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REVISITING *VAN GEND EN LOOS*

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Is Global Constitutionalism Meaningful or Desirable?

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Prologue:
Revisiting *Van Gend En Loos*

Fifty years have passed since the European Court of Justice gave what is arguably its most consequential decision: *Van Gend en Loos*. The UMR de droit comparé de Paris, the European Journal of International Law (EJIL), and the International Journal of Constitutional Law (I•CON) decided to mark this anniversary with a workshop on the case and the myriad of issues surrounding it. In orientation our purpose was not to 'celebrate' *Van Gend en Loos*, but to revisit the case critically; to problematize it; to look at its distinct bright side but also at the dark side of the moon; to examine its underlying assumptions and implications and to place it in a comparative context, using it as a yardstick to explore developments in other regions in the world. The result is a set of papers which both individually and as a whole demonstrate the legacy and the ongoing relevance of this landmark decision.

My warmest thanks go to the co-organizers of this event, Professor Hélène Ruiz Fabri, Director of the UMR de droit comparé de Paris, and Professor Michel Rosenfeld, co-Editor-in-Chief of *I•CON*.

JHHW

IS GLOBAL CONSTITUTIONALISM MEANINGFUL OR DESIRABLE?

By Michel Rosenfeld*

Abstract

Upon conceiving constitutionalism on the scale of the nation-state as transparent and unproblematic, one may think global constitutionalism to be a mere utopia. On closer analysis, however, legitimation of nation-state constitutionalism turns out to be much more complex and contested than initially apparent, as becomes evident based on the contrast between liberal and illiberal constitutionalism. Upon the realization that nation-state liberal constitutionalism can only be legitimated counterfactually, the social contract metaphor emerges as a privileged heuristic tool in the quest for a proper balance between identity and difference. Four different theories offer plausible social contract justifications of nation-state liberal constitutionalism: a deontological theory, such as those of Rawls and Habermas, which privileges identity above difference; a critical theory that leads to relativism; a thick national identity based one that makes legitimacy purely contingent; and a dialectical one that portrays the social contract as permanently in the making without any definitive resolution. Endorsing this last theory, I argue that differences between national and transnational constitutionalism are of degree rather than of kind. Accordingly, it may be best to cast certain transnational regimes as constitutional rather than as administrative or international ones.

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1. Introduction

For the six-decade period that began in 1945 with the adoption of the UN Charter[1] and ended in 2005 with the rejection of the EU's 2004 Treaty-Constitution in referenda held in France and the Netherlands,[2] constitutionalism spread to all corners of the world. Moreover, during the period in question constitutionalism began a worldwide journey in at least two distinct ways. First, a large number of nation-states throughout all continents adopted new constitutions that were in the spirit of the ideal of modern constitutionalism – consisting essentially in limitation of the powers of government, adherence to the rule of law, protection of fundamental rights, and guarantees for the maintenance of an adequate level of democracy. And, secondly, constitutionalism spilled over from its traditional nation-state setting to find new horizons within transnational and even to some extent global arenas. Also, the new transnational dimension of constitutionalism was propelled by a concurrent internationalization of constitutional law and constitutionalization of international law. The internationalization at stake has had in turn two distinct dimensions: a convergence of constitutional norms and values across a multitude of nation-states[3]; and a migration of such norms and values into transnational orderings encompassing several nation-states and/or non-state actors operating across national borders.[4] On the other hand, the constitutionalization of international law has similarly proceeded along two axes: constitutional-type norms and values have increasingly permeated international law through the deployment of *jus cogens* and through other means[5]; and, international legal norms as set in treaties essentially amounting to contracts among signatory nation-states have more recently in some cases acquired a constitutional dimension by virtue of their allocation of legal rights and obligations among nation-states parties to an international treaty and their

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[1] See Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia J Transnat'l L*(1998) 529 (arguing that the UN Charter functions as a world constitution).

[2] The Treaty establishing a Constitution for Europe (TCE) was signed on 29 Oct. 2004 by all (then) 25 members of the EU, but failed due to being rejected in ratifying referenda in France and the Netherlands. It was then reintroduced in a different wrapping – the Treaty of Lisbon, signed on 13 Dec. 2007, which entered into force on 1 Dec. 2009. The Lisbon Treaty, however, is a treaty *tout court* and not (formally at least) a constitution. See N. Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (2nd edn, 2010), at 77–78.

[3] *Ibid.*, at 4.

[4] See H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008).

[5] See de Wet, 'The Constitutionalization of Public International Law', in M. Rosenfeld and A. Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012), at 1209, 1213–1218.

own citizens. In this latter connection, a key turning point was provided half a century ago by the CJEU (then the ECJ) in its landmark decision in the case of *Van Gend & Loos v. Netherland Inland Revenue Service*,[6] in which it held that a Dutch citizen could sue his own state for violating an EC (the predecessor of the EU) treaty provision. As the ECJ stressed:

> the [then predecessor of the EU] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights...and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage...[A]ccording to the spirit ,the general scheme and the wording of the Treaty, [it] must be interpreted as producing direct effects and creating individual rights which national courts must protect.[7]

The 2005 rejection of the EU Treaty-Constitution, which at the time may have seemed but a bump in the road,[8] may now in hindsight mark the beginning of a key turning point veering in the opposite direction and moving away from the hopes and projects previously associated with global constitutionalism. Moreover, this apparent reversal of the onward march of global constitutionalism may be occurring at both levels identified above. Indeed, on the one hand, very recent illiberal nation-state constitutional changes in countries such as Egypt, Hungary, and Venezuela loom as part of a phenomenon that one commentator has labelled 'abusive constitutionalism',[9] thus eroding the thrust to conform to the ideal of constitutionalism. On the other hand, in the wake of the economic crisis that has gripped Europe in the last few years, the EU constitutional project seems to have lost steam. Increasing numbers of citizens in EU Member States

[6] [1963] ECR 1, [1963] 2 CMLR 105.
[7] *Ibid.*
[8] In the words of Valéry Giscard d'Estaing, president of the EU Constitutional Convention that culminated in the drafting of the 2004 Treaty-Constitution, '[t]he Treaty of Lisbon is the same as the rejected Constitution. Only the format has been changed to avoid referendums' (quoted in several major European newspapers on 27 Oct. 2007).
[9] See Landau, 'Abusive Constitutionalism', 47 *UC Davis L Rev* (2013) 189 (forthcoming).

appear to have lost confidence in the European project;[10] there has been a surge of right wing extremism in many EU countries;[11] and a proliferation of proposals within various EU Member States to withdraw from the Union.[12] In addition, there is arguably a current retreat from the internationalization of constitutional law as some of the signatories of the European Convention on Human Rights (ECHR) seek to dilute the powers of the European Court of Human Rights (ECtHR).[13] Concurrently, there is also arguably a current move away from the constitutionalization of international law, in practice if not in form, as evinced by the international community's apparent paralysis in the face of the enormous number of crimes against humanity and apparent return to Cold War power politics in the context of the currently ongoing civil war in Syria.[14]

What the above observations underscore is both that the nexus between constitutions and the ideal of constitutionalism is more fragile than may have seemed at the dawn of the new century and that transnational or global constitutionalism is not only a hotly contested concept but also one that may be incoherent or purely utopian. In what follows, l attempt to shed some light on whether the concept of global constitutionalism is altogether a meaningful one, and on whether it would be useful or desirable to pursue global constitutionalism in case its deployment were plausible or symbolically productive as a counterfactual ideal. In order to do so, it is necessary to address both prescriptive and descriptive issues and to assess both factual and counterfactual considerations. Section 2 focuses on certain key jurisprudential issues that confront constitutionalism as a concept above and beyond any particular context in which it may be operative, concentrating particularly on how constitutionalism may be suited to handle the dynamic between identity and difference which is bound to be encountered

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[10] See Kanter, 'Grind of Euro Crisis Wears Down Support for Union, Poll Finds', *NY Times*, 14 May 2013, at B1.

[11] See R. Melzer and S. Serafin (eds), *Right Wing Extremism in Europe: Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies* (2013).

[12] See Boffey and Helm, '56% of Britons Would Vote to Quit EU in Referendum, Poll Finds', *Observer*, 17 Nov. 2012; 'Brussels' Fear of the True Finns: Rise of Populist Parties Pushes Europe to the Right', *Spiegel International Online*, 27 Apr. 2011 (reporting rise of anti-EU parties and sentiment in many countries within the EU).

[13] See Miller and Horne, 'The UK and Reform of the European Court of Human Rights', SN/IA/6277, Library House of Commons, 27 Apr. 2012 (discussing UK government proposal supported by other countries to reduce the powers of the ECtHR and the objections raised by several human rights NGOs against such proposal).

[14] See Lynch, 'Russia, China veto U.N. sanctions resolution on Syria', *Washington Post*, 19 July 2012 (frustration through use of veto UN SC action to address humanitarian crisis in Syria).

in any contemporary polity. Section 3 examines the features, functions, and elements of legitimacy that a nation-state's constitution must possess in order to approximate the ideal of constitutionalism and in light of this explores the possibilities and plausibility of global constitutionalism. Finally, section 4 addresses the issue of the desirability of global constitutionalism in the context of the dynamic at the level of the nation-state between liberal and illiberal constitutions.

2. Constitutionalism, Constitution, and the Dynamic Between Identity and Difference

A. Liberal versus Illiberal Constitutions

Although no actual constitution is likely fully to live up to the above-specified ideal of modern constitutionalism,[15] a key distinction must be drawn between constitutions that aspire and endeavour to approximate that ideal and those that do not. Moreover, among the latter a further distinction must be drawn between constitutions that on paper basically adhere to the fundamental requirements of constitutionalism but remain largely unimplemented, such as typical Soviet era constitutions – what Sartori has termed 'façade constitutions'[16] – and constitutions that by their very terms depart from, rather than approximating, the ideal in question. Furthermore, it is in this latter sense that recent constitutional developments in Egypt, Hungary, and Venezuela have moved these countries ever farther away from the ideal of constitutionalism. Thus, to cite but one example, the new 2012 Hungarian Constitution dilutes limitations on governmental powers by, among other things, reducing the powers of the country's Constitutional Court;[17] was launched as the constitution of 'the Hungarian Nation' rather than that of the 'People of Hungary'[18] with obvious exclusionary consequences regarding the protection of fundamental rights of ethnic minorities within the country; and, provides

[15] The US, e.g., though explicitly committed to the fundamental requirements of constitutionalism for over 200 years *(see Marbury v. Madison*, 5 US 137 (1803)), has had glaring failures in relation to these requirements throughout its history. The most notorious among these was the constitutional enshrinement of slavery from 1787 to 1865: see US Const., Art I, Sec. 2 and 9 (1787) (taking slavery into account and protecting the slave trade) and US Const. Am. XIII (1865) (making slavery unconstitutional).
[16] Sartori, 'Constitutionalism: A Preliminary Discussion', 56 *Am Political Science Rev* (1962) 853, at 861–862.
[17] See European Commssion for Democracy through Law (Venice Commission), Opinion 720/2013 CDL-AD(2013)012, 17 June 2013, at paras 78–87.
[18] See 2012 Hungarian Const., Preamble.

the current government, which crafted it and brought it into being, with powers far exceeding those legitimately inherent in its current mandate, hence tampering with the future preservation of an adequate level of democracy.[19]

If cases such as that of Hungary and those of another handful of nations were to remain few and far apart, then their theoretical implications might be confined to a reminder that expansion of commitment to the ideal of constitutionalism is neither automatic nor all but assured. If these cases were to end up as the precursors of a widespread trend towards illiberal constitutions, however, then the worldwide trend towards greater nation-state commitment to the ideal of constitutionalism might be actually reversed, and this could well be achieved through use of the same constitutional tools that were deployed in the pursuit of the ideal in question. In other words, if illiberal constitutions were to become the rule rather than the exception, then the rhetoric, vision, aims, and institutional constructs which modern constitutionalism had forged over the course of its expansion could well be turned against it in the pursuit of its own demise.

What unites liberal and illiberal nation-state constitutions is that they both equally figure as charters for self-government. What divides these two types of constitutions, on the other hand, is how they handle difference, plurality, and diversity. The central purpose of a modern democratic constitution is to reconcile identity and difference sufficiently within the relevant polity so as to make self-government at once possible and (at least in principle) acceptable to all members of that polity as legitimate. Accordingly, the concept of the modern democratic constitution is well captured in the metaphor of the social contract which bears analogies to the legal contract.[20] The latter provides the legal means to reconcile identity and difference among the parties to it by affording them the means to reach a 'meeting of minds' that carves out a unity of purpose amidst differences in interests. Similarly, social contractors with a plurality of divergent interests, but united in their desire to live together in a fair and mutually acceptable political unit, manage to reconcile what unites them and what sets them

[19] See Opinion 720/2013,*supra* note 17, at paras 129–134.

[20] For an extensive discussion of the similarities and differences among the social contract, as conceived by Locke, Hobbes, Rousseau, and Kant, and the legal contract, particularly as it emerged during the era of freedom of contract, see Rosenfeld, 'Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory', 70 *Iowa L Rev* (1985) 769.

apart through their agreement to be mutually bound by their social contract. Moreover, a constitution envisaged as social contract can thus be viewed as capable of reconciling the plurality of interests, values, ideologies, political visions, cultures, religions, etc., within the relevant arena of interaction and the identity underlying the commonly shared aspiration to cohere into a single political unit. And consistent with that, a liberal constitution is committed to account in some fashion for the differences among all those within the relevant arena of interaction.[21] In contrast, an illiberal constitution denies recognition and accommodation of differences that are crucial to significant portions of those who are settled within the relevant political arena.[22]

B. The Social Contract Metaphor, Liberal Constitutions and Factual and Counterfactual Legitimation

Leaving for the moment illiberal constitutions aside, the social contract serves as an apt metaphor for a liberal constitution's aspiration to combine a unity of the whole of all those subject to the constitutional order within a polity and its need, for purposes of legitimacy, to leave or make sufficient room for relevant differences among all those within its scope to find adequate expression. Adapting Habermas's criterion whereby laws are legitimate if they can be conceived as both self-imposed and binding,[23] a constitution could be deemed legitimate if it could be counterfactually reconstructed as a social contract-like arrangement that a person concerned would subscribe to and agree to be bound by. Liberal constitutions are thus supposed to be made by 'We the People' for 'We the People' and implemented by the latter as the product of its own will or, to

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[21] Contrast (in the context of liberal constitutions that typically address the differences of all but not all differences), e.g., France's constitution, which only recognizes individual regarding differences: see Conseil Constitutionnel (CC) Corsica decision, No. 91-290 DC, 9 May 1991 (holding it unconstitutional for the French parliament to grant collective political powers to the people of Corsica) with Canada's constitution, which embraces multiculturalism and affords recognition to group differences such as linguistic ones: see *Mahe v. Alberta*, [1990] 1 SCR 342 (Sup Ct Canada).

[22] To return to the Hungarian example discussed above, by being identified as the constitution of Hungarian nationals, the current Hungarian Constitution dismisses the plurality, differences, etc., relating to those who are (and have long been) part of the People of Hungary without being Hungarian nationals. Moreover, because of its explicit inclusion within its scope of protection of Hungarian nationals who are citizens of other nation-states, such as Romania or Slovakia, and who live beyond Hungary's borders: see 2012 Hungarian Const., *supra* note 18, Art. D, the Hungarian Constitution potentially disrupts the bases for constitutional reconciliation of identity and difference in neighbouring constitutional democracies.

[23] See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans, W. Rehg, 1996), at 38–39.

borrow Rousseau's expression, as the expression of its 'general will'.[24] That, however, is *factually* impossible if for no other reason than that for any constitution applicable during the lifetime of several generations the 'We the People' who makes the constitution is not the same as those for whom it is made and who must accept it as (self-)binding. Also, the factual impossibility at stake is the same whether a constitution is made for a city-state like Rousseau's Geneva, a nation-state like France or the US, a transnational polity like the EU, or a global political union that encompasses all human beings throughout the world. Moreover, turning to actual historical experiences such as that of the US, the 'We the People' that made that country's 1787 Constitution left out many contemporaries who became subject to its prescriptions, including women and African-American slaves.[25] In short, factual legitimacy is impossible not only because of the temporal dimension of multi-generational constitutions, but also because of inevitable shortfalls regarding democracy. The social contract requires the unanimous consensus of all those bound by it, and no actual constitution-making or ratifying could possibly be unanimous or account for all relevant differences while maintaining a coincidence or full continuity between the constituent power (*pouvoir constituant)* and the constituted power (*pouvoir constitué*).

As constitutional legitimation cannot be factual, it must be *counterfactual.* But that poses a thorny theoretical problem to the extent that the validity of a contractual arrangement depends not only on the *terms* of the contract but also on the *fact* that an agreement was reached among the parties to it. If two actual legal contracts for the sale of identical goods differ regarding their respective terms, they can still be equally valid and binding so long as each pair made up of a buyer and a seller has had an actual 'meeting of minds'. As no social contract or constitution can count with the actual agreement of all those who are meant to be bound by it, the factual agreement requirement must be replaced by a counterfactual one. What would or should the relevant social contractors or citizens subject to a particular constitution have agreed to? Can there be any meaningful broadly acceptable criterion of the relevant 'would' or 'should'?

[24] See J.-J. Rousseau, *The Social Contract* (1762) (ed. C. Frankel, 1947), at 18.
[25] The Framers of the 1787 US Constitution were 55 white males, and women and slaves could not vote at the ratifying conventions on which the Constitution depended for its final adoption: see M. Rosenfeld, *The Identity of the Constitutional Subject* (2010), at 34–35.

There seem to be essentially four possible answers to this last question. The first is suggested by theories such as Rawls's hypothetical social contract concluded behind 'a veil of ignorance'[26] and Habermas's consensus-based discourse theory.[27] These theories combine a proceduralist approach with a deontological one and maintain that questions of justice and of the right can be answered independently of questions of the good. Accordingly, whatever differences regarding what constitutes the good may exist within a polity, constitutional essentials, to borrow Rawls's term,[28] consistent with the ideal of constitutionalism may be derived from universally applicable criteria of justice and of the right. Accordingly, the first answer to the question under consideration is that there is a universally availability of a justice-based universal means for the achievement of constitutional unity above all actual differences. The unity at stake finds specific expression in Habermas's concept of 'constitutional patriotism',[29] which is encapsulated in the notion that one can rise above all particular differences, be they sectarian, cultural, national, or ethnic, to commit to a common project of forging a unified polity resting on universally shared constitutional values. Moreover, it follows from this answer that constitutionalism and constitutional patriotism are equally conceivable at all levels of political interaction, spanning from the city to the globe.

The second answer to the question under consideration draws on critical theory to assert that there is no way to provide any comprehensive, universal, or fully persuasive counterfactual justification of why all those subjected to a constitution might or ought to feel legitimately bound by it. Underlying this answer is the conviction that constitutions must be historically contingent, as indicated by the US's 'We the People' example alluded to above, and that the constitutional institutions, values, and norms that are enshrined in any particular constitution are bound to be biased in favour of the agenda and conception of the good of some of those subjected to that constitution to the exclusion or detriment of others who are similarly situated. A good illustration of this position is provided by the Critical Legal Studies (CLS) critique of rights to the effect that what purport to be universally applicable fundamental rights in the equal interests

[26] See J. Rawls, *A Theory of Justice* (1971), at 11.
[27] See Habermas, *supra* note 23. Although Habermas's discourse theory is not strictly social contractarian, it certainly fits within that general tradition. See Rosenfeld, 'A Pluralist Critique of Contractarian Proceduralism', 11 *Ratio Juris*(1998) 291.
[28] See J. Rawls, *Political Liberalism* (1993), at 156.
[29] See Habermas, *supra* note 23, at 118.

of all turn out to be fit to advance the interests and values of some to the exclusion of those of others.[30] Consistent with this critical perspective, there are neither factual nor plausible counterfactual reasons why *all* those subjected to a particular constitution would or should genuinely consent to be bound by it. The critical perspective does not do away with the distinction between liberal and illiberal constitutionalism, but it attenuates the normative contrast between them. Liberal constitutionalism includes all, but embraces the perspective of only some, whereas illiberal constitutionalism excludes altogether some of those subjected to its prescriptions. Furthermore, because of its inability to incorporate or rise above the perspectives of all concerned, liberal constitutionalism fails to achieve overall legitimacy at all levels, whether national, sub-national, or transnational.

The third answer to the above question relies on the assumption that a coherent constitutional unit holds together only in so far as all those subject to it share a common identity. Leaving aside for the moment what particular identity might be at play, be it ethnic, national, or constitutional in nature,[31] the idea is that all concerned would or should embrace the constitution to which they are subject as their own. In other words, from this perspective, there is a sufficiently defined commonly shared identity among all those subject to a given constitution in order for everyone concerned factually or counterfactually[32] to accept the prevailing constitutional order as part of who he or she is. Moreover, the common identity at stake would have to be a thick one rather than a thin one, and it would have to be internalized rather than derived from abstract principles such as those put forth by Rawls or Habermas. From this perspective, the social contract would either be superfluous or it would be used to reinforce existing bonds of identity rather than to mediate between identities and differences. Moreover, it would appear that heavy emphasis on a common identity would be most compatible with a city-state or an ethnically homogeneous nation-state, but not with a transnational polity in which clusters of differences would seem bound to far outweigh clusters of identity. Adoption of this third answer does not necessarily preclude a transnational

[30] See Tushnet, 'An Essay on Rights', 62 *Texas L Rev* (1984) 1363.
[31] For a discussion of the distinction between national and constitutional identity see Rosenfeld, *supra* note 25, at 11–12.
[32] Counterfactual acceptance, in this context, refers to instances where a person factually rejects the legitimacy of the relevant constitutional order while actually sharing the same background and values with those who do accept the constitutional order in question as the legitimate reflection of their identity.

constitution, however, to the extent that national identity and the continuity of the nation-state depend on common projection of an 'imagined community'.[33] Indeed, as Anderson emphasizes, a nation, as opposed to a family or a tribe, is made up of strangers and it cannot cohere into a working unit unless it is propelled to imagine itself as a distinct community.[34] In view of this, if a nation-state, including a multi-ethnic or multicultural one, can imagine itself as a community, then there seems to be no logical impediment for a transnational complex of interacting members to do likewise. It may be that the larger and more diverse the relevant unit may be, the more difficult it would become for it to imagine itself as a single community. But that would seem to be due to differences in degree rather than differences in kind.

Finally, the fourth answer to the question under consideration, which is the one endorsed in this article, relies on a dynamic approach that partially incorporates and redeploys the respective conceptions that inform the three previous answers. From this perspective, principles meant to bridge the gap between differences carved out in the confrontation among competing conceptions of the good without however ever transcending the differences in question combine with a common identity that is always under construction and subject to change. This leads to a two level dialectic – one focused on justification, the other on differentiated identification – pitting identity against difference that cannot evolve towards any definitive resolution and thus inevitably falls short of any comprehensive, definitive, or all-encompassing legitimation of any prevailing constitutional order. In terms of the social contract metaphor, the dialectical perspective under consideration is perhaps best imagined as a social contract that is perpetually in the making without ever culminating into a final agreement. The contractors agree to continue negotiating and working to manage and accommodate their differences. This agreement to continue working towards an agreement constitutes the social contractors' pole of identity which is set against an array of differences that are sufficiently accommodated to propel the contractors to continue dialoguing and bargaining while at the same time remaining impervious to the degree of integration that would allow for consummation of the social contract. Furthermore, what this

[33] See B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1991).
[34]. *Ibid.*, at 7.

implies in terms of the corresponding constitution is an ongoing juxtaposition of the *pouvoir constituant* and the *pouvoir constitué*. In other words, the making of the constitution is endlessly ongoing and under debate and contestation, but at the same time the constitution must be postulated as settled to the extent necessary to maintain the unity, order, and cohesion that are required for the peaceful continuation of a joint search for a fully realized constitution that would strike the right balance between identity and difference.

From the perspective associated with the fourth answer, Rawlsian and Habermasian theories which derive from Kant fall short in as much as they overemphasize identity at the expense of difference by minimizing differences or underestimating their resilience.[35] On the other hand, critical approaches, such as those put forth by CLS, tend to overemphasize difference at the expense of identity, either by embracing relativism and thus foreclosing any bridges among competing conceptions of the good, or by reducing law, including the law of the constitution, to power politics, thus setting insurmountable hierarchies among differences which preclude any meaningful harmonization.[36] In addition, pinning constitutional unity on a full blown common identity without more appears too unlikely and too fortuitous for purposes of constitutional legitimation. The constitutional model that comes closest to grounding the constitution on a thick pre-given common identity is the ethnocentric one, but even that model requires some mediation.[37] Indeed, a self-sufficient unmediated thick common identity is conceivable at the level of the family or the tribe, but not at that of any constitutional project among strangers. Accordingly, to the extent that a constitution is in the nature of a social contract among strangers it does depend on a common identity, but it must be a constructed one along two distinct dimensions: the identity that unites all those whose constitution it is,[38] and the identity that shapes the particulars of the constitution. In other words, the dual identity in question concerns

[35] See M. Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account* (2011), at ch.1 for a detailed discussion of this point.

[36] On CLS's tendency to reduce law to power politics see M. Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* (1998), at 113, 333, and 338.

[37] See Rosenfeld, *suprav* note 25, at 152–156.

[38] This identity can be that of an ethnic group or of all those persons who happen to reside in an existing (pre-constitutional) political unit: see *ibid.*, at ch. 1.

respectively the 'who' and the 'what' that demarcate the singularity of any actual constitution.

The 'who' and 'what' that carve out a constitution's singularity must be linked through a common identity, meaning that who is included depends on what is shared in common, and conversely that the particulars of any commonly shared narrative depend on who is included and who is excluded. For example, the 1787 US Constitution which accommodated slavery excluded slaves from becoming part of the 'who', but the repeal of slavery after the US Civil War arguably allowed for integration of ex slave owners and ex slaves in a modified constitutional narrative boosted by the introduction for the first time of an equality right.[39] More generally, as I have argued at length elsewhere, constitutional identity, as distinguished from national identity, is better understood as amounting to *a lack* primed to reprocessing elements of national identity as well as of several extra-constitutional narratives in order to set forth the salient characteristics of an imagined constitutional community.[40] Furthermore, the reprocessing involved is principally carried out through three discursive devices: negation, metaphor, and metonymy.[41] More specifically, to arrive at a workable constitutional identity, one must start with negation involving rejection of other identities, such as the national and other pre- and extra- constitutional ones, followed by a reconstruction (that includes incorporation of certain elements from the rejected identities) along an axis of synchronic unification (metaphor) and an axis of diachronic differentiation (metonymy).[42]

Still within the ambit of the path foreseen by the fourth answer, the process of identification achieved through the dynamic unfolding of a constitutional identity must be combined with a process of justification which comprises an attempted reconciliation of the normative imperatives deriving from the ideal of constitutionalism with the identity-based particulars elaborated through the work of negation, metaphor, and

[39] See US Const. Am XIV (1868). Although it was impossible for slaves to belong to the constitutional 'who', it is a matter of debate at what point the ex-slaves may be reasonably considered to have signed on to a joint project. It seems of course plausible to argue that so long as official racial segregation was deemed constitutional, the ex-slaves would have had no reason to regard themselves as partners in a common constitutional project.
[40] See Rosenfeld, *supra* note 25, at 64–65.
[41] *Ibid*.
[42] *Ibid.*, at 58–65.

metonymy. Accordingly, an acceptable instantiation of a working order sustaining a mutually reinforcing justification of a limitation of the powers of government, adherence to the rule of law, protection of fundamental rights, and maintenance of an adequate level of democracy must be tailored to the particular 'who' and 'what' carved out by the deployment of the relevant corresponding constitutional identity. As both the constitutional 'who' and 'what' and the justification will inevitably remain contested and contestable in terms of an acceptable or optimal equilibrium between identity and difference, both identification and justification will be subject to an ongoing dialectic pursuant to which resolution of one conflict will lead, without exception, to another conflict characterized by a shift in poles of opposition and in the clash of perspectives. The dialectic in question will not lead to any final resolution allowing for a full harmonization of identity and difference, with the consequence that all legitimation of a constitution will be incomplete and less than fully inclusive.

In sum, the dialectic involved will be Hegelian in nature, but without any continuous course of historical progress or any prospect of final resolution.[43] Moreover, in line with the idea discussed above of engagement in an ongoing social contract negotiation with a final meeting of the minds yet to be achieved, the pertinent counterfactual criterion of legitimation would address why one would or should continue her commitment to work as a would-be contractor in a social contract in the making. And such commitment would or should depend on articulation of a reasonable basis for sufficient identification with the current status of the 'who' and 'what' with the prospect of greater identification through further contractual negotiation within a plausible horizon of possibilities. In view of the plurality of considerations and the dialectical approach associated with this fourth answer, this does not – at least *ex ante* – favour or preclude constitutionalism for the city, the nation-state, the transnational region, or the world.

C. Aligning the 'Constitution's Law' with Adherence to the Rule of Law

For a liberal constitution to be both practically viable and normatively defensible, it must combine what the constitution prescribes, which may be referred to as the

[43] See Rosenfeld, *supra* note 35, at 42–51 for an extended discussion of the kind of Hegelian approach presently suggested in the context of the handling of conflicts between identity and difference from the standpoint of comprehensive pluralism.

'constitution's law',[44] with a constitutional guarantee of adherence to the rule of law. On the one hand, the constitution's law is not the equivalent of the constitution as law or, in other words, what a constitution prescribes need not be reduced to law or be made legally enforceable in order to become functional or normatively adequate. Thus, for example, the French 1789 Declaration of the Rights of Man and the Citizen, incorporated in several of France's many constitutions, did not become judicially enforceable before the adoption of France's current 1958 Constitution.[45] Consistent with this, the rights enumerated in the 1789 Declaration functioned as political rights rather than as legal rights for the most part of their history.[46] On the other hand, adherence to the rule of law – at least in the sense of commitment to a regime of prospective publicly proclaimed laws applied with consistency and integrity – need not be tied to a (liberal) constitution as evinced by the emergence of the positivistic *Rechtsstaat* in Germany in the aftermath of that country's failed 1848 *bourgeois* revolution.[47] Thus, for example, the positivistic *Rechtsstaat* would be perfectly compatible with parliamentary adoption and judicial application of a law that would violate fundamental rights routinely protected under all contemporary liberal constitutions.[48]

In the context of nation-states with a liberal constitution there is generally sufficient congruity and continuity between the constitution's law and the constitution as law to provide a solid constitutional grounding to adherence to the rule of law. Ordinarily, the constitution's law, whether written or unwritten, provides for a sufficient body of (constitutional) law subject to judicial interpretation and application and to executive enforcement to guarantee limitation of powers, adherence to the rule of law, protection of fundamental rights, and to maintain some acceptable level of democratic self-

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[44] The 'constitution's law' should be distinguished from what Dicey termed the 'law of the constitution' which only encompasses those prescriptions of the constitution which are judicially enforceable: see A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (3rd edn ,1889), at 22–24.

[45] See Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', 74 *S California L Rev* (2001) 1307, at 1330–1033.

[46] *Ibid.*

[47] *Ibid.*, at 1324–1326.

[48] In contrast, under contemporary Germany's constitution, the Basic Law, the validity of parliamentary laws is subject to judicial invalidation by the Federal Constitutional Court for failure to comply with protection of constitutionally enshrined fundamental rights. Accordingly, the positivistic *Rechtsstaat* – which is best understood as meaning 'state rule through law' – has been supplanted by the *Verfassungsstaat* – that is 'state rule through the constitution as law'. See Rosenfeld, *supra* note 45, at 1328–1330.

government.[49] How much constitutional law derives from the constitution's law varies from one liberal constitution to the next – for example, limitation of powers may be sustained exclusively through political deployment of checks and balances or primarily entrusted to judicial supervision – but in all cases constitutional law must be apt to mediate between the constitution's law and adherence to the rule of law for the constitution in question to remain viable and legitimate. At one end of the spectrum, all facets of the constitution's law may be made subject to authoritative judicial interpretation, with the consequence that a complete overlap between the constitution's law, constitutional law, and (adherence to) the rule of law would result. At the other end of the spectrum, in contrast, no judicial review of the constitution's law would be instituted or permissible. However, even in such an extreme case, so long as the constitution's law provided the means to determine whether a particular law is constitutional or unconstitutional, the body of laws that emerged as constitutional could be regarded as filling the function of constitutional law in the context of constitutionally assuring adherence to the rule of law. For instance, imagine that the relevant constitution's law vested all legislative power in a democratically elected national parliament and all judicial power in an independent judiciary charged with application of the parliament's laws to individual cases but prohibited from deciding whether the laws in question conformed in substance with the constitution. Assume further that the judiciary or another pertinent body could determine whether a law adopted by the parliament complied with the constitutional formalities established by the constitution's law – e.g., eligibility requirements for members of parliament and quorum necessary for passage of a law. Under such circumstances, the parliamentary laws meeting all formal constitutional requirements would collectively figure as a body of constitutionally pedigreed law and their judicial application with consistency and integrity would secure adherence to the rule of law.

Even in cases where the overlap between the constitution's law and constitutional law is remarkably extensive, such as in the US where both structural and rights-based constitutional claims have been treated as legal claims and subjected to adjudication for

[49] For an account of what amounts to 'constitutional law' circumscribed by England's 'unwritten', or more precisely uncodified, constitution see Dicey, *supra* note 44, at 21–24.

over two centuries,[50] there are bound to be gaps and indeterminacies. The latter, moreover, are particularly important in relation to assessing the possibility of transnational constitutionalism in as much as upon first impression it may appear that nation-states promote a seamless continuum between the constitution's law, constitutional law, and the rule of law that any conceivable transnational constitution would seemingly inevitably fail to match. Returning to the case of the US for purposes of illustration, the gaps and indeterminacies in question are paradoxically due to a combination of lapses in the ambit of judicial review of the constitution's law and of the extensive unchecked power of the courts, and in particular of the US Supreme Court, to elaborate a sweeping corpus of constitutional law that on several occasions has significantly altered the constitution's law without recourse to the latter's formal amendment procedure. Indeed, on the one hand, through restrictions on justiciability[51] and through additional judicial tools, such as the 'political question doctrine',[52] US courts have refrained from adjudicating on certain issues squarely within the ambit of the constitution's law or relegated some of these issues to resolution by the political branches of government. On the other hand, the combination of expansive common law judge-made law through judicial decision-making and of the virtual impossibility of successfully amending the constitution in relation to any controversial subject due to the high formal hurdles imposed by the US Constitution's Article V renders sweeping US Supreme Court decisions practically immune from correction or reversal. Accordingly, the US Supreme has become an unchecked check in the US Constitution's scheme of check and balances,[53] as exemplified by its launching what amounts to a constitutional revolution through its rejection of racial apartheid as unconstitutional after decades of declaring it consistent with constitutional equality rights[54] and by its much decried decision granting recognition to an unenumerated individual constitutional right to abortion.[55]

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[50] See *Marbury v. Madison*, *supra* note 15 (characterizing the constitution as a hierarchically superior law and asserting that that vindication of disputed constitutional claims is subject to adjudication).
[51] See E. Chemerinsky, *Constitutional Law: Principles and Policies* (3rd edn, 2006), at 49–53.
[52] *Ibid.*, at 129–134.
[53] See Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts', 2 *I.CON* (2004) 633, at 652.
[54] Contrast *Brown v. Board of Education*, 347 US 483 (1954) with *Plessy v. Ferguson*, 163 US 537 (1896).
[55] See L. Tribe, *Abortion: The Clash of Absolutes* (2nd edn, 1992).

Consistent with the preceding discussion, the mere existence of gaps and indeterminacies in the context of transnational legal regimes does not preclude the possibility of transnational constitutionalism. May these gaps and indeterminacies be greater at the transnational than at the national level? Or, must they be more confined across national borders for a genuine transnational constitutional order to be viable? The answer would seem to depend on whether the gaps and indeterminacies at stake must be counterbalanced by a strong common identity or whether they may be profitably enlisted to accommodate greater differences in the face of relatively thin bonds of identity. Moreover, the answer under consideration would also depend on whether a transnational constitutional order would be more apt to succeed by emulating its national counterparts or whether it would more likely succeed by carving out a distinct, *sui generis,* configuration.

3. The Nation-State Constitution Compared to Transnational Ordering in Relation to the Ideal of Constitutionalism

There are two crucial distinctions between the constitutional order that inheres in a traditional nation-state and any constitutional order that may emerge in a supra-national or global setting. Although there are divergent interests in the (even mono-ethnic) nation-state, two major factors are always present regardless of the particular constitutional identity involved: First, there is a cohesive, unified, hierarchically ordered constitutional/legal system that maximizes formal convergence among all diverse elements and interests; and, secondly, there is a sufficient degree of perceived commonality or overlap among competing interests to secure sufficient material convergence to avoid unduly disruptive challenges to the constitution's or the law's legitimacy. In other words, in the context of nation-state constitutions, there is a formal institutional mechanism to resolve disputes about the meaning of the constitution – e.g., a constitutional court, the parliament – recognized by the polity as a whole as authoritative even if large numbers within it disagree with numerous substantive results. At the same time, material divergences are kept within manageable bounds through adherence to, *inter alia*, a commonly shared national and constitutional

identity.[56]

As was made manifest in the context of the EU, transnational legal regimes seemingly lack the means to secure the hierarchy and unity of legal norms that nation-state constitutions have managed to institutionalize.[57] Presumably a full-fledged truly global government could impose the kind of hierarchy and unity typical of nation-states, but leaving aside the feasibility of such government, its desirability has been highly questioned going back to Kant.[58] Could transnational constitutionalism thrive nevertheless without attaining a hierarchy or unity of norms comparable to those of the nation-state? Furthermore, even assuming an affirmative answer to this question, it would seem that constitutions on a transnational or global scale would confront daunting hurdles along the axis of justification as well as along that of identification. It is hard to see how they could carve out a workable and cogent account of the 'who' and of the 'what' that could circumscribe a working constitutional order with an adequately suited constitutional identity. Indeed, the 'who', the 'We the People', seem bound to be determined in part in terms of who they are not – e.g., the American People as opposed to the French or German one – and accordingly, the 'people' of the globe would presumably lack an 'other' against whom they could rally for purposes of delimiting for themselves a sufficiently defined and congruent 'self'. Furthermore, concerning the 'what', there are undoubtedly more differences that need to be harmonized at the transnational level – e.g., more cultures, religions, ethnic and linguistic groups – than at that of any single nation-state.

There are other looming difficulties that cumulatively appear to render the prospects of global constitutionalism singularly daunting. First, treaties, whether bilateral or multilateral, are still the backbone of all transnational legal regimes,[59] and even with the advent of 'direct effect' launched by *van Gend & Loos,* they remain primarily agreements among sovereigns rather than constitutions plausibly construed as social contracts

[56] For a more extensive discussion of the contrast between the nation-state constitution and transnational legal ordering see Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism', 6 *I.CON* (2008) 415, at 418–427.
[57] See *Solange I,* 37 BVerfG 271 (1974); *Lisbon Treaty Case,* 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09.
[58] Consistently with his cosmopolitan vision, Kant advocated global *governance* rather than global government which he thought would be unduly oppressive: see I. Kant, *Perpetual Peace: A Philosophical Sketch* (1795), reprinted in H. Reiss (ed.), *Kant's Political Writings* (1970).
[59] See de Wet , *supra* note 5, at 1214–1215.

among equal citizens who cohere as a single people.[60] Secondly, although, as argued in section 2, national constitutional regimes cannot avoid fostering gaps and indeterminacies and international law is 'law', it seems bound to remain more 'political' than nation-state law in a constitutional democracy to the extent that, lacking the same kinds of 'checks and balances', sovereign players in an international arena can avoid entrusting the ultimate interpretation of their legal obligations into the hands of others. Thus, for example, independent constitutional courts or democratically accountable parliaments typically have the last word concerning the fundamental constitutional rights of nation-states' citizens, whereas often, and even more so in the case of the most powerful sovereign powers, state signatories to human right treaties refuse to acquiesce to any independent authoritative pronouncements of their obligations thereunder.[61] Thirdly, as repeatedly underscored by reference to the EU's supposed 'democratic deficit',[62] transnational regimes, let alone global ones, seem inherently unsuited to purposes of fulfilling the minimum requirements regarding democracy imposed by the ideal of constitutionalism. And fourthly, focusing particularly on the highly integrated EU and on the unifying role played by its highest court, the CJEU, some have argued that the EU does not in substance have a constitution,[63] or that the EU is ultimately a transnational administrative regime that finds all the constitutional grounding it needs in the nation-state constitutions of its Member States.[64]

From the respective perspectives of the four answers to the counterfactual conundrum discussed in Part 2, however, the above seeming impediments to the *possibility* of EU or global constitutionalism are hardly conclusive. In the context of the debate regarding EU constitutionalism, Dieter Grimm and Juergen Habermas have

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[60] The EU's attempt at constitution-making that resulted in the TCE seems particularly instructive in this respect. In the Preamble to the 18 July 2003 draft of the TCE, its authors were referred to as 'the peoples' of the (then) 25 EU Member States, whereas in the final draft of the TCE issued on 18 July 2004, the 'peoples' were replaced by the heads of state – starting alphabetically with the King of Belgium – of the 25 Member States: see Rosenfeld, *supra* note 25, at 172–173, and 303,n. 37.

[61] E.g., the US has signed but not ratified the American Convention on Human Rights: see *Organization of American States, Ratification Information on the American Convention on Human Rights (Pact of San Jose, Costa Rica)*, available at: www.oas.org/juridico/english/Sigs/b-32..html, and has hence not subjected itself to the jurisdiction of the Inter-American Human Rights Court.

[62] See D. Marquand, *Parliament for Europe* (1979), at 64.

[63] See J.H.H. Weiler, *The Constitution of Europe: 'Do the New clothes have an Emperor?' and Other Essays on European Integration* (1999),at 238. But see Laenerts and Gerard, 'The Structure of the Union According to the Constitution for Europe: The Emperor is Getting Dressed', 29 *European L Rev* (2004) 289 and Mancini, 'Europe: The Case for Statehood', 4 *European LJ* (1998) 29.

[64] See P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010).

disagreed, with Grimm adopting the perspective associated with the third answer and arguing against the feasibility of such constitutionalism, whereas Habermas has adopted the position underlying the first answer and made the case for transnational constitutionalism.[65] The perspective adopted here, which goes hand in hand with the fourth answer above, neither allows for the confidence that Habermas has in the possibility of an EU-wide identity overcoming differences among EU Member States nor shares Grimm's conception of identity as a given unsuited for adaptation beyond national boundaries. What the perspective associated with the fourth answer does hold is that, consistent with the proper counterfactual query articulated above, transnational constitutionalism is possible, but that it should not be conceived in terms of a mere expansion or adaptation of nation-state constitutionalism. With that in mind, I will now explore how global constitutionalism might be possible, and why it might be preferable to have recourse to a transnational constitutional construct than to the main alternatives that have been invoked, given the proliferation of transnational legal regimes such as global administrative law or traditional treaty-based public international law.

Against the unity and hierarchy of the nation-state, the transnational legal universe is one characterized above all by layering and segmenting.[66] The EU, for example, amounts to a regional transnational comprehensive legal regime, with an elaborate separation of powers structure and a court, the CJEU, which brings unity within the relevant layer, but does not achieve unity or hierarchy all the way down to the extent that EU Member State nations maintain the supremacy of their own constitutions in case of conflict between them and EU law.[67] On the other hand, the WTO presides over a worldwide legal regime that is segmented to the extent that it is confined to the area of trade. [68] The question becomes then not whether every layered or segmented transnational legal regime need be constitutionalized – as some of these may be purely

[65] Compare Grimm, 'Does Europe Need a Constitution?', 1 *European LJ* (1995) 282 with Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution"?', 1 *European LJ* (1995) 303.
[66] For an extended discussion of this contrast see Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism', 6 *Int'l J Constitutional. L* (2008) 415.
[67] See *supra* note 57.
[68] *See* Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, 1867 UNTS 154, 33 ILM (1994) 1144, available at: www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 Apr. 1994, Art. 3.2, 33 ILM (1994) 1125, at 1199–1200, :available at: www.wto.org/english/docs_e/legal_e/03-fa_e.htm.

administrative whereas others, such as the EU, are most likely not[69] – but whether some ought to, and if so whether they could come within the ambit of constitutionalism. A further question assuming that certain layered and segmented regimes ought to be constitutionalized (or best regarded as such) is whether they ought to be considered on their own or in conjunction with other layers and segments.

In terms of the dialectic between identity and difference, layered and segmented regimes share in common with unified regimes with an established normative hierarchy the need to mediate between poles of convergence and poles of divergence. For example, within a nation-state citizens may largely agree on social and economic issues but strongly differ on religion, and similarly in a segmented regime like that of the WTO, all may converge on certain trade goals but divide according to whether they are dominant or emerging economic powers.[70] Although it may appear at first that greater convergence and less divergence would be typical of the nation-state than of transnational regimes, this need not necessarily be the case. Thus, differences between Catalans and Castilians may be significantly sharper within Spain than within the ambit of EU institutions. Moreover, segmented regimes, whether they focus on trade, security, or the environment, may well have more convergence and less divergence than would most likely be the case in a multi-ethnic, multicultural, religiously diverse nation state with a constitution, legal and political system that must impact on and account for all subjects relevant to the polity.

One segmented transnational regime that can be persuasively characterized as constitutional and consistent with the ideal of constitutionalism is the European Convention of Human Rights (ECHR) as judicially enforced by the European Court of Human Rights (ECtHR). Formally, the ECHR is a multi-party regional treaty, but functionally it operates with the participation of the ECtHR as a partial constitution focused on the protection of fundamental (human) rights. Moreover, if one combines the ECHR and the implementation of ECtHR decisions by countries parties to the ECHR

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[69] See Rosenfeld, 'Constitutional versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity', 32 *Cardozo L Rev* (2011) 2339, at 2354–2357.

[70] See Stewart and Badin, 'The World TradeOrganization: Multiple Dimensions of Global Administrative Law', 9 *Int'l J Constitutional L* (2011) 556, at 581 (asserting that the interests of the US and European members have traditionally dominated the WTO).

in favour of their own citizens, then one can view the constitutional regime circumscribed by the ECHR and extending downward within each member of the Council of Europe as a multi-layered segmented transnational regime. Consistent with this, the fact that the ECHR is formally a treaty does not appear to hamper the possibility that all individuals protected by the ECHR could have counterfactually agreed to its provisions in the same way as they could have thus agreed to the bill of rights of their own country's constitution.

The only serious remaining doubt concerning the counterfactual constitutionalization of the ECHR concerns the sufficiency of the requisite identitarian convergence among all countries and individuals under its aegis. Human rights, though in principle meant to extend to all humankind (and in the case of the ECHR to all 47 countries members of the Council of Europe), are contested as to their content and interpretation.[71] Human rights are also distinct from constitutional rights.[72] The ECtHR accounts in fact for these differences through application of its 'margin of appreciation' standard.[73] Ideally, through the margin of appreciation a core of convergence among all ECHR countries can be distilled from a periphery of national divergences. The margin of appreciation, however, is a double-edged sword. At its best, it allows for greater flexibility while preserving the requisite identitarian nexus linked to constitutionalism; at worst, it is a purely political tool that allows countries to evade ECHR precepts that they find politically or culturally unpalatable.[74] Be that as it may, the availability of such a judicial tool and its potential, if properly used, point to a plausible counterfactual means to accommodate identity and difference in a transnational constitutional context.

In contrast to the ECHR, the EU is a fully fledged layered transnational regime and, at least within its own layer, it seems at least counterfactually to satisfy the fundamental requirements of constitutionalism, save perhaps that of democracy. Indeed, the EU Council, Commission, Parliament, and the CJEU added together allow for a separation of powers comparable to that of well-functioning nation-state constitutional democracy.

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[71] See ,e.g., J.R. Bauer and D.A. Bell (eds), *The East Asian Challenge for Human Rights (*1999).
[72] See Rosenfeld, *supra* note 25, at 251–253.
[73] See *Handyside* v. *United Kingdom*, 1 EHRR 737 (1976).
[74] The ECtHR's use of the margin of appreciation has been soundly attacked by some as being toothless and purely political: see, e.g., Mahoney, 'Marvelous Richness of Diversity or Invidious Cultural Relativism?', 19 *Human Rts LJ* (1998) 1.

Adherence to the rule of law is also satisfied as the CJEU is the ultimate interpreter of EU law and adjudicator of EU separation of powers conflicts.[75] Based on the now enforceable EU Charter of Rights,[76] and even arguably before it became legally enforceable,[77] the EU affords fundamental rights protection comparable to that guaranteed by nation-state bills of rights.

There seems to be little doubt that factually the EU, at least within the regime it carves out within its own layer, is afflicted by a 'democratic deficit'. That may not be fatal counterfactually, but when combined with the EU's identitarian difficulties, the deficit in question does pose a particularly vexing problem. In a nation-state with a single people and strong national identity, such as France or Germany, it may be obvious on certain matters how the vast majority of citizens would vote based on commonly shared thick common identity bonds. Therefore, the lack of voting or democratic power in such a nation-state may up to a point be counterfactually compensated for based on strong identitarian bonds. In the case of the EU, however, there is a lack of, or too thin a, common identity.[78] This not only fails to alleviate the EU's democratic deficit but it compounds it with an identitarian one. In a strong democracy with weak identitarian bonds, the latter may be somewhat be counterfactually mitigated by the actual approval given on some matters by clear majorities. In the EU, in contrast, weak democracy and thin identity work in tandem to take the layer carved out by the Union further away from constitutionalism.

This problem would be alleviated if, in spite of the resulting deficit in unity and hierarchy, the EU layer were to be added together with the Member States layer. Before indicating how that might work, let us briefly focus on whether adding layers in the EU case would be generally preferable in the context of constitutionalism to keeping them separate. The answer seems clearly to be in favour of combining layers, given the direct

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[75] See, e.g., Case 70/88, *European Parliament v. Council of the European Communities* [1990] ECR I–2041, at para.27 (the European Parliament can sue the European Council or Commission to safeguard its prerogatives).

[76] See Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance', 36 *Fordham Int'l LJ* (2013) 1114, at 1116 (the Lisbon Treaty made the EU Charter of Rights legally binding and stipulated that the EU should accede to the ECHR).

[77] Cf. the German Constitutional Court decision in the *Solange II* case in 1986, 73 BVerfGE 339 ('a measure of protection of fundamental rights has been established within the sovereign jurisdiction of the [now EU] which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the [German] Constitution').

[78] See Grimm, *supra* note 65.

effect announced in *van Gend & Loos* and the many intrusive regulations issuing from the EU layer but also ever present within the Member State layer. In short, whereas in another type of transnational regime, such as NATO, separating the distinct layers may well be the best course – lest military and security issues presumably subject to adequate democratic venting within nation-state members become unnecessarily murky and contentious in the pertinent transnational setting – in the case of the EU, particularly if one focuses on the social and economic spheres, the opposite seems by far better. Returning now to the particular problem at hand, combining the layers may certainly at least in part alleviate the double deficit encountered at the EU level. This is perhaps most obvious at the democratic level. As emphasized by the German Constitutional Court in its *Lisbon Treaty* decision, it is part of the (nation-state) constitutional function of the German legislature to participate in the elaboration of supra-national (EU) policy.[79] Accordingly, such national democratic input in fashioning the EU's legal regime may certainly factually or counterfactually lessen the impact of the EU's democratic deficit. The same does not appear to be the case in the context of identity, as focus on one's thick national identity may exacerbate the extent to which one's EU identity pales in comparison. Viewed more closely, however, thicker identities afford greater opportunities to distill convergences from divergences, and that could be used to project elements of one's nation-state national or constitutional identity unto the supranational stage. This is all the more plausible as identities are generally construed along negative as well as positive components. Part of being European is not being American, and before the end of the Cold War not being in addition like those in polities (though geographically also for the most part European) belonging to the Soviet Bloc.

Supranational identity is thus plausible counterfactually, and it may become possible depending on the particular circumstances involved (with whom and against whom or what does one develops identity bonds). That leaves the question of lack of unity or hierarchy among layers that bedevils the EU and other supranational regimes. Here again, the formalities should not be determinative. The key instead is whether there is a workable distribution of convergences and divergences among layers to allow them to

[79] See the *Lisbon Treaty* case, *supra* note 57 , at paras 225–226, 244, 246–247.

harmonize their respective institutional regimes and political regimes. Inconsistencies among layers need not be constitutionally fatal so long as they do not degenerate into incompatibilities. The German Constitutional Court has said things that are inconsistent with EU supremacy, but has not so far invalidated EU law, making it inapplicable in Germany, which would create an incompatibility and which, if more than merely occasional, would render the EU counterfactually constitutionally indefensible.

Finally, even if in the case of the EU constitutionalism is counterfactually possible, since the EU is *sui generis* in that it is neither a federation nor a confederation, and in that it lacks the unity and hierarchy typical of nation-state constitutions, why not prefer emphasizing its *sui generis* nature rather than struggling to fit it within the ambit of constitutionalism? The answer depends on which of the two alternatives would be more useful and productive, and based on the conclusion that the EU can be counterfactually included within the arena of constitutionalism consistent with the fourth answer described in section 2, it seems amply justified to argue for the alternative involving constitutionalism. Moreover, a similar argument can be mounted in favour of a constitutional rather than an administrative framework, particularly if one is mindful that the administrative sphere is never merely neutral and technocratic and that confining legitimation to EU Member State national constitutions would seem inadequate because largely contingent.[80]

4. On the Desirability of Global Constitutionalism and the Clash Between Liberal and Illiberal Constitutions

Supranational and even eventually global constitutionalism is possible counterfactually, but is it thereby desirable? Take, for instance, the UN Charter that some have proclaimed amounts to the embryo of a world constitution.[81] According to this Charter, binding decisions of the UN Security Council (SC) have supremacy over any conflicting international obligations of UN member states.[82] This may well seem constitutional in form, but in fact comes close to being purely political, as no court has the power to review SC decisions and permanent members of the SC have a veto powers which they

[80] See Rosenfeld, *supra* note 69, for an extended discussion of this last point.
[81] See *supra* note 1.
[82] See de Wet, *supra* note 5, at 1218.

can, and often do, use purely strategically. It seems, therefore, that in the case of the UN it would be more salutary to avoid the constitutional framework than to use it. But what should one do in the case of other transnational regimes, such as the EU, the ECHR, or the WTO?

Before answering this last question directly, it bears making brief mention of the current dynamic between liberal and illiberal constitutions which is illustrative of the difficulties regarding drawing lines between helpful and appropriate use of a concept and abuse of it. As mentioned at the outset, in some of the most recent instances, such as that in Hungary, the proponents of illiberal constitutions have used the language and tools of liberal constitutions to turn them against the latter. To cite but one example, upon being accused of amending the constitution so frequently as to completely undermine a constitution's customary authoritativeness and durability due to its supermajority in Parliament, the Hungarian ruling party levelled the same accusation at other EU actors within the Union's constitutional mainstream.[83] Even if it is true that a mainstream national constitution was amended at a similar rate to the current Hungarian one, this does not preclude that the amendments in question were minor or completely in line with a liberal constitution. But the comparison evoked does have the potential of concealing important differences and muddying the waters between liberal and illiberal constitutions.

In the case of the clash between liberal and illiberal constitutions obfuscation may be unavoidable and difficult to detect for the non-specialist. In the case of supranational regimes, however, as the label 'constitution' is much more contested, it may prove more profitable to strike the right balance. Moreover, in the context of transnational or global constitutionalism any justification or legitimation seems bound to be counterfactual. Counterfactuals are normatively useful in two different ways corresponding to two distinct functions that they are particularly suited to perform. Specifically, counterfactual reconstruction can be either critical or justificatory. This can be illustrated by reference to the construct of a perfect market economy along the lines

[83] See Parliamentary Res. 1941 (2013) of the Council of Europe, 'Request for the opening of a monitoring procedure in respect of Hungary', at para. 8; See also Opinion 720/2013 CDL-AD(2013)012 (Venice Commission), *supra* note 17, at para. 85 (Hungarian officials' criticism of apparently similar Austrian constitutional amendment practice without taking into account that in Austria, unlike in present-day Hungary, the Constitutional Court has the last word).

envisaged by Adam Smith. Obviously, such a perfect market is a counterfactual, and it can be invoked critically to point out that actual markets always fall short and that that requires supplementing or complementing markets with non-market safeguards or regimes. But, conversely, such counterfactual can be used to justify existing imperfectly functioning economic markets as the closest possible approximations to a desirable ideal.

Applying this to the ideal of constitutionalism, the counterfactual critical function seems clearly appropriate in the case of illiberal constitutions. Indeed, use of the counterfactual in its critical capacity can perform a salutary task in distilling crucial substantive differences amidst similarities or convergences in the realm of forms or in that of institutions. Underlying the endorsement of the use of the counterfactual in question in its critical dimension in the case of an illiberal constitution is the conviction that the liberal constitution, as imperfect as it may prove in its various actual instantiations, offers the best alternative in the context of the nation-state.

In contrast, it is by no means clear whether either the critical or the justificatory function of the counterfactual associated with the ideal of constitutionalism is ultimately appropriate or useful in the case of supranational regimes that are at best arguably constitutional in nature. As claimed above, transnational constitutionalism is in principle plausible, and it is likely to some extent to raise difficulties similar to those encountered within the ambit of nation-state and to some other extent problems unlike those encountered in the context of national liberal constitutions. Under these circumstances, the first question that must be addressed in the case of transnational legal ordering – which by all reasonable accounts does not fit neatly within the paradigms of international law, administrative law, or nation-state fitted constitutional law – is whether the counterfactual relating to constitutionalism, that relating to another existing established type of legal ordering, or a new one to be designed to address the *sui generis* salient aspects of prevailing transnational legal orders would be optimally suited to provide the best means to carry out the requisite critical and justificatory counterfactual functions.

For present purposes, suffice it to reiterate that, as transnational constitutionalism is plausible, use of the constitutionalism counterfactual can be defended in both its critical and justificatory dimensions. Whether transnational regimes be segmented or layered

and whether they be considered separate from nation-state constitutions or in some non-fully unified or hierarchically aligned configuration allowing for significant links between the national and transnational legal orders; and consistent with the dialectical perspective endorsed in section 2 above; there seem to be ample grounds upon which to conclude that treating transnational legal orders in terms of the ideal of constitutionalism is not only desirable but also preferable to the alternatives previously alluded to. Moreover, in the case of transnational legal orders, it is crucial to combine the constitutionalism counterfactual's critical and justificatory functions. To the extent that, in spite of differences, a transnational order can approximate a liberal constitution's potential for advancing limitation of powers, adherence to the rule of law, protecting fundamental rights and fostering an adequate level of democracy, it ought to be justified as perfectable under the appropriate normative criteria. For example, if a transnational order could not factually duplicate the functioning democratic institutions of a nation-state, but could nonetheless counterfactually approximate them, then – all other things being equal – it would seem justified and in most cases desirable to invoke the counterfactual's justificatory function both to buttress legitimation and to urge greater approximation.

On the other hand, in as much as a transnational order were to fall short of its national counterpart, in spite of formal or institutional convergences or on account of an absence of the latter, the counterfactual's critical function could in all likelihood be put to good use. It would thus seem more profitable, for instance, to note the constitutional defects that the EU governance allocated among the Council, the Commission, and the EU Parliament in comparison with the allocation of powers in a well-functioning nation-state parliamentary democracy[84] from a critical constitutional standpoint than from a perspective that stipulates that the ideals of constitutionalism are inapposite when considering the EU. From a critical constitutional standpoint, not only are the particular shortcomings in a given transnational order likely to emerge in a most useful light, but also any factual or counterfactual plausible remedy to the shortcomings in question would emerge in its full constitutional implications.

[84] *See* Pavlos Eleftheriades, *the Idea of a European Constitution,* 27 Oxford J. Leg. Stud. 1 (2007).

5. Conclusion

Although by no means as firmly anchored as its nation-state counterpart, transnational constitutionalism emerges as entirely plausible. This is all the more apparent if the nation-state's liberal constitution and its transnational counterpart are gauged from the perspective of the ideal of constitutionalism. From that perspective, notwithstanding seemingly unbridgeable factual differences, both the national and transnational constitutions find expression and justification as counterfactual dialectical processes in search of a working equilibrium between identity and difference aptly captured in the metaphor of an ongoing but never concluded social contract negotiation. Moreover, because of a typical lack of unity and of full hierarchical integration, transnational constitutions seem particularly prone to displaying gaps and indeterminacies. However, though perhaps less conspicuous, careful examination reveals that nation-state constitutions are also affected by gaps and indeterminacies. In view of this and of the dialectical perspective endorsed in this article, a good case can be made that the continuities between national and transnational constitutions predominate over the discontinuities between them. And accordingly, the argument in favour of the plausibility of global and transnational constitutionalism looms as being quite strong.

In addition to being possible, transnational constitutionalism appears to be desirable, at least to the limited extent of being framed so as to come within the sweep of the constitutionalism counterfactual. In other words, even if a particular transnational legal order is not squarely constitutional in nature, it turns out to be preferable to assess its potential and shortcomings in terms of the constitutionalism counterfactual than to do so from the standpoint of other potentially pertinent counterfactuals such as those carved out by the administrative law or the international law paradigm. This leaves one further important question open, namely whether it would be desirable to stir all prevailing transnational legal orders towards as great conformity with genuine constitutionalism as possible. A detailed consideration of this question must be left for another day, but, intuitively at least, the appropriate answer for each case would have to be ultimately context-dependent. Where use of the constitutionalism counterfactual as justificatory would be warranted, the push towards a constitutional ordering would tend to be preferable. On the other hand, where the counterfactual's critical role would be called for, it may well be that constitutional ordering may not provide the best means to

address existing failings and shortcomings.