

# Constitutionalism and the Incompleteness of Democracy

## A Reply to Four Critics

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### Introduction

In this short comment I cannot do justice to the full range of arguments made in the four written responses to my original paper<sup>1</sup> by Stefan Rummens, Morag Goodwin, Wouter Werner and Leonard Besselink, still less to all the issues raised in the broader discussion of our various contributions at the Leiden seminar. I have greatly benefited from the various written and oral exchanges, and am indebted to all concerned for their insights and helpful pointers to future research. For present purposes, however, I intend to concentrate on a few key areas of my argument which my respondents subjected to close scrutiny, and where, therefore, I feel it is most incumbent upon me to defend, clarify, and, as need be, develop or qualify my earlier thoughts.

In particular, I want to address four points. A first concerns whether my approach is biased in its discussion of the relative standing of constitutionalism and democracy, tending to take the meaning and authority of the former for granted and concentrating its critical attention unduly on the incompleteness of democracy. A second and related point concerns my scepticism about the capacity of the idea and practice of democracy to supply its own resources in the development of just forms of political organization. A third, and, again, closely connected point concerns the overall relationship between democracy and constitutionalism, and whether I am correct in characterizing this as a 'double relationship',<sup>2</sup> involving both mutual support and mutual tension. A fourth and last point is less a reply to specific lines of criticism and more an attempt to emphasize the broader import of my argument. It is concerned with how the deeper philosophical concerns raised by my approach and the conceptual reframing they prompt are important not just as an explanatory and evaluative window on the evolving configuration of political relations but also as an expression of that evolution, and with how this new conceptual frame might condition how we approach the question of a democracy-sensitive institutional architecture for the global age.

1 N. Walker, *Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship*, referred to as *Walker, Constitutionalism*, in subsequent footnotes.

2 *Walker, Constitutionalism*, 206.

## 1 Rebalancing Democracy and Constitutionalism

Stefan Rummens, who is my sternest and most directly engaged critic on this point as on others, detects a 'one-sidedness, and thus, weakness' in my comparative treatment of constitutionalism and democracy.<sup>3</sup> This is partly about my alleged failure to appreciate and exploit the full potential of democracy, to which I return below. But it is also about a perceived blindness or inattention on my part to the limitations and pitfalls of constitutionalism. Commenting on my preoccupation with what I view to be the empirical and normative shortcomings of democracy, Rummens asserts that 'many of the forms of [democratic] incompleteness identified by Walker refer to forms of contingency which indeed haunt democracy but which, contra Walker, similarly haunt constitutionalism'.<sup>4</sup> The message seems to be that I am letting constitutionalism off too lightly, and that if I were to apply the same critical standards to it as I do to democracy, then constitutionalism's weaknesses would be starkly exposed and it would be much harder to justify according it the kind of prominence that I do.

I believe this criticism to be based on a misunderstanding of the way in which I conceive of the relationship between constitutionalism and democracy in the modern age. The very basis of that conception is that 'the values expressed by and through democracy are undoubtedly of central importance' to the political forms of mature modernity, and that recent constitutional thought and practice, where previously it had treated democracy as a marginal concern, has been required to acknowledge and respond to that new centrality.<sup>5</sup> Modern constitutionalism, indeed, I seek to argue, is defined *in terms of* its relationship to democracy, either helping to realize democracy or qualifying and supplementing it, and in so doing assuming rather than challenging democracy's centrality. In a fundamental sense, then, modern constitutionalism has become dependent upon, even parasitic upon the political forms and imperatives of democracy.

This is true, moreover, not only in normative and instrumental terms – with constitutional thought and practice involved in the enterprise of making the best moral and institutional sense of democracy, but also in ideological terms. Where I remark that '[d]emocratic incompleteness ... remains both the main justificatory foundation for contemporary constitutionalism *and* the main reason why that justificatory foundation remains inherently fragile', I am alluding to the paradoxical sense in which democracy's weakness, as well as being constitutionalism's opportunity, in the final analysis is also *constitutionalism's* weakness. For constitutionalism in the mature modern age has no *higher* cultural (or moral) resources to draw upon than democracy itself in seeking to supply the deficiencies of democracy; and, as the recent example of the failed European Union constitution demonstrates, the constitutional way always risks popular embarrassment to the extent that it cannot plausibly point to some kind of democratic or meta-democratic warrant for its proposals.

3 Rummens, in this issue, 256.

4 Rummens, in this issue, 277.

5 Walker, Constitutionalism, 206.

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The fact that constitutionalism, in my analytical framework, is defined and justified as seeking to address the incompleteness of democracy is not, therefore, born of any conviction that constitutionalism be somehow elevated above democracy in the firmament of political morality. Rather, it is an acknowledgment that democracy simply cannot by itself answer *all* the questions it raises about the appropriate framing and practice of politics. And it is a tribute to the magnetic pull of democracy in the high modern age that the other key political languages and technologies of the modern age, such as constitutionalism, are most appropriately characterized by the contribution they make within democracy's problem-solving orbit.

None of this means, of course, that the deficiencies and incompleteness of constitutionalism should not also be interrogated. As noted above, I am criticized for failing to appreciate that contingency haunts constitutionalism as much as it does democracy. In fact, however, from the very outset I acknowledge that the 'necessity' in principle of constitutionalism as an accompaniment to democracy is matched by the 'contingency' of constitutionalism's content.<sup>6</sup> Granted, I do not then proceed to subject that contingent content to close critical attention, but only because that was not the focal point of my article. For the record, I readily agree that anything that presents itself as constitutional thought and practice does not *just on that basis* acquire any special epistemic, moral or other privilege that renders it immune from normal protocols of justification or standards of critique. This holds whatever dimension of constitutional thought and practice we are referring to: whether we are talking about the older legacy of constitutionalism, concerned with the limitation of government power in terms of individual rights and other collective goods;<sup>7</sup> or the more recent concern with the 'constitution' of democracy, and so with the ways in which constitutional thought and practice has addressed the democracy-realizing functions of authorship, stakeholding, representation, competence etc.; or, indeed, with any deeper premises of political morality that may be common to democracy and constitutionalism, of which more later.

I also accept, however, that the question of critical emphasis is much more than mere academic nit-picking, but has real political significance. As Morag Goodwin develops in her telling and wide-ranging critique of the increasing use of the purportedly universal discourse of human rights in global constitutionalism as 'place-takers' rather than simply 'place-holders' for democracy,<sup>8</sup> often some kind of special privilege *does* seem to attach to ideas perpetrated within a constitutional regis-

6 Walker, in this issue, Constitutionalism, 206.

7 Wouter Werner in his response wants to define constitutionalism *only* in terms of the limitation of government power (in this issue, 269). However, this, I believe, is unnecessarily restrictive, treating one particular aspect – once predominant – of constitutional thought as the whole. I acknowledge, however, in response to Werner and also to Rummens – who is more explicit in his criticism of my failure to define constitutionalism closely (in this issue, 262), that I should have made it clearer that in my terms constitutionalism refers to all choices and acts and justifications of choices and acts made in a constitutional vernacular, regardless of whether these are concerned with the limitative or the constitutive part of constitutionalism.

8 Goodwin, in this issue, 246.

ter. As a matter of political practice, both nationally and (increasingly) transnationally, constitutional thought is often invoked as an argument-stopper – a way of silencing debate and of providing a cover of false dignity and moral authority for the contingency of particular interests and forms of political expediency. The reasons for constitutionalism's epistemic arrogance are many, ranging from the surfaces of political thought – the way in which in countless different modern settings purveyors of constitutional ideas have tended to trade heavily on the authority of established constitutional practice – to its depths – the enduring legacy of the complex historical link between foundational modes of thought and the idea of a settled frame of social and political life. But none of these reasons are justifications for constitutional imperialism, and Goodwin's essay is a telling reminder of the need to be clear about the dangers of just such an imperialism.

As I have said, my own approach to modern constitutionalism seeks to accord it a more modest, democracy-respecting role, and therefore, as Goodwin herself seems to accept, that approach cannot be a direct target of her critique of constitutionalism as a self-affirming and self-expanding container of rights universalism. Yet she is surely right to sound her more general warning about the capacity of a certain type of democracy-challenging, rights-centred constitutional discourse to continue to draw upon a potent early modern legacy of suspicious containment of public power in order similarly to constrain public power in its late modern transnational forums. And in sounding that warning she is also cautioning that wherever we invoke the language of constitutionalism, even when we intend to achieve the opposite, we risk giving comfort to democracy-marginalizing forces, and so should be ever vigilant of that danger.

## 2 The Limits of Democracy

Even if I do not place too much faith in constitutionalism, do I perhaps place too little faith in democracy? Rummens argues that this is the case, and in particular that I 'underestimate the reflexivity of the democratic process and the way in which it is able to shape its own conditions of possibility'.<sup>9</sup> The nub of his criticism is that I concentrate too much on the inability of democratic *theory* to determine the course and content of democracy, and in so doing neglect the ways in which democratic *practice*, reflexively and iteratively conceived, 'constantly aims to improve the conditions necessary for its functioning'.<sup>10</sup> On this view, 'an inclusive democratic procedure' is a valuable, indeed necessary, 'complement'<sup>11</sup> to both democratic and constitutional theory, in that it is able to take account of specific historical circumstances and local considerations in a way that does much to overcome the incompleteness of general theory.

I readily concede that I concentrate more on the limitations of democratic theory than on those of democratic practice. These theoretical limitations, I stress, are

9 Rummens, in this issue, 263.

10 *Ibid.*

11 *Ibid.*

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born not of 'a lack ... but a surfeit'<sup>12</sup> of available materials. So it is not the case that the theoretical landscape we observe when addressing questions of authorship, stakeholding, representation and basic democracy-realizing capacity and competence is a barren one. Rather, there are rich intellectual resources to draw upon, and we can certainly hope that the reflexive conversation of democracy does indeed draw upon them in adjusting its conditions of possibility in a consistently 'democratically' sensitive manner. But we cannot guarantee that the democratic process will in fact operate in an optimally or even generally democratically sensitive manner, and this is so not just because we cannot guarantee anything in our prediction of the actual workings of democracy (as opposed to our conceptual elaboration of its highest forms). For there is the additional danger, which I point to on a number of occasions,<sup>13</sup> that the democratic process operates in a path-dependent manner so as to reinforce rather than correct its existing biases. If a political system already has one conception of stakeholding, one framework of representation, one model of democracy-prerequisite rights, then the very ways in which that political system mobilizes decision-making opinion may tend to underscore rather than modify and correct any bias in these existing structures. Of course, we should be careful not to overestimate the significance of original constitutional sin. Rummens himself readily concedes that, in a backward-looking perspective, there is a 'more fundamental contingency which marks constitutionalism and democracy alike',<sup>14</sup> but would nevertheless want to concentrate more on the forward-looking potential of democracy to remake itself – infinite progress as an antidote to infinite regress. Leonard Besselink, too, urges that we concentrate less on constitutive bias and more on the 'redemptive power of historical reception'.<sup>15</sup> Yet the fact remains that particular democracies can and sometimes do entrench their own particular limitations – and, indeed, in some ways the historically 'redeemed' and settled polity is less likely than the unredeemed and consistently challenged polity to be democratically self-critical. Surely, then it is one of the tasks of democratic thought, and so also of constitutional thought in its important democracy-realizing mode, to think about the kinds of structures – inclusive constitutional amendment procedures, referendums, extra-institutional dialogue mechanisms, involvement of non-nationals in constitutional courts or other review mechanisms (such as Truth and Reconciliation processes), guaranteed routes of progressive political autonomy for groups passing certain thresholds of collective self-articulation etc. – which might act as a consistent counterpoint to inherent biases in any particular form of constitutional democracy, and about how these countervailing structures might be introduced, maintained and applied against existing biases. If we like, we can still characterize this as the democratic practice and procedure 'complementing' and supplementing democratic theory, just as long as we are aware that there is nothing pure and self-legitimizing about the democratic practice itself, and that without resort to

12 Walker, *Constitutionalism*, 219.

13 Walker, *Constitutionalism*, 214-219.

14 Rummens, in this issue, 264.

15 Besselink, in this issue, 238.

these sorts of self-correcting structures and ideas it will lack the necessary capacity for reflexivity.

### 3 Relating Democracy and Constitutionalism

What of my insistence on the double relationship between democracy and constitutionalism? Here my position is threatened on either flank. It is challenged both from the perspective which questions whether, alongside the mutual tension, there is any significant aspect of mutual support in the relationship between democracy and constitutionalism; and from the opposite perspective which questions whether, alongside the mutual support, there is any significant aspect of mutual tension in the relationship between democracy and constitutionalism. In seeking from their different starting points to eliminate or marginalize one limb of the relationship between democracy and constitutionalism, these two positions instantiate just that 'singular' conception of the connection between democracy and constitutionalism whose conventional historical wisdom I criticize in the introductory section of my article.<sup>16</sup> But does either of these new versions of an old argument hit the mark in their critique of my position?

The position that democracy and constitutionalism remain in tension, with little evidence of mutual dependence, is put forward by Wouter Werner. On the one hand, he argues, democracy does not require constitutionalism for its democracy-realizing functions (as opposed to its democracy-qualifying functions), but rather certain constitutive or foundational acts and arrangements.<sup>17</sup> However, our disagreement here seems to be definitional rather than substantive, flowing from Werner's preference to restrict constitutionalism to the democracy-qualifying or democracy-supplementing idea of limited government.<sup>18</sup> If, against that restricted conception, one accepts my argument of the previous section that whatever frames the democratic condition is not just the naked contingency of the original settlement or the virtuous flow of democratic practice, but is itself susceptible to a process of ongoing consideration and examination under the theoretical light of constitutional democracy, then constitutionalism, now more widely conceived than under Werner's definition, is reintroduced as an important functional precondition of democracy.

On the other hand, Werner argues that constitutionalism, and in particular transnational constitutionalism as it has emerged in the global age, does not need democracy. Here, our difference cannot be so easily resolved by definitional flexibility. For Werner, there are deep questions of authority that remain unanswered at the international and transnational level, and indeed much that passes for postnational constitutionalism is a project without an identifiable author, still less a democratically legitimate one. Moreover, within the complex archipelago of transnational 'constitutional' regimes, questions of stakeholding and demarcation also tend to defy democratic treatment. Who is and who is not a member,

16 Walker, *Constitutionalism*, 208.

17 Werner, in this issue, 268.

18 See n. 2 above.

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and where one regime end and the next one begins, are deeply complex questions where democratic theory and practice, certainly as distilled from the state tradition, is of little help. Yet, while I sympathize with much of Werner's diagnosis of the difficulties of introducing democracy at the transnational level, I am less convinced by his conclusions. That international constitutionalism should concentrate on 'civilizing politics through legal constraints'<sup>19</sup> as in the early modern counter-absolutist variant of state constitutionalism; that more accountability is perhaps the only available surrogate for absent democracy; and that, as Jan Klabbers has suggested, the democratization of the proliferating functional regimes of the transnational order, even to the extent that it might be successful, should be looked on with scepticism as tending to encourage either fragmentation and regime collision or the assertion of new hegemonies of the (relatively) democratically virtuous, strikes me as an excessively gloomy set of conclusions. Certainly, Werner is correct to urge that democratic rhetoric is not enough and that we need 'a frank recognition that the incompleteness of democracy and constitutionalism can never be fully remedied'.<sup>20</sup> Yet I also concur with Rummens that we should not, even in full awareness of the manifold practical difficulties of democratic implementation, be too quick to accept a sub-democratic 'second best' in postnational constitutional arrangements.<sup>21</sup> And in so doing I am reminded that the alternative to the sometimes crude blandishments and premature or exaggerated boasts of democratic rhetoric is not necessarily a brave new world of regulatory candour but, as Goodwin, argues, the even more dangerous seduction of rights-talk.

In the final analysis, the world of post-state democracy will always be partial, overstated, unevenly distributed, and divisive. Yet so too is the world of state democracy whose establishment, I stress in my introduction, is itself so recent and fragile,<sup>22</sup> certainly more so than either certain 'nostalgic' state constitutionalists pining for its golden years or certain 'triumphalist' postnational constitutionalists impatient to move beyond its exhausted paradigm care to factor into their analysis.<sup>23</sup> And just as the imperfections and imperfectability of state democracy have never been good reasons for downgrading its continuing value, so too the imperfections and imperfectability of transnational democracy do not supply good reason for marginalizing its role and potential in the constitution of global political relations. Moreover, as we shall pursue in the concluding section below, the question of what counts as a democratically adequate, or permissibly imperfect, constitutional architecture for the global age is not just a practical question of finding the right tools for the task but, first and foremost, a conceptual question of working out what the task now is. And from that new perspective, the

19 Werner, in this issue, 272.

20 *Ibid.*, 275.

21 Walker, *Constitutionalism*, 22.

22 Walker, *Constitutionalism*, 209-210.

23 See M. Kumm, *The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia*, in: P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism*, Oxford: OUP 2010, p. 201-219.

state tradition of democratic architecture is not so much an inaccessible or unrealistically high standard to apply to the global age as an inappropriate one.

If Werner's concerns that the basis of mutual support of democracy and constitutionalism is becoming inexorably eroded under conditions of globalization can be answered, what of the opposite critique of my double relationship thesis? According to Rummens, the link between democracy and constitutionalism is more 'singularly complementary' than I appreciate.<sup>24</sup> So, for him, it is the oppositional rather than the supportive limb of my dual relationship that should be discarded, and with it my sense that there is a democracy-qualifying and supplementing dimension of constitutionalism alongside the various democracy-realizing dimensions. In part, this argument connects back to Rummens' attempt to secure a more encompassing role for democratic practice, but it cuts deeper than that. It bases itself more fundamentally on the argument of Habermas – and, more distantly – of Claude Lefort about the co-originality of public autonomy and private autonomy – and so of democracy and constitutionalism – in the making of political modernity.

In advancing this argument Rummens is quite correct to point out that I do not do full justice to the Habermasian line of thought in my own account. As he lucidly demonstrates, I am too quick to dismiss the co-originality thesis as a thesis about mutual causality, and therefore as reducible to an argument that is perennially vulnerable to the empirical counter instance where private autonomy does not in fact support public autonomy and vice-versa. In my haste to find a stylized 'third way' of singularity beyond those which place either constitutionalism or democracy normatively 'on top' I neglect to give due consideration to forms of normative (rather than simply empirical) connection between democracy and constitutionalism that do not depend upon the full subservience of one to the other. And, as Rummens, reminds us, through his idea of co-originality Habermas posits just such a deeper normative connection between democracy and constitutionalism – of which the empirical connection is just a trace – at two levels. First, there is a connection in terms of mutual presupposition, and secondly there is connection by reference to a common source. Let me now say something about these two levels, and in so doing seek to demonstrate why, even on this more appropriately rounded consideration of his work, I would still resist the full import of the Habermasian complementarity thesis, and why the vulnerability of a causal and so empirically falsifiable account of interdependence continues to be a factor in that resistance.

The mutual presupposition thesis concerns the ways in which the full realization of the ideals of democracy (public autonomy) depends upon the full realization of the ideals of constitutionalism (private autonomy), and vice versa. This is in some measure concerned with the well-known instrumental and functional links between individual rights and democracy, and so covers much the same ground as my own analysis of the democracy-realizing constitutional dimension of competence. More deeply, and more originally, constitutionalism as private autonomy is also deemed to be prerequisite to democracy in the sense that the modernist

24 Rummens, in this issue, 257.



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eschewal of transcendental forms of political authority and the emergence in its place of an ideal of collective self-rule, collectively self-committed – and so of democracy all the way down – necessarily presupposes the rejection of any form of externally imposed authority, and hence the endorsement of individual freedom for all. Reciprocally, moreover, individual freedom presupposes democracy to the extent that the realization of individual freedom demands acknowledgment of individuals' privileged access to their own needs and preferences, which can only be secured by a system in which all individuals acquire and retain (or can recover) voice in the political process.

In turn, for Rummens and Habermas, as also for Lefort, the mutual presupposition of democracy and constitutionalism can be further accounted for in their common origins in the moral horizon of modernity. Here, Rummens' position comes close to my own. Whether we take our deep historical sociology of knowledge, from Habermas, or, as I prefer, from Charles Taylor (or, as Leonard Besselink prefers, from Kant himself),<sup>25</sup> we arrive at a position where the attainment of the horizon of modernity is about the emergence of a deep social imaginary and moral order associated with individualism, egalitarianism, constructivism and progressivism and its replacement of an earlier imaginary based upon the acceptance of an externally authorized order of human and other relations.

Rummens fully acknowledges the similarity of our positions in this regard, and, indeed, uses this as a peg on which to hang his criticism of my insistence on retaining a dimension of mutual tension in the relationship between democracy and constitutionalism. 'It seems *prima facie* puzzling', he argues, 'that [democratic and constitutional] practices that are meant to implement and realize these [same] values in society should find themselves in an oppositional stance towards one another'.<sup>26</sup> In the face of that challenge, how can I hold to this position, and how can I resist, in this respect, the mutual presupposition thesis which, for Rummens, so closely complements the common moral horizon thesis?

My answer to that twin challenge is in part epistemological and in part practical. In my elaboration of the case for the normative incompleteness of democracy, and of the possibility of its being supplemented and even qualified by other individual rights and public goods, I am at pains to point out that I am *not* claiming that 'the kinds of constitutional claims which might and frequently are made on behalf of such [putatively non-democratic] individual and collective values ... are necessarily additional to or inconsistent with democracy'.<sup>27</sup> Instead, I am merely concerned to assert a negative proposition – that we simply cannot be sure either way. There is no ground upon which we can say with absolute conviction that the values associated with constitutionalism and democracy hang together, just as there is not ground upon which we can say with absolute conviction that they do not. Certainly, if democracy itself should be the umpire – the deep epistemological standard – then there is no broad consensus 'out there' about the singular complementarity of democracy and constitutionalism. This is not to say that the

25 Besselink, in this issue, 241.

26 Rummens, in this issue, 258.

27 Walker, Constitutionalism, 221.

mutual presupposition thesis of Habermas and Rummens is an unattractive one, or that the symbiotic relationship of public and private autonomy is not one that we should be striving to 'make real' in our social and political relations. But that is a different thing from saying that it is *the* truth or, if you prefer, *the* objectively-grounded best understanding of the matter. It is neither invulnerable as an empirical thesis nor consensually grounded as matter of social epistemology. Rather, it is just one more contentious, and itself democratically non-validated, theory about our best understanding of democracy. So it would, in my view, be democratically (or meta-democratically) unwarranted to 'close off options by (the deeply controversial) definitional fiat' that the strong version of the co-originality thesis would ordain. Instead, we should 'hold open the putative category of non-democratic values'<sup>28</sup> and refuse to relinquish the alternative possibility of there being an irreducible tension between them and the values of democracy.

The same argument can be pursued in a more concrete vein. The practice of constitutional law, and in particular constitutional adjudication, is replete with hard cases where we have to balance, reconcile and sometime trade off different values, including those values we associate with democracy on the one hand, and with other constitutionally familiar individual right and public goods less readily or directly associated with democracy on the other. Some, such as Dworkin, hold on to the possibility of one right answer in this process of reconciliation, but even for Dworkin this is often a distant aspiration – a regulative ideal rather than a tangible prospect. As Waldron, argues, and as most constitutional thinkers and practitioners would at least tacitly accept, in the face of epistemological uncertainty, the exalted standard of moral objectivity and the possibility of one right answer, or – at one remove – even of a single scheme or formula for finding the right answer, are simply beside the point. Rather, our legal and moral discourse should be more pragmatically framed, our answers always partial rather than complete, provisional rather than final, approximate rather than exact, persuasive rather than compelling.<sup>29</sup>

Tellingly, for those working within the Habermasian tradition too, there seems to be recognition of a deep tension between different constitutional values and principles at the level of their application to particular cases. Indeed, famously, Robert Alexy – the leading disciple of discourse ethics in legal theory – has come to differ with Habermas himself over the right way to reconcile individual rights and other collective goods in pursuit of the project of constitutional democracy. For Alexy, all disputes can be addressed through weighing and balancing competing principles in light of the particular circumstances,<sup>30</sup> whereas for Habermas, certain private-autonomy focused, democracy-realizing right are considered too important to be fed into the discursive process and should instead be absolutely protected by a constitutional firewall.<sup>31</sup> One can see the force of both arguments. According

28 *Ibid.*, 15.

29 J. Waldron, *Law and Disagreement*, Oxford: OUP 1999, chapter 8; see also J. Tully, *Public Philosophy in a New Key: Vol. II Imperialism and Civic Freedom*, Cambridge: CUP 2008.

30 R. Alexy (trans. J. Rivers), *A Theory of Constitutional Rights*, Oxford: OUP 2002, p. 388 *et seq.*

31 J. Habermas (trans. W. Rehg), *Between Facts and Norms*, Cambridge: CUP 1996, p. 254-59.

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to Alexy, we should trust in the public reason of the Constitutional Court to recognize and to find the deep mutual compatibility of the various democracy-relevant constitutional principles, whereas for Habermas this would be a step too far, jeopardizing the stability of the very conditions of discursive will formation.

The immediate point is not to seek to adjudicate between these views or dismiss either as unreasonable, but merely to note that even from within the camp of communicative ethics and of democratic constitutionalism conceived of as a project of deep complementarity, hard choices remain about how to reconcile different fundamental values and principles – differences which tend to remain coded in terms of democratic and other ‘constitutional’ rights. So deep are the unreconciled differences, indeed, that it seems impossible to find intra-school agreement even on the correct general methodology and formula for finding the right answer, still less on what the right answer should be in any particular case.

All this is to say that at the cutting edge of constitutional discourse the correct balance between the sorts of goods associated with democracy and other sorts of goods is bound to remain controversial, and we need to make due allowance for this in our broader theoretical contemplation of the relationship between democracy and constitutionalism. That is what my argument about the double character of the relationship between democracy and constitutionalism seeks to do. And that argument, in conclusion, is not contradicted by Rummens’ deeper point about the common horizons of modernity. It seems to me perfectly possible to recognize a certain ensemble of values, presumptions, orientations etc., as being distinctive of modernity, without drawing the further conclusion that these should in principle, still less in detailed application, be reconcilable within a single vision. Rather, as I tried to suggest in the concluding section of my main article, there seems to be a clear and irresolvable tension within modernity between a deep ‘second order’ commitment to the realization, *however best achieved*, of the value cluster of individualism, equality and collectively designed and self-informed progress on the one hand, and a ‘first order’ commitment to the democratic process as the *optimal medium* for the achievement of these ends. That is why, ultimately, I see the relationship of democracy and constitutionalism as a ‘combination of mutual inextricability and mutual tension’,<sup>32</sup> and why both the theory and the practice of constitutional democracy is ‘ceaselessly controversial’. It is also the reason why Charles Taylor can insist that, from within the moral horizon of modernity, it is our destiny to construct not one best vision, but rather ‘multiple modernities’.<sup>33</sup>

#### 4 The Architecture of Global Constitutionalism

In conclusion, let me return briefly to the question of what a democratically adequate architecture of global constitutionalism might look like, and how the very

32 Walker, *Constitutionalism*, 231.

33 C. Taylor, *Modern Social Imaginaries*, Durham: Duke University 2004, p. 195.

conceptual tools with which we address this question may themselves be undergoing transformation.

In a valuable set of insights, Leonard Besselink takes me gently to task in his comment for failing, in my attempt to cover a very large terrain, to be insufficiently sensitive to difference and nuance in both the temporal and spatial dimension of constitutional development. Temporally, he points out that my account of the rise of the democratic imperative in modern constitutionalism rather overstates the break between this mature phase and the early modern constitutional assault on absolutism.<sup>34</sup> The early monarchomach literature to which Besselink refers, and indeed the social contract literature which followed on from it, was concerned with containing political power within law understood quite broadly, including legal rules of legitimate leadership succession or qualification as well as legal rules protecting the rights of individual and other substantive values. In other words, from the very outset, there was something proto-democratic about the constitutional impulse to contain power. Besselink's deeper purpose here is both to counsel against an unduly rigid periodization of constitutional history and, of more immediate importance, to alert us to the fact that even in its most ostensibly legalist mode, constitutionalism as containment inevitably raises questions of democratic legitimacy. Similarly, to return to the global age of constitutionalism, for Besselink, here echoing Goodwin, no matter its claims to 'quasi-universality or cosmopolitanism'<sup>35</sup> constitutionalism as the containment of power always also refers to its containment within a particular locale, and so inevitably always also raises and is bound in some sense to respond to the kind of democracy-realizing constitutional questions which are so well-known to state constitutionalism. In other words, whatever its self-presentation, global constitutionalism cannot deny its democratic dimension, and the questions of legitimacy associated with this.

In spatial terms, too, Besselink seeks to qualify my historical analysis. He makes the point that alongside the kind of foundational, documentary constitutionalism, with its emphasis upon revolution, exclusivity and 'sovereigntist thought'<sup>36</sup> which I treat as paradigmatic, there is an alternative tradition of incremental constitutionalism, one which 'codifies rather than modifies',<sup>37</sup> of which the prototype is the British constitution, but which is also exemplified in the Dutch tradition, and – interestingly, from a global context – in the contemporary case of the non-state EU. Besselink proceeds to argue that not just incremental constitutions thus narrowly understood, but, in fact, *all* constitutions manifest certain incremental tendencies. All constitutions are implicated in an unending process of self-completion, one in which they are influenced as much by considerations of contextual effectiveness and the demands of new circumstances as they are by the legacy of original or inherited form. The point of this analysis is, once again, to counsel against viewing the emerging global constitutionalism as too distinct from the

34 Besselink, in this issue, 235-236.

35 *Ibid.*, 243.

36 *Ibid.*, 236.

37 Walker, Constitutionalism, 207.

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constitutional past. His message is that some state constitutional traditions of the non-foundational sort find it easier to contemplate the constitutionalization of the networked space of global society than is commonly supposed, and even the classical foundational traditions are more adaptable than their own declared wisdom (and our received wisdom) allows.

So Besselink reminds us, on the one hand, of the inescapability in principle of democratic concerns in any constitutional vision, and, on the other hand, of the variability, malleability and adaptability of the state constitutional tradition. If we take these comments together they reinforce my sense of the plasticity and impermanence of the state-centred architecture, and its insufficiency as a way of thinking about the proper relationship between democracy and constitutionalism in the global age. For all that in their immediacy and extended prominence over the modern age (pre-democratic and democratic), key state-centred architectural considerations – including sovereign autonomy, the mutual exclusivity of polities, the horizontalization of the public/private distinction within a single self-contained polity, and the replicability of the state form as a kind of uniform ‘polity’ template – have tended to dominate discussion of constitutional possibilities, it is the moral-imaginary dimension that remains fundamental to modernity and its prospects. The architectural framework, and the dominant language of conceptualization predicated on that architectural framework is, finally, just one means to the end of a social cosmology that privileges equality, autonomy and collective design and self-steering.

The constitutional question, then for a global age, is how both to generate and to adapt to a new architecture to help pursue these same deep ends. That is to say, faced with functionally limited rather than territorially sovereign polities; with overlapping rather than exclusive domains of authority; with a specification for any individual of her relevant public domain and domain of protected private freedom, and of the demarcation between these domains, that stretches across many polities rather than being contained within one; and with an increasingly variability and non-replicability of polity forms, how do we modify and optimize the democratic impulse – still at base just the latest iteration of the basic ideal of government by act of the people – alongside the remainder of our inheritance of constitutional ideas and doctrine, so as to revive the best and banish the worst of our modernist tradition? This is a huge question. And it is one which, as already noted, involves freeing our very language of conceptualization – including our notions of authorship, of stakeholding, of representation, of capacity, of boundaries, of public goods – of the assumptions and predispositions associated with a certain type of state-centred architectural backdrop. It is also one, I would wager, that we will be better equipped to address if we continue to view democracy, however renewed, as a vital but empirically and normatively incomplete ideal situated in a double relationship of mutual tension and support with constitutionalism.