

# The Co-originality of Law and Democracy in the Moral Horizon of Modernity

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## 1 Introduction

In order to improve our understanding of the challenges facing constitutionalism in today's globalizing world, Neil Walker rightly focuses on the relationship between democracy and constitutionalism. In the first part of the paper, Walker highlights the complexity of this relationship and argues that common approaches, according to which constitutionalism and democracy are either complementary *or* oppositional, are too simplistic. Walker tries to show that we are facing a false dichotomy and that we should appreciate that this relationship is, in fact, a double one. It is complementary because constitutionalism supports the *realization* of democracy in the sense that it helps to fulfil the necessary empirical conditions for democratic processes to get started or keep going. It is oppositional to the extent that constitutionalism *qualifies* democracy on the normative level by providing an independent rationale for non-democratic values understood in terms of individual rights or collective goods. In the second part of the paper, Walker makes use of his analysis for a reassessment of the fate of constitutionalism in the context of current day globalization. He argues, more specifically, that the double nature of the relationship between constitutionalism and democracy shows that the current debate is again set in terms which suggest an inappropriate dichotomy. On the one hand, theorists who embrace the rise of postnational constitutional structures as a fortunate reinvigoration of constitutionalism even in the absence of the concomitant rise of postnational democracy underestimate the importance of constitutionalism's complementary relationship with democracy. On the other hand, theorists indicting postnational constitutionalism precisely because it lacks democratic credentials are too quick in assuming that constitutionalism has no proper and independent normative functions to fulfil in the absence of a proper embedding in a specific democratic polity. Instead of opting for one of the horns of this false dilemma, Walker suggests that the challenge of postnational constitutionalism consists in finding a new and adjusted architecture in which democracy retains a 'nested centrality' rather than a 'singular pre-eminence' in a postnational order which now no longer consists of neatly separated constitutional states but rather of intricate and only partly constitutionalized postnational networks.

Although Walker's analysis is appealing in many respects, there is a noteworthy shift in his argumentation as he moves from the first to the second part of his paper. I believe this shift is revealing in the sense that it points us towards a remaining one-sidedness and, thus, weakness of his approach. In the first part, Walker analyses the complementary relationship between constitutionalism and

democracy in terms of the incompleteness of democracy and the way in which constitutionalism helps to realize democracy. In the second part, however, when he criticizes theorists celebrating the rise of postnational constitutionalism without democracy, he invokes the complementary relationship between constitutionalism and democracy in terms of the democratic credentials constitutionalism needs (and lacks) at the postnational level. The ideological and metademocratic arguments he raises both point towards an incompleteness of constitutionalism rather than an incompleteness of democracy. It seems that the problem with postnational constitutionalism is not so much that it is unable to 'perform its democracy-realizing function', but rather that because of the underdevelopment of postnational democratic structures, democracy is unable to perform its constitution-realizing or, at least, constitution-legitimizing function. This role of democracy as a supplement to constitutionalism, however, is an unexpected new element never really analysed in the first part, whereas the extensive analysis in that first part of constitutionalism as the realization of democracy in terms of authority, representation, competencies and other dimensions, is never really used in the second part of the paper.

This shift in argumentation reveals that Walker's primary analysis of the complementary relationship between democracy and constitutionalism remains one-sided. It focuses only on the incompleteness of democracy and the democracy-realizing function of constitutionalism rather than also taking into account the reverse complementary and constitution-realizing function of democracy. In this paper, I want to advocate a fuller account that takes into account this *mutual complementarity* between democracy and constitutionalism. Such an alternative approach is consequential for Walker's argument in two respects. In terms of the general analysis of the relationship between democracy and constitutionalism, my adjusted approach leads to a defence of the Habermasian thesis of the co-originality of constitutionalism and democracy which is too quickly dismissed by Walker himself. A fuller appreciation of this co-originality implies that the democracy-qualifying role of constitutionalism should itself be qualified in the sense that this role is performed in virtue of the same normative resources democracy itself relies upon. As a result, the relationship between constitutionalism and democracy is perhaps, after all, more singularly complementary (as opposed to being both complementary *and* oppositional) than Walker recognizes. In terms of the more specific analysis of the impact of globalization, this adjusted approach tilts the argument in favour of the critics of current practices of postnational constitutionalism. Without complementary postnational democratic structures, this constitutionalism remains problematic and potentially oppressive. Although I agree, in the end, with Walker that we need to work on a readjusted architecture beyond state-centred constitutionalism and state-centred democracy, the rise of postnational networks poses serious challenges to which currently no convincing responses seem available.

## 2 The Moral Horizon of Modernity

As the starting point of my argument, I want to pick up on an idea that Neil Walker introduces towards the end of his paper and which I fully endorse. Referring to the work of Charles Taylor, Walker suggests that the moral order and social imaginary that characterize modernity provide the 'deep context out of which our modern understanding of constitutionalism and democracy *alike* emerge'.<sup>1</sup> I agree that a proper understanding of constitutionalism and democracy as well as their mutual relationship requires us to refer to the moral horizon of modernity from which they emerge and which is constituted by such fundamental moral ideas as individualism, egalitarianism, constructivism and progressivism.

It is a bit surprising, however, that Walker also suggests that this deeper moral context should not only explain how constitutionalism and democracy complement each other, but also how they remain in a certain tension. If the moral horizon of modernity is constituted by a coherent set of fundamental values, it seems *prima facie* puzzling that practices that are meant to implement and realize these values in society should find themselves in an oppositional stance towards one another. In contrast, I would like to argue that the moral horizon of modernity, as the source of both constitutionalism and democracy, explains in which sense their relationship is essentially one of complementarity rather than opposition.

The analysis of complementarity I have in mind is well captured by the thesis of the co-originality of private and public autonomy found in the works of authors as different as, for instance, Jürgen Habermas and Claude Lefort.<sup>2</sup> Both forms of autonomy are co-original in a twofold sense. On the one hand, they are co-original in the sense that they have a common 'source' in the deeper context of modern morality. On the other hand, they are co-original in the sense that they mutually presuppose each other and that, therefore, the full realization of the ideals of democracy always depends on the simultaneous realization of the ideals of constitutionalism and vice versa.

Regarding the horizon of modernity as the common origin of both forms of autonomy, Claude Lefort has famously remarked that modernity implies the 'dissolution of the markers of certainty'.<sup>3</sup> This means amongst other things that the hierarchical order of premodern, traditional societies in which the lives of people, both individually and collectively, were organized according to a single religious comprehensive doctrine has now disappeared.

I refer to the disappearance of an authority which subjugated each and every individual, to the disappearance of the natural or supernatural basis which, it was claimed, gave that authority an unassailable legitimacy and an under-

1 Walker, in this issue, 231.

2 Jürgen Habermas, *Between Facts and Norms*, Cambridge: MIT Press 1996); Claude Lefort, *Democracy and Political Theory*, Cambridge: Polity Press 1988.

3 Lefort 1988, p. 19.

standing both of the ultimate ends of society and of the behaviour of the people it assigned to specific stations and functions.<sup>4</sup>

In the absence of an encompassing religious authority, the question as to how life should be lived and organized both on the individual and the collective level can now only be resolved on the basis of the autonomous choices of the individuals and collectives involved.

‘(...) both freedoms [individual and political] stem from the same cause, namely emancipation from any particular authority [*de toute autorité particulière*] which can arrogate the power to take decisions affecting the destiny of all in accordance with its own ends.’<sup>5</sup>

Although Habermas’s analysis of the transition from traditional to modern society differs in many respects from Lefort’s – most notably in the sense that Habermas conceives of this evolution as a process of rationalization –, they arrive at remarkably similar conclusions. Also for Habermas, the advent of modernity is characterized by a fundamental shift in the *final source of authority* which no longer resides with God, but which is now identified with the (communicatively structured) will of the people.<sup>6</sup> This disappearance of the authority of the holy thereby affects both society as a whole and the lives of individuals. In both cases, the common norms which guide our individual and collective behaviour become much thinner and more formal as well as more reflexive, in the sense that they are now no longer decreed by religious authorities but become the outcome of discursive processes of autonomous will-formation.<sup>7</sup>

The fact that both individual and political freedom (or private and public autonomy) find their origins in the typically modern disappearance of a final divine source of authority, also helps to explain how constitutionalism and democracy are co-original in the sense that they mutually presuppose one another.<sup>8</sup> There are, first, different senses in which the individual liberty rights that guarantee our private autonomy constitute a condition of possibility for the democratic process in which we exercise our public autonomy. In a more superficial sense, constitutional rights provide the instrumental and functional prerequisites for the democratic process. The *instrumental* argument thereby refers to the fact that without individual liberty rights that guarantee their safety and independence, citizens would be unable to participate as full and equal members of society in the democratic decision-making process. The *functional* argument on

4 *Ibid.*, 34.

5 *Ibid.*, 170 (translation modified).

6 Jürgen Habermas, *The Theory of Communicative Action: Volume 2: Lifeworld and System: A Critique of Functionalist Reason*, Boston: Beacon Press 1987, 77.

7 For a more elaborate account of the similarities between Habermas and Lefort, see my *Deliberation interrupted. Confronting Jürgen Habermas with Claude Lefort*, *Philosophy & Social Criticism* 34 (2008): 383-408.

8 For a more elaborate analysis, see my *Debate: the Co-originality of Private and Public Autonomy in Deliberative Democracy*, *The Journal of Political Philosophy* 14 (2006): 469-481.

the other hand refers to the fact that our constitutional rights constitute the legal forms and institutions that allow the democratic process to take place. There is, however, an even deeper sense in which constitutionalism is a prerequisite of democracy. Elsewhere, I have argued that constitutionalism is a *transcendental-pragmatic* condition of possibility of democracy in the sense that the practice of democratic decision-making itself becomes meaningless unless all participants in that process are already committed to some of the fundamental principles of constitutionalism and, more specifically, to the recognition of the maximal amount of individual liberty rights for all citizens indiscriminately. A full elaboration of this argument is too cumbersome for the present purposes, but the basic idea here is that participation in the democratic process implies a commitment to the democratic process itself as the final source of authority regarding collective decision-making in society. This, in turn, implies the rejection of other encompassing sources of authority (such as religious ones) and thus, the full recognition that no other citizen should unwillingly be bound by any one particular such source of authority and, thus, the recognition that all citizens enjoy individual liberty.<sup>9</sup> There is, secondly, an important sense in which, the other way around, democracy also constitutes a condition of possibility for constitutionalism. Since, with the advent of modernity, transcendent sources of authority lose their force as the basis for collective decision-making, all laws and even all constitutional laws are somehow authored and authorized by the people themselves.

‘(...) the naturalist conception of rights masked an extraordinary event: a declaration which was in fact a self-declaration, that is, a declaration by which human beings, speaking through their representatives, revealed themselves to be both the subject and the object of the utterance in which they named the human elements in one another, ‘spoke to’ one another, appeared before one another, and therefore erected themselves into their own judges, their own witnesses.’<sup>10</sup>

The fact that transcendent sources of authority are discredited in the modern age means that processes of law-making or even constitution-making can no longer be seen as some kind of *hermeneutical* processes in which the participants are simply elaborating the content of some exterior source of authority or knowledge. Instead, law-making and constitution-making should be understood in *constructivist* terms as processes in which the people concerned themselves decide how they are going to organize their societies. The constructivist nature of this process thereby also implies that nobody – no philosopher, legislator or judge – has privileged expert knowledge in this regard. Instead, if rights are to do justice to the specific needs, values, characteristics and problems of citizens as ‘concrete

9 Maeve Cooke, Five Arguments for Deliberative Democracy, *Political Studies* 48 (2000): 947-969. This does not mean, of course, that people could not decide to live their lives according to the prescriptions of some particular tradition or religion. It simply means that this traditional way of life can no longer appear as universally binding for all citizens.

10 Lefort 1988, 38.

others',<sup>11</sup> they should be constructed through an inclusive process in which the citizens affected themselves can participate.<sup>12</sup> Because individuals have privileged access to their own needs and values, there is, in this regard, an important sense in which they can never be fully represented by others in the democratic process. The co-originality (in its twofold sense) of constitutionalism and democracy implies that democracy can be adequately characterized, in Habermas's terms, as a constitutional project, and that, the other way around, rights should always be understood as political rights. The idea of a *constitutional project* thereby indicates that all democratic societies are built around the same abstract system of basic rights protecting both the private and public autonomy of all citizens, but that, at the same time, the proper elaboration of this abstract system of rights into more specific constitutional rights as well as regular legislation and policy-making should proceed through an inclusive democratic project and will lead to outcomes which characterize each particular society as the historically particular society it is. The concept of *political rights*, on the other hand, distances itself from both naturalistic and positivistic understandings of rights. In opposition to naturalism, a political conception of rights emphasizes that rights are always authored and authorized by the people themselves and that it is the people themselves who should author the specific elaboration and interpretation of general constitutional principles. In opposition to positivism and historicism, the political conception rejects the notion that legitimacy reduces to procedural legality. Indeed, because individual liberty rights constitute the transcendental-pragmatic conditions of possibility of the democratic process, this process would be caught in a performative contradiction if its outcomes were to contradict its enabling conditions. Therefore, these individual liberty rights form a substantive normative core that constitutes and, thus, a fortiori, constrains democratic decision-making.<sup>13</sup>

### 3 Walker Revisited

This brief digression on co-originality should make clear that I believe Walker's dismissal of a Habermasian approach to the relationship between constitutionalism and democracy to be too quick. The normative convergence between both terms is stronger and deeper than Walker assumes. Indeed, this convergence does not only reside in 'the mutually supportive *causal* relationship which obtains between the operation of the two sets of values'<sup>14</sup> but stems, more fundamentally, from the fact that both should be understood as integral expressions of the moral horizon of modernity.

Before looking at Walker's analysis in more detail, I want to raise one more general point of concern. I have the impression that his exposition is marred by some

11 Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, Cambridge: Polity Press 1992.

12 Stefan Rummens, Democratic Deliberation as the Open-Ended Construction of Justice, *Ratio Juris* 20 (2007): 335-354.

13 Lefort 1988, 38.

14 Walker in this issue, 212.



persistent ambiguities. Often, Walker seems to shift from an argument about 'democracy' to an argument about 'democratic theory'. Both are obviously not the same and, as I will argue further on, the resources of 'democracy', as a political regime in which political decisions are based on democratic processes, are wider than the resources of 'democratic theory'. Similarly, Walker also sometimes shifts between 'constitutionalism' as a set of principles and 'constitutionalism' as simply referring to the presence of actual constitutions, constitutional choices or constitutional acts. As I will further illustrate in what follows, these ambiguities affect his argumentation on many occasions and make it less clear and precise than it could have been.

Based on my alternative account of co-originality, I wish to present three more specific comments on Walker's account of the seven dimensions in which constitutionalism realizes and qualifies democracy. First, I believe that Walker *overstates the normative incompleteness of democracy*. In line with Habermas I believe that the proper institutionalization of democracy as a regime that allows for political decision-making in a modern, pluralist society, proceeds on the basis of a universal abstract scheme of rights that essentially protects the private and public autonomy of all citizens. The values contained in this scheme of rights do not 'qualify' democracy as external limitations but rather constitute the transcendental pragmatic conditions of possibility of a democratic practice in which the pre-modern authority of religion and tradition is replaced by the authority of the people itself.

Of course, this scheme of rights is incomplete and only constitutes what Habermas calls 'abstract place-holders' which need to be filled in by more specific constitutional and other rights. The content of this more specific elaboration is not, and here I agree with Walker, determined by democratic theory. Instead, this elaboration should be done by the people themselves through democratic processes that turn the constitutional regime into a historically specific constitutional project. For this elaboration, the people may legitimately draw on many different normative resources – moral, religious, or other –, provided they are able to explain how the arguments they use can be understood to further the core values of liberty and equality in an impartial manner. Although constitutional theory is one of the resources citizens can legitimately make use of, it seems clear that constitutional theory in itself is unable to provide general and unique answers to all questions involved. The assumption that constitutionalism could provide such answers would go against the constructivist account of democracy, according to which no a priori theory can epistemically replace the democratic process itself. Only the actual participation of citizens can ensure that the specification of the requirements of private and public autonomy are attuned to the specific historical circumstances of society as well as to the specific values and needs of the people involved.

In conclusion, the claim that 'equality, liberty, dignity or fraternity' are non-democratic, constitutional values that supplement and qualify democracy should be rejected for two reasons. First, these values are as much the core values of democracy as they are the core values of constitutionalism. Secondly, insofar as democratic theory is incomplete in the sense that it cannot account for the historically

specific elaboration of these values, the same holds for constitutional theory. On the constructivist account, what goes on in the democratic process goes beyond the resources provided by both democratic and constitutional theory.

Secondly, I submit that Walker *underestimates the reflexivity of the democratic process and the way in which it is able to shape its own conditions of possibility*. Although this criticism applies to several of the seven dimensions dealt with by Walker, it applies especially to his account of the issue of competence, i.e. the question concerning the realization of the constitutional prerequisites of democracy (which seems to point to constitutionalism as an instrumental condition of possibility for democracy). Here, Walker has in mind the political and other rights individual citizens need to enjoy in order to be able to participate fully and independently in the democratic process. In this context, I agree again that 'democratic principle and theory becomes unable to determine those competences that are required for democracy's own meaningful elaboration'.<sup>15</sup> However, Walker's conclusion that democracy is incomplete because 'there is no democratically mandated right answer'<sup>16</sup> to the question of competence only holds if this is taken to mean that the right answer should be mandated by democratic *theory*. Here again, the incompleteness of democratic theory is not necessarily the incompleteness of democracy. Indeed, the question as to which specific rights are needed for citizens to become adequate participants in the process of democratic self-determination is part and parcel of the democratic process itself. In this sense, democracy is a reflexive or iterative process which constantly aims to improve the conditions necessary for its own functioning. In considering which interpretation of, for instance, freedom of association or freedom of expression to endorse, citizens can make use of democratic theory as well as constitutional theory. But, as argued before, the constructivist conception of democracy implies that neither of these two kinds of theory is able to provide unique and decisive answers. Therefore, the incompleteness of democratic theory identified by Walker is matched by a similar incompleteness of constitutional theory. As a result, it is again not constitutionalism that supplements democracy; it is, rather, the democratic process which complements democratic and constitutional theory alike. Only an inclusive democratic procedure itself can provide outcomes which take into account historically specific circumstances and considerations and which are, therefore, epistemically adequate.

Of course such an iterative conception of the democratic process, as reflecting on and shaping its proper conditions of possibility, seems to point to a more fundamental incompleteness of democracy. There seems to be an infinite regress at work in which democracy aims to legitimize itself retrospectively. It seems that this endless bootstrapping process is now a vain attempt by democracy to rid itself of the contingency that necessarily characterizes its originating moment. Here, however, we arrive at my third point of criticism. *Many of the forms of incompleteness identified by Walker refer to forms of contingency that indeed haunt democracy but which, contra Walker, similarly haunt constitutionalism*. If we look, for

<sup>15</sup> Walker, in this issue, 219.

<sup>16</sup> Walker, in this issue, 219.



instance, at Walker's account of the dimension of authorship, he is right to point out that 'the original constitutional imposition of democracy (...) is also inevitably an imposition upon democracy'.<sup>17</sup> The original *pouvoir constituant* and the constituent act through which it provides the necessary framing conditions for the operation of democracy are themselves indeed not democratically legitimized. Similarly, the constitutional determination of the scope of citizenship (stakeholding), of the political system through which democracy should operate (representation), of the institutional framework of the constitutional state (implementation), or of the territorial and functional boundaries of the polity (demarcation) can all be understood as an imposition of democracy which is also ineliminably an imposition upon democracy.

Although, in all of these dimensions (which seem to point to the constitution as a functional condition of possibility of democracy), Walker seems to underestimate again the extent to which these constitutional determinations can, retrospectively, become part of the democratic reflexive process itself, he is right to point out that these determinations testify of an ineliminable contingency preceding and haunting the democratic process. Where I disagree with Walker, however, is in his subsequent claim that it is constitutionalism that is able to supplement democracy and help it to deal with its incompleteness. His statement, for instance, that 'constitutionalism's supply of the terms and conditions of authorship of the polity, although necessary to democracy, is not itself democratically determined',<sup>18</sup> is deeply problematic. Although I agree that the issue of authorship cannot be democratically determined, I fail to see how it could be constitutionally determined or how constitutionalism could 'supply the terms and conditions of authorship' as Walker intimates. The constituent act of the *pouvoir constituant* 'precedes' the constitution as much as it 'precedes' democracy. Therefore, the contingency identified by Walker is, indeed, a form of genuine contingency that escapes constitutionalism and democracy alike. Although I agree that 'in all cases, (...) the basic constitutional choice is democratically *determining* rather than democratically *determined*',<sup>19</sup> Walker seems to ignore the fact that this constitutional choice not only lacks democratic determination (or legitimation) but equally lacks constitutional determination (or legitimation). Neither democratic nor constitutional theory is able to provide unique and proper answers to the questions of authorship, representation, stakeholdership and the like. Although I argued in the previous two points that the democratic process itself can supplement much of the incompleteness Walker ascribes to democratic theory, in the present context the democratic process can play no such role. We are, it seems, faced with a more fundamental contingency that marks constitutionalism and democracy alike. And although this contingency is truly fascinating and probably not yet well understood, I fail to see, for now, how the arguments adduced by Walker could detract from the thesis of co-originality or show that the content of

17 Walker, in this issue, 216.

18 Walker, in this issue, 215.

19 Walker, in this issue, 218.

constitutionalism depends on 'supplementary' normative sources fundamentally different from the normative sources of democracy.

#### 4 Adjusted Architecture

In conclusion of this reply, I would like to briefly turn to the issue of globalization and its impact on the relationship between constitutionalism and democracy. As already indicated, I share Walker's view that globalization does not mark a profound change in the moral order of modernity. I agree that both constitutionalism and democracy as expressions of that moral order will continue to play an important role but that we will have to find an adjusted architecture for their proper institutionalization in the postnational order.

I disagree with Walker, however, when he suggests that this new architecture might testify of the double relationship – of both complementarity and opposition – between constitutionalism and democracy. Instead, I see no reason why globalization would somehow affect the singularly complementary relationship of co-originality between them. Even in the postnational constellation, the core of the modern moral order is still captured by the co-original ideas of individual and collective human freedom. In the absence of an encompassing religious or other authority, only the authority of the people themselves can bestow legitimacy on the emerging often partial forms of postnational constitutionalism. The other way around, the rule of the people marks the delegitimization of other forms of authority as uniquely determining the lives of individuals and thus inevitably presupposes the constitutional protection of the individual freedom of each of us.

Interestingly, almost all of Walker's own arguments seem to endorse this view of mutual complementarity. His arguments in favour of postconstitutionalism do not so much support the possibility of postconstitutionalism without democracy but rather endorse complementarity. When he indicates, first, that postnational constitutional points and vectors may connect indirectly to more entrenched democratic settings, he endorses the idea that these new constitutional points and vectors actually need democratic legitimation.<sup>20</sup> Similarly, his reference to the moral order of modernity intends to indicate that both constitutionalism and democracy are part and parcel of that very same moral order.<sup>21</sup>

His arguments in favour of more postnational democracy not only explicitly endorse complementarity, but, as indicated earlier, also emphasize the constitution-realizing role of democracy rather than the democracy-realizing role of constitutionalism. Indeed, the meta-democratic argument refers to the fact that the legitimacy of constituent acts depends on some kind of meta-democratic founding of these acts and on the meta-democratic credentials of the actors involved.<sup>22</sup> These remarks are thereby reminiscent of Lefort's point quoted earlier that every declaration of rights is always a self-declaration by human beings who reveal themselves as both subjects and objects of their utterances. The ideological argu-

20 Walker, in this issue, 229-230.

21 Walker, in this issue, 230-233.

22 Walker, in this issue, 229-230.

ment, on the other hand, connects with the constructivist conception of democracy explained earlier. The point Habermas makes when endorsing constitutional patriotism is not simply that 'the general values of constitutionalism have to be *adopted* by a community as their own',<sup>23</sup> as Walker suggests. The point of conceptualizing the constitution as a constitutional project cuts even deeper in the sense that this conception implies that no epistemically adequate context-specific elaboration of the general values of constitutionalism is possible without the actual democratic participation of all individuals concerned. This means that every imposition of a constitutional regime which is not authored by the people affected themselves *necessarily* constitutes an unjust imposition on these people precisely because it fails to take into account their specific needs and values and the specific circumstances and perspectives which are theirs. Taking individuals seriously as 'concrete others' implies that, in a strong sense, there can be no justice without democracy.

My reconstruction of the thesis of co-originality thus implies that the weight of the arguments shifts in favour of those who argue that postconstitutionalism needs postnational democracy in order to retain its legitimacy. Of course, what this adjusted architecture of postconstitutionalism and postnational democracy beyond the traditional form of the state should look like, is an open question. I even agree, therefore, that in the absence of a more fully elaborated and feasible blue-print for the postnational order, it might be worthwhile to cautiously proceed with the institutionalization of certain forms of postconstitutional points and vectors even if their democratic credentials are not fully established. Constitutional values are core values of our modern moral horizon and any successful attempt at furthering their global realization should be welcomed. This should, however, not make us forget that this situation remains second-best from both a conceptual and a normative point of view. The imposition of these values remains problematic and at least partly unjust as long as their context-sensitive interpretation and implementation is not under sufficiently strong and inclusive democratic control by the citizens themselves.

23 Walker, in this issue, 228 (my italics).