From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems

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Abstract

Academic and policy engagements with constitutions and constitutionalism have largely been built around unstated frameworks within which legitimated activity can take place. The essay suggests both the disorientation of much of the discussion and proposes a n ideological framework that captures the assumptions about which constitutionalist discourse has evolved. Constitutionalism at one time could be said to involve the study of the peculiarities of the unique domestic constitutional framework through which government was constituted and power institutionalized. No longer. This essay examines the current discourse of constitutionalism. That discourse reveals the current dynamic character of the concept. The old consensus of conventional constitutionalism, that constitutions are legitimately grounded either in domestic law and the unique will of a territorially defined demos, is now challenged by a view that constitutional legitimacy requires conformity with a system of universal norms grounded in an elaboration of the mores of the community of nations. Traditional nationalist constitutionalism looks inward for its ideology as well as its yardstick for measuring others. Transnational constitutionalism looks to the common constitutional traditions of the community of states buttressed by international norms and organizations. The prize for both constitutional traditionalists and transnationalists is control of the mechanics for classifying constitutions, judging them legitimate and creating systems to enforce common conceptions of valid constitution making through international law. Yet, both rising constitutionalist discourse, and the development of values rich governance systems suggests that an animating ideology also underlies constitutionalism as a whole, a broader and more basic ideology than those that underpin the particular values variants of nationalist, transnational, theocratic and rationalist constitutionalism. The object of this essay is to draw from out of current practice and discourse a working description of the meta ideology that is constitutionalism in general. That definition suggests the characteristics of constitutionalism as originating as a system of taxonomy and legitimation that is grounded in a set of normative assumptions about the meaning and purpose of government. These basic presumptions produce an ideology of substantive and process limitations on state power the content of which is the usual focus of constitutionalist debate. The constitutionalist presumptions are rarely contested but serve to divide groups of states on the basis of the sort of normative presumptions on which the state is organized—nationalist, transnational, natural law, theocratic or Marxist Leninist presumptions. Constitutions without legitimacy are no constitution at all, and legitimacy is a function of values, which in turn serve as the foundation of constitutionalism. It is through the construction of those values frameworks that international law has come to play an increasingly important role.

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I. INTRODUCTION

Once upon a time it was unnecessary to look beyond constitutions. Each represented the highest expression of the individual will of a political community, sovereign to the extent it could defend (and project) that sovereignty among the community of nations. A state was "conceived of as itself the sole source of legality, the *fons et origo* of all those laws which condition its own actions and determine the legal relations of those subject to its authority."[1] The principal focus was on lawfulness—the adherence by functionaries to the rules and processes through which state power was organized and expressed. "A constitution allots the proper share of work to eah and every part of the organism of the State, and thus maintains a proper connection between the different parts. . . ; while on the other hand, the Sovereign exercises his proper

[1]. WESTEL W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 30 (1924).

functions in accordance with the provisions of the conatitution."[2] Lawfulness required government to be taken strictly in accordance with law—but did not limit the range of lawful assertions of government power. Lawfulness—rule of law—was tied to avoidance of the tyranny of the individuals invoking state power, but not to the regulation of the substantive ends for which that power might be invoked. This was nicely bound up in German notions of the rule state. "The Rechtsstaat could provide redress against administrative action but stopped short of providing a general sanction against governments. As a result, the Prussian government was strictly non-responsible in both a political and legal sense."[3] The value preserved within a constituonal state was process, and the prerogatives of the legislature. "The *Rechtsstaat* principle contemplates government according to law and allows a remedy to be obtained in an impartial administrative court for governmental violations of the law. However, the right to obtain such relief must be granted by the legislature, either in the form of a general grant or by specifically enumerating the type of violation for which a remedy may be obtained."[4] This idea remains a foundational element of constitutions and underpins the nascent international system as well.[5] "In most national communities, a law draws support from its having been made in accordance with the process established by the constitution, which is the ultimate rule of recognition."[6]

No one was particularly fussy about the content of those constitutions. Democracy, for example, so important in modern

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[2] HIROBUMNI ITO, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN 9 (2d ed., 1906).

[3]. GORDON SMITH, DEMOCRACY IN WESTERN GERMANY: PARTIES AND POLITICS IN THE FEDERAL REPUBLIC 53 (1979); *see id.* at 202-05 (regarding traditional rechtsstaat principles). For the Japanese understanding applied to the Imperial Constitution, see, e.g., Nobushige Ukai, *The Individual and the Rule of Law Under the New Japanese Constitution*, 51 NW U. L. REV. 733, 735-37 (1957).

[4] See Ukai, supra, note 3, 735-36.

[5]. THOMAS A. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 41-46 (1995).

[6] Franck, *supra*, note 5, at 41.

understanding of constitutionalism,[7] was viewed as a choice that might be rejected in whole or in part.[8] It was the memorialization and institutionalization of political power that marked constitutions. It was the territorial borders of a state that marked its limits. Constitutions could be declared the product of a fiduciary obligation to ancestors for the protection of subjects.[9] It could be established by the will of hereditary sovereigns.[10] Like the French and American constitutions, it could be written for the establishment of a government apparatus embracing certain higher values, or like the British constitution represent unwritten but still binding higher law articulated through the organs established for that purpose.[11] The law of the constitution, then, could be

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[7]. *See, e.g.*, Walter F. Murphy, *Constitution, Constitutionalism, and Democracy, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al. eds., 1993).

[8]. *See* HIROBUMI ITO, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN (Miyoji Ito trans., 2d ed. 1911).

[9]. The preamble of the 19th Century Japanese Imperial Constitution nicely draws this out:

> Having, by virtue of the glories of Our Ancestors, ascended the throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favored with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate. . . a fundamental law of the State, to exhibit the principles, by which We are guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

Dai Nihon Teikoku Kenpo (1889), preamble, *available at* http://history.hanover.edu/texts/1889con.html.

[10]. The German Imperial Constitution was declared in the following fashion: "Wir Wilhelm, von Gottes Gnaden Deutscher Kaiser, König von Preußen etc. verordnen hiermit im Namen des Deutschen Reichs, nach erfolgter Zustimmung des Bundesrathes und des Reichstages, was folgt." Gesetz betreffend die Verfassung des Deutschen Reiches, vom 16. Apr. 1871, *available at* http://www.documentarchiv.de/ksr/verfksr.html (German Imperial Constitution of 1871) ("We Wilhelm, by the grace of God German Emperor, King of Prussia, etc. decree on behalf of the German Empire, after the approval of the Bundesrathes and the Reichstag, the following. . . .").

[11]. *See, e.g.*, A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3-35 (reprint 1982) (8th edition, London: MacMillan, 1915).

understood essentially as a theoretic of higher law grounded in the power of uniquely constituted and inward-looking political communities.

But, in the aftermath of the Second World War and in the context of the construction of an institutional framework for discourse (and action) among the community of nations, values have become important in constitutions, and the ability of states to insulate themselves from the influence of others has been substantially reduced. Emerging from that war were the beginnings of a consensus that values matter in the establishment of constitutions, that such values were superior in authority to any peculiarities of national sentiment, and that they could be enforced. The modern trend has been to distinguish between constitutionalism and constitution.[12] Their relationship has become commonplace enough that their parameters are assumed. Thus, for example:

> Constitutions, in contrast, are premised on the acceptance of state power as legitimate. If significant strife exists on the ground or the government is not accepted by the people, then the constitution may become a "façade constitution." A façade constitution can declare aspirational principles and adopt power structures for government, but such provisions and principles are ineffective and potentially delegitimized because they are not followed in practice. . . .[13]

A constitution without legitimacy is no constitution at all. It is outside the law in the sense that it ought to be respected by the community against which it is applied. "Insurgency, by definition,

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[12]. *See* Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21st Century*, 27 MISS. C. L. REV. 11, 34-37 (2008).

[13]. Note, *Counterinsurgency and Constitutional Design*, 121 HARV. L. REV. 1622, 1632 (2008) (citing Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962) and Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 872 (2005)). See also Miguel Schor, *Constitutionalism Through The Looking Glass Of Latin America*, 41 TEX. INT'L L.J. 1 (2006).

undermines a shared constitutionalism. Rory Stewart perhaps puts it best: 'It did not matter what human rights were enshrined in documents if your local sheikh, party leader, or policeman could still beat you up on the street corner.'"[14] Legitimacy is a function of values, which in turn serve as the foundation of constitutionalism.

Constitutionalism thus might be understood as a systematization of thinking about constitutions grounded in the development since the mid 20th century of supranational normative systems against which constitutions are legitimated.[15] Communities of nations can rely on that systematization to legitimate, in turn, their actions against non-legitimate governments under principles of international law,[16] or against which the populace can legitimately rebel.[17] Constitutions are distinguished from constitutionalism[18]—the latter serving as a means of evaluating the form, substance and legitimacy of the

[14]. *Id. See generally* RORY STEWART, THE PRINCE OF THE MARSHES: AND OTHER OCCUPATIONAL HAZARDS OF A YEAR IN IRAQ 339 (2007).

[15]. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW, 100-10 (2d ed. 1994) (discussing the meaning of legitimation as a political and legal concept in the modern era for the validation of political and legal acts). "[The] legitimation effect can be defined as the process through which systematic losers come to understand themselves as part of the system, as self-governing, and as having willed their losses and their subordinate status." Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 958 (2007). *See also* Steven Bernstein, *Legitimacy in Global Environmental Governance*, 1 J. INT'L L. & INT'L REL. 139 (2005) (noting the intersection of legitimacy and constitutionalism in the area of environmental justice).

[16]. "In the discourse on international relations, we routinely differentiate between various categories of states and label them according to certain criteria that we consider relevant for our understanding of the dynamics of international politics. Sometimes these criteria are purely factual, but mostly they have an evaluative, even moralizing, overtone." Ulrich K. Preuß, *Equality of States—Its Meaning in a Globalized Legal Order*, 9 CHI. J. INT'L L. 17 (2008).

[17]. *See, e.g.,* Dante B. Gatmaytan, *It's All the Rage: Popular Uprisings and Philippine Democracy*, 15 PAC. RIM L. & POL'Y J. 1 (2006).

[18]. *See, e.g.*, CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 3 (1996); KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENT PROCESS 147-53 (1957).

former.[19] It was in this form, for example, that Carlos Santiago Nino made his powerful arguments in support of the extension of parliamentary governmental systems in Latin America.[20] He explained the value of parliamentary systems "as responsive . . . to the consensus of society."[21] That connection has constitutionalist value. "That the government reflects flexibly the consensus of society enhances most of the values in the light of which a political system may be appraised."[22] And it connects constitutions to the project of legitimacy grounded in values that transcend the whims of a territorially-bounded polity. "That coincidence between a government and its measures and social consensus deepens the *objective legitimacy* of the political system."[23]

Even if one can argue that constitutionalism is grounded in the emergence of a transnational culture of values, it is not clear which of those value systems is legitimate. More importantly, perhaps, it is unclear which of those value systems is privileged above the others. I have suggested that a sort of transnational constitutionalism has sought to claim the privilege of arbitrating constitutional values (and thus constitutional legitimacy).[24] That system is transnational and secular. It is grounded in the development of a single system designed to give authoritative expression to the customary values of the community of nations that together make up the values systems of constitutionalism and constitutional legitimacy.[25] But rival systems of constitutionalism have emerged, the most potent currently being those grounded in

[19]. These notions become clearer beyond the self-contained discussions within Western academic circles. *See, e.g.*, Albert H.Y. Chen, *A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan*, 37 HONG KONG L.J. 647 (2007). Chen notes that "[c]onstitutionalism as a theory and practice of government and law is a product of modern Western civilization. Like science, it has proved to have universal appeal to humanity and has in the last two centuries been transplanted to all corners of the earth." *Id.* at 650.

[20]. Carlos Santiago Nino, *Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 46 (Douglas Greenberg et al. eds., 1993).

[21]. *Id*.

[22]. *Id*.

[23]. *Id*.

[24]. *See* Backer, *supra* note 9, at 104.

[25]. *See id.*

the normative systems of universalist religion.[26] And the traditional understanding of constitution—now understood to embrace the values of constitutionalism without conceding its transnationalist or even its secularist common law character—is alive and well as the backbone of constitutionalist thinking in places like the United States.[27] For that purpose, it is worth spending a little time exploring the meaning of constitutionalism, a term whose meaning is as elusive as the unitary system of constitutional legitimacy it means to underlie.[28] That is the object of this essay.

This essay starts with a critical examination of the main currents of writings about constitutionalism. That scholarship is protean, at best, and empty at worst. To the casual reader, constitutionalism appears to have become an invocation—a part of an incantation useful for contextualizing, intensifying or

[26]. *See* Larry Catá Backer, *Theocratic Constitutionalism: Religion as Basis for Constitutional Legitimacy in a Global Age*, 16 IND. J. GLOBAL LEGAL STUD. -- (forthcoming 2009) ("Theocratic constitutionalism is grounded in notions similar to those that underlie transnational secular constitutionalism—that there is a set of universal values under the authority of which government is both constructed and limited. The form of that government must respect the dignity of individuals, and avoid the elevation of any particular individual to a position in which he can use the authority of the state for personal ends. Government is meant to give effect to the rule of law. But the universal values which provide the framework within which governmental power may be asserted, and the framework for evaluating the relation of individual to state, is provided by religion." Id., draft at 22). *See also , e.g.*, Intisar A. Rabb, "*We The Jurists": Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527 (2008) (discussing the result while avoiding forays into the controversy over the definition of constitutionalism).

[27]. *See generally* EDWARD MCWHINNEY, CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE (1981) (on constitutional ethnocentrism and the possibilities of universal values derived therefrom).

[28]. *See, e.g.,* CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY (1996). It is still commonplace to suggest that constitutions and constitutionalism are equivalent terms, or that constitutionalism refers to the study of constitutions in all its forms, or to the science of legitimate constitution making or to the set of values that can be called constitutional and not merely government. *See* Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1 (2007) (discussing constitutions, constitutionalism, and citing the literature).

legitimating any number of arguments made in its name. Yet it is possible to extract a cluster of meaning from this discourse. That is the purpose of this section—not to judge the arguments of the contributors but to extract from those arguments a framework of meaning within which the discourse is itself understandable. The focus is on the production of meaning within the field. For that purpose academic discourse, though fictive, serves an essential role in the production of an authenticity of meaning and a legitimacy in a specific meaning of and belief in the structure of law—like that of the art dealer in relation to the work she sells. Bourdieu explains the relationship well:

> The art trader is not just an agent who gives the work a commercial value by bringing it into a market; he is not just the representative, the impresario, who "defends the author he loves." He is the person who can proclaim the value of the author he defends (cf. the fiction of the catalogue or blurb) and above all "invests his prestige" in the author's cause, acting as a "symbolic banker" who offers as security all the symbolic capital he has accumulated. . . .[29]

That constitutionalist discourse, in turn, tends to evidence the dynamic character of the concept. Conceptions of conventional constitutionalism are said to be grounded either in domestic law and the unique will of a territorially defined demos, or in a system of universal norms grounded in an elaboration of the mores of the community of nations.

From out of this discourse, Section II suggests a working description of constitutionalism.[30] Constitutionalism is more than the fairly unhelpful general definition—an adherence to or government according to constitutional principles.[31] A more useful definition suggests the characteristics of constitutionalism as

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[29]. PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION 77 (Randal Johnson ed., 1993). For this reason alone, investment in the production of academic thinking is valuable in the construction of belief in constitutionalism and its meaning.

[30]. *See infra* text accompanying notes 199-212.

[31]. Merriam-Webster.com, http://www.merriam-webster.com/dictionary/constitutionalism (last visited Nov. 22, 2008).

originating as a system of taxonomy and legitimation that is grounded in a set of normative assumptions about the meaning and purpose of government. Specifically, this essay unpacks what are identified as the five core elements of constitutionalism as it has come to be developed over the course of this century: *Constitutionalism is: (1) a system of classification, (2) the core object of which is to define the characteristics of constitutions (those documents organizing political power within an institutional apparatus), (3) to be used to determine the legitimacy of the constitutional system as conceived or as implemented, (4) based on rule of law as the fundamental postulate of government (that government be established and operated in a way that limits the ability of individuals to use government power for personal welfare maximizing ends), and (5) grounded on a metric of substantive values derived from a source beyond the control of any individual.*

These basic presumptions produce an ideology of substantive and process limitations on state power the content of which is the usual focus of constitutionalist debate. Indeed, much of the great variations in constitutionalism currently arise from great differences in constitutionalist ideology, in those metrics of substantive values on which classifications are understood, the characteristics of constitutions are assigned values, legitimacy is understood and rule of law is framed. From this definition it is possible to begin to theorize the emerging variants of values based constitutionalism that have arisen since 1945. Traditional *nationalist constitutionalism* situates the source of its values in the transcendent genius of the people of the nation itself. *Transnational constitutionalism* situates those legitimating substantive values in their expression by consensus of the community of nations. *Natural law constitutionalism* is grounded in universal values based on humanity's nature or aspirations.[32] *Theocratic constitutionalism* grounds those values in the

[32] "The universal ideal of the Middle Ages went on what I have called positive natural law, an ideal of a universal superlaw, discoverable by reason, to which local law ought to conform and of which the local law at its best is a reflection." ROSCOE POUND, THE IDEAL ELEMENT IN LAW 28 (Indianapolis, IN: Liberty Fund, 2002) (1929)

imperatives of a privileged religious system.[33] Lastly, *rationalist constitutionalism* situates such values in higher order rational systems—from free market to Marxist-Leninist.[34]

These ideological frameworks of substantive constitutionalism are incompatible, and to some extent aggressively competitive. Each is advanced as the only sensible universal and legitimate system of norms. The basic postulates of constitutionalism (classificatory, judgmental, and rule of law higher law characteristics) are rarely contested. These serve to separate constitutionalist systems from perversions of legitimate government—tyranny, oligarchy and mob rule.[35] But the normative presumptions on which the state is organized—nationalist, transnational, natural law, theocratic or Marxist-Leninist presumptions—the last element of the definition of constitutionalism, tend to sharply divide governance systems. These divisions form the basis of the great modern debate about values supremacy in the organization of states. And on that basis much of what passes for constitutionalist discourse, especially comparative constitutionalist discourse across foundational frameworks, actually is meant to justify the claims of one or another system to universal legitimacy.

Thus understood, constitutionalism becomes the framework through which the organization of states can be evaluated, legitimated and affected. Constitutionalism suggests both a

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[33]. *See, e.g.*, Larry Catá Backer, *Theocratic Constitutionalism: Religion as Basis for Constitutional Legitimacy in a Global Age*, 16 IND. J. GLOBAL LEGAL STUD. -- (forthcoming 2009).

[34]. While traditional Marxist-Leninist governance has been dismissed as illegitimately constitutionalist, it might be possible to construct a legitimate constitutionalist state on Marxist-Leninist principles. For a consideration of that issue see, for example, Larry Catá Backer, *The Party as Polity, The Communist Party and the Chinese Constitutional State: A Theory of Party-State Constitutionalism* , 16 J. CHINESE COMP. & L. (forthcoming 2009); Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 29 (2006).

[35]. In the West, these divisions are at least as old as Aristotle. *See* ARISTOTLE, THE POLITICS (William Ellis trans., 1912).

systematization of the parameters for conceiving constitutions and for responding to particular manifestations of constitutional expression. But it does not suggest a particular form of governmental organization, or a single system of substantive principles through which constitutionalism can be expressed. Still, it distinguishes between understandings of states and state organization that are legitimate, and those that are not. For many, this framework takes on a particular set of behaviors. Democracy, human rights, socials and economic rights, labor rights, religious liberty, secularism, anti-corruption and the like have served as proxies for constitutionalism, yet each of them describe an aspect of a partiocular application of the ideology of constitutionalism raher than it essence. Most importantly, perhaps, it suggests that constitutionalism has become another *means* of organizing the great competition between communities of believers for control of legitimating discourse of political organization. The language may be constitutions, but the object is control, and the control of legitimating discourse is the key. It is to the unpacking of this privileged discourse to expose the legitimating ideology beneath that this article is devoted.

II. CONSENSUS CONSTITUTIONALISM

Robin West once usefully sketched out the parameters within which much constitutionalist discourse is situated:

> We might, in fact, think of various theories of constitutionalism along a continuum, defined by this "particularist-to-universalist" axis. At one end are views of constitutionalism that see the role of the constitution as delineating a national identity, by in effect highlighting and sharpening distinctive events, features, and moments of the nation's shared history. At the other end are views of constitutionalism that see the role of the constitution as imposing constraints, in the name of universalist conceptions of humanity, on just that sort of national distinctiveness: the purpose of the constitution, in other words, as understood at this end of the spectrum, is to require of the state

> obligations derived not from the country's history, but from the human status of the state's citizens.[36]

Many discussions of constitutionalism seek to situate their discussion somewhere along this continuum and in the service of a particular purpose. All constitutionalism is justificatory—justifying a particular perspective or objective in the normative construction of the rules for understanding the character of systems of governance.[37] Most seek to explain and to provide a basis for manipulating the current reality: a system of political states unequal in power, whose governments are constituted by a written instrument that seeks to delineate the limitations of the state's powers, now operating within an increasingly bureaucratic and autonomous network of supranational and international institutions more and more empowered to assert legitimately constituted legislative and executive power. [38]

A. Seeking the Universal; Constitutions as Elements of a Normative World Order.

For many influential scholars, constitutionalism can be most usefully approached from the narrowing confines of the field

[36]. Robin West, *Human Capabilities and Human Authorities: A Comment on Martha Nussbaum's Women and Human Development*, 15 ST. THOMAS L. REV. 757, 770-71 (2003) ("[E]ither pole of this axis, as well as any number of mid-way points along it, are plausible enough accounts of the way the idea of constitutionalism has been bandied about in theory and used in practice, at least in the United States.").

[37]. Mark E. Brandon, *Home on the Range: Family and Constitutionalism in American Continental Settlement*, 52 EMORY L.J. 645, 655 (2003) ("Constitutionalism is a political theory concerned with the architectural structure and basic values of society and of government. It aims to make the world comprehensible and, to some degree, controllable. Historically, it is preoccupied with the problem of power, particularly the power of those who would rule others, especially when that rule might be arbitrary.").

[38]. *Id.,* n. 132, citing MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 10 (1998) (suggesting a working definition: a theory of the institutions and values of a type of political "enterprise" in which (1) people, or "a people," (2) self-consciously attempt (3) to conceive the design for a new political world, (4) to embody that design in some sort of text, and (5) to implement it in the world).

of international law.[39] They build on the great framework of constitution making that produced the Japanese and German post Second World War constitutions. The relevant connection of international to national constitutional law framework is nicely expressed in the Japanese Constitution: "We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations."[40] For scholars using this understanding as a general template for legitimate constitution, constitutionalism might be said to represent the (necessary) subordination of domestic law within the superior binding power of law originating form a self-constituted global community.[41]

Some advocates look to the construction of a global constitution, that is, of the constitution of an autonomous global community from which rules are developed to constrain domestic constitution making. The focus is on the construction of that community.[42] That construction might focus on systems of positive norm-making as well. For that purpose an autonomous institution, superior to any nation-state, might be required. Transnational constitutionalism involves the development of an institutionalized organization of the community of nations—superior to and autonomous of its members.

> As regards the "verticalization" of international law, the surfacing of a hierarchical legal relation between the sphere of individual states and the realm of the interests and values of the global community as a whole--the criterion that I suggest as the defining feature of international

[39]. *See, e.g.*, W. FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1978); TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 31, 34 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

[40]. Nihonkoku KENPŌ [Constitution], preface (1946) (Japan), *available at* http://www.solon.org/Constitutions/Japan/English/ english-Constitution.html.

[41]. *See, e.g.*, Anne Peters, *Global Constitutionalism in a Nutshell, in* WELTINNENRECHT: LIBER AMICORUM JOST DELBRÜCK 535, 536 (Klaus Dicke et al. eds., 2005); LOUS HENKIN, INTERNAITONAL LAW: POLITICS AND VALUES 31-39 (1995).

[42]. *See, e.g.*, Preuß, *supra* note 13, at 17.

> constitutionalism--both erga omnes norms and jus cogens presuppose and refer to a sphere of common matters of mankind which have a higher normative rank than rules regulating interstate relations.[43]

The real issues here are tied to the implementation of the apparatus of this government and the scope of its powers.[44] Among the greatest of those powers are those that mimic domestic federal structure—for example through the development of *jus cogens* principles[45] as lawmaking superior to domestic constitutions,[46] in

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[43]. *Id.* at 39 ("Obviously the former rules include the principles laid down in the UN Charter, such as prohibition of the use of force (except the case of self-defense), respect for the political independence and territorial integrity of any state, and, most importantly, the protection of human rights as laid down in several international compacts." *Id.*). *Erga omnes* norms have been understood as obligations common to the community of nations, that is "the obligations of a State towards the international community as a whole. . . . In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations ***erga omnes.***" Barcelona Traction, Light & Power Co. (2d Phase) (Belg. v. Spain), 1970 I.C.J. 3, 33 (Feb. 5) ("Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." *Id.*, at 34). *Erga Omnes* norms might also be understood as peremptory norms—*jus cogens*. *See* Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("Treaties conflicting with a peremptory norm of general international law (jus cogens) A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."). Jus cogens is not defined with precision but is said to include many norms whose obligations are ergo omnes. The forms of international law, and the way in which they seek to bind states, sought its constitutional effect. In this sense, international law norms appear to contribute to systems of transnational constitutionalism—that is of constitutionalism that is based on a presumption of the legitimacy of international aw norms to limit the scope and choices of ordering states through domestic constitutions. *See* Ruti Teitel, *Humanity Law: A New Interpretive Lens on the International Sphere*, 77 FORDHAM L. REV. 667, 679-81 (2008).

[44]. *See, e.g.*, Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 183-86 (1997).

[45]. *See* Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *available at*

the way that federal law is superior to the law (even the constitutional law) of the states comprising the union.

Yet, such institutionalist systems can be customary in nature—based on the evolving constitutional traditions of the member states of the community. The European Union provides a model—a federalist system grounded in international law, constitutionalized through the acts of its own institutions acquiesced to by the Member States.[47]

> Institutional design, even in the most venerable and venerated constitutional settlements, must always be viewed as a derivative and contingent exercise, always at the service of the core values and the changing detail of material and cultural conditions and of diversely located solutions which influence the articulation and optimal balance of these core values.[48]

In this context, the internationalization effectively represents a blending and generalization of the consensus positions of appropriate or basic norms drawn from the evolving constitutional traditions of the member states of the supranational system. "The universalistic content of basic rights is not restricted by the ethical permeation of the legal order; it thoroughly permeates nationally

http://www.worldtradelaw.net/misc/viennaconvention.pdf ("For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

46. *See, e.g.*, Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195 (1993); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Jus Cogens and General Principles,* 12 AUSTL. Y.B. INT'L LAW 81-108 (1992).

47. *See* Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001) (discussing the nature of that settlement within the architecture of European Union constitutionalism).

48. NEIL WALKER, *Postnational Constitutionalism and the Problem of Translation, in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27, 54 (J. H. H. Weiler & Marlene Wind eds., 2003).

specific contexts."[49] South Africa provides another example.[50] These generalized norms are then used as a yardstick against which the actions of the member states themselves are measured—by the organs authorized for that purpose at the supranational level.[51] In the case of the European Union, of course, that is tied up in the legitimation of the European Court of Justice as a sort of Supra Constitutional Court.[52]

Both approaches to supranational or international constitutionalism do not focus directly on the peculiarities domestic constitutions themselves, except as a consequential or incidental matter. The context or uniqueness of a particular constitutional experience may serve as a part of the conversation leading to consensus but does not generally require acknowledgement where it deviates form transnational norms. The important element is the development of the framework within which these contextualized expressions of higher domestic law can be judged, and corrected. This is constitutionalism with another

[49]. Jurgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law*, 17 CARDOZO L. REV. 1477, 1498 (1996).

[50]. The Preamble to the South African Constitution commits the nation to "Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations." S. AFR. CONST. 1996, pmbl., *available at* http://www.constitutionalcourt.org.za/site/constitution/english-web/preamble.html. The Constitution itself is formally tied to international law as it emerges among a consensus of nations. Article 39 instructs the South African Courts: "When interpreting the Bill of Rights, a court, tribunal or forum 1. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; 2. must consider international law; and 3. may consider foreign law." *Id*. at art. 39.

[51]. For a discussion of the process, see Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union* 12 EMORY INT'L L. REV. 1331, 1343, 1369-82 (1998) ("Within the constitutional context, the doctrines of autonomy and supremacy provide the framework for the possibility of establishing norms at the Community level, while the development of general principles of Community law provides the substance of such norms.").

[52]. *See* Larry Catá Backer, *Restraining Power from Below: The European Constitution's Text and the Effectiveness of Protection of Member State Power Within the EU Framework*, The Federal Trust for Education and Research Online Paper No. 15/04 (July, 2004), *available at* http://www.fedtrust.co.uk/eu_constitution.

goal—the construction of a global governance order.[53] Since the late 1940s, the focus of this institution creation exercise to memorialize transnational consensus on constitutional governance values has been on the United Nations system and the construction of a variety of supranational human rights organizations. These institutions are meant to produce norms that reflect the constitutional and justice traditions of its members—that reflect their highest and best aspirations—and formalize those traditions as international law binding not only on states but superior to the constitutional traditions of any of them.[54] International institutions, for example the International Court of Justice, have increasingly adopted this position, though many states, including the United States, have not yet embraced the notion as a matter of law.[55]

For that purpose a certain verticality is necessary; a constitutionalization of international law is required.[56] But the full consequences of this verticality suggest a certain subordination of national for supranational order, bounded by a singular set of

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[53]. *See, e.g.*, Allen N. Sultan, *Principle and Practical Foundations of a Global Constitutional Order*, 3 WASH. U. GLOBAL STUD. L. REV. 155, 162 (2004).

[54]. L. ALI KHAN, A THEORY OF UNIVERSAL DEMOCRACY: BEYOND THE END OF HISTORY 115 (The Hague, Netherland, 2003) ("universal values emerge from a global state of consensus").

[55]. A particularly illuminating example involved the long battle between the Texas Court of Appeals, the United States Supreme Court and the International Court of Justice regarding the application of provisions of the Vienna Convention in a way that is incompatible with traditional American constitutional limits. *See, e.g.*, Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, 596 U.N.T.S. 261, 262-512, *available at* http://fletcher.tufts.edu/multi/texts/BH444.txt; Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 12 (Mar. 31), *available at* http://www.icjcij.org/icjwww/ipresscom/ipress2004/ipresscom2004-16_mus_20040331.htm; Medellín v. Dretke, 544 U.S. 660 (2005), *available at* http://www. supremecourtus.gov/opinions/04pdf/04-5928.pdf); Ex parte Medellin 223 S.W.3d_315 (Tex. Crim. App. 2006), *available at* http://www.cca.courts.state.tx.us/OPINIONS/HTMLOPINIONINFO.ASP?OPINIONID=14711; Medellin v. Texas, 128 S.Ct. 1346 (2008), *available at* http://www.oyez.org/cases/2000-2009/2007/2007_06_984/.

[56]. *See, e.g.,* JÜRGEN HABERMAS, THE DIVIDED WEST (2006). *See also* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J. H. H. Weiler & Marlene Wind eds., 2003).

norms.[57] The place of the constitutions of the Member States of the European Union within that system provides an advanced regionalist model of the form.[58] Even at the international level, focusing on the United Nations architecture, for example, there is a sense that a principal element of this constitutionalism is focused on international institutionalization[59]—state building of one sort or another, whether as a customary or positive legal system or a variant thereof.[60] As one proponent put it, paraphrasing George Washington, "membership in a community means being bound."[61] In its postmodern iteration, the other shoe drops—the idea that constitutionalism ought no longer to be tied to the nation-state suggests that constitution and nation state are no longer necessarily synonymous.[62] A similar approach has evolved within the

[57]. *See* Thomas Cottier, *Limits to International Trade: The Constitutional Challenge*, 94 AM. SOC'Y INT'L L. PROCS. 220, 221 (2000) (suggesting as a basic orientation of global governance a need for constitutionalization grounded in "an attitude and a framework capable of reasonably balancing and weighing different, equally legitimate and democratically defined basic values and policy goals of a polity dedicated to promote liberty and welfare in a broad sense").

[58]. "The dominant international and, especially, European constitutional tradition contemplates 'a constitutional order embodying universal principles that derive their authority from sources outside national democratic processes and that constrain national self-government.'" Kenneth Anderson, *Foreign Law and the U.S. Constitution,* 131 POL'Y REV. 33, (June & July 2005) (citing Jed Rubenfeld, *The Two World Orders*, 27 WILSON Q. 22 (Autumn 2003)). *See, e.g.*, Martin Scheinin, *Introduction, in* WELFARE STATE AND CONSTITUTIONALISM: NORDIC PERSPECTIVES (Martin Scheinnin ed., 2001).

[59]. *See, e.g.*, Cary Coglianese, *Globalization and the Design of International Institutions, in* GOVERNANCE IN A GLOBALIZING WORLD 297 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000).

[60]. Hassan El Menyawi, *Toward Global Democracy: Thoughts in Response to the Rising Tide of Nation-to-Nation Interdependencies,* 11 IND. J. GLOBAL LEGAL STUD. 83-133 (2004) ("Rather than develop a democracy for all nations in a single global assembly, it might be more appropriate to develop democracy by linking (either among or between) national populations without bringing them together under a single roof, where smaller nations might be overwhelmed by larger ones and prompted to cede their sovereignty." Id., at 87). For a discussion, see Backer, *supra* note 9, at 34-37.

[61]. Preuß, *supra* note 13, at 45 (referencing *Documents Illustrative of the Formation of the Union of American States* 1003 (Charles C. Tansill ed., 1927)).

[62]. *See, e.g.,* Paolo Carrozza, *Constitutionalism's Post-Modern Opening, in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 169 (Martin Loughlin & Neil Walker eds., 2007).

constitutionalist discourses of regional human rights courts.[63] In either iteration, it is the modernist notion of the uniqueness of the ethnos, uniqueness legitimately expressible within a constitution, which is undermined.

In its non-institutional form, a variant of internationalist constitutionalism is grounded in that strain of comparative law that focused on universalism and convergence.[64] "Universal values share two distinct characteristics: First they are not geographical, in that they cut across national, ethnic, religious, and linguistic borders. They are common to all states. Second, they are not confined to temporal boundaries."[65] It is sometimes couched in the language of cosmopolitanism.[66] It posits a new constitutionalism, grounded in a vertical ordering of domestic law with constitutional

[63]. *See, e.g.,* Larry Catá Backer, *Inscribing Judicial Preferences into Our Basic Law: The Political Jurisprudence of European Margins of Appreciation as Constitutional Jurisprudence in the U.S.*, 7 TULSA J. COMP. & INT'L L. 327, 346-61 (2000) (noting the European Court of Human Rights and margins of appreciation in enforcing the norms of the European Human Rights Convention).

[64]. For an interesting discussion of the convergence model of constitutionalism and its critique, see Ruti Teitel, *Book Review: Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2573 (2004) (reviewing COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (Norman Dorsen et al. eds., 2003)) ("The casebook assumes that '[c]omparison is at the center of all serious inquiry and learning' (p. 1) and that one should always conduct the inquiry with an eye to convergence. In this regard, Comparative Constitutionalism attempts to recover the comparativist project's longstanding ambition of reclaiming a belief in a coherent body of law.").

[65]. L. ALI KHAN, A THEORY OF UNIVERSAL DEMOCRACY: BEYOND THE END OF HISTORY 81 (2003) ("In their origin, universal values are rooted in the state of consensus. In their purpose, they provide guidance to Free States in conducting their internal and external affairs. In the era of nation-states, the supreme values are confined to national constitutions and national traditions.").

[66]. *See, e.g.*, SEYLA BENHABIB, ANOTHER COSMOPOLITANISM: (THE BERKELEY TANNER LECTURES) (Robert Post ed., 2006) (arguing that the institution of the United Nations systems has produced an age of global civil society in which norms of universal social justice originating are legitimated and privileged over other norms, including the conception of democratic norms held by some polities); KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006) (focusing on ethics rather than on legal constitutionalism per se).

provisions at its apex.[67] "Constitutionalism is an ideal that may be more or less approximated by different types of constitutions. . . ."[68] Institutionalism, at the supranational or national level is rejected as anti-constitutionalist.[69] Instead, constitutionalism "reflects the abiding hope that from the shared culture, history, and ethos of these consanguineous states, a homogeneous legal order can emerge."[70] As such, "constitutionalism is not necessarily tied to any definite institutional project, European or otherwise. Less than an architectural project, constitutionalism would then be a programme of moral and political regeneration. This is what I mean by the description of constitutionalism as a 'mindset.'"[71] In its natural law formulation it suggests

> *certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. . . . In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.*[72]

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[67]. David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT'L L. REV. 687, 704-10 (2005) (addressing Latin American constitutionalism).

[68]. COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 10 (Norman Dorsen et al. eds., 2003).

[69]. Like Neil Walker, these scholars tend to ask: "Is it at all legitimate even to attempt to translate the language and normative concerns of constitutionalism from the state to the non-state domain? If it is not, there is no problem that merits, still less requires, our attention." Walker, *supra* note 44, at 27.

[70]. Margaret A. Burnham, *Indigenous Constitutionalism and the Death Penalty: The Case of the Commonwealth Caribbean,* 3 INT'L J. CONST. L. 582, 614 (2005) (focusing on the institution of the Caribbean Court of Justice).

[71]. Martti Koskenniemi, *Constitutionalism As Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 18 (2007) ("Irrespective of the functional needs or interests that laws may seek to advance, a Kantian view would focus on the practice of professional judgment in applying them."). *See also* William E. Scheuerman, *Constitutionalism in an Age of Speed*, 19 CONST. COMMENT. 352, 366 (2002) (describing constitutionalism as the expression of "a broadly-defined set of abstract moral principles").

[72]. EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 4-5 (Cornell University Press 1955) (1928) (emphasis in

B. Constitutional Legitimacy as Values.

The principal issue, then, is to determine the set of ideals that follow. This effort has been at the forefront of substantive constitutionalism since the end of the Second World War with the reconstitution of the Japanese and German constitutions. Both constitutions were rich in process constitutionalism before 1945, but were additionally enriched with a set of constitutionally mandated substantive moral/ethical principles.[73] Much of the

original). For a classic critical discussion, see ROSCOE POUND, sypra note 32, at 31-65 (Indianapolis, IN: Liberty Fund, 2002) (1929) ("Today we should be employing philosophical method in jurisprudence to set off and criticize the ideal element in systems of developed law." Id., at 31).

Natural rights notions were critical to the development of constitutionalist conceptions of the state and state power in the United States over the issue of the power of the federal government to control the rights of American citizens from the antebellum period through the adoption of the Fourteenth Amendment. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 890 (1986) ("After the Civil War, some congressional Republican supporters of civil rights enforcement embraced the antebellum radical abolitionist theory of constitutionalism. They argued that the national government had always possessed the authority to secure the natural rights of American citizens because the function of securing these natural rights is the primary purpose of all free governments."); JACOBUS TENBROEK, EQUAL UNDER LAW 176-79, 181, 188-89, 191-97, 209-11 (Collier Books, rev. ed. 1965) (1951).

[73]. *See* Backer, *supra* note 9, at 11. For a contemporaneous account of the process in Japan, see SUPREME COMMANDER FOR THE ALLIED POWERS, GOVERNMENT SECTION, POLITICAL REORIENTATION OF JAPAN, SEPTEMBER 1945 TO SEPTEMBER 1948: REPORT (Washington, D.C.: U.S. Government Printing Office, 1949) ("Thus, in [MacArthur's] efforts to entrench political freedom based upon the rights and dignity of the individual, and economic freedom based upon free private competitive enterprise, he has received little aggressive support in a land where these fundamentals to American life and progress have never before been known." Courtney Whitney, *Forward: The Philosophy of the Occupation*, in Id., at xx). As the administrators of the Japanese Occupation explained their assumptions in pressing for the reform of the Imperial Constitution:

> The basic ingredients of government in a democratic society are well established. There must be a body of rules readily available to and easily understood by all, equally applicable to all and adopted and altered according to procedures which assure full opportunity for participation by all members of the

recent development of universalist secular constitutionalism has invested tremendous resources into an interrogation of the components of those ideals.[74] Michel Rosenfeld provides a useful digest:

> community and which are sufficiently rigid to guarantee reasonable stability of those rules. There must be a body of administrators chosen by and from among the individual members of society and answerable to them. The right of every individual freely to choose and freely to retire his agents of government is an absolute and inalienable one in a democracy. There must be an independent and impartial tribunal for the trial of disputes between individuals and between individuals and their government. And there must be effective guarantees against those threats to individual freedom, to human existence and to the public welfare which human society has come to recognize as threats to civilization itself.
>
> The state--the body politic--has neither existence nor authority nor justification beyond the collective hopes and desires of the individual members. The citizen--the participating member of the society--owes no duty or allegiance to the state as a separate entity but only to society as the aggregate of its individual human members--as the projection of himself. Neither the government nor its agents can be immune to his challenge. At every point in the administration of government at which the individual considers that his rights or his liberties have been infringed, he is entitled as of absolute right to ask: "By what authority is this done?"; he is entitled to seek redress or remedy through the channels provided by law --the ballot box or the court of justice.

Political Reorientation of Japan, supra, 92 (Sewction III, "The New Constitution of Japan"). For its application in the Chinese context, see Larry Catá Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16(1) J. OF TRANSNAT'L. L. & CONTEMP. PROBS. 29 (2006).

[74]. Among the most influential theorists of this project is Louis Henkin. *See, e.g.*, Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533, 533 (1993); *see also* LOUIS HENKIN, CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin et al. eds., 1990); Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity, in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 3 (Michel Rosenfeld ed., 1994) ("modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights"); Daniel S. Lev, *Social*

> [I]n the broadest terms, modern constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights. Moreover, although not all constitutions conform to the demands of constitutionalism, and although constitutionalism is not dependent on the existence of a written constitution, the realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution.[75]

The foundational ideal is the drawing of principled limits to the assertion of governmental power.[76] These concerns are bound up in notions of process—protections against arbitrary actions on the part of government or any of its servants. Many of these notions

Movements, Constitutionalism and Human Rights: Comments from the Malaysian and Indonesian Experiences, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 139 (Douglas Greenberg et al. eds., 1993) (legal process); FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (2005) (freedom, individual rights, limited government and rule of law); Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617 (1999) (verticality and constitutional supremacy, modification limited, powerful and independent judiciary, popular sovereignty).

[75]. Rosenfeld, *supra* note 70, at 3. This sort of approach was widely held in any number of variations and from a variety of perspectives, all of which embraced the process substantive rule of law basis of constitutionalism. *See, e.g.*, Vasiliy A. Vlasihin, *Political Rights and Freedoms in the Context of American Constitutionalism: A View of a Concerned Soviet Scholar* 84 NW. U. L. REV. 257, 258 (1989) ("Constitutionalism is thus a written constitution per se surrounded by a cloak of unwritten principles, values, ideals, procedures, and practices. Without attempting to list the entire file of attributes of American constitutionalism, let me single out the key ones. Making up the core of constitutionalism are the ideas of "popular sovereignty" and a social contract as the source of the government; the principles of republicanism, federalism, separation of powers, and government limited by law; respect for the rights and liberties of citizens and the protection of private property; the rule of law and the supremacy of the Constitution; and independence of the judiciary and judicial review.").

[76]. *See, e.g.*, CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 21-22 (Cornell University Press rev. ed. 1947) ("constitutionalism has one essential quality: it is a legal limitation on government"); HANNAH ARENDT, ON REVOLUTION 143 (1977).

are bound up in the principles understood as "rule of law," at least in its process aspects.[77]

But process is not enough to protect a polity from itself.[78] Rule of law or limits as a foundational component of constitutionalism now also has a substantive aspect.[79] The principles under which legality is constituted becomes of paramount importance within modern constitutionalism.[80] For many, the focus is on democracy,[81] though there is a substantial

[77]. *See* Backer, *supra* note 59, at 72 ("First, rule of law is understood as embedded in mandatory systems, for maintaining firm limits on the arbitrary use of state power by the individual. This is the idea of rule of law in its process aspect, limiting the use of state power only when grounded in legitimately enacted law. Second, rule of law is understood in its substantive aspect as vesting the state with the critical role as guardian of a set of foundational communally embraced substantive norms that are to be protected and furthered through the use of state power grounded in law."). *See also* RANDALL PERRENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 126-88 (2002).

[78]. *See, e.g.*, Matthew Lippman, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 TEMP. INT'L & COMP. L.J. 199 (1997).

[79]. Thus, academics sometimes speak of positive as well as passive constitutionalism associated with the vindication of certain norms. "[W]e should talk about constitutionalism in terms of what government *should* do, rather than what it *cannot* or *should not* do. We must tackle the challenge posed by Leon Duguit many years ago: 'Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of powers cannot do certain things; second, there are certain things they must do.'" Arthur S. Miller, *Myth and Reality in American Constitutionalism*, 63 TEX. L. REV. 181, 204 (1984) (reviewing DON PRICE, AMERICA'S UNWRITTEN CONSTITUTION: SCIENCE, RELIGION, AND POLITICAL RESPONSIBILITY (1983) and HEBERT MCCLOSKY, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES (1983) (quoting LEON DUGUIT, LAW IN THE MODERN STATE 26 (H. Laski trans., 1919)).

[80]. *See, e.g.*, FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 181 (1960) ("all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right").

[81]. *See, e.g.*, BORIS DEWIEL, DEMOCRACY: A HISTORY OF IDEAS (2000); Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1861 (2004) (addressing "the role of constitutionalism in stabilizing democratic governance in . . . fractured societies. . . . because of the limitations it imposes on democratic choice").

spectrum of meaning hidden within that ideal,[82] along with rule of law, social justice, and political justice.[83] Democracy, as a constitutional concept, is sometimes tied to notions of citizenship—that is the legitimacy of democracy itself is grounded in the inclusion of all members of the polity in an effective and perhaps equivalent way.[84] The meanings of those terms vary with the politics of the advocate.[85] Democracy is also a difficulty for

[82]. *Contrast*, for example, the universalist focus on democracy as the essential focus of constitutionalism as expressed by the first President Bush, see Larry Catá Backer, *President Bush's Second Inaugural Address: A Revolutionary Manifesto for International Law in Chaotic Times*, Law At the End of the Day, at http://lcbackerblog. blogspot.com/2006/04/president-bushs-second-inaugural.html (Apr. 1, 2006, 17:48 EST), *with* emerging notions of African democratic constitutionalism, see H. Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New Dawn?,* 5 INT'L J. CONST. L. 469, 481 (2007) ("In a nutshell, constitutionalism in Africa in the early decades following the end of colonialism faced a massive deficit of legitimacy. Africa's postcolonial rulers chose to create sources of legitimacy not in constitutions or democratic elections but in supraconstitutional (and supradem ocratic) welfarist projects tied to the pressing material concerns of the people"). *See generally* MICHELMAN, *supra* note 73, at 3-32; RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM AND DEMOCRACY 277 (1999) ("Democracy is essentially a member of the mutual-benefit class of theories. If political divisions cut very much deeper than the marginal issues on which we can democratically compromise, democracy may no longer seem to produce mutual benefits. It then produces major–not marginal–winners and losers. Big disagreements bring us down.").

[83]. Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 7 (2007) (arguing that constitutionalism "clearly means something more than the mere attempt to limit governmental arbitrariness, which is the premise of a constitution, and which attempt may fail, as it has done several times in Africa. The concept today can be said to encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations."). *See also* PHENG CHEAH, INHUMAN CONDITIONS: ON COSMOPOLITANISM AND HUMAN RIGHTS (2007).

[84]. *See, e.g*., SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (THE SEELEY LECTURES) (2004) (citizenship and moral personhood); BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM (2002).

[85]. *See, e.g.,* CHEAH, *supra* note 82, at 17-44, 80-119 (arguing that mainstream, multiculturalism, and human rights discourse do not adequately focus on issues

those seeking to move constitutionalist discourse up from the national to supranational institutions.[86] Indeed, sometimes constitutionalism and democracy are inverted within the hierarchy of political values.[87]

Human rights are also foundational to notions of constitutionalism.[88] Human rights have been particularly privileged within constitutional orders, especially since 1945.[89] Constitutions now tend to emphasize the importance of limits on governmental power to interfere with individual prerogative and to impose positive obligations on states to protect individuals in a

of distributive justice). *See also* essays in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994). For a critique, see AMARTYA SEN, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY (ISSUES OF OUR TIME) (2007). For a discussion of recent efforts at distinguishing between real and sham democracy, see Larry Catá Backer, *Democracy, Part XII: On Sham Democracies*, Law At the End of the Day, http://lcbackerblog.blogspot.com/2008/06/democracry-part-xii-on-sham-democracies.html (June 27, 2008, 16:22 EST) (referencing in part Human Rights Watch, *HRW World Report 2008*, Jan. 31, 2008, *available at* http://hrw.org/wr2k8/pdfs/wr2k8_web.pdf ("Under modern notions of transnational constitutionalism, sham democracies are illegitimate–as are the governments created thereunder. As constitutional 'outlaws' sham democracies may be subverted, ignored, sanctioned, or overthrown.")).

86. For a discussion, see Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489 (2001); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25 (2003).

87. *See, e.g.*, Christopher J. Walker, *Toward Democratic Consolidation?: The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 FLA. J. INT'L L. 745, 755 (2006) ("a lively and independent civil society, a political society with sufficient autonomy and a working consensus about procedures of governance, and constitutionalism and the rule of law—are virtually definitional prerequisites of a consolidated democracy"). *See also* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2002).

88. "The fundamental value that constitutionalism protects is human dignity." Walter Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 758 (1980).

89. There is a long tradition of the incorporation of human rights within constitutional systems. Its modern form, perhaps, can be traced back to the 1789 Declaration of the Rights of Man eventually and now loosely tied French Constitutionalism. *See* JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 156-62 (1998).

variety of circumstances.[90] All substantive values in constitutional systems, no matter how disparate the treatment appears in detail, include precise and significant protections of the individual. It is central to notions of secular constitutionalism,[91] but also of theocratic[92] and rational constitutionalism as well.[93] The constitutions of political communities from out of colonialism are particularly well developed in this respect.[94] The human rights focus is tied to democratic principles. "In contrast to the presumed moral worth of nativism against the colonial rulers, the task in the era of new constitutionalism is the moral definition of democratic

[90]. The German postwar constitution provides a useful template for human rights privileging constitutional construction. See Grundgestez, arts. 1-20. The critical provisions of which may not be changed through amendments to the constitution. See, id., at art. 79(3) ("Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.").

[91]. *See, e.g.,* András Sajó, *Preliminaries to a Concept of Constitutional Secularism,* 6 INT'L J. CONST. L. 605, 625 (2008) ("Secular (public) reason-giving in law is also crucial for the human rights component of liberal constitutionalism in the following sense: 'The secular character of the normative system embodied in human rights doctrine is essential to its comprehension. All its premises, values, concepts and purposes relate to the homocentric world and to ways of thought freed from transcendentalist premises and from the jurisdiction of religious authority.'") (quoting in part YEHOSHUA ARIELI, THE THEORY OF HUMAN RIGHTS, ITS ORIGIN AND ITS IMPACT ON MODERN SOCIETY [in Hebrew], quoted after Frances Raday, *Culture, Religion, and Gender,* 1 INT'L. J. CONST. L.663, 663 (2003)).

[92]. *See* Cairo Declaration on Human Rights in Islam (Aug. 5, 1990), *available at* http://www.religlaw.org/ interdocs/docs/cairohrislam1990.htm. "Thus, it is not that theocratic constitutionalism, or its Islamic variety, fails to embrace human rights as a strict limit on the power of the state, it is that the understanding of the nature and character of those rights spring from foundationally different sources. Those difference can produce significant variation in application." Larry Catá Backer, *Theocratic Constitutionalism: Religion as Basis for Constitutional Legitimacy in a Global Age*, 16 IND. J. OF GLOBAL LEGAL STUD. -- (forthcoming 2008).

[93]. *See* Larry Catá Backer, *The Communist Party and the Constitutional State: A Theory of Constitutionalism and the Party-State*, 16 J. CHINESE & COMP. L. -- (forthcoming 2009).

[94]. "In the context of the human rights revolution, the main focus of the moral redefinition of the new democracies in contrast to the totalitarian regimes they replace is the latter's violation of human rights." James T. Richardson, *Religion, Constitutional Courts, and Democracy in Former Communist Countries*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 129, 135-36 (2006).

political community."[95] It is also tied to the erection of binding systems of international norms whose object is to limit the power of constitutional states in the exercise of their otherwise constitutionally lawful powers.[96]

Sometimes that search leads to the rejection of uniformity in the way in which a political community is organized.[97] It is sometimes couched in the language of polycentricity or pluralist constitutionalism.[98] It can even suggest a blending of public and private law in the construction of higher order systems of governance. "In a polycentric order . . . state boundaries have

[95]. *Id*. at 135.

[96]. "Contemporary international law has started to present certain requirements to governments concerning the treatment of their population. . . . all governments, notwithstanding whether they have ratified any human rights treaties or not, are under the obligation to respect and protect at least the core of basic human rights." REIN MÜLLERSON, ORDERING ANARCHY: INTERNATIONAL LAW IN INTERNATIONAL SOCIETY 166 (2000).

[97]. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996); CHARLES YOUNG, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (1994); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990). This strain looks to multicultural constitutionalism, which in the United States, tend to look inward. *See* text and notes 164-65, *supra*.

[98]. *See* Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism, in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 41-65 (Christian Joerges et al. eds., 2004). In the European context, see Marlene Wind, *The European Union as a Polycentric Polity: Returning to a Neo-Medieval Europe?, in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 103, 122 (J. H. H. Weiler & Marlene Wind eds., 2003) ("A polycentric approach would thus reject that the hierarchical nation state is the only *or* the best model to describe the European Union as it looks today or may come to look in the future. One might instead try to see the Community as consisting of an ongoing dialogue or negotiation between multiple networks and levels–each claiming its interpretation to be the valid one."). I have previously described this as a foundation norm of contained conflict. *See also* Larry Catá Backer, *Harmonization, Subsidiarity and Cultural Differences: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems*, 4 TULSA J. COMP. & INT'L. L. 185, 210 (1997) ("In a sense, the notion of contained conflict is built into a system with the irreconcilable goals of harmonization, subsidiarity and protection of insular cultures. This is a containment of conscious design. . . . It reflects both the mistrust of harmonization, subsidiarity and insularity, as well as the mistrust of the absence of any of them.").

become permeable, actors are less dependent on territory, technologies transcend the nation-state, and state-centered constitutionalism loses ground to independent regulatory agencies and government networks."[99] Though the state cedes power, even constitutional power to these networks, the power ceded does not necessary come to rest in supra national public entities or within a community of nations. Instead, network governance can be grounded in private as well as public consensus. Constitutionalism thus acquires a private as well as a public context, as both public and private communities assert constitutional authority within the scope of their jurisdiction and cooperate in the assertion of their respective authorities.[100] At its limit, constitutionalism is presented as both diffused and extra-legal—in the sense that it loses its precise connection with the ordering of states as holders of a monopoly of regulatory power and acquires a global dimension as the discourse of limits of public or private communal power.[101]

Sometimes constitutionalism and legitimacy assumptions are inverted, so that constitutionalism becomes one of a number of assumptions that serve legitimacy,[102] or accountability.[103] Legitimacy, within a constitutionalist context, is sometimes also understood as a function of its historicity, and the control of that history.[104] For others, "the very idea of Constitutionalism itself . . .

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[99]. Andrea Hartmann & Hélene Ruiz-Fabri, *Transnational Networks and Constitutionalism*, 3&4 INT'L J. CONST. L. 481, 484 (2008).

[100]. *Id.* at 487 ("Private transnational networks operate in transboundary contexts, where power is diffuse and virtually impossible to locate, even as they set up . . . parallel private sets of norms that ultimately escape constitutional law.").

[101]. *See* Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory, in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3-28 (Christian Joerges et al. eds., 2004).

[102]. *See, e.g.*, Thomas Poole, *Legitimacy, Rights and Judicial Review*, 25 OXFORD J. LEGAL STUD. 697 (2005).

[103]. "Conceptions of horizontal and vertical accountability correspond to the ideas of constitutionalism and democracy, respectively." Richard L. Sklar, *Democracy and Constitutionalism, in* THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES 53 (Andreas Schedler et al. eds., 1999).

[104]. For an excellent study, see Amy Kapczynski, *Historicism, Progress and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1042 (2005) ("Accepting that we must think historically if we want to think constitutionally, and that we

at least in liberal democracies or republics, and certainly including our own, should be understood as entailing that states are obligated to ensure that all citizens enjoy those basic capabilities necessary to lead a decent life."[105] Still others use the constitutional taxonomy of Karl Loewenstein to merge notions of constitutionalism with normative (substantive values based) constitutions.[106] Another group might speak of constitutionalization strategies grounded in the distinctive needs of the stakeholders in a particular constitutional system.[107] What

must, when thinking historically, also account for the present day legitimacy of the Constitution, what kind of history should we practice?").

[105]. Robin West, *Katrina, the Constitution and the Legal Question Doctrine,* 81 CHI.-KENT L. REV. 1127, 1128-29 (2006) (citing MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000)).

[106]. "Normative constitutions determine who become power holders, and really regulate the exercise of power and the relationship between power holders; their normative force is internalised by political actors who really take the rules stipulated in the constitution seriously, respect them and abide by them." Albert H.Y. Chen, *A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan*, 37 HONG KONG L.J. 647, 651 (2007). "A normative constitution is thus an essential ingredient of the practice of authentic constitutionalism." *Id.*

[107]. Ernst-Ulrich Petersmann, *Addressing Institutional Challenges to the WTO in the New Millennium: A Longer-Term Perspective*, 8 J. INT'L ECON. L. 647, 662 n.39 (2005) (exploring constitutionalism, Petersmann said "from a citizen perspective (e.g. as the struggle of citizens for 'constitutionalizing' national and international law by bringing it into better conformity with individual constitutional rights) and from a comparative constitutional perspective (e.g. focusing on the common 'constitutional principles' resulting from the struggle for individual and democratic self-government, like democracy, separation of powers, rule of law, human rights, legal primacy of constitutional over post-constitutional rules, social justice"). For a discussion of a feminist positivist constitutionalism, see Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277 (2008) (looking at positivist constitutionalism—disruptive, ameliorative and transformative—from a new feminist perspective grounded in gender justice). Ironically, these strategies for constitutionalism apply even for those who would otherwise focus constitutionalism on the local characteristics of the constitution making demos (or ethnos). Thus, for example, some argue that some constitutionalist internationalism may be a necessary predicate to avoid the pitfalls of majoritarianism within religiously based constitutionalizing states. *See* Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891 (2005). His theory of "[e]nlightened constitutionalism rejects shutting down transnational discourses in the name of preserving authenticity and resisting 'imposition.' It is premised on a view of permeable borders across which ideas and power

clearly emerges within this tradition, though, is the development of a dynamic relationship between constitution, constitutionalism and legitimacy. A written document denominated "constitution" may not be considered legitimately so unless it is written in accordance with the substantive and procedural parameters of constitutionalism.[108] "Constitutions without constitutionalism are a fairly standard, if not the defining, feature of illiberal regimes everywhere."[109] But the touchstone is a taxonomy that makes it easier to distinguish between constitutions with the objective of limiting the ability of states to legitimate governments through constitutions that do not practice what they appear to preach.[110]

Yet another focus of this approach is technical. Assuming a set of universal values to be advanced—the substance of constitutionalism—the real issue is reduced to process.

inevitably will flow. Furthermore, enlightened constitutionalism embraces the affirmative need for and right to cross-cultural dialogue." *Id*. at 902.

[108]. *See* ANDREA BONIME-BLANC, SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING (1987) (arbitrariness and the Spanish constitution); H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65 (African constitutions). "Defining 'constitutionalism' to mean simply 'having a written constitution' is tautologically vacuous and necessarily fails to provide any insights into the legitimacy of a constitutional government." Edward A. Harris, *Living with the Enemy: Terrorism and the Limits of Constitutionalism*, 92 COLUM. L. REV. 984, 985 (1992) (reviewing JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW (1991)).

[109]. H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa,* 80 TUL. L. REV. 1239, 1280 (2006) (citing Atilio A. Borón, *Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 4, at 339 (Latin American constitutions and illegitimacy); Radhika Coomaraswamy, *Uses and Usurpation of Constitutional Ideology, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 4, at 160 (South Asian constitutions)).

[110]. "In setting up the formal governmental structures, the North Korean communists paid special attention to legal and political formalities, that is, constitutionalism. Such an emphasis was important because North Korea was in a bitter competition for legitimacy with the Republic of Korea." Chin-Wee Chung, *The Evolution of Political Institutions in North Korea, in* ASIAN POLITICAL INSTITUTIONALIZATION 18, 22 (Robert A. Scalapino et al. eds., 1986).

Constitutionalism may vest constitutions with a strong positive function—no longer merely to reflect the will of the demos/ethos from which it derives its authority to constitute, but to transform that polity as well.[111] It may serve as a bridge between the local and the global. In addition, the methodology of successful implementation becomes the crux of the problem of constitutionalism as an internationalist construct.[112] The development of an international elite of judges committed to the convergence of constitutionalist ideals is also critical to the project,[113] as is the building of transnational legal culture grounded

[111]. This has been especially felt in some constitutionalist discourse after the 1980s. In an African context, the positivism of constitutionalism—sometimes expressed in the notion of transformative constitutionalism—is emphasized. *See, e.g.*, Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998) ("Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."). But, there is a tradition in the West that parallels these notions. Jaques Derrida, *The Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 969-71 (1990) ("Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l'avenir* the transformation, the recasting or refounding of law and politics.") (Mary Quaintance trans.). There is an American version of transformative constitutionalism as well. *See, e.g.*, Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 34 (1983) ("I use the term 'redemptive' to distinguish this phenomenon from the myriad reformist movements in our history. Redemption takes place within an eschatological schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other."); Arnon D. Siegal, Note, *Section 1983 Remedies for the Violation of Supremacy Clause Rights*, 97 YALE L.J. 1827 (1988) (application in Section 1983 context).

[112]. *See, e.g.,* Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513 (2008) (referring to and discussing some of the literature). "Policymakers have started to ask what we have learned and specifically whether some constitutional reform processes are more likely than others to deliver a reduction in violence or more rights-respecting fundamental documents." *Id.* at 1513.

[113]. For an analysis from the perspective of comparative constitutional law, see Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257 (2008). *See also* Lech Garlicki, *Cooperation of Courts: The Role of Supranational Jurisdictions in Europe*, 6 INT'L J. CONST. L. 509 (2008); Ann-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Ann-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003). For a discussion of constitutionalism in its comparative and judicial context, see Sujit Choudhry, *Globalization in Search of*

in Code and judge.[114] As a consequence, "one of the most significant effects of judicial empowerment through constitutionalization has been the transformation of national high courts worldwide into major political decisionmaking bodies and a corresponding judicialization of 'mega' politics."[115] It has served a critical role even in war and the execution of defeated leaders, among them Saddam Hussein of Iraq.[116] Yet others are suspicious of this judicialization as part of constitutionalism. They suggest that it is not a global judicial elite but citizen mobilization and commitment to the constitutional settlement that is of critical importance to a liberal constitutionalism.[117] For some in this

Justification: Toward a Theory of Comparative Constitutional Interpretation, 74 IND. L.J. 819 (1999). *But see* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (discussing the effects of what the author suggests is a vast amount of power given to judges and courts in a constitutional context in Canada, New Zealand, Israel, South Africa, and the failure of this power to advance notions of social justice to a degree greater than that possible through democratic politics).

114. *See, e.g*., Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1 (2003).

115. Ran Hirschl, *Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming*, 84 TEX. L. REV. 471, 475 (2005). For additional discussions, see essays in LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS (Mary L. Volcansek ed., 1997); Russell A. Miller, *Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany* 61 WASH. & LEE L. REV 587 (2004).

116. *See* Larry Catá Backer, *The Execution of Saddam Hussein and the Road to Global "Higher" Common Law*, Law At the End of the Day, http://lcbackerblog.blogspot.com/2006/12/saddam-hussein-and-road-to-global.html (Dec. 30, 2006, 08:49 EST) (suggesting that "the trial and execution of Saddam Hussein represents an application of the principle that states, their apparatus and the individuals with authority thereunder (from whatever source) are subject to a higher law than the constitutional law of the state represent. The execution of Saddam Hussein suggests that even the people of a sovereign state may not vest their representatives with authority that exceeds certain standards of conduct, and that the international community may intervene to limit those excesses."). The agents of this change are made up of a new class of global jurists and lawyers that are "tied to any number of national, international and non-governmental entities. In their hands, the customary law will acquire a life of its own in a global system which though uncomfortable for any single nation may provide the necessary level of mutual security to make it at least grudgingly respected." *Id*.

117. For a powerful exposition of this perspective in the context of Latin American constitutionalism, see Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1 (2006).

group, the distinction between national constitutionalism and international constitutionalism may be important, and might be meant to serve as a brake on the creation of governance constitutionalism at the international level.[118] For still others, political borders may be quite permeable. Constitutionalist mores seep across borders, whether or not invited.[119] Aspirational constitutionalism is a related notion.[120] Whatever its complexion, institutionalist and comparative constitutionalism has a common core—all assume that constitutional theory cannot be understood as a purely domestic matter. This approach is new but growing. At least one scholarly journal has been created to institutionalize and create incentives for the production of this type of work within the legal academy.[121]

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[118]. *See, e.g.*, Ernst Ulrich-Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 5, 7 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006) ("[I]nternational constitutionalism . . . provides for multilevel constitutional restraints aimed at limiting 'constitutional failures' at national as well as intergovernmental levels without pursuing state-like forms of constitutional governance at the international level."). *See also* Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, n.76 (2002) (discussing six principles of international constitutionalism).

[119]. *See, e.g.*, Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders,* 82 TEX. L. REV. 1763 (2004) (discussing examples from Israel, India, and Ireland); Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891 (2005) (arguing that constitutionalism is, in effect, a public and communal activity among the family of nations, and that the ability of progressive elements in illegitimately constituted states to act may depend on the example of other states).

[120]. Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models,* 1 INT'L J. CONST. L. 296, 299 (2003) ("Aspirational constitutionalism defines a country, a nation, in terms of its future, its goals and its dreams. Other countries' constitutions and constitutional examples can be used to express this aspirational sense and may be positively selected precisely in order to do this. For example, many second- and third-wave European democracies may have adopted the model of the Federal Constitutional Court of Germany precisely to demonstrate that they, too, aspired to realize the constitutional principles that the Constitutional Court had helped Germany achieve.").

[121]. Norman Dorsen & Michel Rosenfeld, *Note to Readers,* 1 INT'L J. CONST. L. 1 (2003) ("[T]he International Journal of Constitutional Law . . . is designed to

C. Ethnic/National Constitutionalism and the Legitimacy of Particularized Values.

Still, the very traditionalism that is rejected by internationalist constitutionalists has re-emerged as a potent force.[122] "There should always be the possibility, at least in liberal democracies, to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles."[123]

In the United States it has experienced a renaissance of sorts among the more traditionally minded. There, influential academics have acknowledged this sort of internationalization of constitution making, but appear to reject its implications as illegitimate. Among the most important of the followers of this school is Noah Feldman who is widely associated with the construction of the Iraqi constitution.[124] For Feldman, there is a distinction between constitutionalism and what he calls "imposed constitutionalism."[125] The former is legitimate, and the latter is not. Recalling the multilateral nature of constitution making in the former Yugoslavia, East Timor, Afghanistan and Iraq, he suggests

fill a need created by the recent trend toward globalization of constitutional norms, and by the ever-increasing use of comparative analysis in constitutional adjudication and scholarship.").

[122]. Traditionalism is not a potent force just in the United States. *See, e.g.*, Günter Frankenberg, *Stranger than Paradise: Identity & Politics in Comparative Law*, 1997 UTAH L. REV. 259, 262-74 (1997) (discussing comparative law, convergence and legal imperialism).

[123]. Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397, 412 (2008).

[124]. For a discussion, see Backer, *supra* note 9, at 11. But Feldman draws on an older learning. *See, e.g.*, *Introduction: Political Culture and Constitutionalism, in* POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 1, 2-3 (Daniel P. Franklin & Michael J. Baun eds., 1995) (arguing that the rule of law but not a constitutional regime may be imposed by force—but noting the success of more benign occupations on the evolution of constitutionalist regimes).

[125]. *See* Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857 (2005).

certain illegitimacy because they are being drafted "in the shadow of the gun."[126]

> Each of these cases has seen substantial local participation in the constitutional process; but each has also seen substantial intervention and pressure imposed from outside to produce constitutional outcomes preferred by international actors, including NATO, the United Nations, and international NGOs, as well as foreign states like the United States and Germany. What is occurring in these contexts is the latest, most sophisticated form of imposed constitutionalism, raising its own problems and challenges.[127]

Feldman's argument is subtle but perverse. Imposing constitutional orders on Germany and Japan a half-century or more ago might be seen as a good thing. But the conditions ushered in by those constitutions have made their replication impossible. And the impossibility lies precisely in the nature of the success of those imposed constitutions within the transnational legal order. "Yet there is something theoretically and practically distinctive about imposed liberal constitutionalism today: it takes place against a backdrop of widespread commitment to democratic self-determination."[128] Against this, Feldman offers ancient wine in a postmodern bottle: looking back on the Japanese experience from this side of the Second World War, he states: "A half century later, one cannot imagine this sort of acquiescence being

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126. *Id*. at 858.

127. *Id*. at 858-59 (citations omitted).

128. *Id*. at 859. For a different view, based on the German postwar experience, see Michael J. Baun, *The Federal Republic of Germany, in* POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH, *supra* note 120, at 79, 80 ("The experience of the Federal Republic, therefore, appears to support a different conclusion about the relationship between institutions and culture: that the political culture of a nation lacking strong democratic traditions can indeed be successfully shaped or molded along democratic lines, given the proper institutional framework and supportive economic and external political conditions."). Baun argues that "[i]n the case of the Federal Republic, the democratic norms and principles of its constitutional regime appear, over a relatively short period of time, to have become 'ingrained' in the German body politic." *Id*.

reproduced in most places in the world. Today a new constitution must be understood as locally produced to acquire legitimacy."[129]

This approach to constitutionalism is grounded in an implicit ordering of substantive constitutional values in which democracy and self-determination are privileged and other notions of substantive norms—particularly that cluster of behavior norms limiting the power of states against individuals—is subordinated.[130] It essentially conflates constitutionalism with these two elements. This conflation makes it easy to take the next step—embracing an implication that the other components of constitutionalism might be relegated to an inferior place in the hierarchy of constitutional importance. From these substantive values, virtually all constitutional expression is legitimate—principally because or to the extent that it reflects the will of the majority. This privileging, "grounded in the democratic theory of self-determination, perfectly frames the conflict between egalitarianism and autonomy that lies at the heart of the contemporary problematics of imposed constitutionalism."[131] From this privileging of democracy emerges a faith in majoritarianism that translates for Feldman, when combined with self-determination as the mechanism for producing an act of sovereign will,[132] into a basis for legitimating theocratic

[129]. Feldman, *supra* note 124, at 859.

[130]. This is, of course, hardly new to Feldman. *See, e.g.*, Welshman Ncube, *Constitutionalism and Human Rights: Challenges of Democracy, in* THE INSTITUTIONALISATION OF HUMAN RIGHTS IN SOUTHERN AFRICA 1, 14 (Pearson Nherere & Marina D'Engelbronner-Kolf eds., 1993) ("Representative government is at the heart of democracy and constitutionalism. Without it is idle to speak of the constitutional protection of human rights.").

[131]. Feldman, *supra* note 124, at 862 ("Advocates of equality, typically outsiders, want to press for a constitutional guarantee of equality that will expressly trump any competing considerations derived from religion, or indeed from other forms of democratic politics. Meanwhile local elites—often backed by majorities empowered by the democratization process—would prefer to see a less complete victory for egalitarian values. They ground their arguments in the foundational claim that the constitution is meant to express the will of the people, understood in a majoritarian or super-majoritarian fashion.") (citations omitted).

[132]. For another view of self-determination in a similar context, see Abdullahi An-Na'im, *The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination, in* CONSTITUTIONALISM

constitutionalism.[133] In Africa, for example, faith has not always produced the desired effects.[134]

Feldman suggests that transnational secular constitutionalism is in part an American product—but a product bereft of theory and heavy on politics.[135] Its principal failure is a failure at the core of the normative premises of written constitutionalism itself—"which is that the constitutional document ought to guide actual realities of government practice."[136] As an alternative, Feldman suggests a sort of capitalist version of constitutionalism: "*when constitutional norms are adopted by political elites as a matter of self-interest*."[137] But

AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 4, at 105.

[133]. Feldman, *supra* note 124, at 877-85. "It is therefore a little strange to hear advocates of equality for women or minorities pressing the argument that new constitutions must not provide too great a role for Islam because doing so would be undemocratic." *Id*. at 864-65. *But see, e.g*., Backer, *supra* note 9, at 11; *Hannibal Travis, Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 4, ¶ 2 (2005), *available at* http://www.law.northwestern.edu/journals/jihr/v3/4/travis.pdf; SANFORD LEVINSON, CONSTITUTIONAL FAITH 150 (1988) ("[C]onstitutionalism is an important limit to the value of majority rule precisely because it incarnates a value hierarchically superior to majority rule").

[134]. "The failure by recent constitutions to avoid the danger of democratic majoritarianism descending into the tyranny of the majority does not auger well for constitutionalism in Africa." Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 44 (2007).

[135]. Feldman blames imposed constitutionalism on a cabal of Americas: "The answer involves the unlikely bedfellows of the human rights left, the neoconservative democracy exporters, and the evangelical right; to unfold it properly requires understanding the historical context of the nation building projects undertaken at the behest of the United States in the aftermath of September 11." Feldman, *supra* note 124, at 865. The argument is further elaborated upon. *See id*. at 865-77.

[136]. *Id*. at 872.

[137]. *Id*. at 885 (emphasis in original) ("I am not arguing that constitutionalism does not work, that it is not a real phenomenon, or that in its implementation it invariably masks immediate self-interest of political elites. To the contrary, constitutionalism is a tremendously powerful and durable mode of government. But to succeed, it must get off the ground through a process of adoption by localized self-interest,

he is cautious in his claims as well: "My more modest claim is that, where the international community or the occupier lacks the will or capacity for sustained transformation of constitutional norms over time, it would be mistaken to impose norms that are perceived by local political actors as antithetical to their interests."[138] This is a formalist constitutionalism with hopes eventually for an evolution to a substantive framework like those of other states. But this formal constitutionalism comes with no guarantee of substantive evolution. Indeed, the opposite might be true—Feldman's form of constitutionalism might well solidify a normative constitutional sense based on the self-interest of governing elites. As long as the privileged values of democracy (majoritarianism) and self-determination are respected, deviations from substantive international constitutionalism can be excused—and pressure for the adoption of provisions reflecting the substantive (usually human rights oriented) values of the international community can be rejected as an illegitimate imposition on the democratic political order.[139] "This is especially true when the imposed norms are understood locally to contradict important symbolic features of the constitutional order, such as the role of Islam."[140] Ironically, other constitutionalists have posited that even this stance, so deeply rooted in a perverse localism, is itself of concern because it suggests that what passes for constitutionalism elsewhere is not up to that of those nation-states which may no longer "impose" the normative foundations of its

not out of episodic external pressure that will soon be lifted." *Id*. at 886).

138. *Id*. at 887-88.

139. One student of the Iraqi constitution nicely summed up this notion. "While the enshrinement of morals in a constitution should not come to embody the moral command of the majority group's will upon all individuals, a complete denial of that moral identity across government institutions would be equally repugnant to any substantive approach to rights." Joseph Khawam, Note, *A World Of Lessons: The Iraqi Constitutional Experiment in Comparative Perspective,* 37 COLUM. HUM. RTS. L. REV. 717, 754 (2006). The ultimate aim, nicely reflected in this student comment, is balancing through which sort of welfare maximization might be possible. "Ultimately, moral identity, in terms of secular or religious constitutionalism, must be defined in a way that is consistent with maximizing human rights, and hence democracy." *Id.*

140. Feldman, *supra* note 121, at 888.

own indigenous constitutionalism.[141] On the other hand, Feldman's contextually driven hopefulness appears in at least one strain of Palestinian constitutionalist discourse, as well.[142] It has been powerfully made in the context of the post-colonial conundrum of sub-Saharan African constitutionalism where transnationalism might mask post-colonial dysfunction.[143]

There is a bit of nostalgia about this, which is both deeply ingrained in American legal philosophy and infused with politics

[141]. *See* Madhavi Sunder, Commentary, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891 (2005). Sunder faults Feldman for a bit of stereotyping, the effect of which is to imply that the religious Middle East cannot measure up to the human rights standards of the West. *Id.* at 893 ("[T]he Middle East is religious and patriarchal, the Western world secular and egalitarian."). "While Feldman sees democracy in the Muslim world as homegrown, he seems to imagine egalitarianism as largely exogenous to Islamic democracy." *Id.* at 892. Ironically, Sunder moves from nationalist constitutionalism to a convergence-based, internationalist non-institutional constitutionalism to fit his model of a kinder and worldly institutional Islamic constitutionalism. Again, from his introduction: "Transnational influence is inescapable; political and cultural autarky is hard to imagine. Power and ideas hardly pause at passport controls. And diverse peoples, even governing elites (especially in tentative times), look across borders for validation." *Id.* at 893.

[142]. Zaha Hassan, *The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism*, 16 FLA. J. INT'L L. 897, 920 (2004) ("Rather than serving a legitimating function or setting out the state's programmatic mission, the Palestinian draft constitution appears to be aimed at communicating its vision of how the institutions of power should be organized in a future Palestinian state. Clearly delineating the institutions of power may serve to regain the trust of the Palestinian people in their government, encourage transparent and accountable administration of the state, and establish a floor for the ongoing attempts to find a just resolution to the Palestine-Israel conflict.") "The fact that a constitution may be drafted for purposes other than setting up constitutionalism does not mean that constitutionalism may not take root." *Id.* (referencing NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARABIC BASICS LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 103 (2001)). There is a relationship here to aspirational constitutionalism. *See* Scheppele, *supra* note 116.

[143]. *See* Ruth Gordon, *Growing Constitutions*, 1 U. PA.. J. CONST. L. 528, 582 (1999) ("The example of Somaliland portends a possible different path; a path where constitutions are built upon the culture, knowledge, and experiences of the people who will breathe life into them and make them living documents that truly *matter* in the lives of those whom they will govern.") (emphasis added).

of ethnocentric privilege through constitutionalism.[144] It is also infused with a privileging of historicism that serves both to benefit and legitimate a particular and highly contextualized vision of reality.[145] It is suspicious of universals.[146] However, it may rely on values that appear to bleed across political borders. It is only a short step from Feldman's "imposed constitutionalism" to Professor Jed Rubenfeld's "international constitutionalism."[147] Feldman, of course, posits an internalized constitutionalism from an international framework; Rubenfeld works from the traditional

[144]. *See generally*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004). For its application within the internal constitutional politics of a state see, for example, Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991) (suggesting an ethnos/demos orientation to higher law by focusing on popular pre-commitment as inherent in legitimate constitutionalism).

[145]. "Constitutional historicism aspires to definitive historical interpretations, and asserts, usually via the fiction of collective consent, that history itself has constitutional authority." Amy Kapczynski, *Historicism, Progress and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1112 (2005). *See also*, Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995); G. Edward White, *The Arrival of History in Constitutional Scholarship,* 88 VA. L. REV. 485 (2002) (ahistoricity and the transformation of American constitutionalism from republican to democratic centered). For a critique of the conventional American constitutionalist history, see Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 RUTGERS L.J. 1327, 1348 (2004) ("The standard narrative of American constitutionalism inadequately explains how Americans engaged in drafting, revising, and debating the meaning of written constitutions. Much of that experience is either ignored or dismissed as being aberrational and of no meaningful consequence to 'American' constitutionalism.").

[146]. *See, e.g.*, Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory,* 77 GEO. L.J. 19, 106 (1988) ("[C]onstitutionalism largely consists of the effort to define and manipulate context. Thus, the act of drafting a constitution is best understood as an effort at self-definition. By writing and adopting a constitution, a political community defines its boundaries as a political community, and thereby establishes the system from which legitimate outcomes derive.").

[147]. *See*, Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1974 (2004). Like Feldman, Rubenfeld privileges democracy (as he understands it) and self-determination (though a self expression in ethically unique constitutionalism) as a consequence of which any form of constraint on ethnic self-expression through constitutions is anti-democratic and, therefore, illegitimately constitutional. *See id.* at 1975.

state as the highest source of a power framework.[148] But both reflect an older tradition which, as expressed by others, posits a constitutionalism that is inward looking.[149] Both embrace the assumption that each political community is unique (otherwise there would be no basis for independence),[150] and that uniqueness must find political expression in the foundational constitution of the state.[151] This traditional approach to constitutionalism has

[148]. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 54-58, 183-84 (2001) (proffering a vision of democratic constitutionalism grounded in a demos which seeks to implement its fundamental norm standards reflecting its unique legal and political culture).

[149]. For a taste of the strictly limiting variations in traditional elite American discourse, see, for example, the essays in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS (Larry Alexander ed., 1998); CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION (Alan S. Rosenbaum ed., 1988); CONSTITUTIONALISM: NOMOS XX (J. Roland Pennock & John W. Chapman eds., 1979).

[150]. These notions, of course, are foundational to the American experience with independence as expressed in the American Declaration of Independence, July 2, 1776. On the modern expression of theories of demos and political constitution, see Brunner v. European Union Treaty Bundesverfassungericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 1 Common Law Market Reports [C.M.L.R.] 57(89), 1994 (F.R.G.). For a commentary from an Europeanist perspective, see Manfred Zuleeg, *What Holds Nations Together? Cohesion and Democracy in the United States of America and in the European Union*, 45 AM. J. COMP. L. 505 (1997). Yet, the very reasons that supported the idea that a Europe without a demos was incapable of assertions of legitimate constitutional will, when inverted, could be used to assert that, indeed, such a demos (and will) already existed—the issue was merely empirical rather than theoretical. *See, e.g.*, Larry Catá Backer, *The Euro and the European Demos: A Reconstitution*, 21 Y.B. EUR. L.13 (2002); Mattias Kumm, *Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called*, 54 AM. J. COMP. L. 505, 528 (2006).

[151]. The relationship between demos, as a political sorting device and ethnos, serving a similar purpose, has tended to be complicated in political theory. *See* Larry Catá Backer, *Reifying Law - Government, Law, and the Rule of Law in Governance Systems*, 26 PENN ST. INT'L L. REV. 521, 539 (2008) ("For the great state builders of the nineteenth century, from Hamilton and Thomas Paine in the United States, to the state builders all across Europe, and ultimately the builders of totalitarian state regimes in Europe in the early twentieth century, 'the images of legal science and legal practice were (and still certainly are) mastered by a series of simple equivalences. Law = statute; statute = the state regulation that comes about with the participation of the representative assembly. Practically speaking, that is what is meant by law when one demanded the "rule of law" and the "principle of the legality of all state action" as the defining characteristic of

proven problematic for a theory of legitimacy of state constitutions within a federal system—it is higher law, yet not constitutional in the larger sense.[152] On the other hand, federalism might suggest a more pluralistic approach to national constitutionalism[153] or an escape from its limits.[154] It also conflicts with a different traditionalism ancient within the American constitutional context—natural law constitutionalism.[155] Natural law constitutionalism, ironically, can posit a sort of transcendent universalism.[156] But the universalism of this form of constitutionalism emanates from outside the possibility of human will or consent.[157] However, it can as easily serve to strengthen the

the Rechtsstaat.'") (quoting CARL SCHMITT, LEGALITY AND LEGITIMACY 18 (Jeffrey Seitzer ed. & trans., Duke University Press 2004) (1932)).

[152]. For a discussion, see James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1028-30 (1993). *But see*, Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience,* 77 MISS. L.J. 369, 372-74 (2007). For a revision of the usual story of the relationship between state and federal constitutionalism, see Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitutions*, 68 ALB. L. REV. 261 (2005).

[153]. *See*, *e.g.*, Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1592 (2005) (multilevel constitutional principles need not apply uniformly to all levels of government).

[154]. *See* William J. Brennan, Jr., *Foreword to Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 11, 11 (1988). *See, e.g.,* Robert K. Fitzpatrick, Note, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights,* 79 N.Y.U. L. REV. 1833 (2004).

[155]. *See, e.g.*, Corwin, *supra* note 68; Christopher L.M. Eisgruber, Comment, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 288 (1988), Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?,* 69 N.C. L. REV. 421, 447 (1991), and Kaczorowski, *supra* note 68. For its modern context, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 53-86 (2004).

[156]. *See* David T. Butleritchie, *Organic Constitutionalism: Rousseau, Hegel and the Constitution of Society*, 6 J. L. SOC'Y 36 (2005).

[157]. In this sense, natural law constitutionalism comes closest to theocratic constitutionalism, though it may not be the same thing. Both would look to the universal, a universal beyond any particular constitutional community, but natural law constitutionalism would not necessarily seek those values within a particular universal institutionalized religious community. For a discussion in the context of judicial resistence to the slavery protections in the antebellum American constitution, see, Christopher L.M. Eisgruber, Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism, 55 U. Chi. L.

contextualist notions of traditional state (demos/ethnos) based constitutionalism.[158]

For traditionalists, the core question of constitutionalism is the process and substantive components of governmental structuring uniquely suited and appropriately expressed by a singular political community composed of a unified demos/ethnos.[159] Its source is democratic legitimacy expressed through the will of a unique people (demos), exercising its general will through equal citizenship rights.[160] In the Western (and

Rev. 273, 288 (1988) (judicial employment of natural law notions in slavery law); Charles Grove Haines, The Law of Nature in State and Federal Judicial Decisions, 25 Yale L.J. 617, 628 (1916) ("Justice Chase believed that there are principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of positive law. An act of the legislature contrary to the first principles of the social compact cannot, he thinks, be considered a rightful exercise of legislative authority.").

158. For example, David Butleritchie argues for a contextual constitutionalism grounded in natural law. *See* Butleritchie, *supra* note 152, at 41 ("By calling such a process organic, I hope to connote that such a process is most healthy and robust when it is left to grow from within its own particular context. In other words, an organic constitution is one that is formed in the crucible of a distinct social and political context. To try to deny that context by imposing *universal* norms, in this case by laying so-called *fundamental* principles of constitutionalism across a developing or re-developing society, is both dangerous and troubling."). "[M]y use of the term organic is meant to convey a belief that constitutional formation should be homegrown in order for it to take root and flourish." *Id.*

159. "Although law is by no means static, legal evolution in each country is distinct and will produce vastly different outcomes. Far from converging over time, legal institutions remain different." KATHARINA PISTOR & PHILIP A. WELLONS ET AL., THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995, at 35 (1999) ("Law and legal evolution are part of the idiosyncratic historical development of a country, and that they are determined by multiple factors, including culture, geography, climate, and religion.").

160. "Within the nation-state context, it assumes a common identity on which one can base the expression of the general political will via parliamentary representation." Stijn Smismans, *New Governance--The Solution for Active European Citizenship, or the End of Citizenship?,* 13 COLUM. J. EUR. L. 595, 616 (2007) ("Consequently 'citizens are deprived of their particularities and their embeddedness in particular communities, cultures, and social roles and conceived as abstract political beings whose opinions converge around a concept of the public good which is more or less shared by all because all are equals. Only equals can form a general will.'") (quoting, in part, Ulrich K. Preuß, *The*

principally American) context, those rights expressions target the power of the state, as well as the exercise of state power by or through the state apparatus.[161] As commonly understood, "the basic idea behind constitutionalism is preventing the abuse of state power. Constitutionalism is defined as a 'determination to bring . . . government under control and to place limits on the exercise of its power.'"[162] National constitutionalism, then, serves as a nexus point for the identification and vertical ordering of a system of substantive and process values, which might reflect the unique national will of the territorial sovereigns.[163] These usually include

Constitution of a European Democracy and the Role of the Nation States, 12 RATIO JURIS 417, 423 (1999). *See also*, Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 RUTGERS L.J. 1327, 1327 (2004) ("[T]he idea that a written constitution reflects the will of the sovereign people--both empowers and limits American government.").

[161]. It is in this vein that Martin Redish, for example, can speak of American constitutionalism. *See* Martin H. Redish, Response, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 152-54 (2006) (responding to Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006)). Redish suggests that "American constitutionalism, as I use it, links two distinct, albeit intertwined, levels of theoretical analysis. One is appropriately described as 'macro' and the other as 'micro.'" *Id.* at 152. Macro constitutionalism looks to "the basic notion of limited government, confined not solely by the will of the majority or the decisions of the majoritarian branches of government, but also by a binding, written constitutional structure, subject to revision, repeal, or amendment only by an intentionally cumbersome supermajoritarian process." *Id.* Micro constitutionalism looks to the social contract, positing "that government will not employ its power in an arbitrary, invidious, or irrational manner against the individuals to whom it is accountable". *Id.* at 153. *See also*, Richard S. Kay, *American Constitutionalism, in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16 (Larry Alexander ed., 1998); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 4 (1993).

[162]. Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy,* 96 GEO. L.J. 1411, 1434 (2008) (quoting, in part, M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 2 (Liberty Fund, Inc. 2d ed. 1998) (1967)).

[163]. "Neither constitutions nor constitutionalism can be transferred. The point should be obvious, but is often obscured by proprietary claims to the correct model." Daniel S. Lev, *Social Movements, Constitutionalism, and Human Rights: Comments from the Malaysian and Indonesian Experiences, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 139, 141 (Douglas Greenberg et al. eds., 1993) ("The dimensions of French constitutionalism are not altogether clear to Americans or to Japanese,

democracy (however defined) and rule of law.[164] But there are other values, as well.[165] Still, these substantive notions themselves are value laden and ambiguous.[166] In the form of "popular constitutionalism,"[167] there is a parallel to Feldman's

the Indian or Norwegian cases seem odd anywhere else, and so on, because the political compromises worked out historically, the tacit social and economic agreements made along the way, the play of local habit and values and cultural assumptions, the ways in which change proceeds, are all taken for granted at home but are unfathomable away.").

[164]. One European scholar defines national constitutionalism, for example, as "constituting and limiting government powers for the protection of equal rights of citizens by means of constitutional rules of higher legal rank." Ernst Ulrich-Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism, in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 5, 6 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006). *See also* Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623, 630 (2006) ("[C]onstitutionalization must be understood in at least two, and perhaps three, dimensions. In the international setting, this concept has a 'levels' problem. In a domestic setting, one central hallmark of constitutionalization is the restraint of the state - setting limits on the legislative capacity of the state.").

[165]. *See*, *e.g., Introduction: Political Culture and Constitutionalism, in* POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH, *supra* note 120, at 6-7 (discussing constitutionalism and the uniqueness of political culture); GIOVANNI SARTORI, THE THEORY OF DEMOCRACY REVISITED 308-09 (1987) (addressing constitutionalism and rule of law within political systems—requiring a written constitution memorializing a higher law interpreted by an independent judiciary and lawmaking is constrained by protections against arbitrary action and confined to a representative legislature); John Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 465 (1991) (noting constitutionalism as a moral or ethical perception).

[166]. For rule of law ambiguity, see Backer, *supra* note 59, at 329. On democracy and constitutionalism in Africa, see, for example, Okoth-Ogendo, *supra* note 104, at 65.

[167]. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000). *See also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001). This approach is the subject of a substantial criticism of Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067, 1069 n.5 (2008) (citing additional analysis and commentary). *See also* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007); Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 794-95 (2007) (noting that popular constitutionalism adds a

majoritarianism as the foundational principle of constitutionalism.[168] But therein lies a powerful critique as well:

> At precisely the same moment that some constitutional theorists are highlighting popular involvement in the mechanics of constitutional interpretation, political scientists tell us that participation and interest in politics are declining. Moreover, popular interpretive opinions are often based on limited information, and are highly susceptible to manipulation by elites. . . . The result is an academic construction where "the People" look a lot like Woody Allen's Zelig, inhabiting whatever incarnation is needed to conform with the theoretical backdrop.[169]

Nonetheless, the notion of political power in the people, both as an abstraction and as a physical force for change[170] is powerful. The notions underlying popular constitutionalism in the United States also have analogues elsewhere.[171] Constitutionalism, nationalism, and contextualized choice conflate.

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majoritarian check on the judiciary); Richard Murphy, *The Brand X Constitution*, 2007 BYU L. REV. 1247 (using judicial doctrines of administrative deference as a basis for constraining the constitutional interpretive power of the courts).

[168]. This parallel extends to the definitional difficulties of the concept of the popular in popular constitutionalism. *See, e.g.,* Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675-76 (noting that "there is no precise definition of the concept. . . . A major frustration in discussing the body of scholarship arguing for popular constitutionalism is its failure to define the concept with any precision.").

[169]. Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 900 (2005).

[170]. An example is the fascination with the initially successful and ultimately ambiguous consequences of the Ukraine's Orange Revolution. *See, e.g.*, ANDREW WILSON, UKRAINE'S ORANGE REVOLUTION (2005); Adrian Karatnycky, *Ukraine's Orange Revolution*, 84 FOREIGN AFFAIRS 35, 35-52 (2005); and the failed revolutionary attempt in China culminating in the episode at Tiananmen Square in 1989. *See* BAOGANG HE, THE DEMOCRATIZATION OF CHINA (1996); Tsao Tsing-yuan, *The Birth of the Goddess of Democracy, in* POPULAR PROTEST & POLITICAL CULTURE IN MODERN CHINA 140 (Jeffrey N. Wasserstrom & Elizabeth J. Perry eds., 1994).

[171]. *See, e.g.*, HIRSCHL, *supra* note 109 (democratic politics provides a legitimate vehicle for advancing constitutionalist goals of social and political justice); Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-*

D. The Peculiarities of an American Constitutionalist Ideology.

In its American form, the concept of popular constitutionalism remains inward looking but becomes a political device—an rhetorical trope masking an agenda the goal of which is to undo the constitutional settlement of the early nineteenth century in the United States in which constitutional interpretation was deemed to be judicial in character and thus the subject of the exercise of judicial power.[172] For Americans, the question of constitutionalism, especially in its form of judicial interpretive power, reduces itself to three questions, all relating to power.[173] The first focuses on the legitimacy of interpretive methods. The object is to avoid judicial despotism by forcing judicial discourse to privilege forms of analysis that reduce the ability of judges to substitute their personal predilections for that of the community reflected in the constitution.[174] Similar issues appear within Islamic jurisprudence.[175]

hyun from a Comparative Constitutional Perspective, 53 AM. J. COMP. L. 403 (2005) (on the popular control element of constitutionalism). *But see* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000) (discussing the effects of European Constitutional Courts in advancing human rights in Europe).

[172]. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). For interesting insights on the tensions in the early Republic in this respect, see Robin West, *Tom Paine's Constitution*, 89 VA. L. REV. 1413 (2003). For a discussion in the context of the 2000 Presidential election and the judicial opinions generated in its aftermath, see Larry Catá Backer, *Race, "The Race," and the Republic: Reconceiving Judicial Authority After* Bush v. Gore, 51 CATH. U. L. REV. 1057 (2002).

[173]. "The key concept of constitutionalism is power, defined in this way for present purposes: Power is the ability or capacity to make decisions affecting the values of others, the ability or capacity to impose deprivations and bestow rewards so as to control the behavior of others." Arthur Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375, 381 (1986).

[174]. *See, e.g.*, WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION (2d ed. 2006); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[175]. *See, e.g.*, Asifa Qurashi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006).

The second targets the use of foreign sources,[176] now understood in its larger context as a battle over control of the essence of the character of the state and its relationship to other states and the community of nations.[177] The other targets the constitutional power of the legislature, the popular in popular constitutionalism.[178] Yet, even here, there is little to suggest a limitless majoritarianism, both for fear of a descent into tyranny and because of the popularity of the notion of entrenchment in constitutional law; and so back to the principle of *rechtsstaat*, this time focused on the constitutional authority of the legislature.[179]

Foundational to this approach to constitutionalism, a nationalist constitutionalism, then, is the assumption of the uniqueness of each national community.[180] It is a short step from

[176]. *See, e.g.*, Judith Resnick, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) (especially Part III); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005) (presenting a framework for approaching the legitimacy of the use of foreign materials by American courts); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

[177]. *Compare* Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV. No. 131, June & July 2005, at 1 n.2, *available at* http://www.policyreview.org/jun05/anderson.html; Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 362 (2005); *with* Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication* (Apr. 1, 2005), *available at* http://www.asil.org/events/AM05/ginsburg050401.html; Anne-Marie Slaughter, *supra* note 109, at 191. For an ironic commentary in an internationalist contest, see James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1 (2006).

[178]. For commentary, see Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L. REV. 187, 192-94 (2007); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (focusing on popular movements to affect legislative effects).

[179]. *See, e.g.*, Michael C. Dorf, *Courts, Reasons, and Rules*, 19 Q.L.R. 483 (2000); SCALIA, *supra* note 170, at 37-41.

[180]. This sort of nationalist constitutionalism is reinforced not only by traditional notions of social contract but by notions of cultural and ethnic solidarity or even by a post colonial experience. *See generally*, Resnick, *supra* note 172, at 1564 (discussing and critiquing in the American context).

Feldman's imposed constitutionalism to Mark Tushnet's skepticism about the transnational element to constitutionalism.[181] It is an even smaller step, though one tinged with irony, from Tushnet to that of critical legal scholars, who suspicious of internationalism as a tool of hegemony, sometimes seek refuge in plural constitutionalism,[182] or a dynamic constitutionalism,[183] or a redemptive constitutionalism.[184] Ironically, pluralist or redemptive constitutionalism in some forms can exhibit a refusal to be confined to a particular national context, especially in the context of citizenship and participatory rights of sub-national or identity groups whose membership exist across states.[185]

Constitutionalism, at least at the micro level, at the level of its constituent values, becomes a proxy for power games for control of the mechanics of interpretation.[186] To that extent, values

[181]. *See* Mark Tushnet, *Some Skepticism about Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1474 (2008) ("I suggest that what primarily determines the content of constitutions are the intensely local political considerations "on the ground" when the constitution is drafted, and therefore that normative recommendations about what "should" be included in a constitution or constitution-making process are largely pointless.").

[182]. *See, e.g.*, GAVIN W. ANDERSON, CONSTITUTIONAL RIGHTS AFTER GLOBALIZATION 148 (2005).

[183]. One of the most interesting expositions of this sort of dynamism combines both the element of movement and the core progressive constitutionalist assumptions about anti-subordination and social justice. *See*, RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000) (discussing transitional constitutionalism as both constituting the state apparatus and transforming the society from which it arises).

[184]. *See, e.g.*, Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003); Robert Cover, *The Supreme Court, 1982 Term--Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 34-36 (1983).

[185]. In a sense, this approach suggests that there are characteristics of communal membership that perhaps ought to be privileged over citizenship in political states, or that the content and scope of citizenship ought to be splt to refkect membership in multiple communities among individuals. *See, e.g.*, DONNA LEE VAN COTT, THE FRIENDLY LIQUIDATION OF THE PAST (2000) (regarding differentiated citizenship); Robert Justin Lipkin, *Liberalism and the Possibility of Multicultural Constitutionalism: The Distinction between Deliberative and Dedicated Cultures*, 29 U. RICH. L. REV. 1263 (1995) (discussion of variants of multicultural constitutionalism mostly by its advocates).

[186]. *See, e.g.*, Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990). The permutations of this micro analysis are almost

constitutionalism becomes recontextualized,[187] but only within the framework of its values structure. There is thus very little that separates postmodern constitutionalist discourse from the most traditional strict constructionist within a community of constitutionalist framework values. Though the consequences can be significant in terms of the way in which a particular constitution

limitless and constrained only by the inventiveness of those with authority to imagine changes. For example, Frederick Schauer has noted in his own critique that:

> Robert Post and Reva Siegel offer a mixture of departmentalism (endorsing the constitutional interpretive authority of Congress), popular constitutionalism (giving a role to the people in defining the Constitution), and skepticism about aggressive judicial review (criticizing the Supreme Court for insufficient deference to the constitutional determinations of Congress) which is not easily pigeonholed. Nevertheless, their view plainly falls within a tradition of concern over the anti-democratic tendencies of strong forms of judicial review and judicial supremacy.

Frederick Schauer, *The Supreme Court, 2005 Term--Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 51 & n.180 (2005) (citing Robert C. Post, *The Supreme Court, 2002 Term--Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 36 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power* 78 IND. L.J. 1 (2003)).

[187]. Postmodern constitutionalism, it was once offered, "asks how changes in technology and culture create new opportunities for the exercise of power. It seeks to draw closer connections between the material conditions of life and thought by studying the technological re-creation of forms of life." Jack M. Balkin, *What is Postmodern Constitutionalism*, 90 MICH. L. REV. 1966, 1978 (1992) (putting it starkly, "Postmodern constitutionalism is the constitutionalism of reactionary judges surrounded by a liberal academy that despises or disregards them, and which is despised and disregarded in turn; postmodern constitutional culture is the culture in which the control of constitutional lawmaking apparatus is in the hands of the most conservative forces in mainstream life, while constitutional law as practiced in the legal academy has cast itself adrift, whether out of desperation, disgust, or despair, and engaged itself in spinning gossamer webs of republicanism, deconstruction, dialogism, feminism, or what have you." *Id*. at 1967.).

is applied,[188] it does not affect the fundamental values that guide any of these interpretive schools.

Yet, for all its complexities, this sort of inward looking approach fails to acknowledge the importance of communal norms developed among the community of nations. It reflects a now obsolete view that law ends at the territorial limits of states and that beyond those borders there are merely international relations or the contractual relations among states. Yet, this view is still powerful in more or less well-drawn form. Thus, some academics couch their analysis in terms that suppose a tension between constitutionalism and internationalism. "Both sets of commitments involve claims to special authority as higher law, but they are conceived of in two fundamentally different ways that are in tension with each other."[189] Or it conflates the content of constitutionalism with its character or nature. That conflation can serve the interests of those whose focus is on contests for control of the normative structure of internally derived and constrained constitutionalism.[190] But it can also serve as a basis for internationalist or comparativist constitutionalist discourse as

[188]. For a discussion of interpretive methodology, its inherent presumptions and the effects it can have on understanding constitutions in the American context, see ESKRIDGE ET AL., *supra* note 170.

[189]. *See* Catherine Powell, *Tinkering with Torture in the Aftermath of Hamdan: Testing the Relationship Between Internationalism and Constitutionalism*, 40 N.Y.U. J. INT'L L. & POL. 723 (2008) (applying a variant of traditional theory, positing that international and constitutional law are co-constitutive of the other). On the one hand, "Constitutionalism is based on 'the foundational law a particular polity has given itself through a special act of popular lawmaking' as the 'inaugurating or foundational act of democratic self-government.'" *Id*. at 733 (citing Rubenfeld, *supra* note 143, at 1975). On the other hand, "internationalism is based on the idea of universal rights and principles that derive their authority from sources outside of or prior to national democratic processes. These rights and principles constrain all politics, including democratic politics." *Id*. Under this perspective, "[t]he universal rights and principles inherent in internationalism emerge not from an act of democratic self-government, but rather as a check and restraint on democracy." *Id*.

[190]. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind," in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257-75 (Kimberlé Crenshaw et al. eds., 1995) (demonstrating a current version of that sort of self-reflective constitutionalism, bound up in its own notions of nationality and field separation).

well.[191] This has been particularly acute within Asian and Asian values constitutionalist discourse.[192] Of particular interest has been the Chinese contribution to this discourse, at once strongly nationalistic and at the same time open to the universalization of its model or approach to constitutionalism.[193]

Most of the foundational articles about constitutionalism, as a national or international normative structure, quickly move from the nature of the concept (its institutional parameters) to the scope of its legitimate parameters.[194] Among the more powerful of recent iterations of this approach:

> Constitutionalism entails a sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to

[191]. *See, e.g.*, Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect*, 15 MICH. ST. J. INT'L L. 643 (discussing the Indian Constitution).

[192]. *See, e.g.*, Alice Erh-Soon Tay, *"Asian Values" and the Rule of Law*, 1 JURA GENTIUM J. OF PHIL. OF INT'L L. AND GLOBAL POL. 1 (2005), *available at* http://www.juragentium.unifi.it/en/surveys/rol/tay.htm.

[193]. For examples of the discourse suggesting both the uniqueness of Chinese constitutionalism or its embeddedness within the global constitutionalist discourse, see the approaches advanced in, for example, Dinjian Cai, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 COLUM. J. ASIAN L. 1 (2005); Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1, 10 (2002) (arguing in part that "whereas traditional constitutionalist analyses focus on the courts, the real locus of constitutional development lies in China's parliament, the NPC."); M. Ulrich Killion, *Three Represents and China's Constitution: Presaging Cultural Relativistic Asian Regionalism,* Vol. XIII, No. 1 CURRENTS INT'L TRADE L.J. 23, 31-33 (2004); SUZANNE OGDEN, INKLINGS OF DEMOCRACY IN CHINA (2002). On the "Three Represents" and Chinese constitutionalism, see Backer, *supra* note 72 at 29. *See generally* STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (2000).

[194]. *See, e.g.*, Louis Henkin, *John Marshall Globalized*, 148 PROC. AM. PHIL. 53, 55 (March 2004) (identifying among others, the consent of the governed, representative government, separation of powers, and protection of individual rights as elements of constitutionalism). *See also* Walter Murphy, *Constitutions, Constitutionalism and Democracy, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3-25 (Douglas Greenberg et al. eds., 1993); Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective* 16 TUL. J. INT'L & COMP. L. 49 (2007).

> protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation.[195]

And most also target the individual—and the national community of individuals (a polity, ethnos or demos) over its sub-national communal components. Yet, constitutionalism, especially nationalist constitutionalism, appears to be pointing toward a recognition of sub-national groups as subjects of constitutionalism to an extent that might approach the privileged place within constitutionalist discourse currently occupied by the individual.[196]

E. Veiling Constitutionalism Within Contests Over Values.

All the same, by that conflation, constitutionalism as a concept tends to be lost within the values that its proponents suggest form its core. That mixing tends to strengthen arguments against what people might call the mechanical application of concepts across political communities. In a sense, that is what joins national and internationalist constitutionalists.[197] Yet, constitutionalism ought to be understood as something apart from those substantive norms it is said to serve. Much that passes for constitutionalism and constitutionalist discourse are veiled

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[195]. Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1254 (2008).

[196]. *See, e.g.*, Larry Catá Backer, *Democracy Part VII: Constitutionalism and Indigenous Peoples in the Bolivian Constitution*, Law at the End of the Day, at http://lcbackerblog.blogspot.com/2007/12/democracy-part-vii.html (Dec. 9, 2007) ("collective persons recognized as such in the constitution, like individuals, are guaranteed rights and protections similar to those offered to natural persons. These include the right to popular action. (Proposed Constitution Arts. 138-139)), the right to recourse to the process of constitutional amparo (Proposed Constitution Arts. 131), to privacy protection (Proposed Constitution Arts. 133), to seek a declaration of unconstitutionality (Proposed Constitution Arts. 135), the protection of the public defender (Proposed Constitution Arts. 229-233)." (Id.)) See also, Jean Leclair, *Federal Constitutionalism and Aboriginal Difference*, 31 QUEEN'S L.J. 521 (2006).

[197]. *See, e.g.*, DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 15-29 (2006).

attempts to justify particular political settlements—and to justify them usually within a targeted group of states. Alternatively, constitutionalism serves as a mask over state building efforts at an international level, either as part of efforts to overthrow the secular state system or to federalize that system by the creation of a global federal state. In any case, the object is to move the locus of authoritative pronouncements over legitimacy of state organization—and its relationship with the people within a state—from individual political states to supranational or international organizations. Constitutionalist discourse, then, tends to serve as post facto justification for political or legal conclusions that require legitimization.

What this short and necessarily incomplete walk through the thickets of constitutionalist discourse reveals, then, is a lively area of discourse within which there is little consensus beyond the most basic generalizations. Nor is there much of a focus. On the one hand, constitutionalism is sometimes used as part of an invocation—usually to intensify legitimacy. Sometimes constitutionalism is deployed as a fetish object—a manifestation of the good, the just or the concrete manifestation of ethereal truth. Or, better put, constitutionalism as an artless term of art tends to provide substantial evidence to support Nietzsche's old observation about the miscausation of politics and political theory.[198] Constitutionalism appears to define values, but it better appears that values define constitutionalism.[199] Indeed more detail might have revealed in more dizzying detail the anarchic context of constitutionalist discourse—or better put, the dozens of apparently marginally related conversations, connected, it seems at times, only by a shared agreement to use the world "constitutionalism" or one of its variants, in the discussion. That hardly portends well for

[198]. I have written of this in the context of the construction of the parameters of modern international law. *See* Larry Catá Backer, *The Führer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN ST. INT'L L. REV. 509, 516-20 (2003).

[199]. Thus, cause and effect are reversed. "The newspaper reader says: this party destroys itself by making such a mistake. My higher politics says: a party which makes such mistakes has reached its end; it has lost sureness of instinct." Friedrich Nietzsche, *Twilight of the Idols,* ¶¶ 1-2, *in* THE PORTABLE NIETZSCHE 492-94 (Walter Kaufmann trans., Viking Press 1972) (1889).

any suggestion that there is something of a connection between them, or more ambitiously, that there is a coherent framework—much less a discernable ideology—that can be characterized as constitutionalism. Yet that is precisely what this section attempts, without falling into the trap that Geertz describes as valueless or misleading generalizations as a consequence of the high level of generality required to find evidence of commonality.[200]

III. THE IDEOLOGICAL FRAMEWORK OF CONSTITUTIONALISM.

The constitutionalism discourse has spawned a set of legitimating approaches to constitutions and the construction of the apparatus of government. All share a similar approach to an understanding of the relationship between the individual and the state, as well as to the relationship between governmental power and individual prerogatives to be free of that power. All also share the fundamental understanding that distinguish despotism or tyranny, oligarchy and mob rule (illegitimate) from constitutionalist (legitimate) states: rule of law, understood as a principle of agency or fidelity to the community whose power is being asserted and an obligation to act selflessly. But they are also distinguished by the substantive values that shape the meaning and application of the central principles of constitutionalism.

The key to an understanding of the framework within which constitutionalism is both understood and deployed lies in the development of the great schools of values constitutionalism after 1945. That evolution of the way in which states organized themselves through constitutions of a type different from those that existed before, is critical for situating the discourse and extracting from it its essence. With these developments, the old discourse, once confined within the borders of territorially confined states, with constitutional principle a prisoner of the peculiarities of territorially limited polities, was substantially broadened, and thus broadened better able to reveal the character of the presumptions underlying constitutionalism. That is the principal insight of the

[200]. *See* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 87-125 (1973).

scholarly discourse if only briefly analyzed above. That broadening can be understood as having occurred in three phases.

The first of these broadening efforts focused on globalizing constitutions within the emerging framework of international governance that was produced by the Allied victories against Japan and Germany.

> The focus of this constitutionalism was transnational and secular. It was grounded on the rules of behavior derived from the understandings and sensibilities of the community of states. In this sense it was self-referencing and meta sovereign—the system essentially moved ultimate discretion up from any individual state to the community of states.[201]

Within this frame of reference, the fundamental character of constitutionalism is its separation from the organization of states and their governance mechanics through written instruments.[202] This approach was developed simultaneously with a revolution o sorts in the ideological framework of comparative law. "The dominant theory of the modern era of comparative law has been the conscious, articulated intent to identify unifying elements and to discount differentiating ones. . . . 'Every legal system in the world is open to the same questions and subject to the same standards, even countries of different social structures or different stages of development.'"[203] In both cases the notion embraced was to privilege unity of principle and organization as a legitimating device. This approach of transnational constitutionalism served to spotlight the differences between constitutionalism systems that cultivated a self-referential construction (nationalist

[201]. Larry Catá Backer, *supra* note 9, at 38.

[202]. "We may criticize some tenets of the Soviet Constitution; but never has the doctrine of the Soviet Union reached the height of legal cynicism and political bigotry shown by Nazi German professors of constitutional law in the assertion that the best and most "living" constitutional order is one without a constitution." MAX M. LASERSON, RUSSIA AND THE WESTERN WORLD: THE PLACE OF THE SOVIET UNION IN THE COMITY OF NATIONS 75 (1945).

[203] Vivian Grosswald *Curran, Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AMERICAN JOURNAL OF COMPARATIVE LAW 43, 66 (1998). (citing in part Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law 39 (in two volumes; Tony Weir, trans. 1977).

constitutionalism) with those more open systems that looked to international consensus for its values. If both forms of constitutionalism were legitimate, then what did they have in common that justified viewing them both as legitimate constitutional expressions, and how could one distinguish these from illegitimate government?

The second of these broadening efforts saw the rise of religion as the basic ordering framework for core constitutionalist values. Theocratic constitutionalism in its modern form is very young in many respects, no more than a generation old at this point. But it has become a powerful system for constructing and legitimating constitutional systems, at least among those who embrace the normative religious framework within which it operates. The focus of this constitutionalism was a search for a grounding in values beyond the control of individuals. Expressions of rules for institutional organization and behavior derived from the holy texts and rule systems fo organized religions provided a basis for the merger of substantive normative systems with the procedural rechtsstaat protections of traditional constitutions. With this broadening the discussion was expanded—if values were a basic referent in the understanding of constitutionalist systems legitimate) and a means of distinguishing them from states with constitutions (illegitimate), then how might one distinguish between constitutionalist values systems and illegitimate ones, for example between theocratic constitutionalism and theocracy?

The third was a revolutionary change in the way in which rational constitutionalist systems were being implemented. Moving away from the nominally constitutional systems of the Soviet era and Maoist China, Marxist Leninist constitutionalism has developed in the years since 1978 into something quite different.[204] Even formerly political forms of state organization that rejected the constitutionalist ideology now have developed a sophisticated discourse of constitutionalism looking to the implementation of the values based constitutionalist structure of

[204]. *See, e.g.,* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

modern Marxist Leninist Party states.[205] Again, Marxist Leninist systems posed a problem for constitutionalism and its ideological basis. Would it be possible to consider state systems grounded in Marxist Leninist or other rational systems of political values constitutionalist in the background of a history in which Marxist Leninist systems (especially in the form of Stalinism and its progeny) were once typecast as the antithesis of constitutionalist governance?[206]

It is with these background questions in mind that it is possible to organize the freewheeling discourse of constitutionalism broadly suggested in Section II of this essay. At the nexus of this history, development, implementation and articulation of constitutionalism as practice and ideal lies a developing ideology that has become a powerful framework for the organization of the meta-values through which constitutional systems are judged, and political consequences are legitimated. Mark Warren speaks about the ideology of liberal constitutionalism, "the combination of constitutional devices—separation of powers, checks and balances, civil liberties and civil rights—that are presumed to protect against illegitimate political coercion against persons and which guarantee public influence over political decision makers."[207] Yet, both rising

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[205]. *See, e.g.*, M. Ulrich Killion, *"Building Up" China's Constitution: Culture, Marxism, and the WTO Rules*, 41 LOY. L.A. L. REV. 563 (2008); Zhu Soli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L. L. 533 (2007).

[206] Christian Bioulanger related a story that nicely captures this understanding:

> "Ewa Letowska recounts the following anecdote: A hungry traveler walks into a shady restaurant in Moscow. He sits down and inspects the menu. "I'll have the pork chops," he says. "We don't have any," answers the waiter. "Well then, I'll have the meat balls." "We don't have those either," "How about liver then?" "Nope," answers the waiter. The annoyed customer finally asks: "Am I reading the menu or our constitution? This anecdote captures the role of Leninist constitutions in the political reality of the former Soviet bloc."

Christian Boulanger, Constitutionalism in East Central Europe? The Case of Sloavkia Under Meciar, 33 East Eur. Q. 1999 (quoting in part Ewa Letowska, *A Constitution of Possibilities*, 6(2) EAST EUROPEAN CONSTITUTIONAL REVIEW 76-81, 76 (Spring/Summer, 1997)).

[207] Mark Warren, *Liberal Constitutionalism as Ideology: Marx and Habermas,* 17(4) POL. THEORY 511 (1989).

constitutionalist discourse, and the development of values rich governance systems suggests that an animating ideology also underlies constitutionalism as a whole, a broader and more basic ideology than those that underpin the particular values variants of nationalist, transnational, theocratic and rationalist constitutionalism.[208]

Yet both action and discourse have produced something more than ideology, understood as a framework for guiding, explaining and justifying particular political action, grounded in a particular value set.[209] "We touch upon the theoretical or noological level whenever we consider not merely the content but also the form, and even the conceptual framework of a mode of thought as a function of the lift situation of a thinker."[210] What these developments, and the discourse generated, have produced is

[208] I note but reject the commonplace—that ideology suggests a critique of its object, that is, that [o]one's own ideas are not ideological, only those of one's adversaries." Sam Coombes, *The Early Sartre and Ideology*, 9(1) SARTRE STUDIES INTERNATIONAL 54 (2003). For an interesting discussion attempting to bridge the gap, through a reconception of notions of ideology as false consciousness between liberal democratic theory and the Marxist/Frankfurt School, see David Weberman, *Liberal Democracy, Autonomy, and Ideology Critique*, 23(2) SOCIAL THEORY AND PRACTICE 205 (1997) ("A belief or desire is ideological if it was generated in the wrong sort of way."). Rather the conception here is ideology as "an overarching set of beliefs and values." Weberman, supra, at n. 41.

[209] See, VERNON VAN DYKE, IDEOLOGY AND POLITICAL CHOICE: THE SEARCH FOR FREEDOM, JUSTICE, AND VIRTUE 1 (1995) ("The most likely alternative is to treat ideology as a doctrine or dogma and to treat the adherents of an ideology as doctrinaire or dogmatic ideologues, more likely to be fanatical than reasonable. . . . In a sense, all ideologies are substitutes for thought, and they get condemned for this reason; but they do not deserve the condemnation. They are substitutes for thought in about the same way as the Ten Commandments are substitutes for thought." Id., 2).

[210] KARL MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE 51 (1954). He uses an example from Marxist thought to illustrate the point, though the point is in this sense not confined to the thought framework of Marxism. "'The economic categories are only the theoretical expressions, the abstractions, of the social relations of production. . . . The same men who establish social relations conformably with their material productivity, produce also the principles, the ideas, the categories, conformably with their social relations.' Karl Marx, The Poverty of Philosophy, being a translation of Misère de la Philosophie, with a preface by Frederick Engels, translated by H. Chicago Quelch, 1910, p. 119." Id.).

a basic understanding of constitutionalism as a *Weltanschauung*—a system of beliefs relating to power in the world, and specifically to that power that is asserted to organize and run a political organization, and its expression—through law.[211] "As soon as the total conception of ideology is used, we attempt to reconstruct the whole outlook of a social group, and neither the concrete individuals nor the abstract sum of them can legitimately be considered as bearers of this ideological thought-system as a whole. The aim of the analysis on this level is the reconstruction of the systematic theoretical basis underlying the single judgments of the individual."[212] Constitutionalism as *weltanschauung* contains within it its own ontology (a descriptive model of legitimate constitutions), explanation (the purpose of constitutions), objectives (the ultimate aim of constitutions), values (constitutional ethics), methodology (a theory of action or means of obtaining the goals of constitutions), epistemology (a theory of knowledge, of figuring out true and false constitutions), and its own etiology (an account of the building blocks of constitutions).

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[213]

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[211]. This is a notion better brought out in political science and philosophy literature than in legal literature. Joseph Raz, for example, defines a constitution, in part, as expressing a common ideology. *See* Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries, in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152-93 (Larry Alexander ed., 1998) (defining constitutions as an entity that is constituted as a stable legal system, whose legal basis is expressed in written form and made higher law (in the sense that its constitutional law is superior to ordinary law) that is justiciable, entrenched and expresses the common ideology of the polity). *Cf.* Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35, 70 (1985) (arguing that constitutions should not necessarily be defined as existing primarily to establish a normative source via hermeneutics).

[212] MANNHEIM, *supra,* note 214, at 52.

[213]. Cover, *supra* note 180, at 5 (footnotes omitted).

Early definitions get at some of these notions. Before the Second World War, American academics, for example, began to understand constitutionalism in this way: "Constitutions, like all creations of the human mind and the human will, have an existence in men's imagination and men's emotions quite apart from their actual use in ordering men's affairs."[214] Lerner embraced Walton Hamilton's definition of constitutionalism to this effect, as "the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order."[215] Constitutionalism, thus, invokes both evocative symbolism as well as instrumentalism—an ordered system or systematization of belief.[216] Constitutionalism provides a language, the study of the key words of which are the means to a "conceptual grasp of the Weltanschauung or worldview of the people who use that language as a tool not only of speaking and thinking, but, more important still, of conceptualizing and interpreting the world that surrounds them."[217]

That worldview has a strong ordering element. Constitutionalism is a classification system for evaluating the organization of "statelike" entities.[218] The classification system is

[214]. Max Lerner, *Constitution and Courts as Symbols*, 46 YALE L.J. 1290, 1293-94 (1937).

[215]. *Id.* at 1294 (citing Hamilton, *Constitutionalism*, 4 ENCYC. SOC. SCI. 255 (1931)).

[216]. *See* Corwin, *The Constitution as Instrument and as Symbol,* 30 AM. POL. SCI. REV. 1071 (1936). "As an instrument it must be viewed hardheadedly and used flexibly to promote the people's welfare in the present and future. As a symbol it is part of the mass mind, capable of arousing intense popular hysteria, loaded with a terrible inertia, its face turned toward the past." Lerner, *supra* note 203, at 1294.

[217] Syamsuddin Arif, *Preserving the Semantic Structure of Islamic Key Terms and Concepts: Izutsu, Al-Attas, and Al-Raghib Al-Isfahani*, 5(2) ISLAM & SCIENCE 107, 109 (2007). ("The term 'Weltanschauung' gives a clue to Izutsu's understanding of semantics as a kind of sprachliche Weltanschauungslehre, 'a study of the nature and structure of the worldview of a nation at this or that significant period of its history, conducted by means of a methodological analysis of the major cultural concepts the nation has produced for itself and crystallized into the key words of its language.'" Id., citing Toshihiko Izutsu, God and Man in the Koran: Semantics of the Koranic Weltanschauung 11 (Tokyo: Keio Institute of Cultural and Linguistic Studies, 1964))

[218]. The term is borrowed from Robert Nozick, who in working through the idea that a dominant protective association within a territory might satisfy the

not merely descriptive, though it is *necessarily* so. Constitutionalism provides a taxonomy of state organization grounded in law.[219] In this sense, Constitutionalism is not *about* constitutions, but rather about the consequences of constitutional difference. It serves to distinguish those clusters of contextualized features that serve the ideological ends of constitutionalism from those others which must be deemed illegitimate.[220] Constitutionalist taxonomy provides room for context, culture, tradition, and historical serendipity that mark a particular demos as distinct from others while providing a more generalized framework against which those contextual differences are contained.[221] The ideology of framework legislation serves as a grounding for this sorting function of constitutionalism.[222]

Taxonomy leads to an underlying normative structure, and constitutionalism's worldview is also particularly normative. Constitutionalism has an object—to judge the constitution of political systems as legitimate or illegitimate—in accordance with

conditions necessary to characterize that entity as a state, concluded that "the protective association dominant in a territory, as described, *is* a state. However, to remind the reader of our slight weakening of the Weberian condition, we occasionally shall refer to the dominant protective agency as "a statelike entity," instead of simply as "a state."" ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 117-18 (1974) (suggesting that the state need only have a de facto monopoly of violence rather than be the sole authorizer of violence).

[219]. *See* Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 GEO. J. INT'L. L. 947 (2005) (providing an excellent example of the religious element in the constitutions of Muslim majority states). *See also* Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology--Toward a Layered Narrative*, 4 INT'L J. CONST. L. 439 (2006).

[220]. *See Lerner, supra* note 203, at 1294-1304.

[221]. *See id.*

[222]. The easiest way to conceptualize the descriptive and proscriptive parameters of this function is by analogy to the directive within the legal order of the European Union. *See* Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 249 ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."); PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES & MATERIALS 85 (4th ed. 2008) ("Directives are particularly useful when the aim is to harmonize the laws within a certain area or to introduce legislative change.").

the normative beliefs from out of which it is constituted. This is a crucial evaluation. As Robert Nozick noted, "those legitimately wielding power are entitled, are *specially* entitled, to wield it."[223] It follows that the evaluation implicit in constitutionalism has legal and political consequences for the obligations of individuals to conform and other states to respect the organization and actions of a particular entity.

The normative element of constitutionalism carries with it a certain authentic or legitimating meta-ideology, like religion, but based on its own logic.[224] For the most part, that ideology[225] has crystallized along now familiar rechtsstaat and Sozialstaat lines, which include: protection of the higher law status of the constitution in both blackletter and by an appropriate mechanism (an independent judiciary or constitutional court system), rule of law, democracy, consent, limited government, interdiction of arbitrary acts, actions taken in accordance with law, respect for human rights and dignity as such notions are commonly understood by the community of nations. The ideology is both universalizing and secular—that is it draws on its own internal framework grounded in the mores of the collectivity of nation-states for its principles.

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[223]. NOZICK, supra note 206, at 134.

[224]. András Sajó, *Preliminaries to a Concept of Constitutional Secularism,* 6 INT'L J. CONST. L. 605, 625 (2008) ("It is not just a convenience of modernization to rely on the--unfortunately too-often-false--promise of reason and human rationality. Basing the legal system (its laws and decisions) on secular arguments differs fundamentally from a system based on religious arguments, and not only because the secularist can tentatively demonstrate the practical advantages of reason, insofar as one prefers modernity generally."). *Cf.* W. Tarver Rountree, Jr., *Constitutionalism as the American Religion: The Good Portion*, 39 EMORY L.J. 203, 205 (1990) (suggesting that American nationalist constitutionalism has attributes of religion in the form of its constitution as higher law with sources apart from those of religious higher law values).

[225]. "Constitutionalism is a political ideology that consists of various principles and assumptions about the dual nature of the individual as private person and public citizen, the nature of the state, and the nature of the complex set of relationships between the individual and the state." Edward A. Harris, *Living with the Enemy: Terrorism and the Limits of Constitutionalism*, 92 COLUM. L. REV. 984, 986 (1992) (reviewing JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW (1991).

Religion presents itself as either object worthy of protection within that cluster of human rights and dignity concerns, or otherwise subordinated to the superior mores generated by the global collective of states. Religion must behave. Religion must assimilate to the overall normative constructs of society.[226] Thus softened, it may participate on the terms of the values framework of the constitutional order.[227] The bulk of constitutionalism's ideological manifestations are to be found within the document itself, in the common or customary law of a particular polity (usually protected by the highest independent interpretive body of that polity), and sometimes also in the pronouncements and instruments of international and supranational organizations (from regional human rights organizations, to the United Nations system). Thus, the common constitutional traditions of the community of nations may themselves serve as the basis for the extraction of principles of constitutional behavior and its application in specific contexts.

Lastly, constitutionalism has an implementation element derived from its ideologically constrained organizational basis. Constitutionalism is concerned with the way in which its ideologically derived norms are implemented. The focus has been on process and substantive provisions. Process provisions are meant to guard against arbitrary conduct. These provisions implement notions of lawfulness understood as rule of law in its

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[226]. *See* Lasia Bloß, *European Law of Religion—Organizational and Institutional Analysis of National Systems and Their Implications for the Future European Integration Process*, New York University School of Law, Jean Monnet Working Paper 13/03, 2003, *available at* http://www.jeanmonnetprogram.org/papers/03/031301.pdf (describing the softening within the normative frameworks of European constitutional traditions).

[227]. *See, e.g.*, NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY 3-17 (1989). It is in this sense, perhaps, that one can understand the push in the West to the creation of soft versions of universalizing religion that speaks with a political voice. The object is to assimilate religion within a superior normative political framework system, to make religious expression more compatible with the superior political system, and to suggest the subordination of religion within that system—in matters of dissent, the only acceptable alternatives are exit or separation.

traditional sense of due process or rechtsstaat (loosely understood). Substantive provisions are meant to limit the power of the apparatus of state constituted through the basic law of state organization. These are the Sozialstaat notions—the articulation of the moral and ethical basis of state organization. These provisions embrace the great normative framework of state power—limiting power, the relationship of individual to state, social justice and human rights considerations. Constitutions without both process and substance rights would not be legitimate constitutions of governments as understood under constitutionalist principles.

Thus, Constitutionalism as taxonomy and ideology provides a basis both for determining the legitimacy or illegitimacy of forms of "higher law" governance, and for developing those normative frameworks that give deep substantive effect to the rule of law systems that define the heart of constitutionalist legitimacy. Constitutionalism is thus revealed as a system of classification, the core object of which is to define the characteristics of constitutions (those documents organizing political power within an institutional apparatus), to be used to determine the legitimacy of the constitutional system as conceived or as implemented. The bright line in constitutionalism—the core assumption that separates legitimate from illegitimate constitutionalism—is rule of law. Rule of law is the fundamental postulate of legitimate government, understood generally as the establishment and operation of government in a way that limits the ability of individuals to use government power for personal welfare maximizing ends. Government of laws and not of individuals, bureaucratization and institutionalization of politics within systems that limit discretion are the hallmarks of constitutionalism. But rule of law is necessary but not sufficient for legitimate government under constitutionalist principles. Rule of law, and the construction of the state, the assumptions of its powers and the limits thereof must also be grounded on a metric of substantive values derived from a source beyond the control of any individual.

Constitutionalism as Weltanschauung thus evidences its own ontology, providing a basic descriptive model of constitutions, a rationale (the construction of government that is lawful within the framework of a core set of presumptions), the ultimate aim of

which is to institute a legitimate form of state power through institutions that are responsive to the ultimate sovereigns in a political community. Constitutionalism develops a sophisticated system of values, implemented through a core methodology—the rule of law—which also serves as the basis of constitutionalist epistemology, a theory of knowledge that distinguishes between legitimate and illegitimate constitutions grounded in the values systems from out of which constitutional power is distributed and limited within a set of structures of governance which serves as its etiology.

Thus understood, the discourse of constitutionalism described above,[228] helps better organize and understand the constitutionalist discourse generated over the last century. The constitutionalist framework described above sharpens and contextualizes the focus and scope of constitutional discourse in its various aspects. Constitutionalism as taxonomy also organizes constitutional discourse into two principal sites within which political and academic actors engage in two important discursive contests. These are contests with important power dimensions.

> The emergence of the problem of the multiplicity of thoughtstyles which have appeared in the course of scientific development and the perceptibility of collective-unconscious motives hitherto hidden, is only one aspect of the prevalence of the intellectual restiveness which characterizes our age. In spite of the democratic diffusion of knowledge, the philosophical, psychological, and sociological problems which we presented above have been confined to a relatively small intellectual minority. This intellectual unrest came gradually to be regarded by them as their own professional privilege, and might have been considered as the private preoccupation of these groups had not all

228. *Supra* Part I.

> strata, with the growth of democracy, been drawn into the political and philosophical discussion.[229]

The first is the classical conflict between legitimate and illegitimate constitutionalist states. That contest invokes all five elements of the working definition.[230] This was the critical focus of constitutionalist discourse in the period immediately after the Second World War. It served as the basis for helping to reconstruct the German and Japanese constitutions.[231] It was critical for the construction of theories of illegitimacy of Soviet constitutionalism.[232] This was the source of principles critical of the legitimacy of governments formed by dictatorships,[233] and governments that excluded citizens on the basis of race (notably South Africa).[234] Lastly, it served as a basis for distinguishing

[229] KARL MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE 30 (1954).

[230]. *See* LASERSON, *supra* note 198, at 68-74; *see also* Backer, *supra* note 9, at 35.

[231]. *See* Backer, *supra* note 9, at 35.

[232]. LASERSON, *supra* note 198, at 69 ("Among the features of the Soviet state-order there was not much place for that atmosphere which in real democracy surrounds a constitution as a kind of lofty legislation as compared with usual lawmaking. In democracies a constitution is always considered as a document which shows the achievement by a given nation at a certain stage in the struggle of the citizens or subjects toward self-government and limitation of the powers of the state. This is why constitutions very often lay down their basic rules (norms) as negations of former restrictions.").

[233]. ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 255 (2002) ("Chile remained subject to military rule. In the eyes of the opposition and foreign critics, the constitution was merely a move to legitimate further dictatorship. Like most authoritarian constitutions, the elaborate democratic edifice of the 1980 constitution, even with its many restrictive precepts, was nothing more than a façade: Through the back door authoritarian rule reappeared and was firmly entrenched."). *See also id.* at 254 (arguing that "[c]ontrary to the general view that the constitution was merely an instrument of military rule, the constitution itself would impose additional constraints, now however upon the Junta as a whole. Strikingly, the commanders of the armed forces would end up bound by terms of their own earlier agreement.").

[234]. *See, e.g.*, ROBERT M. PRICE, THE APARTHEID STATE IN CRISIS: POLITICAL TRANSFORMATION IN SOUTH AFRICA, 1975-1990 220-49 (1991).

legitimate constitutionalist states from theocracies and other similar forms of state organization.[235]

The second site for conflict pits legitimate constitutionalist systems against each other. The differences between systems produce discourses of competition/harmonization/divergence similar to those of traditional comparative law interrogation of different families of law.[236] The focus of those differences has centered on the substantive values around which constitutionalist systems are organized. Values constitutionalism as it is being developed serves to distinguish the foundations of constitutionalist systems from each other—with respect to the core values of state organization. These values permit insiders (citizens) and outsiders (foreign states, other entities and individuals) to judge the constitutional order created as either legitimate and authoritative or not, and to permit as well a judgment of the distance between the values ideals of a particular constitutionalist system and its reality.

On the one hand, constitutionalist principles have been applied from a state centered perspective. Traditional nationalist constitutionalism looks inward for its ideology as well as its yardstick for measuring others. While mindful of developments elsewhere, it tends to privilege context, nuance, and internal manifestations of norms over formal suggestions of harmonization. It rejects the notion of convergence from without, though it is not averse to effective convergence as the act of will of the domestic sovereigns in accordance with their tastes. While nationalist constitutionalism does not like to be told what to do, it is sensitive about benchmarking and will tend to conform to some extent. Issues of interpretation, of the sources and meaning of the constitutional order are all grounded in the idea of the uniqueness of the polity and the constitutional settlement.

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[235]. *See, e.g.*, C. NORTHCOTE PARKINSON, THE EVOLUTION OF POLITICAL THOUGHT 121-166 (1958); Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. U. J. INT'L HUM. RTS. 4 (2005).

[236]. See PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 32-44 (Cavendish 3d ed. 2007) (1995); KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 1-73 (Tony Weir trans., Clarendon Press 3d rev. ed. 1998) (1977).

More recently, such principles have been applied from a global perspective—producing an institutionalist and customary global constitutionalism. Roscoe Pound might have been looking at the change in the relation of local law to legal ideals when he declared that "[t]hroughout the world there has been a revival of the universal ideal,"[237] yet this notion is nowhere more true than in the context of constitutionalism. Transnational constitutionalism looks to the communal traditions of the community of nations for the sources of substantive limits on state constitutive powers. Rejecting the notion that a state can stand alone in the construction of its government and in the exposition and implementation of the values underlying that system, transnational constitutionalism explicitly embraces the idea of a source of higher law outside the state or its local sovereigns. It concedes the possibility that the desires of a majority of its population may be checked by an ideology in the development of which it may participate but which it does not control.[238] A useful example of the differences between transnationalist and nationalist constitutionalism is evidenced by the approaches of the Supreme Courts of the United States and South Africa when confronted with the question of the legality of the death penalty under their respective constitutional systems.[239]

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[237]. ROSCOE POUND, supra note 71, at 29.

[238] Thus, "1. The legal system of East Timor shall adopt the general or customary principles of international law. 2. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette. 3. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid." Constiuttion of the Democratic Republic of East Timor (2002), available http://www.constitution.org/cons/east_timor/constitution-eng.htm. "We recognize that all peoples of the world have the right to live in peace, free from fear and want. We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations." Nihonkoku Kenpô (1946) Preamble (The Constitution of Japan).

[239]. *Compare* State v. Makwanyane 1995 (3) SA 391 (CC) at 391 (S. Afr.), *available at* http://law.gsu.edu/ ccunningham/fall03/DeathPenalty-SouthAfrica-Makwanyane.htm (South Africa), *with* Roper v. Simmons, 543 U.S. 551 (2005).

What is clear is that constitutionalism escaped its territorial bounds. It is no longer merely the peculiar expression of a uniquely constituted demos/ethnos. Constitutionalism has acquired a transnational aspect. This development challenges but has not eliminated traditional state bounded conceptions of constitutionalism. The challenge is not grounded in a suggestion of illegitimacy, rather it targets the values on which such traditional constitutionalism rests. The transnational element of constitutionalism is not a uniform construction—it is developing along both institutionalist and communal/comparativist lines. The great difference between transnational and nationalist constitutionalism lies in the assumptions about the source of ultimate authority over constitutional design. For nationalists, that ultimate authority remains with the state—contextualism and the local is privileged above other values. For transnational constitutionalists the source of ultimate authority is the community of nations. All states have a stake in the construction of constitutionalist values, but none control its development. Like states in a federal system, all are bound by the higher law of global constitutional values which serve as a limit on contextualist variation. For transnational constitutionalism harmonization within a universally applicable set of values is privileged above other values, and especially over the legitimacy of inconsistent local variations.

Yet constitutionalism has also escaped its transnational bounds. It has found a source for legitimate organization within the universal moral/ethical systems of religion. To a great degree, constitutionalism has proven that religion is not merely an object of governance—a right to be ordered along with the others in accordance with nationalist or transnationalist principles. Instead it serves as the source of those values which, beyond the control of any individual, can serve as the source for interpreting the application of state power.[240] The source of ultimate authority in

[240]. *Introduction: Political Culture and Constitutionalism, in* POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH, *supra* note 120, at 5 ("For example, is it possible to speak of a constitutional regime in a Muslim state that is governed by Islamic law (sharia)? We think so. To deny this possibility is to lend an irrevocably Western bias to our analysis. After all, a people's willingness to surrender to the authority of the state (in the person of a

theocratic constitutionalism is neither the people, as a political body, nor the community of nations, as a body of consensus governance. Instead the ultimate authority is the Divine. The priest serves as his intermediary. Priesthood is thus not merely a religious but a political vocation. The institutions of the religion on which state constitutional norms are grounded serve not merely as religious but also as political institutions. Constitutionalism within a religious values system is possible where religion is the values framework through which government is implemented, rather than where religion serves as a substitute for government, law, rule of law, etc.[241] Yet it rejects both the values foundations of nationalist and transnationalist constitutionalism as illegitimate.

Even theocratic constitutionalism, though, is not the only alternative to nationalist and transnationalist constitutionalism. Rising in parallel with religion as a foundation values system for constitutionalist systems are systems of rationalist constitutionalism, and in particular those grounded in Marxist-Leninist principles. Once the very proxy for illegitimate constitutionalism, Marxist Leninist systems, and in particular those of the People's Republic of China since 1979, have begun to elaborate a universal values structure that provides a basis for constitutionalist nation building consistent with the ideological framework of legitimating constitutionalism.[242] Even states organized on the principle of a single party in power can claim some constitutionalist legitimacy where the institutions created

king, or in the form of a particular philosophy or theology) is variable and culturally determined. We entertain the possibility (admittedly without much enthusiasm) that political modernization can take a path different from that of liberal democracy.").

[241]. *See* Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Ordering*, 16 IND. J. GLOBAL LEGAL STUD. - (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/paper.cfm?abstract_id= 1184118; Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49 WM. & MARY L. REV. 1179, 1179 (2008).

[242]. *See* Larry Catá Backer, *The Party as Polity, The Communist Party and the Chinese Constitutional State: A Theory of Party-State Constitutionalism* , 16 J. CHINESE COMP. & L. (forthcoming 2009); Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 J. TRANSNAT'L L. & CONTEMP. PROBS. 337, 349-55 (2004) (in the context of globalization).

adhere to the great principles of constitutionalism—especially its adoption of its rule of law principles and its substantive constitutionalism that avoid tyranny, oligarchy and mob rule by bureaucratizing and institutionalizing power under clearly articulated principles.[243]

The values element in constitutionalism—important as a key element in the elaboration of modern constitutional governments—now also serves as the site of great contests for consensus over which set of values ought to be inscribed in the constitutionalist structure of states.

> For one must understand this: every natural custom, every natural institution (state, judicial order, marriage, the care of the sick and the poor), every demand inspired by the instinct of life—in short everything that contains its value *in itself* is made altogether valueless, *anti*-valuable by the parasitism of the priest (or the "moral world order"): now it requires a sanction after the event—a *value conferring* power is needed to negate what is natural in it and to *create* a value by so doing.[244]

So it is with constitutionalism. Except now in place of the priest as a framework values infusing "type" there is now the doctor of law, or better understood in its continental form—*droit, derecho, diretto, recht*—for which task priest, lawyer, judge and politician are qualified.[245]

It is over values that variations in constitutionalism have arisen. And it is over values that constitutionalist systems compete for the legitimating loyalty of political communities. Though each variant—nationalist, transnational, theocratic, rationalist or natural law constitutionalism—might view the others as illegitimate (or as

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[243]. *See* Larry Catá Backer, *A Constitutional Court for China Within the Chinese Communist Party: Scientific Development and the Institutional Role of the CCP* (Consortium for Peace & Ethics Working Paper No. 2008-1, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1308598.

[244]. Friedrich Nietzsche, *The Antichrist*, *in* THE PORTABLE NIETZSCHE 597 (Walter Kaufmann ed. & trans. 1968).

[245]. *See* Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges,* 12 WM. & MARY BILL RTS. J. 117 (2003).

incompatible with its own values), each might be legitimately understood as constitutionalist rather than despotic.

Whatever the outcome of this competition, it has now become clear that for many people, states and communities, there may well be a higher law above constitutions. States no longer sit atop the hierarchy of sources of law, even of their own domestic constitutions. However manifested, that higher law may be compelling. Depending on the strength of the communities of believers, conformity to that "higher law" may be compelled. It seems that communities of the faithful—now communities of constitutionalist faithful—are reverting back to traditional forms of competition once reserved to religion.

Constitutionalism systematizes the way in which one can separate between legitimate and illegitimate systems of governmental organization in a principled manner. Yet it also systematizes the creation of variations in legitimate constitutionalist values frameworks, in accordance with the basic presumptions of constitutionalist government. Among these systems, markets in governance are being created. Unregulated for the moment, their systemization awaits a greater power.

IV. CONCLUSION.

Academic and policy engagements with constitutions and constitutionalism have largely been built around unstated frameworks within which legitimated activity is understood to take place. The essay suggests both the disorientation of much of the discussion and proposes an ideological framework that captures the assumptions about which constitutionalist discourse has evolved. No longer is it possible to think about constitutions without considering the underlying values that each embraces and testing those values against a set of markers of legitimacy. This essay suggests that the way in which constitutions are understood has changed dramatically since the time of the founding of the American Republic. But important segments of academic and legal discourse about constitutions are being conducted without the participation of many Americans, who continue to embrace

nineteenth century notions of national primacy and exclusivity. This is ironic in the face of the actions that have been the hallmark of American policy since 1945, contributing to the transnational constitutionalism that marked the vanguard element of constitutional development after 1945, and now again after 2003, contributing to the creation of theocratic constitutionalist regimes in Iraq and Afghanistan. In both cases, constitutionalist systems emerged that emphasized universal value systems as limits on expressions of contextual national predilections for governance.

This essay has suggested the context in which ideas about constitutionalism have emerged in the early part of this present century. Once a belief in the power of states to construct themselves by reference to the characteristics of their own unique populations, constitutionalism was limited to matters of transposing contextual characteristics into a document that required interpretation true to the underlying belief systems from out of which it was created.[246] American constitutional law followed that pattern, and still does to a great extent. That was the limit of constitutionalism.

But tremendous changes were brought to constitutionalism outside the United States; changes in which the Americans have had a great hand, but which have little affected the internal understanding of the law system they have helped create.[247] Principal among these has been the rise of transnational constitutionalism, embracing a belief in the power of the community of nations to develop and impose values based limits on the power of states to adopt whatever constitutional norms might strike them. Constitutionalism now became a basis for judging the legitimacy of systems of governance, and for providing a framework within which legitimate systems could be created.

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246. *See supra*, Part I (discussing numerous examples). S*ee also* Craig Green, *Erie and Problems of Constitutional Structure*, 96 CAL. L. REV. 661, 687-92 (2008); Richard A. Primus, *When Should Original Meanings Matter?,* 107 MICH. L. REV. 165, 212-13 (2008). *See generally* Richard Stith, *Securing the Rule of Law Through Interpretive Pluralism: An Argument from Comparative Law*, 35 HASTINGS CONST. L. Q. 401, (2008).

247. *See* Backer, *supra* note 12, at 61-65. See also Roper v. Simmons, 543 U.S. 551, 575-79 (2005)and id. (Scalia, J., dissenting at section III).

These functions added to rather than replaced the old focus of constitutionalism to the methodologies of fidelity to adopted norms.[248] Values based constitutional limits have now expanded well beyond the original framework. Other values systems have now sought to compete with transnationalist values constitutionalism and replace it if they can. Among them are theocratic and rationalist constitutionalist values systems.

These changes have affected the discourse of constitutionalism that has developed from out of that context, in which academics and others have sought to understand and apply notions of constitutionalism. Action and thought have thus come together to produce a set of beliefs and assumptions, which though usually assumed, are rarely expressed together. This essay reviewed that discourse. Together, discourse and practice have suggested an approach to a definition of constitutionalism consisting of five elements: (1) a system of classification, (2) the core object of which is to define the characteristics of constitutions (those documents organizing political power within an institutional apparatus), (3) to be used to determine the legitimacy of the constitutional system as conceived or as implemented, (4) based on rule of law as the fundamental postulate of government (that government be established and operated in a way that limits the ability of individuals to use government power for personal welfare maximizing ends), and (5) grounded on a metric of substantive values derived from a source beyond the control of any individual.[249]

[248]. On constitutional fidelity, see Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature,* 49 SANTA CLARA L. REV. 165, 210 (2008) ("In the end, my hope is to retain proximate fidelity to the Constitution."); Reva B. Siegel, *Dead Or Alive: Originalism as Popular Constitutionalism in Heller,* 122 HARV. L. REV. 191, 220 n.137 (2008) ("As Justice Scalia analyzed the question in 1989, judges should interpret the Constitution to enforce fidelity to 'original values'; it was abandoning original values that required a constitutional amendment."). For an example from German constitutional law, see Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems,* 90 VA. L. REV. 731, 739-62 (2004).

[249] *See supra* Part II (for discussion).