**Conclusion: Postnational Pluralism and Beyond**

Chapter:

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Author(s):

**Nico Krisch**

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Chapter 9 summarizes the argument in the preceding chapters and sketches broader implications of the turn towards pluralism in postnational law. The case for pluralism may also have repercussions for debates on domestic law and politics. It suggests that pluralism may be appealing more broadly in societies characterized by strong diversity and contestation. The rise of pluralism also affects our general understanding of the phenomenon of law as such. The multiplicity of sub-orders in the postnational legal order stands in tension with the idea of unity, often regarded as central to the idea of law. The different, often conflicting normative orientations of these sub-orders also question the image of universality and impartiality and allow the law to appear more clearly as the pursuit of very particular, and inevitably partial projects.

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Globalization and the rise of global governance have long left lawyers quite indifferent. ‘Plus ça change, plus c'est la même chose’ seemed to be their axiom, and uncomfortable insights were brushed aside as long as possible.[1](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1145) This stance is slowly giving way to the realization that the classical structure of the legal order beyond the state, based on a neat distinction between the domestic and the international level, is disappearing. Yet what precisely this means, and what consequences it entails, remains uncertain and highly contested.

**I. PLURALISM IN POSTNATIONAL LAW AND POLITICS**

In this book, I have made a case for the recognition of this fundamental change in the legal order, a turn towards ‘postnational law’. And I have tried to elucidate some of the key structural choices that follow from this turn—choices resulting from the fact that the different layers of law in the postnational order no longer operate in separate spheres but are deeply intertwined. This development puts pressure on the guiding principles and forms of legitimation of those orders. In the classical picture, thick (but diverse) sources of domestic legitimacy (liberal democracy, people's democracy, theocracy, etc) could coexist and find coordination in an international legal order based on the thin ground of consent. As the line of separation between the layers fades away, this division of labour no longer holds. Central elements of domestic political and legal orders move into the international sphere and clash with one another and with the classical international commitment to accommodate diversity.

In Chapter [1](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-1), I trace this process and the main responses to it in theory and practice. ‘Containment’, the attempt to limit the shift and re-domesticate global governance in national constitutional frameworks, appears as impractical in the absence of a return to less dense forms of transboundary cooperation. It also turns out to be normatively problematic as it privileges (p.298) decision-making in national communities over more inclusive fora which often correspond more closely with the range of those affected.

Among the other responses to the postnationalization of law, two stand out—constitutionalism and pluralism—and they form the focus of this book. Both take the increasing enmeshment of national, regional, and international law seriously but follow very different inspirations. While constitutionalism seeks to transfer domestic models of order to the postnational sphere, pluralism sees the need for a break with those models and proposes to develop fresh alternatives. In the first part of this book, I dissect both approaches and inquire into their normative grounding. Chapter [2](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-2) analyses the legacy of constitutionalism for politics and law beyond the state. It retraces the different modes in which constitutionalism has been conceptualized in regional and global contexts, asks what it means to ‘translate’ such a concept into another sphere, and investigates the historicaland normative pedigree of its main strands—power-limiting and foundational constitutionalism. Foundational constitutionalism has been the dominant tradition in Western politics over the last two centuries, but if we take the experience of divided societies as a measure, it is unlikely fully to redeem its promise of framing (and taming) politics through law in the highly diverse and contested postnational space. Yet lowering ambitions and retreating to a power-limiting form of constitutionalism—a frequent move in current debates—would sell the constitutionalist project short: it would fail to connect with the more radical promise connected with it historically.

Against the background of these difficulties with postnational constitutionalism, Chapter [3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-3) develops a pluralist alternative. Postnational pluralism recognizes the blurred separation of layers of law but does not seek to reorganize them in an overarching legal framework, as does constitutionalism. It envisages a heterarchical structure in which the interaction of different layers is not ultimately determined by one legal rule but influenced by a variety of (potentially conflicting) norms emanating from each of the layers. Between the different layers, there is no common point of reference in law; their relationship is fundamentally open and depends, in large part, on political factors.

Pluralism has been increasingly used as a prism for understanding the structure of law beyond the state, yet it has gained less attention as a normative vision. While a number of arguments have been advanced in its favour by commentators, none of them turns out to be fully convincing. In this chapter, I develop an alternative defence, based on the private and public autonomy of individuals. If public autonomy is to redeem its promise, it has to extend to the definition of the scope of the polity itself; individuals' choices, loyalties, and allegiances to particular polities thus demand respect in the construction of an institutional and jurisdictional framework. Individuals' attitudes (p.299) on this point diverge widely, with many favouring a primacy of the national (or subnational) collective, others preferring regional or global polities. Most of these positions have a sound normative grounding, and the structure of postnational governance should accommodate their multiplicity rather than settle in favour of one of them. Pluralism, I argue, better reflects this need than constitutionalist models.

The discussion in the first three chapters operates on an abstract level, and it leaves open a number of questions about the current shape of postnational governance as well as the actual functioning of (and dangers linked to) pluralist orders. The second part of the book addresses these issues more concretely, using three case studies of particular contexts of postnational politics and law. Chapter [4](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-4) analyses the European human rights regime, often regarded as a prime example of constitutionalization beyond the state because of its development towards an integrated order with the European Convention of Human Rights as its ‘constitutional instrument’ at the top. On closer inspection, however, this description turns out to be misguided—the regime is better regarded as pluralist, as characterized by a heterarchical relationship between its constituent parts that is ultimately defined politically and not legally. In this chapter, I trace the emergence and workings of this pluralist order through the interaction of the European Court of Human Rights with courts in Spain, France, the European Union, and the United Kingdom. All these cases not only show conflicts over questions of ultimate supremacy but also significant convergence and harmony in day-to-day practice. I begin to identify factors that have led to this convergence and conclude that central characteristics of pluralism—incrementalism and the openness of ultimate authority—seem to have contributed to the generally smooth evolution of the European human rights regime in a significant way.

This finding suggests a broader appeal of pluralist models as alternatives to constitutionalism in the construction of postnational authority and law, but it also comes with a number of caveats. After all, the European human rights regime has developed in circumstances far more favourable than those existing in most other contexts of postnational governance. Chapter [5](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-5) analyses a harder case, that of the dispute over rights protection in UN sanctions. This dispute, which pitches high politics—security—against diverse interpretations of fundamental rights, brings out the increasing enmeshment of layers of law in a particularly pointed way, exemplified here in UK and EU law and jurisprudence. Courts in these jurisdictions have developed very different approaches to the broader challenge this enmeshment represents, ranging from monist/constitutionalist to pluralist visions, and from clear assertions of supremacy of the international, regional, and national levels to more accommodating attitudes. The overall picture here is again pluralist but, despite the high stakes and the substantial diversity in approaches, has (p.300) not proved to be unstable. Challenges to the UN regime have failed to produce serious non-compliance, and the pluralist contestation over fundamentals has generally been buffered by an accommodating, pragmatic mode of cooperation on most issues. The UN Security Council has deliberately chosen this accommodating stance over the more hierarchical tools at its disposal, and this choice alone signals awareness that hierarchical forms do not sit well with the structure of postnational society and politics.

Chapter [6](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-6) focuses on a central area of global governance that is often regarded as an example of *failed* cooperation—the regime complex around trade, food safety, and the environment, exemplified in the dispute over trade in genetically modified organisms (GMOs). The chapter analyses the different institutions and their modes of interaction in this area, and it shows how their competing authority claims relate to broader claims by various collectives striving for control in the construction of global governance. It also continues the investigation into the charge that pluralist orders create instability. As in previous chapters, the analysis of the GMO dispute does not confirm this view: it reveals limits to what global risk regulation can achieve in the face of highly politicized conflicts, but it also shows significant cooperation successes. Moreover, it suggests that the limits of cooperation are due less to institutional than to societal structures, and that by leaving issues of principle open, a pluralist order may provide a safety valve for issues of high salience, thus avoiding frictions a constitutionalist order might produce.

The third part of the book draws the insights of the more abstract argument and the specific case studies together to inquire in greater depth into some of the most trenchant critiques levelled at a pluralist vision. Chapter [7](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-7) focuses on prospects of cooperation and problems of power. It begins by sketching the contours of the trajectories of postnational governance that have emerged from the case studies, arguing that in most of them the assertion of competing supremacy claims is part of processes of change in the respective regimes. More specifically, such claims can be understood as a reaction to an increasing legalization and strengthening of postnational institutions over time.

This element of change is also crucial for the assessment of pluralism's promise as regards the stability of cooperation. Pluralism occupies a middle ground between hard, legalized and softer network forms of cooperation and thus combines the virtues of greater flexibility with those of (limited) hierarchical instruments. Yet compared with constitutionalism's emphasis on hard law, it also opens up space for opportunistic behaviour and non-compliance, thus potentially undermining common regimes. This ambiguity flows from the diversity of postnational society, which resists hard legalization but also limits the prospects of softer regulation. Pluralism's benefits emerge more clearly from the presence of two other factors in the postnational context: a (p.301) strong role of domestic publics and institutions and a large extent of institutional change. Domestic actors typically only play a marginal role in formal processes of regime design on the global level, but they have the potential to destabilize a regime later on. Moreover, when institutions change rapidly (and radically), with substantially increased costs for some players, resistance becomes more likely—again, most fundamentally among those actors not implicated in formal processes. Competing supremacy claims can give expression to—and buffer—such resistance. Leaving ultimate supremacy open and working around competing claims in an incrementalist fashion, as pluralism does, may then increase the prospects of stabilizing cooperation and constructing postnational authority over time.

As regards problems of power, the element of change turns out to be central too. A common charge against pluralism is that it favours the powerful over the weak by allowing for the political (not legal) determination of the relation between sub-orders. Interestingly, the case studies do not confirm this, presenting instead a more complex picture. This is in part because of the element of time: as postnational governance evolves, its effects on societal actors become more visible, thus triggering engagement, demand for institutional transformation, and processes of normative change. At a later point in time, the actor constellation will thus often be more inclusive and favourable to fair solutions than at the initial stage of regime design, which is typically dominated by arcane forms of negotiation among (select) governments, often enough driven by well-organized interest groups. It is this initial design that a constitutionalist framework is likely to stabilize whereas pluralism introduces an element of challenge and potentially gives initially excluded actors greater influence.

Chapter [8](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-8) inquires into pluralism's implications for democracy and the rule of law. It does not develop a theory of postnational democracy, but analyses the ways in which a pluralist order relates to three key parameters of any such theory—the plurality of governance sites, the multiplicity of *demoi*, and the multidimensional nature of democracy. It takes up the argument developed in Chapter [3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-3) that much of pluralism's virtue lies precisely in situating the institutions of postnational governance at a distance from the competing visions of the right locus of authority. The chapter also sees a key advantage in the destabilization of the institutional order pluralism brings about—in the element of revisability and contestation that flows from the coexistence of different sub-orders in a heterarchical setting. The checks so introduced resonate well with contemporary emphases on contestation in democratic theory.

The rule of law, even more than democracy, is often seen as a particular problem for a pluralist vision, because of pluralism's emphasis on openness rather than legal determination. Legal certainty and consistency are (p.302) indeed not central to the pluralist imagination. However, also in a domestic context, predictability is not assured when it comes to particularly salient issues, and the rule of law is usually not seen as absolute (except perhaps in a libertarian approach). This should caution us against seeing it as a key obstacle for pluralism: as long as there are strong normative arguments for a departure from a unitary legal setting—as is the case here with respect especially to the multiplicity of *demoi* and the need to allow for effective contestation—formal rule-of-law values may not be ultimately controlling.

Democracy and the rule of law should, however, influence the construction of the interface norms through which much of the institutional structure in a pluralist postnational order is determined. These norms are produced in the various sub-orders themselves—and may thus come into conflict, without a common constitutional frame that could provide resolution among them. Yet the interface norms should follow a normatively defensible vision of when one sub-order needs to show respect for norms emanating from another. In the conception put forward in this book, such a vision should be based on the private and public autonomy of individuals—sub-orders are due respect when they have a sufficient autonomy pedigree; when they are linked to the self-government of individuals and are sufficiently inclusive. This does not settle their ultimate weight: there may well be many situations in which norms from national, regional, and global contexts can all be seen to further an autonomy-based vision of postnational politics. If this is the case, they should strive to achieve consistency or at least compatibility with the other sub-orders, rather than trying to impose themselves on them.

**II. PLURALISM IN THE POSTNATIONAL SPHERE AND BEYOND**

As I have pointed out at various junctures, the argument presented here is provisional—not all theoretical arguments are pursued in sufficient depth, nor are the empirical findings sufficiently robust to ground ultimate conclusions. More work will be necessary, both theoretically and empirically, and some of it is likely to raise doubts over my findings. Until this happens, though, there appears to be a relatively strong case for the pluralist vision set out here.

The argument in this book has implications for a number of current debates. The turn towards a ‘postnational’ law challenges the *distinction between domestic and international law*, so constitutive for both, and leaves both layers of law radically transformed and exposed to demands that they realize the guiding principles of the respective other. The argument for pluralism as not only a useful analytical prism but also a normative vision questions (p.303) the *predominance of holistic, unitary frames* as a model for postnational politics and law. The emphasis on the parallel grounding of competing polities in individual autonomy brings out the problematic nature of both *cosmopolitan and nationalist visions* of institutional development, which all too easily brush over actual societal contestation in favour of substantive considerations in the determination of the preferred scope of the polity.[2](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1146) By stressing the value of fluidity and openness, the book also calls into doubt the virtues of the widely hailed *legalization* of international politics—a legalization which, if taken too far, may well provoke a backlash and weaken rather than stabilize cooperation. Its insights into the mobilization of actors and normative resources as well as shifts in power constellations in the development of regimes may help us better understand processes of *normative change* in international politics. More broadly, the book suggests that the widespread hope of constructing the postnational space on the basis of *domestic models* runs into serious obstacles, and that alternative approaches may fare better in the highly diverse and contested society that characterizes the world beyond the state.

We have encountered more detailed discussions of these and other points throughout the previous chapters. They have focused on the domain of the postnational, but the argument in this book may also lead us to question some traditional understandings of the domestic context, and of the phenomenon of law as such. The focus on diversity as the driving force behind postnational pluralism indicates that a pluralist order may be attractive also in other highly diverse settings, such as multinational federations. Where the locus of ultimate authority is similarly contested as in the postnational space, pragmatic accommodation and institutional equidistance may be preferable to constitutional settlement, both on moral and prudential grounds. Fixing the relationships between the different polities would potentially disregard well-founded claims of some polities, and overcoming the ensuing resistance may overstretch existing normative resources, thus destabilizing the overall order.[3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1147) Pluralism might then provide a better fit. In these circumstances, it may also be advisable to shift our *interpretation* of existing constitutional settlements—instead of regarding them as ultimate frames of reference, we may see them as compromises on circumscribed issues, leaving fundamental questions undecided except where explicitly agreed. We might then interpret these polities as pluralist—in the sense that (p.304) the locus of ultimate supremacy is left open and subject to political dispute rather than legal determination. James Tully's vision of a ‘common constitutionalism’, which interprets constitutions as treaties, would be close to that vision.[4](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1148) Olivier Beaud's reconstruction of federalism as involving multiple levels of sovereignty—evoking an older line of federalism that also inspired Carl Schmitt—points in a similar direction.[5](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1149)

A rethinking might also be in order in less fundamentally contested settings. Even when there is little or no contestation over the right *polity*, there may still be sufficient diversity in society to warrant a re-examination of the character of constitutional frameworks. We commonly interpret them as holistic settlements, which comprehensively establish and regulate the exercise of public power and thereby allow for the joint exercise of private and public autonomy. We have seen in Chapter [2](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-2) how this vision of foundational constitutionalism has become dominant over the last two centuries. Among other things, this frame makes us understand constitutions as crucial elements in the integration of diverse societies—as steps on the way from a *modus vivendi* to an overlapping consensus, as John Rawls puts it.[6](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1150) And it makes it possible to interpret vague constitutional norms (especially rights provisions) in a principled fashion, as expressions of a shared moral understanding in an abstract form.[7](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1151)

Yet such a reading conceals historical processes of constitution-making, in which conflict and compromise, rather than general agreement, often explain the vagueness of the resulting norms—unclear norms may just as well point to disagreement as to agreement. If we emphasize (as I have done in this book) the public autonomy of individuals, which extends to the definition of their constitutional framework, we will give weight to, and respect, such disagreement. This may lead us to understand constitutions as contracts or compromises,[8](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9%22%20%5Cl%20%22acprof-9780199228317-note-1152) interpret vague provisions as open, and counsel constitutional courts against filling them.[9](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1153) It may also lead us to emphasize (p.305) the extent to which constitutions leave inter-institutional relations undefined.[10](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1154) More generally, such a reading will promote investigations into the history of constitutional settlements and encourage us not to assume principled agreement when the societal constellation is characterized by deep-seated difference. Of course, such openness seems to pose problems for a constitution's role in integrating and stabilizing society—aims so closely linked to the modern constitutionalist project. Yet it appears as less problematic if we acknowledge the stabilizing potential for political orders that may lie in the *absence* of constitutional settlement, which we have witnessed throughout this book. Accepting such openness will seem desirable if we regard constitutions—and law more generally—as (at least in part) instruments of control of one group over others. The more diverse a society is perceived to be, the more such a reading suggests itself: presumably neutral rules then often appear as biased and discriminatory in effect.[11](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1155)

The turn towards postnational pluralism indicates that we should rethink law and politics in yet other, perhaps even more fundamental respects. On the one hand, this is because of the shift away from binary conceptions of law I have sketched already in Chapter [1](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-1).[12](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1156) With the turn to postnational law, norms ‘foreign’ to one of the sub-orders often escape the binding/non-binding dichotomy that is so characteristic of the legal system.[13](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1157) Instead, they acquire a form of gradated authority: they are not entirely ignored but also not regarded as controlling—they are only ‘taken into account’. The resulting picure resembles the common law's use of ‘persuasive authority’, quite distinct from classical civil law categories and from categorical distinctions between inside and outside and law and non-law.

Another central element of legal thought comes under pressure in the postnational order. As we have seen, constitutions are only pieces in a broader puzzle; they can no longer redeem their holistic ambition and have therefore lost some of their allure. They have also lost their ability to ensure the *unity* of the law, so central to contemporary theories of law which hold the legal (p.306) order together by means of a *Grundnorm* or rule of recognition.[14](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1158) Pluralism radically undermines ideas of unity: without a common point of reference, different parts of the legal order lead distinct, formally unconnected lives.[15](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1159) They may produce *internal* unity—national law continues to accept the supremacy of the national constitution, international law continues to ignore the latter and deduce its validity from independent sources. Between them, though, there is no arbiter—neither in the form of an institution nor through a norm valid for all. This does not imply that between the layers no communication takes place; as we have seen in our case studies, interaction is often constant and intense. Yet the different parts are not formally integrated. This is perhaps not news to those, especially sociologically minded, voices who have for long sought to unmask the hierarchy and unity of law as a fiction. By bringing the different layers of law closer together, postnational governance—perhaps paradoxically—highlights the distance between them and brings out the lack of a common frame; it has perhaps become the most potent force in undermining law's hierarchy and unity.[16](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1160)

The turn towards postnational governance is thus bound to have a subversive effect. It unsettles traditional understandings of the structure of both domestic and international law and in the process reshapes the respective roles of law and politics. Amongst the many laws in a pluralist order, law can no longer decide; recourse must be had to other, often political means, and pluralism brings this fact out into the open. It also helps to make visible another consequence of the multiplicity of laws—the loss of universality, and with it the loss of neutrality. More clearly than in the unitary conception, law becomes *particular*—the reflection of particular values and particular projects of individuals and groups, in competition with the values and projects of others. The legal form may mitigate the partiality of these endeavours but it can neither eliminate nor conceal it effectively. Amid the multiplicity of laws, the law exposes itself as deeply implicated in this partiality.

This partiality is not as such negative; it is merely a consequence of the diverse character of modern societies. It is also not novel: the space for (p.307) politics in the face of legal indeterminacy as well as the law's partial character have long been highlighted by critical scholars.[17](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#acprof-9780199228317-note-1161) Yet the postnational context accentuates these traits—the more contested politics becomes, the less the law is able to maintain a neutral appearance. This is, in part, the dilemma of postnational constitutionalism—insisting on the rule of law in the postnational context means (more obviously than in the domestic realm) insisting on the rule of *one* law, *one* polity, *one* project over others. In a space in which material power relations are so central and governance arrangements so fluid, legalizing/constitutionalizing relations always runs the risk of unduly preferring one perspective over others, of locking in domination.

In this light, pluralism's openness comes to appear as a chance more than as a menace: as a chance to contest, destabilize, delegitimize entrenched power positions—and to pursue progressive causes by other means than constitutional settlements. This chance comes with a greater burden for everyday political action: if the realization of crucial values cannot be left to institutional structures, it depends on continuous engagement and struggle. This implies greater fluidity and also risk: but as we have seen, the hope of eliminating this risk in postnational society is in any case slim and burdened by high costs. In the fluid, divided, and highly contested space of the postnational, easy solutions are elusive—and pluralism, for all its complexity, may allow us to realize central political values better than more clearly structured, constitutional frames. (p.308)

**Notes:**

([1](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1145)) See P Alston, ‘The Myopia of the Handmaidens: International Lawyers and Globalization’, *European Journal of International Law* 3 (1997), 435–48.

([2](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1146)) For a related critique, see 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 541–9.

([3](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1147)) I have discussed related studies in Chapter 2, III, Chapter 3, III, and Chapter 7, II.

([4](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1148)) J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: Cambridge University Press, 1995.

([5](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1149)) O Beaud, *Théorie de la Fédération*, Paris: Presses Universitaire de France, 2007. See also Chapter 3, I.

([6](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1150)) J Rawls, *Political Liberalism*, New York: Columbia University Press, 1996, 158–68.

([7](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1151)) See R Dworkin, *Law's Empire*, Cambridge, MA: Harvard University Press, 1986, ch 10; R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, MA: Harvard University Press, 1996.

([8](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1152)) See, eg, G Frankenberg, ‘The Return of the Contract: Problems and Pitfalls of European Constitutionalism’, *European Law Journal* 6 (2002), 257–76; R Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise*, London: Routledge, 1999.

([9](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1153)) See, eg, J Waldron, *Law and Disagreement*, Oxford: Oxford University Press, 1999.

([10](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1154)) See D Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in J L Dunoff & J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Government*, Cambridge: Cambridge University Press, 326–55.

([11](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1155)) See, eg, I M Young, *Justice and the Politics of Difference*, Princeton, NJ: Princeton University Press, 1990; N Torbisco Casals, *Group Rights as Human Rights: A Liberal Approach to Multiculturalism*, Dordrecht: Springer Verlag, 2006, ch 4. See also Chapter 2, III.3 and Chapter 7, III.

([12](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1156)) See Chapter 1, II.

([13](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1157)) On the centrality of this dichotomy for law, see N Luhmann, *Das Recht der Gesellschaft*, Frankfurt am Main: Suhrkamp Verlag, 1993, 60.

([14](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1158)) H Kelsen, *Reine Rechtslehre*, Leipzig/Vienna: Deuticke, 1934; H L A Hart, *The Concept of Law*, 2nd edn, Oxford: Oxford University Press, 1994.

([15](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1159)) See Torbisco Casals, ‘Beyond Unity’, 538–40.

([16](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1160)) See G Teubner, ‘The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy’, *Law & Society Review* 31 (1997), 763–88 at 768–9, with a focus on globalization and the production of non-state forms of law, especially the *lex mercatoria*. See also P Zumbansen, ‘Transnational Legal Pluralism’, *Comparative Research in Law & Political Economy Research Paper* 01/2010, 〈[http://ssrn.com/abstract=1542907](http://ssrn.com/abstract%3D1542907)〉.

([17](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199228317.001.0001/acprof-9780199228317-chapter-9#ref_acprof-9780199228317-note-1161)) On international law, see M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd edn, Cambridge: Cambridge University Press, 2006.