1 A constitutionalising global order: an introduction
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With the end of the Cold War and the rise of globalisation, both international organisations and international legal norms have become increasingly salient in global politics. These changes have led scholars, policy-makers and activists to envision new forms of global order. One of the most interesting and innovative strands of this work addresses global constitutionalism. Drawing on a political idea that finds antecedents in the history of political thought and coming to fruition with the rise of liberalism, constitutional ideas had been influential in shaping the emergence of international legal institutions in the nineteenth and early twentieth centuries, but with the emergence of realist thinking and practice seemed to have declined. Now, though, core constitutional norms such as the rule of law, separation of powers, and human rights have emerged as crucial to the theories and practices of global politics. Yet, the rule of law and human rights remain contested by many, especially as political conflict emerges around asylum, lesbian, gay, bisexual and transgender (LGBT) rights, indigenous peoples' rights, democratisation and global trade relations. At the same time an interdisciplinary academic field around the idea of global constitutionalism has gained momentum, with its own journal, a number of research centres, blogs and a growing trans-border constitutional discourse. Importantly, scholars working in these areas do not see this field as an idealist blueprint for world order; as the leading journal in this field notes in one of its editorials, there remain 'hard times' ahead (Dunoff et al. 2015).

At the time of writing this introduction, January 2017, these hard times seem to have become even worse. The election of Donald Trump as US president relied upon a discourse of American nationalism, a rejection of liberal values such as free trade, vigorous resistance to immigration, and the suggestion of literally building a wall between the United States and Mexico. The Brexit referendum in the United Kingdom shocked the European Union. Equally, it rejected the established sets of liberal norms that had been stipulated by decades of constitution building in the European Union (Capoccia and Kelemen 2007). In effect, the referendum result indicates that, pending a successful exit procedure which remains heavily contested at the time of writing, one of the great powers of Europe may leave a long-standing supranational organisation out of which ideas about global constitutionalism have emerged. This referendum outcome also resulted, in part, from anti-liberal discourses representing hostility vis-à-vis immigration and concerns about global or regional forms of legal control impacting on national sovereignty. The withdrawal of Burundi from the International Criminal Court (ICC) also suggests a preference for sovereignty over global liberal values, especially on behalf of countries in the global south. Some have argued that the ICC has undermined its legitimacy in Africa where it has already been subject to challenge because of its seemingly exclusive focus on conflicts on this continent (Jeßberger and Geneuss 2015). Also, the Paris Agreement on Climate Change has given to states the ability to set their own targets concerning reduction of greenhouse gases, a direct

challenge to the structures put in place by the Kyoto Protocols which made such reductions mandatory.

What benefit is there in proposing new ideas about global constitutionalism in light of the resurgence of nationalism and traditional sovereignty? As this *Handbook* demonstrates, as an academic discipline, global constitutionalism is dedicated to studying both empirical facts and normative ideals. By studying them in tandem, the interdisciplinary field of global constitutionalism encourages research that explores a more balanced and bottom-up perspective on constitutional quality in the global realm. In this spirit, this *Handbook* includes contributions from a diverse range of authors including those who argue that the international and global system is becoming more constitutional and those who argue that it should become more constitutional. So, our efforts here may, in some sense, be proved wrong in the short term concerning the empirical facts of constitutionalism. However, the editors and the contributors share the view, in one way or another, that globalisation and international legal developments continue to inch toward a global constitutional order. For instance, along with Burundi, South Africa had announced it was withdrawing from the ICC in October 2016. But after its highest court ruled such a move unconstitutional, it announced in March 2017 that it would remain in the Court. We intend our normative reflections to suggest ways in which those developments can be improved and developed to ensure justice across all levels of governance.

In light of these developments the *Handbook on Global Constitutionalism* addresses three questions: is the global legal and political order becoming more constitutional? If so, what explains this change? Is such a change a desirable one? These questions have generated a range of answers across a number of interrelated disciplines. The *Handbook* provides some answers to these questions by asking a select group of leading scholars to examine the idea of global constitutionalism. This introduction will locate some of the broad themes that have been constitutive of the debates about global constitutionalism and the ultimate emergence of an interdisciplinary academic field. In addition, it will provide some historical and theoretical context for the chapters that follow. The *Handbook* approaches the field of global constitutionalism through the prism of the practices, processes and principles of constitutionalisation as the starting point for conceptualising a shared albeit contested idea. We believe that such a practice-based approach is best equipped to acknowledge the essentially contested nature of constitutional norms and constitutional narratives because it enables a diversity of understandings to emerge and be subject to further refinement and development. In so doing, we see the *Handbook* as a tool for scholars and students alike as they grapple with a rapidly changing global political and legal order.

A constitutional political and legal order enables and constrains political decision-making. It places limits on political life through its emphasis on the rule of law. At the same time, it enables the creation of new institutions and laws in moments of founding and in practices of interpretation. Four principles or 'fundamental norms' make manifest these limiting and enabling functions: the rule of law, a balance or separation of powers, constituent power, and rights (Wiener 2008, pp. 65–66, Wiener et al. 2012, Rosenfeld 1994). Constitutionalism, then, sits at the intersection of law and politics. A global constitutional order exhibits some variation of these constitutional features. A global constitutional order need not mirror in detail the constitutional orders of Western, liberal democratic states, although there are numerous overlaps between this tradition and the

emerging global constitutional order. Moreover, the global process continues to evolve, that is, there remains more constitutionalisation than constitutionalism at the global level. Global constitutionalism, for instance, exhibits a rule of law, but governs both the relationships of individuals with each other and with the relationships of states, international organisations and non-governmental organisations. A global constitutional order exhibits a separation of powers and a balance of those powers, but some powers are more prominent than others; for instance, there is no real global legislative body, although there are a number of intersecting sites of law-making and an increasing number of judicial bodies. A global constitutional order does not have a single, clearly defined *pouvoir constituant* (constituent power) but various groups, agencies and modes of activism together can be understood as providing a kind of representative community for the international community as a whole. And the global human rights regime remains contested by many.

Global constitutionalism as a field of study focuses on these emerging elements of the international system. It sees constitutionalism as a description and explanation of how the international legal and political order is changing. It is also a way to normatively evaluate those changes by valorising constitutionalism as a means by which rights can be protected and responsibilities distributed in the global order. The idea that there is a global order with constitutional features is not necessarily a new claim. Efforts to formalise international law in the nineteenth and twentieth centuries included discourses of the constitutional nature of international life. Indeed, the idea that there is a constitution that stretches beyond the specifics of any one nation state can be found in ancient, medieval and early modern political theories.

However, recent years have seen a more concerted effort to describe, explain and evaluate the global order through the concepts and ideas drawn from constitutional theory. These efforts are responses to changes in the European Union (EU); in international institutions such as the United Nations (UN) and its various bodies and committees, especially the UN Security Council (UNSC); in international judicial institutions such as the International Criminal Court (ICC); in international law especially with regard to the relevance of international law vis-à-vis regional and sector-based governance; and last but not least in discourses surrounding human rights and, in particular, the rapidly expanding literature on the responsibility to protect (R2P) individual human rights (Bellamy 2007; Brunnée and Toope 2010a, 2010b; Erskine 2013; Welsh 2013). In academic scholarship, moves toward interdisciplinary work by political scientists on law, the rise of constructivist international relations (IR) theories, and overlaps between political and legal theory have generated important new insights about politics and law at the global level (Dunoff and Trachtman 2009).

This *Handbook* seeks to find in this diverse and rapidly growing body of work some clarity on the nature of global constitutionalism and provide a guide to its foundations, evolution and potential for future scholarship and practice. The *Handbook* intends to be a 'broad church' that locates global constitutionalism and its related themes in a diverse array of scholarship and practices. The *Handbook* is constructed around six parts: Historical Antecedents; Political and International Relations Theories; Legal Theories; Principles and Practices; Institutions and Frameworks; and New Horizons. This introduction first elaborates the idea of constitutionalism, exploring its historical antecedents and (contested) normative principles. It connects this core idea to recent literature that identifies trends and developments at the global level that exhibit a constitutional

character. Second, the introduction explains in more detail the idea of constitutionalisation as a process as opposed to the idea of constitutionalism as an end point. This section highlights the contested nature of constitutionalisation, suggesting that constitutionalism as a political and legal space enables a kind of contestation that does not (necessarily) descend into conflict but can productively produce new institutions at the domestic and global level.

HISTORICAL ANTECEDENTS

A constitution is the set of principles and rules that have been rooted in a society prior to agreeing on the constitution and which govern a society. Constitutionalism is a political theory that protects individuals from the arbitrary exercise of power through the rule of law and a separation of powers. A constitution can be written or unwritten, as in the case of the United Kingdom. In each case, a constitution is expected to embody the principles of constitutionalism. However, the substance and degree to which these principles are respected and enforced varies according to tradition and context (Tully 1995). Almost every country today has a written constitution, although not all countries are constitutional. Also, some states without written constitutions, such as the United Kingdom, are very much constitutional systems. By committing a country's political structure and organisation to a written text, actors in that order will be bound in some ways by the need to adhere to the legal system. Constitutions not only limit power, however, they also channel it into structures and institutions that govern. In this way, constitutions turn constituent power into constitutional form (Loughlin and Walker 2007).

The first written constitutions appeared in the late seventeenth and eighteenth centuries as a result of the revolutions in America and France.[1] The purposeful creation of a constitution was a divergence from the traditional constitutionalism found in places such as Great Britain. Charles McIlwain notes how the move from the classical and medieval eras to the modern era assumed that a constitution is a set of customary and evolutionary norms and principles that govern a society (McIlwain 1958 [2008]). When the American delegates to the Constitutional Convention came together in Philadelphia in the summer of 1787, they may not have envisioned that they would be changing the nature of constitutionalism. However, both they and the French a few years later created a very different understanding of the constitution and its place in political life, which ensured the protection of rights against the arbitrary power of the mother country (American) or vested social and political interests (French).

The written constitution has come to be seen as the epitome of constitutionalism. Yet the latter is a political philosophy that captures more than the existence of a written text. Instead, it is the broader idea of government in accordance with the rule of law. The rule of law as manifest in constitutionalism, however, is not a rigid adherence to specific codes or legal texts; rather, it is an understanding of the law as a bulwark against the arbitrary exercise of power. The specific tools remain to be agreed by each society. Laws protect

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[1]   Though some might argue that the colonial charters of the Americas provided earlier models of the written constitution.

individuals and, crucially, create institutions that will balance and check the powers of individuals. Constitutionalism, then, is the underlying philosophical ideal of a political order defined by four core principles: the rule of law, institutional balance, constituent power, and rights. Each of these four norms can be employed to describe, explain and evaluate political life. As constitutionalism becomes a shared reference within the wider context of global society and global constitutionalism obtains a meaningful role as a novel approach and idea in international law, international relations and global governance, the concept moves on towards a new historical period.

A brief history of ideas reveals the various ways in which constitutionalism and related ideas have been understood. The purpose of this brief historical excursus, however, is not to tell a progressive narrative in which these moments culminate in a global constitutional order. Moreover, our intention is to not to privilege a liberal story of constitutionalism. Rather, as 'antecedents' the individuals identified here can be seen as providing important insights into the intersection of law and politics. They are drawn from a broadly conceived 'Western' historical tradition whose insights have been invoked at times and places by different figures in theorising law at the global level. While we draw upon insights from this historical trajectory, we fully appreciate and hope to see more of reflections on law and power from other traditions, especially as those have impacted upon and shaped the Western discourses. As James Tully has pointed out, to understand the 400 years of constitutional history arising from the Anglo-American context requires appreciating its intersection with the colonial project and the ways in which those encounters have shaped its ideas (Tully 1995). Research in the field of global constitutionalism therefore needs to be fully aware and take better account of diverse contexts of constitutionalisation and how these intersect through both regulatory and customary practices of constitutionalism (McIlwain 1947). For example, more research on cultural practices and how they might question regulatory mechanisms of modern constitutionalisation need to be explored in order to better account for cultural diversity (Borrows 1994; Williams 2009). Others have pointed to the ways forms of global governance can be drawn from experiences such as the Iroquois nations in North America (Crawford 1994).

Even more importantly, by noting these antecedents, we can disabuse ourselves of the idea that there is something radically new in global politics and law today. Instead, we can see parallel developments in different times and places when struggles to capture politics in legal form have taken place. In addition, the brief overview provided here crosses both domestic and global constitutionalism, for some thinkers looked only to their internal constitutional orders while others sought to theorise from that internal foundation to regional, international or global levels.[2]

In Ancient Greece, the contrasting views of Plato and Aristotle provide two helpful markers for understanding the relationship between law and politics. For Plato, a constitutional order can be reduced to the laws that define it. Plato's view of Law can be found in the *Crito* and the *Laws*. The *Crito*, Socrates' explanation of why he refuses to flee Athens as he faces his death at the hands of the democracy, presents the Law as a

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[2]   Historical context is a vexed methodological problem, and it will certainly not be solved in this introduction or this *Handbook*. Martti Koskenniemi (2013) provides one effort to balance progress and context in the study of international law.

moral framework that guides the individual through his/her life and serves as something like a father figure to the individuals of the city. This idea is further refined in the *Laws*, where Plato presents a theory of laws and law-making. Underlying this theory of law, however, is a political order framed by virtue, an idea explored in Plato's other important political work, *The Republic*. The politics of virtue are (in)famously institutionalised in Book XII of the *Laws*, where Plato introduces the 'nocturnal council', an institution designed to ensure that the laws conform to virtue and that they will ensure the role of law in the upbringing of all persons. While the text has little to say about anything beyond the community, the nocturnal council does draw upon the expertise of individuals from other communities, perhaps giving an early intimation of constitutional learning that has become a more recent prominent dimension of global constitutionalism.

An alternative picture of constitutionalism emerges from Plato's student, Aristotle. Rather than a theory of law or law-making, Aristotle explores political life through the nature of its institutions. Like Plato, Aristotle sees the political system as intimately connected to virtue and moral education. Yet, for Aristotle, a constitution includes everything from the structure of law-making to principles of education and location of the city. This comparative study directly informed his famous work of political theory, *The Politics* (Aristotle *c.* 350 BC [1996]; Polin 1998). Aristotle privileges politics over law, seeing in the institutions of political life the tools for ensuring the good life rather than in the making of laws. As with Plato, Aristotle has much less to say about anything beyond the polis, though his comparative method does suggest that understanding the diversity of the global order might help inform the ways in which we read constitutions.

Neither Plato nor Aristotle theorised political life much beyond the borders of the city state. Roman theorists of law and politics, however, had more reason to turn beyond the city state as their political order expanded into an imperial one. In addition, the more formal legalism of the Roman republic contributed in important ways to our understanding of what it means to have a law governed society (Lincott 1999). A Greek statesman who was captured and taken to Rome, Polybius explored the centrality of the mixed constitution in the Roman political system, arguing that its success as an empire relied to some extent on its ability to keep the different elements of society in balance. The mixed constitution is one in which the different forms of government – monarchy, aristocracy and democracy – provide a foundation for political order by reflecting the social interests of different elements in society. The mixed constitution contributed to the modern idea of the separation of powers, though it is less about functions than about political classes (Polybius 1979). Polybius' insights into the mixed constitution are not about Rome's empire, but about Rome itself; at the same time, his articulation of the mixed constitution comes in the middle of his description of how the Roman Empire was able to expand so quickly.

Another important Roman theorist of constitutionalism is Cicero, whose focus reflects the influence of Plato more than the historical expansion of Rome. Cicero's *Republic* stands as a continuation of Greek thought in many ways, drawing on the importance of virtue and its relationship to political order. Cicero understands law and politics through the lens of natural law, which informed the ways in which constitutionalism and political theory more broadly developed. Writing at the moment when the Roman Republic was collapsing into an authoritarian rule, Cicero's reflections on the benefits of a constitutional order are less about what Rome actually was and more about what he and others

hoped it could be. This more theoretical, idealistic interpretation of Rome greatly influenced the development of law and particularly the creation of the natural law tradition that shaped so much of medieval legal and political thought (Cicero 1998).[3]

Importantly, though, the history of Rome is one of occupation and expansion. This history should give us pause to think through the ways in which constitutional developments arise from imperial practices and the increased size of the empire, as the contribution by Jill Harries in this *Handbook* highlights.

This natural law tradition shaped the medieval European understanding of law and politics. Thomas Aquinas refined the natural law, connecting it with the Christian tradition more clearly through his elaboration of the divine, eternal, natural and civic law. This framing of the natural law tradition moved the tradition away from a constitutional framing and more toward a moral framing, but its influence was felt across the political spectrum of Europe. However, outside of the theories of natural law, constitutionalism emerged in the legal and political practices of medieval Europe. The relationships that defined the feudal order in England, for instance, resulted in a discourse of common law that came to undergird the centrality of the rule of law as a device to protect emerging agencies. Brian Tierney has pointed to this historical context as central in understanding constitutionalism (Tierney 1982). Others have looked to the relationships within the church in medieval Europe, particularly the conciliar movement in the fifteenth century as an instance in which individuals within the church polity sought to carve out more space for consultation and shared governance. This largely failed effort at conciliar governance within the church evolved, Francis Oakley has argued, into a defence of rights and the centrality of law in seventeenth-century conflicts in England, Scotland and Wales (Oakley 2003); Oakley's reflections on the global dimensions of these developments are found in his contribution to this *Handbook*. Nicholas of Cusa, who helped articulate the conciliar ideal in the Catholic Concordance, can be seen as a theorist of constitutionalism in this context. His ideas, as applied to the 'global' institution of the church, in which various levels of church polity had to be structured in relation to the papacy, might also be read as an antecedent of not just constitutional theory but of global constitutionalism (Nicholas of Cusa 1443 [1991]).

The early modern period saw further developments in constitutionalism. Hugo Grotius, Thomas Hobbes and John Locke are all seen as crucial in the development of the social contract tradition and natural rights which came to be so central in constitutional thought. Although they did not advance arguments for formal written constitutions, and they all had very different ideas of what constitutes both the social contract and natural right, these three are often seen as important markers in the development of constitutionalism. Underlying their accounts, though in very different ways, is a broadly understood theory of natural law that builds on the ancient and medieval heritage but transfers it into a theory of rights. While rights have become a dominant discourse in modern constitutional theory, the natural law framework should not be ignored, for natural law and

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[3]   While a work of literary theory and history, C.S. Lewis's lectures on medieval and Renaissance literature use Cicero's famous passage in the *Republic*, Scipio's Dream, as the foundation for the strong natural law heritage found throughout medieval and Renaissance literature and philosophy (Lewis 1994).

constitutionalism both provide a framing of law and politics that describes and evaluates the political and legal. Grotius, of course, theorises law and politics at the international level, most famously in *The Laws of War and Peace* (Grotius 1625 [2005]). Grotius' account does not conceptualise his approach in constitutional terms, though his arguments may well have been shaped by ongoing debates in the newly independent Netherlands about its constitutional order (Lang 2010). Even more importantly, as Martine Julia van Ittersum highlights in her contribution to this *Handbook*, the ways in which the reliance on written agreements in the conduct of relations between the natives of the East Indies and the Dutch imperial powers – relations in which Grotius was intimately connected – allowed for the disenfranchisement of peoples and their loss of rights, a situation that the contemporary 'fetishism' of treaties continues to reinscribe. At the same time, the contribution by Bardo Fassbender in the *Handbook* explores the nature of the written, as opposed to the unwritten, constitution, providing an alternative viewpoint on the nature of texts and global constitutionalism.

Hobbes's work is rarely seen as constitutional, and he is often seen as a theorist of decisionism rather than a theorist of law. Recent interpretations of his work, however, have emphasised the importance of the law and principles such as equity in Hobbes's work, both of which contribute to an understanding of the social contact, and constitutionalism, as more nuanced and law bound than previous interpretations of Hobbes have made (Dyzenhaus and Poole 2012). Some have advanced interpretations of Hobbes that even suggest his ideas about law and constitutionalism may have something to tell us about a global rule of law (May 2013; Dyzenhaus 2014; Lang 2017).

Locke, in part because of his influence on the American founders and their written constitution, is perhaps closer to the constitutional tradition than Grotius or Hobbes (Locke 1681 [1988]).[4] As noted above, though, it was the revolutions in America and France in the late eighteenth century that brought on the shift to a written constitution and, importantly, the idea of a constitution as a device to promote a particular framework of institutions and rights. However, even while appreciating the importance of the written text as a formal normative form for political governance, the longer historical context provides a way to understand constitutionalism as both descriptive and normative.

Enlightenment figures further contributed to the philosophy of constitutionalism, though, again, the focus is less on the written constitution and more on the underlying political and moral ideas. Montesquieu's *Spirit of the Laws* explored constitutionalism in a way that parallels Aristotle, resulting in a comparative project that sought to delineate the wide range of elements that form the legal order. In terms of constitutional theory, he is perhaps most famous for his portrayal of the English constitution as encapsulating a separation of powers (Montesquieu 1748 [1989]). Montesquieu here builds on the idea of the mixed constitution, though we now begin to see the slow transformation of this ideal from a theory that reflects social classes into a theory that defines the functioning of governments. Montesquieu does not theorise a global or even international legal order, but his ideas about the separation of powers come to form an important part of the constitutional tradition.

Arising at roughly the same time, though, Emer de Vattel, the Swiss diplomat and inter-

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4   On Locke's natural law ideas, see 'Essay on the Law of Nature' (1663–64) in Locke (1997).

national legal theorist proposed a European legal and political order in which all states shared sovereign equality, providing a crucial new way of seeing the international legal order. For Vattel, equality did not depend on power or size but on a formal understanding of statehood, a principle that continues to shape and define the international order. While his theories are not necessarily about global constitutionalism, one might read them instead as a theorisation of a kind of international constitutionalism, one in which law and institutions such as sovereignty create a proto-constitutional European order (Vattel 1758 [2008]).

Enlightenment ideas continued to ferment in Europe, with both cosmopolitan and communitarian strands emerging. In the work of Immanuel Kant, the idea of law and rules plays a crucial role in his overarching ethical and political thought, perhaps best captured in his *Theory of Right*. Law is not simply a tool to govern society; it constructs the self and the relationships within society in a profound way. Kant addressed international affairs as well, famously in his essay, *Perpetual Peace*, where he moves from the importance of republican states to respect for international law to the intimations of a cosmopolitan political order. While some have argued that Kant is the modern-day father of cosmopolitanism, both in this essay and other political works, he is perhaps somewhere between the international constitutionalism of Vattel and later developments in international law that we might identify as global constitutionalism. That is, with his careful construction of a legal and political order in which republican states respect international law and welcome strangers in pursuit of a cosmopolitan right of hospitality, Kant moved the Enlightenment ideals of law and politics a step closer to a global constitutional ideal (Kant 1990).

While Kant's cosmopolitanism shapes one version of constitutionalism, G.W.F. Hegel's statism and communitarian philosophy shapes another strand. The pinnacle of German idealism, Hegel's conceptions of the European (or perhaps German?) state as the epitome of human development shapes constitutional thinking in a number of ways. By locating the fulfilment of the human person in the construction of a particular kind of liberal state, Hegel's theories create the state as the model form of political community, a model that continues to animate global public policies which seek to replicate the European constitutional state in situations of post-conflict and more widely in the developing world. Hegel also theorised a complex relationship between the sovereign state and its relations with other states, sometimes seeing in the practice of war the triumph of state agency, and at other times seeing the practice of legal relations among states as a defining feature of their maturity. Theorists of global ethics and politics have fruitfully drawn upon Hegel to articulate how perfecting the state can lead to a more peaceful and just global order, a version, it might be argued, of a global constitutional order (Hegel 1821 [1991]; Frost 2008).

These conflicting Enlightenment ideals around constitutionalism became a reality with the American constitutional convention in 1787. The shift from the Articles of Confederation to the Constitution altered the political and legal landscape in not just the United States but in our understandings of a constitution as a written text by which a state might be governed. The philosophical underpinnings of that constitution can be found in the series of newspaper articles written in defence of the newly proposed constitution, which eventually came to be called *The Federalist Papers*. These arguments around various elements of the constitution were written by John Jay, James Madison

and Alexander Hamilton, who were building on the ideas of figures such as John Adams, Thomas Jefferson and Thomas Paine. Together, these thinkers and political actors helped to define a new political order which relied on an open-ended political agreement. The interpretation of this text by the influential Supreme Court Justice, John Marshall, enshrined the idea of judicial review in the American, and soon global, legal and political context (Amar 2005).

Constitutional theory and practice developed further from these key moments, but they provide the context from which much later work developed. Sociological theorists of constitutionalism have drawn upon these historical antecedents to develop a range of different interpretations of constitutional theory (Teubner 2012; Thornhill 2011). Indeed, the *Handbook* includes a contribution by one of the leading theorists of sociological approaches to constitutionalism, Chris Thornhill, whose contribution locates these Enlightenment strands in relation to ideas about global governance and international constitutional developments at that time and into the modern period. In addition, Michel Rosenfeld's contribution moves us from the Enlightenment to the modern period in thinking through the heritage of constitutional thought for both domestic and global constitutionalism today. Indeed, the five contributions on history in the *Handbook* demonstrate that there is no simple liberal trajectory for constitutional thought and, as the global dimensions of those ideas are better understood, we must consider carefully the ways in which it intersects with imperial and oppressive political dynamics. For the editors, this does not imply that we should abandon constitutional thought or practice, but by understanding and acknowledging these developments, we can appreciate how they function today and how we might propose alternative configurations to avoid the errors of the past.

CONSTITUTIONAL PRINCIPLES

Emerging from these historical antecedents, however, are the four underlying principles of constitutional theory. The first, and most important, is the rule of law. The rule of law is simply the idea that a political order should be organised in such a way that decisions result from a rule-based system that has emerged from a formal legislative process. These two elements of the rule of law – governance in accordance with law and formal law-making – ensure that a political order is not controlled by any one agent. The emergence of constitutionalism in the different historical contexts noted above often comes in response to governance by individuals who care little or nothing for the consistency and fairness that arise when political life is rule governed (Bingham 2011). The rule of law is not simply the existence of a legal code, however. Law must arise from a legislative process that reflects a diversity of interests and allows a community to not simply create law but engage in the practice of politics. The difference between the rule of law and rule by law in authoritarian regimes reveals this difference (Ginsburg and Simpser 2014). That is, the rule of law means a political order that is law governed and a legal order that results from a fair and representative political process. In this *Handbook*, Mattias Kumm's conceptual clarification around the rule of law moves from philosophical reflections on the idea to a greater understanding of how it functions in the global realm.

The separation of powers is the next crucial element of a constitutional system. As with

the rule of law, the separation of powers is a device for ensuring that no single political actor has too much power or can direct the political system to his or her own purposes. As noted above, the separation of powers can be found in a different way in the ancient idea of the mixed constitution. Separating powers arose from the need for different social classes to be represented in the political order. It also represented the different forms of government, in accordance with Aristotle's division of ruling according to numbers (monarchy, aristocracy and democracy). For instance, in the Roman Republic, the democratic form was found in the legislative assemblies, the aristocratic in the Senate and the monarchical in the consuls. This separation evolved in the medieval and early modern period into a separation of functions rather than classes or forms. This separation also translated into the balance of power in a constitutional order, as the functions of the legislature, executive and judiciary came to serve different roles which ensured that no single agent (particularly the executive) could dominate the political system. Montesquieu has become the most famous theorist in the history of political thought to develop this idea, though his version of it was based on an idealised conception of the British constitutional system. The separation of powers provides a means not only to limit power, however, but also to enable power, to channel it into productive and useful ends. At times, particularly in the modern-day American political order, a separation of powers can lead to political dysfunction, especially when political disagreement cannot be resolved in a productive manner. However, the ideal of the separation of powers is not simply a limiting device, but also an enabling one. The separation of powers has also led to the emergence and importance of the judicial branch in constitutional theory and practice. Some would argue that the judicial branch in many political orders is too strong, leading to an overly legalised political order (Bellamy 2007). At the same time, most constitutional theories give pride of place to the judiciary which serves to guard the constitution and ensure the protection of rights.

Eoin Carolan's contribution to this *Handbook*, building on his previous work on the separation of powers in domestic constitutional theory, looks to the idea of a balance of powers in global constitutionalism, bringing forth an alternative approach to this crucial constitutional ideal. The institutional division of powers found in domestic constitutional theory provides a starting point for the contributions by William E. Scheuerman on the executive, M.J. Peterson on the legislature and Başak Çalı on the judiciary. In a different form of the separation of power, Thomas O. Hueglin takes up the theme of federalism in its historic and contemporary manifestations. In each of these contributions, however, the authors explore the ways in which such institutional forms function at a global level, leading to new insights into the emerging global constitutional order, albeit continuously subject to contestation and critique by actors throughout the system.

A constitutional order rests upon the people. This idea is sometimes referred to in French as *pouvoir constituant*, the heritage of the French Revolution and its theorist, Emmanuel Joseph Sieyès, better known as Abbé Sieyès. In his pamphlet, *What is the Third Estate?*, Sieyès (1970) gave voice to the people and argued for their centrality in the creation of a constitutional system. The importance of the people in the founding of the constitution translates further into their continued role in representative government and in allowing them the ability to enact and change the constitution when necessary. In recent years, particularly among post-Marxist theorists, the idea of constituent power has become a device that can be used for political protest and action across different spheres of the political

order, often outside of formal channels. This participatory tradition in political life can be unpredictable and even dangerous to stability, so one of the most important challenges for any political order is to turn political action into governmental form (Loughlin and Walker 2007). Peter Niesen's account of constituent power in the *Handbook* clarifies and advances our understanding of this idea by drawing on some figures in the history of political thought. Looking to the European Union as providing an alternative way to understand this concept, Niesen develops an important new approach to constituent power. Andrew Arato, in his contribution, looks to the practice of constitution-making, which also touches on the idea of constituent power. His comparative study of different forms of constituent assemblies, ratification procedures and political practices intersects with the global constitutionalism idea both in theory and practice.

The final principle that plays a part in constitutional theory is often the most prominent in 'popular' conceptions of constitutionalism. Rights, either in a domestic or global context, have increasingly become part of constitutional theory and practice. The classic legal definition of rights comes from Wesley Hohfeld, an American theorist of the early twentieth century: rights are justified demands we make on others (Hohfeld 1918 [1946]). This definition is not the only or final version, of course, but it does lay out some important features of rights. Rights are not a form of charity, but are demands we can legitimately make. Further, rights arise in a communal context and so require some exchange among individuals. Rights are at that intersection of politics and law where I have located constitutionalism more generally. Many assume that constitutional theory can be reduced to the protections that rights afford especially through the exercise of judicial review. Ronald Dworkin famously argued that rights are trumps in political life, a basis against which all other practices must be measured (Dworkin 1977). The rise of human rights since the end of World War II as a prominent discourse of global governance has made this concept perhaps the most important (though for some, such as the American founders, it was derivative of the creation of a functioning political system; see Zink 2013). In this *Handbook*, Samantha Besson considers the forms and practices of human rights as contributory to a global constitutional order. Human rights remain central to such practices in that they provide a language and political space in which contestation can take place. The work of James Tully and others has demonstrated how rights can be a resource for thinking through the idea of global citizenship, without falling into the liberal ideology that shaped early conceptions of rights, a crucial insight into understanding rights and global plurality.

As noted above, the point of this overview is not to devise a progressive narrative that indicates how we moved from under theorised constitutions to the culmination in the written constitutions of the United States and France. Instead, the point of this exercise is to highlight the ways in which various principles of constitutionalism emerged and have been important at different times and places. As suggested above, any time a community must seek to balance a role for law and politics, some version of constitutionalism emerges. Emphasising the diversity of historical contexts is important if only because we do not believe there is one current theorisation of global constitutionalism. Instead, there are a variety of global constitutions, and a variety of interpretations of those global constitutions. Some argue that for any global order to be constitutional, it must be tied to a specific constitutional text. Bardo Fassbender has been a leading proponent of the view that the global constitutional order is to be found in the UN Charter. He is not a

wild-eyed idealist, for he understands that the text is flawed in places and requires inter-pretation (Fassbender 2009). He builds upon this foundational work in his contribution to this *Handbook*, where he turns to the written constitution, looking to the UN Charter as an example of why a written text is to be preferred to the unwritten model. Michael W. Doyle's contribution to this *Handbook*, building on recent work he has been doing on global constitutionalism, also looks to the Charter as a constitutional document, in which he finds new insights on global governance. Jeffrey L. Dunoff, drawing from resources in both political science and international law, examines the terrain of functionalism as a possible way to understand law and institutions such as the UN and the World Trade Organization (WTO) as spaces of global constitutionalisation.

Certain strands in international legal theory have also focused on the way in which judiciaries and legal texts are coming to define international law in diverse ways. These works see a 'constitutionalisation' of international law (Klabbers et al. 2009). In his con-tribution this *Handbook*, Jean d'Aspremont not only surveys some of the efforts to find in positivist international law a constitutional theory, he also helpfully looks to the critics of these approaches (a category in which he includes himself). His insightful and considered overview reveals that some of the criticism of the constitutionalisation of international law arises from a particular set of agendas that he critiques, giving us a nuanced assess-ment from the perspective of positivist legal theory. Jutta Brunnée and Stephen J. Toope bring their interactional legal theory to bear upon debates in global constitutionalism in their contribution to the *Handbook*. Also, Anne Peters, one of the earliest proponents of global constitutionalism within the sphere of international law, proposes an understand-ing of proportionalism, a standard category across many international legal theories, as a way to see how global constitutionalism functions in the global legal sphere.

Another version of global constitutionalism arises from a cosmopolitan reading of Kant. Jürgen Habermas has made this argument in the context of European Union poli-tics, drawing on Kant's *Perpetual Peace* essay to propose an evolution from state to state international law to cosmopolitan law. He builds upon the German idea of 'constitutional patriotism' as a model for how to move toward a global civil society (Habermas 2001, 2006). The idea of *Verfassungspatriotismus* that Habermas is deploying is drawn from German constitutional theory, one which is sceptical of patriotism because of German history. At the same time, a very strong allegiance to the constitution and respect for the Federal Constitutional Court (*Bundesverfassungsgericht*) has arisen in Germany. Respect for the law at the international level for Habermas means something related to constitu-tional patriotism. Other theorists have also drawn on Kant to propose versions of global constitutionalism. Garrett Wallace Brown draws on not only the *Perpetual Peace* essay but a wide range of Kant's work on political philosophy and public law to explore the potential for a global constitutional order. Brown sees in Kant's account the possibility for a cosmopolitan constitutional order (Brown 2009). In his contribution to our *Handbook*, Brown makes a powerful case that global constitutionalism is a form of legal cosmopoli-tanism, and that theorists from both perspectives could learn greatly from each other.

Others have located constitutionalism in political arrangements rather than primarily in the rule of law discourse. Jean Cohen, for instance, while writing from the perspective of an international legal theorist, has proposed a more minimalist account of constitutionalism at the global level, with more focus on the importance of sovereignty as a principle that should undergird the international order but which can somehow accommodate moves

toward a globalising structure (Cohen 2012). Theorists drawing from strands in international relations (IR) theory have proposed similar constitutional interpretations of the global order. Liberal theorists of international relations such as G. John Ikenberry suggest that the international order is becoming more constitutional as it adopts ideas about the rule of law and human rights. Ikenberry and others, however, link this development to the triumph of American and British liberal ideas, which makes their account less about balance and more about a hegemonic structure imposed from a single source (Ikenberry 2006). Iain Ferguson explores some of the liberal strands within global constitutionalism, specifically connecting them to debates in IR theory. A republican literature within IR theory has also emerged that focuses on how balances and law promote and protect individual agents. These works draw on sources such as Aristotle, Vattel and the American founders (Onuf and Onuf 1993: Onuf 1998; Deudney 2007). Antje Wiener has drawn upon constructivist theories of IR alongside wide-ranging interviews with European policy elites to propose the existence of an 'invisible constitution' in certain regional and international contexts (Wiener 2008). Drawing on James Tully's *Public Philosophy in a New Key* (Tully 2008a, 2008b), practice-orientated perspectives on the contested interpretations of fundamental norms have offered novel insights into the time-space contingency of constitutionalism as a contested narrative itself (Tully et al. 2016). Drawing upon constructivist theories of IR and public philosophy this research focuses on the impact of cultural diversity on variations in the normative structure of meaning-in-use in distinct constitutional contexts (Milliken 1999). Based on critical discourse analysis, this research adds an inductive approach to global constitutionalism, arguing for the importance of the interplay of different kinds of norm validation. Jan Wilkens, in his contribution to this *Handbook*, summarises and advances the work of critical constructivism in IR theory and derives important links with global constitutionalism as a prospective field of study of diversity and constitutional development based on bottom-up regional perspectives. International Society theorists have also contributed to this literature, going back to some brief references in Martin Wight's work to more developed accounts of constitutional legitimacy in Ian Clark's work and studies of order by Andrew Hurrell and Robert Jackson (Jackson 2003; Clark 2005; Hurrell 2007; Lang 2014). Another IR theory that held particular prominence in the twentieth century, realism, is also addressed in this *Handbook*. By elaborating on the distinction between legal and political realism, Oliver Jütersonke explores some of the ways in which theorists such as Hans Morgenthau might be more relevant to understanding global constitutionalism than might at first glance seem possible.

Engagement with the idea of global constitutionalism continues to develop in the pages of the journal *Global Constitutionalism*. From its opening editorial, which set out an agenda for research on the idea (Wiener et al. 2012), to more sceptical engagements with what it means to talk of such an idea (Brown 2012) and, more recently, about the interrelation between the 'end of the "west" and the future of global constitutionalism' (Kumm et al. 2017), the journal has continued to develop the idea and locate it in relation to themes such as democracy, the rule of law and human rights. As befits an interdisciplinary scholarly journal, the editors have been open to a range of different theoretical and disciplinary positions on the idea, and these positions are reflected as well in this *Handbook*. Indeed, it is the idea of contestation and constitutionalisation, the ongoing development and refinement of the idea, that frames an important part of the *Handbook* and which we explain in more detail in the next section.

CONSTITUTIONALISM AND CONSTITUTIONALISATION

To some research in the field of global constitutionalism entails studying 'constitutional practice – and constitutional discourse – *at transnational sites* of governance' (Dunoff and Trachtman 2009, p. 3, original emphasis; compare also Klabbers et al. 2009). Others, in turn, would argue that studying global constitutionalisation includes the very constitution of transnational sites that obtain their legitimacy through inter-national contestations of constitutional norms (Benhabib 2007; Isiksel 2010; Liste 2016). The contributions to this *Handbook* demonstrate that the specific timing of constitutional practice matters in two ways. First, by turning to practices that precede these sites of governance, it becomes possible to include a range of actors who are located at the fringes of international organisations. It follows that global constitutionalisation is not understood as practised by member states of international organisations or international treaty regimes and their government representatives. The conceptual move allows for the inclusion of a more diverse state-plus actorship which encompasses the contestations of non-governmental organisations (NGOs), social movements, strategic networks and advocacy groups, next to international institutions and state, as constitutive for both the sites and the fundamental norms of global constitutionalisation. Second, the inclusion of contestatory practices that are located as 'prior to', 'outside of' or 'in interaction with' sites of global governance allows for research to establish the very transnational quality of an arena (Tully 1995, 2002; Pettit 2007). This suggests how the practices which are constitutive of global constitutionalisation can be understood as 'unbound' from the state (Wiener and Oeter 2011, 2017).

There are some traditional sites in the international order where forms of global constitutionalism can be found. These include the WTO, the UN, the ICC and the EU. The *Handbook* includes discussions of these spaces in the contributions from Joel P. Trachtman, Jan Klabbers, Anthony F. Lang, Jr., Andrea Birdsall and Jo Shaw. In their accounts, these inherently international spaces have opened up possibilities for considering global political practices that are constitutional or demonstrate modes of constitutionalisation. In so doing, these places, while certainly sites for powerful agents to control institutions, also reveal places where contestation can fruitfully take place. For instance, in the critical accounts of the global political economy offered by Gavin W. Anderson and Christine Schwöbel-Patel, global economic interactions are revealed as possible sites of resistance and contestation.

This centrality of the conceptualisation of the place where constitutionalisation occurs has been explored in particular by practice-orientated approaches to norms in international relations theory as well as in public philosophy. While some work with an unproblematic understanding of 'transnational sites of governance' (Dunoff and Trachtman 2009, p. 3), to others the qualification of an arena as 'transnational' represents a research assumption that remains to be proven by empirical research. For, if sites are conceptualised as 'transnational' the impact of diverse experiences and expectations must per se remain bracketed. To reverse this analytical bracketing, practice-oriented approaches within global constitutionalism allocate norm-generative practices at a point in time that exists 'prior' to constitutional agreements. That is, practices, principles and agreements are considered to be equally and partially constitutive for the normative meaning-in-use entailed in and transported by global constitutionalisation at any point in time (Berger

and Luckmann 1991; Onuf 1994; Adler-Nissen and Kropp 2015; Sending et al. 2015). The contribution from Susanna Mancini demonstrates that religious traditions can provide such spaces for contestation, while Neil Walker's development of the idea of pluralism further enhances our understanding of how contestation functions in international legal orders as they overlap and interact.

To summarise, constitutionalisation is a category that describes processes of institutional ordering which result in terms of constitutional function and quality and which are therefore comparable with forms of political and legal order. In turn, as a social practice, contestation indicates objection to the norms of the latter orders.

> Depending on the type of norm, ranging from fundamental norms to organising principles or standardised procedures, this disapproval is expressed differently . . . The mode of contestation, that is the way contestation is displayed in practice, depends on the respective environment where contestation takes place (*i.e.* courts, regimes, societal or academic). Several discursive codes are to be distinguished (*i.e.* formal, semi-formal or informal). Accordingly, four modes of contestation can be distinguished with reference to the literatures in law, political science, political theory and political sociology, respectively. (Wiener 2014, p. 1)

At the centre of these contestations are fundamental norms, that is, norms and principles that are widely shared by the relevant actors, fulfil a constitutional function and are parallel to the fundamental constitutional principles at the basis of institutional ordering at the national level. For global constitutionalists, therefore, contestations entail key information about normative change and indicators of the sites where this change is negotiated.

In contra-distinction to concepts of political and legal order, the trans-border quality of global constitutionalism crucially depends on concepts of social order and social ordering of the global realm. Given the trans-border quality as a *sine qua non* of global constitutionalisation as a process that is carried by a state-plus actorship which operates across and beyond the boundaries of national constitutionalism, the central concepts of global constitutionalism have been evolving in close interrelation with the constitutional ideals and ideas of the previous centuries. Today's meanings of the four main elements of modern constitutionalism, that is, the rule of law, the balance of power, the *pouvoir constituant*, and rights have changed subsequent to the contestation of fundamental norms. As a relatively recent field of study, global constitutionalism reflects these contestations. The main concepts for the study of global constitutionalisation therefore include contestation (as the constitutive practice of constitutional substance), fundamental norms (including the rule of law, fundamental rights of individuals and democracy) as well as state-plus actorship (as the stakeholders with a rightful claim to regular contestation). While traditions of political and legal order inform the ideas and ideals of constitutionalism, the trans-border quality of global constitutionalism requires a shift from modern constitutional ideas towards the way these ideas' normative meanings have been re-/enacted over time. That is, in order to address issues of legitimacy, fairness or accountability in terms of global constitutionalism, research needs to engage with both the given 'hard' institutional settings (that is, international organisations and their respective treaty regimes) on the one hand, and the 'soft' institutions that are re-/enacted through contestatory practices vis-à-vis fundamental constitutional norms (that is, the normative structure of meaning-in-use) on the other. By linking contestation (as a localised activity) with constitutionalisation (as a globalised process) it is possible to facilitate a relational

account of global constitutionalisation as a mosaic of pluralist constitutional narratives rather than a single encompassing normative order.

CONCLUSION

In his recent history of global governance, Mark Mazower argues that culture, science, politics and law each made important contributions to theories of world order in the nineteenth century. While culture and science are not the focus of this book, law and politics are. Mazower uses the American conflict over the League of Nations (hereafter, the League) to bring out the different strands of legal and political thinking in the debates about global governance. He points to the legalism of figures such as Elihu Root and William Howard Taft as advocates of the arbitration and legalisation model of global governance that played such an important role in creating the judicial institutions and international legal culture of the late nineteenth and early twentieth centuries. At the same time, he suggests that the ideas of Woodrow Wilson, whose scholarly work focused on the US Congress, as central to the creation of a parliamentary model for the League structures, which highlighted the importance of deliberation and representation as more important than law and judicial structures. The Wilsonian legislative and political model became the foundation for the League, which Mazower argues played an important part in the American Republicans' refusal to ratify the League. Certainly, some Republicans such as William Borah refused the League because it limited American sovereignty, but according to Mazower, some American resistance came from an insistence on a stronger legal and judicial institutional governance model rather than the parliamentary and deliberative model (Mazower 2012).

Had it been a recognised idea at the time, perhaps global constitutionalism might have allowed a way to ameliorate this conflict. Global constitutionalism, or constitutionalism, brings together the political and legal. Constitutions are founded as political acts but they generate legal structures and codes. When created, those institutions and legal codes shape and reshape political life and the deliberations that take place in parliamentary spaces. In so doing, global constitutionalism can be seen as a framework that brings together law and politics. There is no end point to this process, however, for it continues on and will continue to be a contested and fruitful subject of analysis. The contributors to this *Handbook* provide new insights from history, politics, law and sociology in the hope of laying some foundations on which to build further research and inform global public policy. It is our hope as editors that this *Handbook* will provide new ways of seeing international relations and international law, which can enable new political constellations and insights in the multiple and contested global orders of today.

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