PART I Visions of Postnational Law

# Beyond Constitutionalism: The Pluralist Structure of Postnational Law

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**Parte I**

**Postnational Law in Search of a Structure**

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Beyond Constitutionalism

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**Abstract and Keywords**

Chapter 1 analyses the turn to postnational law and the main frames for conceptualizing it. As binary distinctions of inside/outside and binding/non-binding are giving way to more gradated forms of normative authority in the practice of governance in and beyond the state, national, regional, and international law are increasingly enmeshed. The emerging postnational law puts pressure on the guiding principles and forms of legitimation of the different orders—thick domestic forms of legitimacy and thin, consent-based and diversity-oriented international ones are no longer neatly separated and come into conflict. Attempts at containing this challenge by re-domesticating global governance in national constitutional frameworks appear as both impractical and normatively problematic. For the new, postnational legal order, two structural visions—constitutionalism and pluralism—stand out; they form the focus of this book. This chapter briefly introduces them and provides an overview of the different chapters.

*Keywords:*   [postnational order](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=postnational%20order), [postnational law](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=postnational%20law), [legitimacy](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=legitimacy), [national law](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=national%20law), [international law](http://www.universitypressscholarship.com/search?f_0=keywords&q_0=international%20law)

**I. CLIMAX AND CRISIS**

In the twenty years since the end of the Cold War, the modern framework of law and politics has plunged from one of its greatest successes into one of its most serious crises. In the early 1990s, constitutionalism, the cornerstone of Western political imagination for two centuries, seemed to emerge unrivalled when its main competitor disappeared from the scene, and it became the model for political change not only in Central and Eastern Europe but in many other parts of the world as well. At the same time, international law turned into a beacon of hope, unleashed by the demise of deadlock and disagreement and suddenly able to redeem its promise of a better, more just world. The international sphere seemed to move from anarchy to order, with new institutions and courts structuring the emerging landscape and common values providing a principled framework for it. The spread of constitutional democracy at the domestic level seemed to be reinforced and secured by an increasingly robust and fair international legal order.

Two decades later, both constitutionalism and international law have come under heavy pressure and are unlikely to survive in their classical form. In both cases, this has to do with their own success and the success of the respective other. Constitutionalism is struggling because international law and global governance have become increasingly effective, thus removing key issues from the reach of national constitutions and domestic political processes. International law, on the other hand, experiences problems because its thin, consent-oriented legitimacy base no longer appears adequate to the task. Now that international law has grown in importance, it is seen as overly formalistic and undemocratic, and a thicker, more substantive foundation seems called for. Constitutionalism stands ready to fill this gap, but to many, it appears as unsuited for this expansion and also as too emblematic of a particular political tradition.

As constitutionalism and international law are moving closer together, both undergo radical change, risk their identity, and may well shift into a (p.4) twilight.[1](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-1) The classical distinction between the domestic and international spheres that had sustained them is increasingly blurred, with a multitude of formal and informal connections taking the place of what once were relatively clear rules and categories. In this sense, law has become ‘postnational’—the national sphere retains importance, but it is no longer the paradigmatic anchor of the whole order. In Europe, this process began earlier under the influence of European integration, but many held out the hope that old frameworks could be revived once the integration process had gone far enough. Globalization and the rise of global governance have shattered this hope—they have undermined old distinctions, created deeper connections, yet without serious prospects to recreate the statist paradigm on a larger scale.

Law and politics have been transformed, but we do not quite know yet how—we do not have a settled understanding of what structures are currently taking shape, or in what directions the changes go or should go. We experience, as Neil Walker has phrased it, a ‘disorder of orders’, with countless analytical and normative proposals competing for influence.[2](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-2) Many are inspired by domestic analogues, such as administrative law or indeed constitutionalism. This is only too natural: if much of what used to be domestic has now moved into the global sphere, extending domestic concepts is an obvious move to salvage historical achievements. Yet other proposals take the opposite path: they seek to use the opportunity to break free from traditional frameworks that have perhaps captured our imagination for too long. As usual, a great transformation comes with freedom, opportunities, and anxiety.

This is the landscape in which this book is situated. It is a rugged landscape, one in which it is far from clear whether and how the forms and values that have shaped our political imagination for the last few centuries can be recast and made to work. We do not know yet whether in the postnational setting we can recreate the sense of collective political agency so characteristic of Western politics since the late eighteenth century; whether we can envision democratic theories with real purchase in the complex structures of global governance; whether the idea of a ‘public’ power will be as central to the postnational sphere as it has been in the domestic; or whether Western governance scripts should at all be the focus of our imagination for global structures.

(p.5) This book does not pretend to have conclusive answers to these big, open questions or to present a comprehensive proposal for the future development of postnational politics and law. If anything, it aims to clarify the challenge we are facing and some of the key choices that lie ahead. It begins in this chapter by outlining why it might be justified to conceive of today's law as ‘postnational’—a notion that may be accepted more readily in politics but still meets with significant resistance in the legal arena. The remainder of the book explores the shape and trajectories of the order that is beginning to replace the classical, ‘Westphalian’ configuration. It focuses on two central structural visions for postnational law: constitutionalism and pluralism. Both capture elements of the way the legal order beyond the state has developed over the last decades, but observers disagree as to which has been more influential. This book seeks to shed light on this question, yet more importantly, it seeks to help us better understand how these antagonistic visions relate to the circumstances of postnational politics—circumstances which, because of the degree of societal diversity and contestation, are markedly different from those we typically find in domestic politics. What forms and structures we need to realize key political values in this context, is the question driving the inquiry in this and the following chapters.

**II. POSTNATIONAL POLITICS—POSTNATIONAL LAW?**

The term ‘postnational’ had been in use for some time before Jürgen Habermas made it prominent in the late 1990s. It was employed chiefly to analyse changes in the practice of citizenship and membership—it pointed to a process by which membership rights had become decoupled from a strong form of belonging to a national polity.[3](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-3) With Habermas and other authors picking the term up, it took on a broader meaning, denoting now a more general decoupling of political processes from the nation-state; a development that demoted the state from the centre of the political universe to one among a number of actors in a wider setting, populated also by international institutions, multinational companies and transnational non-governmental organizations (NGOs).[4](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-4) The diagnosis was, in Michael Zürn's words, that

[t]he national constellation, that is the convergence of resources, recognition and the realization of governance goals in one political organization—the nation state—, seems to be in a process of transformation into a post-national (p.6) constellation. The nation state is no longer the only site of authority and the normativity that accompanies it.[5](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-5)

Throughout the first decade of the twenty-first century, this usage became more commonly accepted.[6](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-6) The diagnosis behind it—the fact that the centre of gravity had shifted away from the nation-state in its classical configuration—was in any event hardly contested any more.[7](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-7) The boundary between domestic and international politics had become a ‘frontier’, in James Rosenau's influential expression: ‘a new and wide political space … continuously shifting widening, and narrowing, simultaneously undergoing erosion with respect to many issues and reinforcement with respect to others’.[8](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-8) In other areas, postnationalism was subject to greater dispute. For example, while Ulf Hedetoft and Mette Hjort introduced their 2002 volume on ‘The Postnational Self’ by pointing out that ‘hybrid identities, several homes, and multiple attachments are a fact of life in most nation-states’,[9](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-9) the contributors varied in their assessment of the degree and direction of the actual shifts in individual identities.

**1. Law at the Domestic–International Frontier**

In law, diagnosing a ‘postnational turn’ faces yet higher hurdles. It is one thing to state that the centre of political authority and feelings of belonging have changed, another to claim that this has effected a shift in the structure of the legal order. Law's formality resists the simple reflection of shifts in its environment; the law insists on its own power to determine whether a fact is legally relevant and how.[10](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-10) Political deterritorialization and pluralization (p.7) may thus contrast with law's aspiration for unity.[11](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-11) And indeed, the classical, formal separation between national and international law had long survived the factual pressures stemming from the increasing density of international law. The fact that there was a thick layer of law on the international level did not in and of itself challenge the distinct existence of domestic law, which regulated—through the national constitution or other domestic instruments—the extent to which external norms entered it.

In Europe, this came to be challenged by the rise of European Union law.[12](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-12) Through doctrines such as direct effect and supremacy, EU law claimed for itself the right to determine its impact in the domestic sphere, thus piercing the protective veil around national law. This impact could theoretically be traced back to delegations from member states, and domestic legal orders also continued to stipulate conditions for European law to have effect in them.[13](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-13) Yet the need for uniform interpretation and application largely reduced this insistence on domestic autonomy to a mere formality, relevant only in marginal cases, if at all. In the normal course of affairs, norms generated at the EU level trumped domestic law, and the two formed part of a more integrated legal order than the classical domestic/international dichotomy suggested[14](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-14)—albeit one in which European law was often ‘indigenised’ in its application in the national realm.[15](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-15) Unsurprisingly, EU law is often labelled as *sui generis*—it simply does not fit the established categories.[16](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-16)

(p.8) Beyond the European Union, transformative processes had less of a formal pedigree. International law was increasingly dealing with domestic issues, but this fact did not at first appear to challenge classical structures.[17](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-17) Yet thicker linkages between layers of law are visible, for example, in human rights matters. In the European human rights regime—which I will analyse in greater detail in Chapter [4](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-4)—national constitutions have increasingly been interpreted as linked with European human rights standards, creating a default position often difficult to rebut, while European rights bodies were careful to respond to domestic readings of certain rights.[18](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-18) Similar interactions have been observed well beyond Europe. International human rights norms and practices have became increasingly influential for domestic judges—sometimes even despite the fact that they were not binding for the country concerned, as in the much-noted *Baker* case in Canada.[19](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-19) This has led to a diagnosis of a ‘creeping monism’ in many common law countries, quite in contrast with their classical dualist stance.[20](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-20) Yet processes of adaptation and reinterpretation of national constitutions and law on the basis of regional or international human rights norms are widespread in other jurisdictions too—provoking the ‘globalisation of state constitutions’, as one commentator has noted.[21](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-21)

Another area in which the classical bifurcation between domestic and international law is under pressure is that of global regulatory governance. In the context of security governance, the UN Security Council began to target individuals and non-state groups in the 1990s, and at times it created (p.9) immediate obligations for them, thus piercing the veil of the national legal order.[22](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-22) This has led to some resistance and countermoves, which will be the subject of more detailed investigation in Chapter [5](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-5). In spite of such tensions, Security Council resolutions are often granted particular weight in the domestic sphere. In many countries, they benefit from facilitated procedures, sometimes even from an automatic incorporation into national law. In this way, UN sanctions implementation often avoids participatory procedures and parliamentary oversight, which would have been applicable to other forms of regulation. And it often enjoys special weight when domestic courts conduct proportionality analyses of interferences with individual rights.[23](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-23)

In other areas of global governance, international norms may not insist on direct effect or enjoy formalized privileges in the domestic realm, but they have become an ever more integral part of overall law-making mechanisms—and have ‘colonised’ domestic law to an important extent.[24](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-24) As we will see in Chapter [6](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-6), world trade law has come to shape EU law and jurisprudence as a matter of course, despite the reluctance of the European Court of Justice formally to accept its direct effect in the legal order of the Union. This also helps related standards, such as those set by the Codex Alimentarius Commission on food safety matters, to influence the practice of domestic courts and regulators in significant ways.[25](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-25) In the area of financial regulation, non-binding global standards, usually set by the Basel Committee on Banking Supervision, are transformed into domestic regulations almost automatically—because they benefit from facilitated procedures (as in the EU), because states cannot afford not to implement them because of the costs involved, or because of an identity of domestic and global regulators which makes implementation a matter of course.[26](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-26) More broadly, we can observe an increasing number (p.10) of areas—from international security to civil aviation regulation—in which national judges have adopted subtle approaches to weigh the role of global norms, not granting them all-out authority but carefully calibrating their influence.[27](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-27) And on issues as diverse as counter-terrorism action, environmental protection and migration control, courts are making use of a panoply of domestic and international law to engage in cross-country dialogues with other courts about how to hold executives to account.[28](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-28)

Such processes testify to an increasing ‘normalization’ of international law and global standards in regional and national law, quite in contrast with—or at least circumventing—the classical picture of separate spheres.[29](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-29) This normalization is in part driven by the incentive structure in and through which global regimes operate: when they function as part of coordination games, they can set focal points individual states can only ignore at a high cost, especially at the risk of losing market access. In collaboration games, many regimes today operate with monitoring and enforcement mechanisms which raise the costs of non-compliance considerably.[30](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-30) The widely noted ‘legalization’ of world politics[31](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-31) formally remains mostly confined to the international level, but it creates pressures that lead to an ever-growing interwovenness of the different layers of law—national, regional, international.

This development is particularly pronounced in Europe, where the European Union has blurred the lines between the layers in an exceptional way. But the examples I have cited are by no means confined to this space. This would also be surprising—global governance may have an uneven impact across the world and its legal influence is subject to the forms and culture of national legal orders, but the factors that push for closer linkages (p.11) should have particular force in countries that are more dependent on international institutions than the rich states of the North. We require far more empirical work into the spread, shape and intensity of the links between domestic and international layers of law in different parts of the globe. Yet the initial survey above already shows that the categorical distinction between domestic and international layers of law has in many contexts given way to a greater interwovenness and a more nuanced assessment of the weight of norms from different origins.

**2. Changing Practices and the Rise of Postnational Law**

What consequences should we draw from this (admittedly sketchy) account? We could insist on formality and point to the fact that, despite all interlinkages, the divide between national and international layers of law continues to exist—after all, courts usually look first to their own legal orders to determine which norms apply.[32](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-32) The fact that both layers interact and perhaps even function in similar ways does not challenge this formalist view. It suggests taking the different layers into view together as an object of study, but not necessarily drawing them into one as a matter of legal theory.[33](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-33)

Yet keeping the layers strictly apart would hardly do justice to the more nuanced practice I have just outlined. We do not need an anthropological approach to take such practice seriously in legal theory; after all, positivist conceptions of law, such as the ‘social fact’ approach of H L A Hart, also place social practices at the centre. In Hart's view, for a rule of recognition to be in place it needs to be generally accepted by decision-makers and public officials.[34](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-34) It is certainly too early to claim that there is today a rule of recognition that includes domestic as well as regional and international spheres and binds them together in one integrated global legal order. We would need more empirical work to ground such a claim, and practices are probably too diverse at the moment to allow for a general conclusion in any (p.12) case.[35](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-35) The ultimate reference points of the law are in flux, and courts and officials attach weight to sources from different spheres. Norms from all spheres do not enjoy the same weight—for many decision-makers, a clear norm from their own order will be more important than one originating from another context. Domestic judges will pay more attention to domestic norms; international judges to international ones (and among them, for example, World Trade Organization (WTO) panellists more to WTO law than to other international legal rules). However, norms of different origins will likely play a stronger role when solutions are not obvious—when, as is usually the case, a legal order leaves its own officials and judges interpretative space. Throughout this book, we will encounter various strategies of courts to fill this space by relating to other legal orders, and I will return to them in greater detail in Chapter [8](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-8).[36](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-36) Suffice it to note at this point that in this picture, external norms come in at the interstices of internal ones and may have persuasive rather than binding authority. It is a picture of gradated authority—one that leaves behind the binary scheme of binding/non-binding and instead associates norms with different weights, depending on the particular decision-making processes at issue.[37](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-37) Postnational law is not black and white; it comes in shades of grey.

We may thus not have arrived at one integrated legal order for the globe, but we have left behind the traditional dichotomy for a denser form of interaction in which national law—the anchor of the old order—only plays one part among others. As Nijman and Nollkaemper put it, ‘[n]o longer can we talk of *The* Divide; it rather becomes a more fluid set of continuities and discontinuities between national and international law’.[38](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-38) The resulting ‘postnational law’ is thus a frame comprised of different orders and their norms. It overcomes the categorical separation between the spheres, without however merging them fully or necessarily defining the degree of authority their different norms possess. How this frame is filled, and in particular what authority is assigned to the different layers and bodies of law, will have to be worked out in the further specification of postnational law's content.

**(p.13) 3. Framing Law and Legitimacy**

Besides providing a better fit with practice, such a conception of the legal order would have the advantage of aligning it more closely with the legitimacy questions postnational governance raises. From a positivist perspective, law may not be conceptually linked to morality. Yet law often provides a certain degree of legitimacy, and it is in any case a key instrument of social control. Throughout modern constitutionalism, it has thus been central to realizing visions of the right political order, and legal—especially constitutional—questions have typically been framed as questions of political theory too. This link becomes tenuous, though, if domestic and international law are treated separately while the political (and also legal) linkages between the layers continue to grow.

In the classical picture, national and international law were grounded in distinct forms of legitimacy—domestic law in thick concepts such as liberal democracy, communism, or theocracy; international law in the consent (or, as the case may be, acquiescence) of the individual states. The distinction of layers thus allowed for the coordination of very diverse, yet still thick domestic visions of political justice; as long as the two only intersected through consent, wide divergences could be managed.[39](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-39) However, the growing linkages between the layers render this model moot. As the domestic and international spheres come closer together, questions about their normative foundations come to the fore. International law, in particular, can no longer rest on its old basis when consent elements have been increasingly diluted through delegation to international institutions, decision-making in informal networks and enforcement through review mechanisms and formalized sanctions procedures. And domestic law cannot achieve its objectives if key parts of what it intends to regulate escape its reach. If this is so—and I will return to this point in the next section—legitimacy questions have to be framed for the entirety of the order, not just for one (domestic or international) part of it. In another context, this has led me and my co-authors to stipulate the emergence of a ‘global administrative space’ and ‘global administrative law’.[40](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-40) Conceptualizing law as postnational allows us to link legal construction to legitimacy frames in an even more encompassing way. The move to ‘postnational law’ is thus also a response to the political (p.14) enmeshment of all parts of the global order and to the ensuing shift in structures of legitimation.[41](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-41)

**III. STRUCTURAL VISIONS**

Postnational law is a relatively open frame that needs to be filled with content, but also with structure—with a determination of how the different layers of law and their various institutions relate to each other. The question of structure is at the heart of this book, and in the chapters that follow I will inquire in greater detail into different structural visions that compete for explaining and structuring the postnational space. We can situate this competition within three main strands of thinking that dominate the debate about structures—strands that reflect broader attitudes to the challenge of postnational governance.

**1. Three Approaches: Containment, Transfer, Break**

As suggested in the introduction, the rise of postnational governance provokes contrasting reactions. In some it causes anxieties, a sense of threat; in others, a sense of opportunity; and in many (of course) feelings somewhere in the middle. How these reactions are channelled into theoretical construction, however, depends on a second dimension, namely views about institutional possibilities—a focus on the continuity of traditional forms contrasts here with an emphasis on difference and disruption, the need to respond to the challenge with new institutional imageries.

The first broad approach to the structure of postnational law—*containment*—combines a vision of threat and a prospect of continuity. It largely rejects the changes brought about by postnational governance and seeks to limit their impact. It insists that both practically and normatively, the only hope for legitimate governance lies in the domestic constitutional framework and that governance structures should be conceived, and constructed, as ultimately flowing from and controlled by national political and constitutional processes. This stance is most commonly based on democratic arguments that emphasize the social and institutional preconditions for democratic processes which are difficult to replicate beyond the state. Sometimes these are framed in absolute terms, such as when a strong common *demos*, a somewhat homogeneous people, is seen as a prerequisite for democracy and the ability of a collective to give itself a constitution.[42](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-42) Many (p.15) approaches erect lower hurdles, but even so they require a degree of societal solidarity or a quality of common deliberation that usually obviates intense forms of cooperation beyond the state (or at least beyond highly integrated regional polities).[43](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-43)

Advocates of containment do not always focus on democracy alone; they also point to other obstacles for realizing key political values. For example, they see the idea of a constitution, and of constitutionalism, as largely utopian in the global realm—creating a framework for public power that redeems the promise of agency and self-government seems to them largely impossible in the absence of massive social and institutional change.[44](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-44) The consequence would be to tie international cooperation back to domestic processes and to re-establish the control of national parliaments and governments over the making and implementation of international norms—thus to return as closely as possible to the classical model of international law, even if this implies serious limits on transboundary cooperative efforts.

The second approach—*transfer*—likewise pursues continuity but harbours greater hope that such continuity can be achieved by transferring key domestic concepts and institutions to regional and global levels. Such hope is expressed most prominently in David Held's theory of cosmopolitan democracy,[45](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-45) but also, for example, in approaches such as that of Philip Pettit for whom the structure of domestic democracy—with an emphasis (p.16) on contestation—is not as alien to the global order as in other theories that focus more on electoral authorization.[46](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-46) Others, who stress deliberation as key to democracy, also see chances for its realization beyond the state.[47](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-47) I will return to those theories in Chapter [8](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-8).

Other authors in the transfer category focus less on democracy as such, but more on broader frameworks: most prominent here are the widespread attempts to translate constitutionalism into the postnational arena.[48](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-48) As we will see in greater detail in the next chapter, these take a multitude of forms, ranging from a reinterpretation of the current international order in constitutional (hierarchical, value-oriented) terms, to calls for stronger legalization or a better realization of rights in postnational governance, broader attempts to conceive of global constitutionalism as ‘compensating’ for deficiencies in the domestic realm, or comprehensive reconceptualizations of constitutionalism in a cosmopolitan paradigm.[49](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-49) In this reading, transferring concepts means adapting them to the new circumstances while securing continuity with their core meaning.

The third strand of thinking—*break*—seeks to go beyond, rather than connect with, traditional forms in the postnational space. One element in this strand is a decoupling of legitimacy concerns from democracy as such, either through an emphasis on output over input legitimacy, through an exploration of non-electoral accountability mechanisms, or more broadly (p.17) through a focus on accountability as a mix of relationships that does not necessarily find its anchor in democratic terms.[50](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-50) For some, the turn to global governance is seen as an opportunity to further projects which, like that of an ‘agonistic democracy’, have not been realized domestically.[51](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-51) On a more structural level, advocates of a ‘break’ eschew constitutionalism's emphasis on law and hierarchy and propose more pluralist models, which would leave greater space for politics in the heterarchical interplay of orders.[52](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-52) This often connects with a hope for change through activism and contestation, and some such theorizing is itself inspired by agonistic interpretations of politics, such as that of James Tully.[53](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-53) Other strands are rooted in the very different framework of Luhmannian systems-theory.[54](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-54) Chapter [3](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-3) will analyse the pluralist imagination and its promise in greater depth. It is probably the most pronounced attempt to break with traditional forms in the construction of postnational governance.

**2. Containment's Bleak Prospects**[**55**](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-55)

This book ultimately sides with the latter, pluralist vision and situates itself within the strand of thinking that favours a break with classical forms. As we will see in the following chapters, it shares with the advocates of containment the view that in postnational governance continuity with key political traditions is difficult, if not impossible. Like protagonists of the transfer approach, however, it sees the idea of returning to domestic constitutionalism as the main anchor of the political order as neither practically possible nor normatively desirable.

**(p.18) Domestic Constitutionalism and its Limits**

Domestic constitutionalism gains its teeth through the degree of control domestic political processes exercise over outcomes—through the extent to which they can decide on policies without being bound, or strongly influenced, by external action. In the classical picture, this was achieved through a buffer between the layers of law—international law and international institutions rested on state consent (expressed typically in treaties), and the obligations flowing from them, typically relatively vague, could be concretized and controlled through domestic implementation. Whatever substantive problems international law raised were dealt with through the channel of member states, and the central site for controlling transnational governance was the domestic constitutional setting.[56](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-56)

Today, constructing the accountability of postnational governance around delegation and control bears only limited promise.[57](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-57) This is largely because of the processes I have sketched above as lying at the core of the shift to postnational law. It is, first, because of the increasing legalization of international politics and the institutionalization of international law. When powers are delegated to international institutions, the initial delegation of powers is usually thin: the founding treaties of international institutions (as well as the European Union) generally contain only vague guidance as regards the scope of powers, especially informal powers,[58](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-58) and even this limited determination disappears when it comes to transnational government networks which typically operate without a formal basis altogether.[59](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-59) Moreover, delegation is entirely absent as regards outsiders (non-members) that may be affected by decisions,[60](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-60) or in the case of private regulators. The latter do not depend on any form of delegation but, even when they cooperate with (p.19) governments, are typically self-appointed.[61](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-61) Because of the need for flexibility in those institutions and the difficulty of creating and speedily adapting treaty mandates, more extensive formal bases and greater specificity will usually be hard to achieve.

Moreover, the level of control each member state can exercise over an international institution is usually low. This is in part because of the problem of multiple, diverse principals: delegation structures are relatively unproblematic and may allow for meaningful degrees of control and accountability if there is only one principal (or few principals), as is typically the case in domestic settings where central governments or parliaments delegate power to lower levels or independent institutions. The situation becomes more problematic when the number of principals increases: each of them can then retain only a smaller fraction of control, and mechanisms for holding agents to account become more cumbersome.[62](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-62) Greater control would only flow from veto rights, but these would risk stalemate in any institution with a significant number of members.

A more promising avenue for domestic control might then be the implementation of international decisions. Whether binding or non-binding, most norms and decisions in postnational governance depend on domestic implementation for their actual effectiveness; global regulatory action is typically not followed by its ultimate addressees (state officials, individuals, companies) unless it becomes part of the domestic legal and regulatory framework. In the classical vision of international law, this opens up space for states' sovereign choices as to their domestic policies—even if such choices contradict international rules, they remain decisive in the domestic realm (even though they might entail responsibility on the international level). This in turn allows domestic constitutionalism to take centre stage, by determining when and how international norms can enter domestic law, and by defining (p.20) the substantive limits and procedural conditions for engagement with the international sphere.[63](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-63)

For this to be an effective tool of national control, however, it has to operate in a relatively permissive environment: if non-implementation is to remain a real (rather than merely formal) option, it must not be overly costly. In classical international law, this was certainly the case, as rules were often underspecified and non-compliance even with binding rules was rarely subject to meaningful sanctions. Yet today, as already mentioned, precision has increased and enforcement has gained teeth in many areas of postnational governance. The clearest example is the EU, with its doctrines of ultimate effect and supremacy as well as the possibility of sanctions against non-complying member states. But similar considerations apply on the global level too: if refusing compliance with WTO rules exposes a country to trade sanctions that cost millions (sometimes hundreds of millions) of dollars, it presents a conceivable option for only very few actors. And where international standards help solve coordination games in global markets, opting out is often not a real option as it entails exclusion from those markets, or at least significant hurdles for access.[64](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-64) Non-compliance—even with non-binding instruments—thus often comes at a prohibitive cost, and the prospect of domestic constitutionalism retaining control through implementation is accordingly limited. As pointed out above, this problem is exacerbated when global decision-making involves domestic regulators directly: if they are implicated in the setting of global standards (as they typically are in government networks), their commitment to compliance will often be too strong to allow for much flexibility at the implementation stage.[65](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-65)

Thus neither the delegatory relationship nor domestic implementation can guarantee significant national control over postnational governance beyond the creation stage. This significantly conditions the viability of the domestic constitutional route: except for particularly powerful states, or in contexts in which the costs of non-compliance are low, the prospect of domestic constitutionalism shaping global governance or controlling its impact is very limited. The only hope for advocates of containment would then be to turn (p.21) the clock back and begin to withdraw from regional and international structures of cooperation.

**Flaws of the Domestic Route**

Such a return to the classical picture is not only unlikely but also ultimately undesirable. Domestic constitutionalism may have been a viable anchor for the international order for a long period of time, but today it risks being underinclusive and insufficiently effective.[66](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-66)

The first point is based on the lack of congruence of nation-state boundaries with the range of those affected by political decisions. In an interdependent world, political challenges as well as regulatory responses straddle national boundaries in most areas. Consequently, under any conception of democracy that relies (at least in part) on the degree to which individuals are affected by decisions, the range of those with a valid claim to participate in decision-making often goes well beyond the national community.[67](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-67) Domestic constitutionalism, which places the national community at the centre of the legal and political universe by giving it control over its commitments, cannot reflect this broader constituency—on transboundary issues, it remains underinclusive.[68](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-68)

Domestic constitutionalism not only fails to include but also fails to deliver. Realizing democracy not only poses demands on existing government structures, but also requires the creation of sufficient public power to implement self-legislation in society. Adjusting decision-making structures to the scope of the problems then becomes itself a democratic demand.[69](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-69) But here again, as we have seen, domestic constitutionalism is at a loss: it would require us to withdraw from, rather than extend, effective postnational decision-making structures in order to safeguard control by domestic political processes.

This signals the inadequacy of the domestic constitutionalist route even from the perspective of the national community, but it also points to a broader tension in the relationship of democratic thought with postnational structures. Democracy typically requires both a certain *quality* of the political process and a certain degree of *effectiveness* as to its outcomes. These two aspects were merged in the state setting, where processes of nation-building (p.22) had produced communities cohesive enough for the demands of democratic practice and where central institutions were sufficiently strong to implement most democratic decisions.[70](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-70) Today, as problems increasingly require responses beyond the state, effectiveness and quality considerations pull in different directions and leave democratic theory in a quandary, forced to sacrifice either one or the other—or move into utopian territory to make both match again at a higher level, perhaps in something akin to a world state.

The difficulty of striking the right balance becomes evident, for example, in Jürgen Habermas's vision of global politics. Because of his insistence on relatively strong democracy, Habermas sees a potential for intense forms of cooperation only on the regional level (where robust democracy may be possible) and conceives of global politics merely in classical international (inter-regional) terms.[71](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-71) This may, however, lead to severe costs in the provision of global public goods and we may ask whether his approach (just as most modern political theory since the rise of the absolutist state) is not based too much on a preoccupation with *limiting* public power to invite translation to the postnational environment.[72](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-72) If we take a more Hobbesian, or possibly also republican, perspective, we may place stronger emphasis on *unleashing* public power and will perhaps rebalance the weight of effectiveness and procedural integrity for the postnational space. From this perspective, the *absence* of strong institutions would require as much justification as a departure from the ideal qualities of a democratic process.

It is not the place here to inquire further into how the balance between quality, effectiveness, and inclusiveness of democratic procedures should ultimately be struck or whether the tensions between them can be resolved at all. I will delve deeper into this issue in Chapters 3 and 8, and it will reappear throughout this book. Yet whatever solution one chooses, it is bound to depart from the ‘pure’ domestic constitutionalist route—if it is minimally responsive to the concerns about inclusiveness and effectiveness I have outlined above, the national community loses its key role—it may retain an important place in postnational politics and law, but one among others, not in the very centre. The ‘containment’ of the postnational turn, already improbable as a practical matter, turns out to be undesirable on normative terms too.

**(p.23) IV. CONSTITUTIONALISM OR PLURALISM? THE PLAN OF THE BOOK**

Constructing postnational law is no minor challenge. In the age of postnational governance, the legal order has lost its anchor—national law and domestic constitutionalism are no longer at the centre of legal processes, and they do not present a promising option either. ‘Containment’ of the seismic shifts in law and politics is thus hardly viable. Both analytically and normatively, however, it is easier to describe where we come from than where we are going—the vocabulary of ‘post’nationalism signals this departure from settled understandings as well as the uncertainty of its destination.

This book aims to make some progress towards elucidating this destination. As I mentioned above, it focuses on structural issues—on the relationships between the different elements of the postnational order, rather than on the substance of the law these elements contain. It takes as its point of departure the framework I have sketched in the previous section and investigates two contrasting structural visions, constitutionalism and pluralism. These are emblematic for the ‘transfer’ and ‘break’ attitudes to postnational law, and their precise meaning and implications will be the subject of further exploration in the following chapters. In a nutshell, postnational *constitutionalism* attempts to provide continuity with the domestic constitutionalist tradition by construing an overarching legal framework that determines the relationships of the different levels of law and the distribution of powers among their institutions. It seeks to redeem the modern, revolutionary promise of a human-made constitution as an antidote to the forces of history, power and chance. *Pluralism*, in contrast, is a less orderly affair. It sees such an overarching framework as neither practically possible nor normatively desirable and seeks to discern a model of order that relies less on unity and more on the heterarchical interaction of the various layers of law. Legally, the relationship of the parts of the overall order in pluralism remains open—governed by the potentially competing rules of the various sub-orders, each with its own ultimate point of reference and supremacy claim, the relationships between them are left to be determined ultimately through political, not rule-based processes. In this, pluralism eschews a central element of the Western political tradition—the hope to contain politics through the rule of law. Yet as we will see, the break this implies may be better suited to the radically diverse society characteristic of the postnational space. In this highly contested space, realizing public autonomy and creating order may require a departure from the classical imagination inspired by national social structures.

The book inquires into postnational constitutionalism, pluralism, and their respective virtues in three main steps. Part [I](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1), ‘Visions of Postnational Law’, focuses on the concepts as they have been put forward in the literature, (p.24) places them into a theoretical context and presents an initial analysis of their suitability in postnational society. This has begun in the present chapter and continues in Chapter [2](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-2) with an examination of constitutionalism beyond the state—a notion with widely varying uses in scholarship as well as public discourse. The chapter asks what it means to translate a concept such as constitutionalism from the domestic to the postnational sphere and contrasts the different usages with competing strands of thought in the domestic tradition. Many of them, in fact, connect with a much weaker strand than the (foundational) one that has come to dominate Western political theory and practice over at least the last century. The chapter goes on to analyse what continuity with the foundational tradition might mean in the postnational context and what problems such continuity would face, given experiences in other highly diverse and contested settings. Chapter [3](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-3) focuses not on continuity and constitutionalism, but on break and pluralism. It asks, what does pluralism mean?, and what could be its normative basis in the postnational context? In the course of this inquiry it tries to disentangle the various, but often not fully convincing analytical and normative arguments put forward in support of pluralism in the literature, and seeks to develop an own normative framework in its defence—a framework that builds upon the public autonomy of individuals and their (ultimately democratic) right to determine which polity they want to be governed in and by.

Part II, ‘Pluralism in Postnational Practice’, seeks answers to some of the questions left open in the theoretical chapters through the study of three central areas of postnational governance. It aims to discern more clearly what analytical purchase constitutionalism and pluralism have on the processes in these areas and which of them might be more suitable to guide their further development. Chapter [4](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-4) focuses on the European human rights regime, which has often been characterized as a prime example of constitutionalization because of the ever tighter links between domestic and European layers of law in its frame. At closer look, however, the constitutionalist picture is challenged by processes of contestation, largely on the part of national courts that insist on the ultimate supremacy of their—national—constitutions. The resulting order is pluralist rather than constitutionalist, and the chapter seeks to gain a better understanding of its dominant trajectories and of the influence pluralism has had on the relatively smooth development of the regime.

Chapter [5](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-5) turns to the global level and studies the UN Security Council's sanctions practice and its embeddedness in international, regional and domestic layers of law. A security regime such as that of sanctions is a particular challenge for any vision of postnational law because of the widely assumed dominance of national interest (and consequent likelihood of national control) in this area. Yet the study of the sanctions regime reveals (p.25) close links across layers of law—links that, however, do not necessarily lead to an integrated whole but trigger processes of resistance and normative distancing characteristic of a pluralist order. The chapter seeks to show how this difficult positioning is dealt with in different contexts, and how the pluralism of the resulting picture impacts on the stability and effectiveness of the regime.

The third case study, in Chapter [6](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-6), focuses on global risk regulation around the dispute over genetically modified organisms (GMOs) and trade. This area has been described as an example of ‘when cooperation fails’,[73](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-73) and it puts structural visions of postnational governance to a particular test. The chapter analyses how different actors have mobilized different regimes (of national, regional, and global origin) in pursuit of their own substantive preferences and how this has produced a tightly connected but again not fully integrated order. And it seeks to develop insights into the impact of this lack of integration—the pluralist rather than constitutionalist structure of the regime complex—on the success of cooperation on the matter.

Three case studies, taken from widely varying areas of regional and global governance with different sets of actors and rationalities, cannot provide the ground for robust conclusions on the relative virtues of pluralism and constitutionalism in the postnational sphere. Yet they indicate the prevalence of pluralist patterns in settings as diverse—and as important—as those of the European Union, the European Convention on Human Rights, the UN security regime, and global trade regulation. And they produce provisional insights into the dynamics of pluralist orders in all those contexts, thus providing a starting point for further empirical work as well as for theoretical engagement.

Part III, ‘Pluralism's Virtues (and Vices)’, attempts the latter. It draws on the case studies as well as existing analyses to take up issues that are often seen as particularly critical for pluralist orders. Chapter [7](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-7) focuses on stability and power. Both are usually regarded as problematic in pluralism: when relationships are not legally fixed but open to recurring contestation, friction rather than smooth cooperation appears as the likely outcome and might, not right, the probable driving force behind the resolution of conflicts. Chapter [8](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-8) responds to a different challenge: that from democracy and the rule of law. Democracy is an unsolved issue for any conception of postnational law and politics, but the rule of law poses particular problems for pluralism: leaving the relationship between legal sub-orders open seems to run counter to the very core of the rule-of-law ideal. And it leaves judges (p.26) and other decision-makers in a quandary as to how they should frame their links with other sub-orders—because it fails to posit an overarching frame, it seems to invite arbitrary choices.

As we will see throughout the book, such concerns are largely misplaced or at least exaggerated. Pluralist orders are not particularly unstable or prone to exploitation by the powerful—whether they are, depends on underlying societal circumstances that will affect any institutional structure. Pluralism's openness may bring with it certain risks, but it also has significant advantages over more rigidly constitutionalized structures, especially as regards the processes of adaptation and change so pervasive in postnational politics. It also has important strengths in democratic terms—not only because it gives contestation greater space but also because it reflects social indecision about which polity should govern transboundary issues. National, regional, and global polities often compete here, all with strong normative grounding and significant loyalties. Pluralism, unlike constitutionalism, does not need to decide hierarchies between them; it can grant them space for competition, mutual accommodation, and perhaps eventual settlement. Pluralism's institutional openness thus corresponds with the openness and fluidity of postnational society in a way constitutionalism, tailored to less heterogeneous societies, does not. As Chapter [9](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-9) suggests, this may have repercussions for the constitutional and legal theory of diverse societies well beyond the particular focus on the postnational space.

This book does not pretend to give final answers to questions about the structure of postnational law, democracy beyond the state, or the contest between constitutionalist and pluralist approaches. We are still trying to find our way through the maze, or ‘mystery’,[74](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-note-74) of global governance and lack many of the empirical and theoretical resources that would allow us to come up with solutions. What this book does, though, is to invite us to think in unconventional terms about the structure of postnational governance. It asks us to be honest about the (far-reaching and perhaps undesired) implications of the continuity with domestic models, above all constitutionalism, which many advocate. And it asks us to consider alternatives, such as pluralism, even if these do not accord with our political traditions or common expectations. Governing the postnational space, after all, requires both an analytical vocabulary and a normative compass attuned to the particular dynamics of a space much more fluid and diverse than the national. It is a challenge that should make use of as many imaginative resources as we can muster.

**Notes:**

([1](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-1)) See M Loughlin & P Dobner (eds), *The Twilight of Constitutionalism?*, Oxford: Oxford University Press, 2010.

([2](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-2)) N Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’, *International Journal of Constitutional Law* 6 (2008), 373–96.

([3](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-3)) See, eg, Y N Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, Chicago, IL: University of Chicago Press, 1994.

([4](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-4)) See J Habermas, *Die postnationale Konstellation*, Frankfurt am Main: Suhrkamp Verlag, 1998.

([5](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-5)) M Zürn, ‘The State in the Postnational Constellation—Societal Denationalization and Multi-Level Governance’, *ARENA Working Papers*, WP 99/35, 〈<http://www.arena.uio.no/publications/working-papers1999/papers/wp99_35.htm>〉.

([6](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-6)) See, eg, the *Wikipedia* entry on ‘Postnationalism’, 〈<http://en.wikipedia.org/wiki/Postnationalism>〉: ‘the process or trend by which nation states and national identities lose their importance relative to supranational and global entities’.

([7](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-7)) For an early influential statement, see S Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge: Cambridge University Press, 1996.

([8](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-8)) J N Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World*, Cambridge: Cambridge University Press, 1997, 4.

([9](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-9)) U Hedetoft & M Hjort, ‘Introduction’ in U Hedetoft & M Hjort (eds), *The Postnational Self: Belonging and Identity*, Minneapolis, MN: University of Minnesota Press, 2002, iii–xxxii at xvi.

([10](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-10)) See, eg, N Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main: Suhrkamp Verlag, 1993, chs 1 and 2.

([11](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-11)) H Lindahl, ‘A-Legality: Postnationalism and the Question of Legal Boundaries’, *Modern Law Review* 73 (2010), 30–56.

([12](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-12)) Throughout this book, I use ‘European Union’ and ‘EU’ also to refer to the European Communities as they existed before the 1992 ‘Treaty on European Union’, in order to avoid confusion for readers less familiar with the development of Europe's formal and institutional structures. On the trajectory of European integration, see P P Craig & G de Búrca, *EU Law: Text, Cases, and Materials*, 4th edn, Oxford: Oxford University Press, 2008, ch 1.

([13](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-13)) See, eg, the judgment of the German Federal Constitutional Court on the Maastricht Treaty, Bundesverfassungsgericht, Judgment of 12 October 1993, *Maastricht*, BVerfGE 89, 155.

([14](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-14)) See E Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, *American Journal of International Law* 75 (1981), 1–27; J H H Weiler, ‘The Transformation of Europe’, *Yale Law Journal* 100 (1991), 2403–83.

([15](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-15)) See J Jupille & J A Caporaso, ‘Domesticating Discourses: European Law, English Judges, and Political Institutions’, *European Political Science Review* 1 (2009), 205–28.

([16](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-16)) See, eg, D Chalmers & A Tomkins, *European Union Public Law*, Cambridge: Cambridge University Press, 2007, 44–57.

([17](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-17)) See A-M Slaughter & W Burke-White, ‘The Future of International Law is Domestic (or, The European Way of Law)’, *Harvard International Law Journal* 47 (2006), 327–52 at 349–50, who emphasize the impact of international law on domestic politics but insist on the continuing divide between domestic and international law, ‘at least conceptually’.

([18](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-18)) See Chapter 4, I and II.

([19](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-19)) Supreme Court of Canada, Judgment of 9 July 1999, *Baker v Minister of Citizenship and Immigration*, [1999] 2 SCR 817. For thoughtful discussions of this and related cases, see K Knop, ‘Here and There: International Law in Domestic Courts’, *NYU Journal of International Law and Politics* 32 (2000), 501–35; M Moran, ‘Shifting Boundaries: The Authority of International Law’ in J Nijman & A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law*, Oxford: Oxford University Press, 2007, 163–90 at 167–74.

([20](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-20)) M Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’, *Columbia Law Review* 107 (2007), 628–705.

([21](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-21)) A Peters, ‘The Globalization of State Constitutions’, in Nijman & Nollkaemper, *New Perspectives*, 251–308.

([22](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-22)) See J A Frowein & N Krisch, ‘Introduction to Chapter VII’ in B Simma et al (eds), *The Charter of the United Nations: A Commentary*, 2nd edn, Oxford: Oxford University Press, 2002, 701–16 at 714–16.

([23](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-23)) See V Gowlland-Debbas, ‘Concluding Remarks’ in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, The Hague: Martinus Nijhoff, 2004, 643–58 at 644–5.

([24](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-24)) N Torbisco Casals, ‘Beyond Unity and Coherence: The Challenge of Legal Pluralism in a Post-National World’, *Revista Jurídica de la Universidad de Puerto Rico* 77 (2008), 531–51 at 543.

([25](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-25)) See Chapter 6, II.2 and IV.

([26](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-26)) See A van Aaken, ‘Transnationales Kooperationsrecht nationaler Aufsichtsbehörden als Antwort auf die Herausforderung globalisierter Finanzmärkte’ in C Möllers, A Vosskuhle & C Walter (eds), *Internationales Verwaltungsrecht*, Tübingen: Mohr Siebeck, 2007, 219–57. On the latter point, R B Stewart, ‘The Global Regulatory Challenge to US Administrative Law’, *NYU Journal of International Law and Politics* 37 (2005), 695–762 at 699–712.

([27](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-27)) B Kingsbury, ‘Weighing Global Regulatory Rules and Decisions in National Courts’, *Acta Juridica* (2009), 90–119.

([28](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-28)) E Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by Domestic Courts’, *American Journal of International Law* 102 (2008), 241–74.

([29](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-29)) See also J Nijman & A Nollkaemper, ‘Beyond the Divide’ in Nijman & Nollkaemper, *New Perspectives*, 341–60 at 341–2, 350; Y Shany, *Regulating Jurisdictional Relations Between National and International Courts*, Oxford: Oxford University Press, 2007, chs 2 and 3.

([30](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-30)) On the general regime structures, see A A Stein, ‘Coordination and Collaboration: Regimes in an Anarchic World’, *International Organization* 36 (1982), 299–324 .

([31](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-31)) J L Goldstein et al (eds), *Legalization and World Politics*, Cambridge, MA: MIT Press, 2001.

([32](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-32)) See, eg, G Arangio-Ruiz, ‘International Law and Interindividual Law’ in Nijman & Nollkaemper, *New Perspectives*, 15–51.

([33](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-33)) C A Whytock, ‘Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law’, *Georgetown Journal of International Law* 36 (2004), 155–93 at 159–60; in a similar vein, P S Berman, ‘From International Law to Law and Globalization’, *Columbia Journal of Transnational Law* 43 (2005), 485–556; J Goldsmith & D Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’, *Harvard Law Review* 122 (2009), 1791–868. See also the cautious stance in Slaughter & Burke-White, ‘Future of International Law’, 349–50; Nijman & Nollkaemper, ‘Beyond the Divide’.

([34](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-34)) H L A Hart, *The Concept of Law*, 2nd edn, Oxford: Oxford University Press, 1994.

([35](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-35)) See also B Kingsbury, ‘The Concept of “Law” in Global Administrative Law’, *European Journal of International Law* 20 (2009), 23–57 at 29–30.

([36](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-36)) See Chapter 8, III.

([37](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-37)) See Knop, ‘Here and There’ at 535; Moran, ‘Shifting Boundaries’; Nijman & Nollkaemper, ‘Beyond the Divide’, 354–5; Kingsbury, ‘Weighing Regulatory Rules’. See also Shany, *Regulating Jurisdictional Relations*, ch 6, who emphasizes the flexibility of jurisdictional rules.

([38](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-38)) Nijman & Nollkaemper, ‘Beyond the Divide’, 350.

([39](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-39)) See, eg, G de Búrca & O Gerstenberg, ‘The Denationalization of Constitutional Law’, *Harvard International Law Journal* 47 (2006), 243–62 at 244–6.

([40](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-40)) B Kingsbury, N Krisch & R B Stewart, ‘The Emergence of Global Administrative Law’, *Law & Contemporary Problems* 68:3 (2005), 15–61.

([41](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-41)) See, in a similar vein, de Búrca & Gerstenberg, ‘Denationalization’; Whytock, ‘Thinking Beyond’, 191–3.

([42](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-42)) See, eg, P Kirchhof, ‘Der deutsche Staat im Prozeß der europäischen Integration’ in J Isensee & P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol VII, Heidelberg: C F Müller Verlag, 1992, 855–87; P Kirchhof, ‘Die Identität der Verfassung’, [ibid, vol II](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-bibItem-42), 3rd edn, Heidelberg: C F Müller Verlag, 2004, 261–316 at 288–93; E-W Böckenförde, ‘Die Zukunft politischer Autonomie’ in E-W Böckenförde, *Staat, Nation, Europa*, Frankfurt am Main: Suhrkamp Verlag, 1999, 103–26.

([43](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-43)) See R A Dahl, ‘Can International Organizations be Democratic? A Skeptic's View’, in I Shapiro & C Hacker-Cordón (eds), *Democracy's Edges*, Cambridge: Cambridge University Press, 1999, 19–36; J Habermas, ‘Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?’ in J Habermas, *Der gespaltene Westen*, Frankfurt am Main: Suhrkamp Verlag, 2004, 113–93, 137–42; I Maus, ‘Verfassung oder Vertrag: Zur Verrechtlichung globaler Politik’ in P Niesen & B Herborth (eds), *Anarchie der kommunikativen Freiheit*, Frankfurt am Main: Suhrkamp Verlag, 2007, 350–82.

([44](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-44)) eg, D Grimm, ‘The Constitution in the Process of Denationalization’, *Constellations* 12 (2005), 447–63; also Maus, ‘Verfassung oder Vertrag’. See also Habermas, ‘Konstitutionalisierung’, who regards a full (republican) constitutionalization as possible on the regional level but not in the global sphere.

([45](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-45)) D Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*, Cambridge: Polity Press, 1995; see also D Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy*, Princeton, NJ: Princeton University Press, 2008.

([46](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-46)) P Pettit, ‘Democracy, National and International’, *The Monist* 89 (2006), 301–24; in a similar vein, A Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions*, Oxford: Oxford University Press, 2004.

([47](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-47)) eg, J S Dryzek, *Deliberative Global Politics: Discourse and Democracy in a Divided World*, Cambridge: Polity Press, 2006; J Bohman, *Democracy across Borders*, Cambridge, MA: MIT Press, 2007.

([48](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-48)) See the survey in N Walker, ‘Taking Constitutionalism Beyond the State’, *Political Studies* 56 (2008), 519–43.

([49](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-49)) See, eg, B Fassbender, ‘The United Nations Charter as Constitution of the International Community’, *Columbia Journal of Transnational Law* 36 (1998), 529–619; E de Wet, ‘The International Constitutional Order’, *International & Comparative Law Quarterly* 55 (2006), 51–76; E-U Petersmann, ‘Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society’, *Leiden Journal of International Law* 19 (2006), 633–67; A Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, *Leiden Journal of International Law* 19 (2006), 579–610; M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in J L Dunoff & J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, 258–324.

([50](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-50)) See, eg, F Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press, 1999; T Macdonald & K Macdonald, ‘Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry’, *European Journal of International Law* 17 (2006), 89–119; R W Grant & R O Keohane, ‘Accountability and Abuses of Power in World Politics’, *American Political Science Review* 99 (2005), 29–43. See also Kingsbury, Krisch & Stewart, ‘Emergence of GAL’, 42–51.

([51](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-51)) C Mouffe, *On the Political*, Abingdon: Routledge, 2005, ch 5.

([52](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-52)) For an overview, see R Michaels, ‘Global Legal Pluralism’, *Annual Review of Law & Social Science* 5 (2009), 243–62.

([53](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-53)) eg, J Shaw, ‘Postnational Constitutionalism in the European Union’, *Journal of European Public Policy* 6 (1999), 579–97; N Walker, ‘The Idea of Constitutional Pluralism’, *Modern Law Review* 65 (2002), 317–59.

([54](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-54)) eg, A Fischer-Lescano & G Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, Frankfurt am Main: Suhrkamp Verlag, 2006.

([55](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-55)) This section is partly based on N Krisch, ‘Global Administrative Law and the Constitutional Ambition’ in Loughlin & Dobner, *Twilight*, 245–66.

([56](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-56)) Cf J H H Weiler, ‘The Geology of International Law—Governance, Democracy and Legitimacy’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (2004), 547–62 at 553–6.

([57](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-57)) But see, eg, F Scharpf, ‘Legitimacy in the Multilevel European Polity’, *MPIfG Working Paper* 09/1 (2009), 10–12, 〈[http://www.mpifg.de/pu/workpap/wp09–1.pdf](http://www.mpifg.de/pu/workpap/wp09%E2%80%931.pdf)〉; E Schmidt-Aßmann, ‘The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship’, *German Law Journal* 9 (2008), 2061–80.

([58](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-58)) On the uncertainties surrounding the interpretation of powers of international institutions, see also J Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2002, 60–81.

([59](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-59)) See A-M Slaughter, *A New World Order*, Princeton, NJ: Princeton University Press, 2004.

([60](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-60)) The Basel Committee for Banking Supervision, for example, consists of only eleven members but its decisions are designed to apply far beyond this circle; see M S Barr & G P Miller, ‘Global Administrative Law: The View from Basel’, *European Journal of International Law* 17 (2006), 15–46 at 39–41.

([61](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-61)) On the example of forestry regulation, see E Meidinger, ‘The Administrative Law of Global Private-Public Regulation: The Case of Forestry’, *European Journal of International Law* 17 (2006), 47–87.

([62](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-62)) On international institutions, see A P Cortell & S Peterson, ‘Dutiful Agents, Rogue Actors, or Both? Staffing, Voting, Rules and Slack in the WHO and WTO’ in D G Hawkins et al (eds), *Delegation and Agency in International Organizations*, Cambridge: Cambridge University Press, 2006, 255–80; D A Lake & M D McCubbins, ‘The Logic of Delegation to International Organizations’, [ibid, 341–68](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#acprof-9780199228317-bibItem-74) at 361–7.

([63](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-63)) This is certainly the ambition of some constitutional courts; see, eg, Bundesverfassungsgericht, *Maastricht*; Judgment of 14 October 2004, *Görgülü*, BVerfGE 111, 307. See also M Kumm, ‘Constitutional Democracy Encounters International Law: Terms of Engagement’ in S Choudhry (ed), *The Migration of Constitutional Ideas*, Cambridge: Cambridge University Press, 2007, 256–93.

([64](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-64)) On the structure of coordination games in international standardization, see S D Krasner, ‘Global Communications and National Power: Life on the Pareto Frontier’, *World Politics* 43 (1991), 336–66.

([65](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-65)) See Stewart, ‘Global Regulatory Challenge’, 699–712.

([66](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-66)) For a trenchant critique of state constitutionalism, see Kumm, ‘Cosmopolitan Turn’.

([67](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-67)) Held, *Democracy and the Global Order*, ch 10; I M Young, *Inclusion and Democracy,* Oxford: Oxford University Press, 2000, ch 7.

([68](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-68)) M Poiares Maduro, ‘Europe and the Constitution: What if This is as Good as it Gets?’ in J H H Weiler & M Wind (eds), *European Constitutionalism Beyond the State*, Cambridge: Cambridge University Press, 2003, 74–102 at 81–6.

([69](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-69)) See Held, *Democracy and the Global Order*, ch 11.

([70](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-70)) Scharpf, *Governing in Europe*, 6–28.

([71](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-71)) Habermas, ‘Konstitutionalisierung’; J Habermas, ‘Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik’ in Niesen & Herborth, *Anarchie*, 406–59 at 443–59.

([72](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-72)) But see Maus, ‘Verfassung oder Vertrag’, 373, who criticizes Habermas for placing more weight on effectiveness than on procedural integrity.

([73](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-73)) M A Pollack & G C Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods*, Oxford: Oxford University Press, 2009.

([74](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199228317.001.0001/acprof-9780199228317-chapter-1#ref_acprof-9780199228317-note-74)) D Kennedy, ‘The Mystery of Global Governance’ in Dunoff & Trachtman, *Ruling the World?*, 37–68.