutional traditions seriously and avoid a process of legal homogenization that could be characteristic of supranational state-building.²⁸

The EU, then, appears to combine the best of both worlds: on the one hand close, formalized cooperation, entrenched, protected and indeed constitutionalized at the supranational level, and yet, on the other hand, also an explicit commitment to respect, recognize, and even to celebrate, diversity. The laws of others are in fact not merely tolerated (an approach potentially compatible with constitutional closure and limitation); rather the laws of others are engaged with, sometimes selectively appropriated in a process of mutual learning and opening, and sometimes, where convergence is to be avoided, actively recognized. And in addition, many new laws are in fact still made with others. In sum, then, we find here a form of constitutionalism that is beyond a group of states, but not unconnected to them; it constrains them (thereby doing justice to one rather uncontroversial dimension of constitutionalism), but it seeks to avoid a lack of democratic legitimacy through the flexibility described above: Member States cannot have anything like 'raw international law' imposed on them that might violate some of their deepest normative commitments. Therefore the absence of an obvious political act of democratic self-

²⁸ Conforming to Goethe's maxim – and thereby contrasting with constitutional closure: 'Tolerance should be a temporary attitude only: it must lead to recognition. To tolerate means to insult.'

authorization of the political community can also be said not to pose any real normative challenge. Constitutionalism here is limiting and limited; it respects and even contains existing constitutional traditions of the various Member States; and it can exist without an overall European civic identity and a pan-European constitutionalist discourse.

What are we to make of this rather irenic-sounding picture? First, there is a normative one-way idealization here – but this time it is actually to be found in the realm beyond the nation-state. What appears at first sight like a form of supranational multiculturalism in fact turns out to be what one might call plural, statist monoculturalism. A mouthful, admittedly, which is simply to suggest, however, that in this vision 'diversity' is only recognized among states; the practices of mutual recognition of which defenders of constitutional tolerance and European pluralism are so proud, only admit states as agents and addressees.²⁹ There is little evidence that this particular approach helps to strengthen the rights of individuals, or that it helps to preserve (let alone increase) the *internal* diversity of Member States. This is of course not a problem in itself – diversity is not ipso facto a good thing – but it is a problem for a specifically diversity-based justification of European constitutionalism: it appears to suggest double standards. In particular, within European nation-states tolerance, let alone multiculturalism which is widely seen as discredited, are hardly popular normative justifications at the present juncture. 30 To be sure, this is not a knock-down objection to the picture we are presented with. But it points to a possible form of hypocrisy in trying to dress up a revamped version of de facto intergovernmentalism (as

²⁹ Kalypso Nicolaïdis, 'Trusting the Poles: Constructing Europe through mutual recognition', in: *Journal of European Public Policy*, Vol. 14 (2007), 682-98.

³⁰ I do not endorse the more or less standard European view that something meaningfully called 'multiculturalism' has failed in the Netherlands and the UK; I am merely reporting the common perception.

evidence by the stress on vetoes, opt-outs, etc.) with values that not many European citizens actually rank highly, and very few associate with the EU in particular.

Secondly, the vision of Europe as devoted to the preservation of diversity is normatively dependent either on a theory of liberal nationalism or on a theory of multiculturalism. More likely it is the former, as only diversity among pre-constituted peoples is at issue; while the latter, as just said, appears as widely discredited across the continent. Consequently, this version of post-state constitutionalism very much shares normative foundations with at least some of the advocates of constitutional closure. While we now also have mutual engagement, dialogue, etc., it is clear that ultimately existing constitutional (and larger cultural traditions) will stay in place. Once more, this is not a knock-down objection – but it brings out potentially very problematic underlying normative and sociological assumptions.

Moreover, while advocates of this particular kind of constitutionalism can make a convincing case that constitutionalism is not one thing and that it can at least partially be disaggregated, it also seems that some of the basic elements often associated with constitutionalism disappear here – and that nothing new appears to compensate for their functions. In particular, there is the ordinary function of *clarification*: constitutions clarify, when they allocate powers, specify rights, and set out the parameters of a constitutionalist discourse. Now, the constitutionalism described here certainly does not clarify; rather, the quasi-permanent process of negotiating what Europeans want to share with others and what they do not want to share is, for the most part, not very transparent; it involves highly differential relations among members of the polity; and it can easily empower those who can work an increasingly arcane system of exemptions, opt-outs, etc., or can negotiate special

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³¹ See Alexander Somek, 'Postconstitutional Treaty', in: *German Law Journal*, Vol. 8 (2007), 1121-1132.

deals.³² And for the possibility of always being able to negotiate something special, there needs to remain a kind of supranationally shared culture of mutual accommodation and consensus.

Furthermore, this constitutionalism has to rely on the assumption that delegated supranational authority will *not* fundamentally clash with national constitutional traditions, of which national constitutional courts regard themselves as the ultimate guardians – that is, not clash in a way that cannot be resolved through opt-outs and other such mechanisms. Again, this is an observation more than any kind of conclusive objection – but it shows how potentially fragile the achievements of a constitutionalism of tolerance and mutual engagement are. It cannot and does not want to foster a positive shared civic identity; its answer to questions about democratic legitimacy is purely negative (by pointing to vetoes and opt-outs); and to some degree it relies on a continuous shared belief in a kind of 'as-if': let European law be adjudicated and treated *as if* it was like domestic constitutional law. Whether in the long run such a partial form of constitutionalization – heavily dependent on a culture of accommodation and compromise within and above states -- is a stable political arrangement certainly remains to be seen.

Finally: how plausible is this picture empirically? It seems a hard case to make that the Union is really about the maximization of diversity. After all, the fact is that European integration is ultimately also a mechanism for exporting a particular model of the European state: aspiring Member States have to conform to a given template, demonstrate their commitment to constitutionalism (and, not least, state capacity). Thus the success of European constitutionalism is based precisely not on a celebration of diversity, but, overall,

32 Ihid.

a *homogenization* of constitutionalist traditions. Celebrating mutual recognition and the principle of margin of appreciation as centerpieces of the European constitutionalist response to interdependence makes an aspect of the process central that is important, but not nearly as important as the homogenizing effects of European integration.

Global (and Societal) Constitutionalism

Global constitutionalism comes in two versions: on the one hand, there is the suggestion that international law is becoming 'constitutionalized' and serving as a hard constraint on the behavior of states; it is, even in the absence of an explicitly constitutionalist discourse, the functional equivalent of constitutional law at the domestic level. Such claims also rest on the basic assumption that a single state is neither necessarily the subject nor the single possible object of a constitution. In this sense, the EU experience clearly serves a kind of template for the constitutionalization of international law and international bodies such as the WTO; it is assumed that, as the European analogy suggests, an increasingly powerful court or a centralized dispute settlement mechanism will be crucial to such supranantional constitutionalization – which, however, is also conceived as an open-ended process (that is, without an obvious goal such as a world state). Some, however, go even further and already see the emergence of a constitution of the 'international community' centered on *ius cogens* and *erga omnes*, or at least an international political society, or even societies.

³³ Andreas Fischer-Lescano, 'Die Emergenz der Globalverfassung', in: *Zeitschrift für ausländisches* öffentliches Recht und Völkerrecht - Heidelberg Journal of International Law, Vol. 63 (2003), 717-760 ³⁴ See the foundational text by Georges Scelle, 'Le Droit constitutionnel international', in: *Mélanges R. Carré de Malberg* (Paris: Sirey, 1933), 503-15.

This 'world constitution' also comes with a specific institutional infrastructure centered on the UN, rights protection, and mechanisms for adjudication (most plausibly in the form of the World Court, but also the ICC).

The second version is much more radical. Here it is suggested that global constitutionalism ought *completely* to break with the state-centric model that developed in the seventeenth and eighteenth centuries. The decisive issue, according to this line of reasoning, has long ceased to be how to tame and constrain absolutist state power, and, by implication, concerns about the constitutionalization of partial extensions of the modern administrative state into the supranational realm are far less important than the discussion around the EU would suggest. Rather, the challenge now is to develop a 'societal constitutionalism' which effectively constrains the exercise of power by non-state actors. Put differently: the hope is not for the emergence of a global constitutionalism that limits the power of states – a vision that according to defenders of 'societal constitutionalism' (Teubner, drawing on David Sciulli's work) remains caught in a state-centric logic; rather, advocates of such constitutionalism already observe the formation of 'civil constitutions' negotiated by private or semi-public actors – corporations, associations, unions, NGO's, etc. These 'constitutions' will not necessarily cohere or ever establish a global hierarchy of norms; in fact, a unified global law – and thus a global constitutionalism, let alone a global state – will not materialize. Instead, global law is inevitably diffuse and fragmented, even in fact sometimes so blatantly contradictory that collisions between different legal regimes constantly have to be negotiated in a pragmatic fashion.³⁵ Put differently: legal pluralism is the norm; we make rules in shifting constellations with different others, frequently finding

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³⁵ Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Frankfurt/Main: Suhrkamp, 2006)

legal clashes, and having to negotiate partly constitutionalized, overlapping and often contradictory orders, some private, some public. The global village turns out to be, as Teubner has put it, 'global Bukowina'.

What to make of these two visions, given our criteria? There seems to me to be no way of accusing proponents of either vision that they are using double standards; in fact both advance coherent arguments for continuity between the domestic and the supranational realm. Both explicitly justify such continuity by pointing to the weaknesses of the overly state-centric perspective from which many constitutionalist theories suffer. It is less clear, however, that at least the second vision is not dependent on highly specific and controversial empirical and normative assumptions – in particular the systems theory of Niklas Luhmann. This does not, of course, doom these positions to failure, but it is at least an uphill battle to argue that politics and the state really are as insignificant as Luhmann's systems theory generally holds.

What about empirical evidence? There is little doubt that a strengthening of international human rights protection has taken place in recent decades, and that – again – the European example has real force in the debate about the very possibility of supranational constitutionalism. At the same time, it would be very difficult to sustain that international law has somehow 'hardened' in the way that EC law did from the 1960s onwards.

Moreover, in the absence of an effective UN there is no enforcement mechanism, and there certainly is no culture of mutual accommodation in the way it has developed in the EU.

Also, the more recent European experience surely points to a difficulty with trying to constitutionalize a whole range of rules and institutions beyond the nation-state: the failed attempt at establishing a European Constitution (or, to be precise, to ratify an EU

Constitutional Treaty) reveals the dangers and unintended consequences associated with inflating the 'currency of constitutionalism', and strategic pitfalls for post-national or post-state constitutionalism.³⁶ Rather than the 'c-word' containing a kind of magic that automatically conjures up legitimacy, the very language of constitutionalism appears to raise the political stakes: whatever has been constitutionalized ceases to be easily contestable – so those disaffected with the status quo have an important incentive to prevent constitutionalization (or so the logic of many opponents of a European constitution goes, but also of opponents of constitutionalizing the WTO, for instance).³⁷ Or, put differently: the prospect of disconnecting law from politics in fact leads to intense politicization. This might be a good thing or a bad thing, but a strengthening of constitutionalism is by no means the obvious outcome (as it was not in the case of the EU).

Finally: whether 'societal constitutionalism' can be effective is an entirely open empirical question. The examples pointed to by its proponents – ICANN, international sports associations, maybe the TRIPS agreement — certainly do not inspire the kind of confidence needed completely to break with established state-centered paradigms. In particular, a large question mark remains about the enforceability of 'civil constitutions' in the absence of states. To be sure, enforceability is always a sensitive issue for constitutionalist thought (and for constitutional courts in particular). But the advocates of societal constitutionalism owe more of an answer to these concerns than they have provided so far.

³⁶ Neil Walker, 'A Constitutional Reckoning', in: *Constellations*, Vol. 13 (2006), 140-50.

³⁷ Robert Howse and Kalypso Nicolaidis, 'Enhancing WTO Legitimacy? Constitutionalization or Global Subsidiarity?', in: *Governance*, Vol. 16 (2003), 73-94, and Jeffrey L. Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law', in: *European Journal of International Law*, Vol. 17 (2006), 647-75.

Conclusion

This essay has found most positions in favor of constitutional closure deeply problematic on a number of levels. Many rely on unconvincing one-way idealizations and on normatively and empirically dubious background theories. More plausible are views that are skeptical of constitutionalism beyond the state on essentially conceptual-historical grounds – although in the end there is little reason to reify one particular idealized eighteenth-century constellation of legal and political elements and deny that constitutionalism could not be broken down into different parts. In particular, a basic notion of constitutionalism as entrenched limits on political power subject to supranational adjudication seems transferable to the realm outside the state without thereby making constitutionalism become incoherent or empirically irrelevant.

The most plausible example of such a partial constitutionalization beyond the state is the EU. The proponents of a particular constitutionalism of tolerance and mutual engagement supposedly embodied in the Union have certainly painted a normatively coherent picture, but they arguably overplay their normative hand when justifying their form of constitutionalism in ways that very often do not square with empirical realities. And they tacitly rely on a background culture of compromise and mutual accommodation, which is a political achievement, but also exacts very real costs in transparency.

Even less convincing are claims about 'global constitutionalism' and 'societal constitutionalism' outside the state. Both lack any far-reaching empirical evidence and neither has succeeded in alleviating concerns about a lack of democratic legitimacy and

constitutionalism's capacity of actual enforcement in the absence of both states and an EU-style culture of mutual accommodation. Global legal pluralism might be celebrated for the diversity and spontaneity it could possibly foster – but it will be even more lacking in transparency than EU constitutionalism, and it might well turn out simply to be rule by the stronger (or regulation by the savvier expert). ³⁸

Both propositions for global constitutionalism appear as examples of a kind of normative over-investment in constitutionalism – as if more constitutionalism were always automatically a good thing and as if 'constitution talk' could somehow by itself generate legitimacy. As the experience with the EU Constitutional Treaty in particular has shown, the 'c-word' (and the specter of a largely irreversible constitutional settlement it necessarily conjures up) can be just as de-legitimizing.

Thus 'post-state constitutionalism' is hardly the last 'realistic utopia'. But it also is not an automatic threat to constitutional-democratic integrity. Above all, it is not a conceptual impossibility. But that in itself simply says nothing about its desirability on a case-by-case basis, and also says nothing about the particular normative goals which constitutionalism in certain contexts might help to achieve.

³⁸ Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', in: *Modern Law Review*, Vol. 70 (2007), 1-30.