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REPLY

States with constitutions, constitutions without states, and democracy: skeptical reflections on Scheuerman's skeptical reflection

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Abstract

Let me first thank Bill Scheuerman for his long and rich argument on my different considerations of global and European constitutionalism and democracy. It was an inspiring reading, and I have learnt a lot by it. I agree with most of his basic assumptions, and even with some of his more critical remarks. Here, I will first take the opportunity to make some revisions and clarify some conceptual misunderstandings. I will then make some additional remarks on my theoretical framework, and the ideas of law and constitution which are fundamental for it. In the last section I discuss again the issue of state and constitution about which Scheuerman and I already had a short controversy in *Constellations* last year.¹ This time, however, I will discuss the development of modern society in a broader historical, or evolutionary, perspective.

Keywords: *state; world state; monopoly of power; co-evolution; nation; national identity; territory; citizenship; modern society*

REVISIONS, AMBIGUITIES, AND MISUNDERSTANDINGS

For me Europe is *not* a paradigm case for global constitutionalism, as Scheuerman suggests. It was not by accident that I considered Europe at the end of my book on *Solidarity*.² But I should make the point a bit clearer since it is important to the argument as a whole. What I have tried to avoid from the very beginning is to take the perspective of the nation state as a starting point (as nearly all legal philosophy, with the single exception of Kelsen, has done over the last 200 years; from Kant's and Hegel's philosophies of law to Jürgen Habermas' *Faktizität und Geltung* and

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Luhmann's *Das Recht der Gesellschaft*), likewise I wish to avoid taking a European or any other continental perspective. In line with Ulrich Beck who rightly criticized the *methodological nationalism* of sociology, and more recently Luhmann (not of *Das Recht der Gesellschaft* but of *Die Gesellschaft der Gesellschaft*), I have from the very beginning tried to follow the paradigm shift from regional or national societies to the world society. There exists only one *single world society*, and all the rapidly (and sometimes alarmingly) growing cultural, political, social, and economic differences are *internal* differences of this *one and only* world society. Following this line of argument, I interpret (according with Habermas) the global political system as a system that is internally differentiated according to three *global systems of organizations*. The first is the global system of *world-organizations*, which follows lines of functional differentiation and the second is the global system of segmented continental regimes, which are bundling a lot of functions on a specific territory. Finally, the third system of organization is the global system of *nation states*, which themselves can no longer be analyzed as self-sufficient or closed systems, but as constituting *one single global system* of parts that are all closely connected and—whether they like it or not—are subject to international law (*open states*).³ Hence, the state itself has become a (segmented) global organization. It makes a crucial difference already in the concept of states if they are only a regional phenomenon or if they are a global system that (since the de-Colonization of the 1960s and the de-Sovietization of the 1990s) covers every square meter of the globe. *The more global this system is and the closer the legal network between and over them is entwined, the more national politics in the form of a single national actor becomes ideological or symbolic politics.*⁴ This is the *first* law of global politics: that of the shrinking power of national actors for designing national society. The *second* is that of the growing power of transnational actors of all kinds: *Once all states create a national educational (or military, welfare, scientific, etc.) system that structurally is more or less identical with that of all other states, they have created one single global educational (military . . . etc.) system, that can only be changed in concert*, regardless of whether the single state wants it or not (the Pisa and Bologna processes are nice illustrations, or the financial and economic crisis now).⁵

What I have to revise is the thesis that the EU is the evolutionary leading system within the constitutional regime of the world society; that Europe is the rising new and post-national continental power, whereas the older continental regimes that more resemble the model of the classical nation states—China, Russia, or the USA—are stuck in an evolutionary dead-end, sentenced by history to decay. I have made this argument in an essay from 2005 in an experimental way, not as a strong and serious thesis that has to support a whole theory.⁶ Now I would say, the thesis is wrong; *first*, because not all of the older continental regimes are older than the EU. China and India are not. *Second*, none of the non-European continental regimes are a classical nation state but all are strongly divided and fragmented, and hence better resemble federal or confederated regimes and empires than nation states like France or Germany. In this respect, they are not that different from the EU.

Jellinek's famous (but even for the *German Reich* of 1900 disputable⁷) criteria of a state—the unity of *Staatsgewalt* (monopoly of power), *Staatsvolk* (nation/people), and

Staatsgebiet (territory)—exist neither in the EU nor in China. In this respect (as well as in other respects), the Chinese constitution is only a ‘nominalist’ and not a ‘normative’ (effectively working) constitution.⁸ There is *no monopoly of power in these regimes*, neither in China nor in the EU. The provinces of China today seem to be much more autonomous with regard to domestic and economic affairs, and much less under the control of Peking than the European Union’s member states are under the control of Brussels. The reason for this is simple and follows one of the few eternal laws of sociology. Its *explanandum* is: The power of the one-party regime is far too centralized and far too authoritarian to be a strong power. The centralized one-party dictatorship is strong only when Peking sends its troops. But the day they leave, the authority of the central government becomes more or less weak again. The judges of the region care much less about Peking law than national judges in Europe care about European Law.⁹ And here comes the law of social science that *explains* this difference: ‘Absolute power is weak’ (Luhmann).¹⁰ It can be very destructive, but if it becomes too destructive it must destroy itself like the fascist Behemoth in Franz Neumann’s famous book.¹¹ It appears the Chinese government knows this, because it now seems to keep its own destructive power (which is much greater and more harmful than that of the EU) more limited, and at the same time it tries to improve its own power by a more densely and better working legal structure. Nonetheless, it will remain in power (and the economy will keep growing) only if it reaches a clear functional and federal differentiation of a lot of more or less autonomous branches of power which are related and integrated by a working and legally structured system of check and balances (which unfortunately must not be democratic, although, this would at least allow better chances for the fight for democracy).

There is also *no unity of the whole (Chinese or European) nation in these regimes*. Both are shaped by a plurality of (once again internally heterogeneous) nations, languages, religions, and cultures, and only the Europeans have a clearly documented and undeniable Citizenship of the Union—but only for the full member states (and not for people of Switzerland or Norway who belong to ‘Schengen’ and have nearly all non-political rights of European citizens, and are hence *de facto* but not legal citizens of the Union). Chinese citizenship and citizens’ rights are much more diverse and fragmented, and it is not easy (if at all possible) for poor peasants to get a passport, or to settle, live and work in Shanghai or Hong Kong, or even to transgress the borders of the region where they were born. The *territory is in both cases deeply divided* by different zones of integration, the Euro-zone, the Schengen zone, etc., in the case of the EU, Hong Kong or specific industrial developmental zones in the Chinese case.

The political and legal regimes of Europe and China are today located on opposite ends of a continuum of continental regimes, the one less legalized and much more authoritarian than the other. But this could change soon because China needs more and more legalization, rule of law, and active participation, which means that it could eventually become democratic in one way or another. Perhaps in the not-too-distant future, China will become a much more democratic transnational regime than Europe is today, or the first (and alarming) case of an authoritarian regime that is more effective than western democracies. Similarly, the EU could lead to a new and

better democracy than that which we have within the member-states today or to a new kind of (soft) Bonapartism that marginalizes national democracy, as I have tried to explain elsewhere.¹²

If we now compare Europe with the USA and ask ourselves: Where is *social integration* stronger, in the USA or in the EU? To be sure, this is an abstract and academic question because ‘social integration’ is something that changes permanently depending on incalculable practical actions and complex constellations of conflicts. To try to fix it like a substance is political fetishism. Therefore, ‘social integration’ should be taken as a performative and dynamic concept and not as a substantial and static concept. If we keep this in mind, it might actually turn out that the USA in its present constellation is much more deeply divided and fragmented than the EU is today, and not only in terms of social inequality and exclusion which is dramatic enough.

Let us take the example of *collective identity*, which again is more of a performative than a substantial concept. Scheuerman shares with Habermas the thesis that a shared civic identity is needed to build a regime that is democratic and egalitarian, in particular, if we seek a European social welfare regime and redistribution of wealth.¹³ I am not that sure which of two goals is more important to reach: a social a priori of *shared civic identity* or a *constitutional framework* that allows different and conflicting interests and values (of any kind, including fundamentalist) to fight *for* their right *within* the right. Such a framework does *not necessarily* presuppose *any* kind of collective civic identity—which already as a semantic concept seems to be inconsistent and meaningless.

Where, for example, is the American shared civic identity today, except in Obama’s speeches? Today (and since the Vietnam War) one of the most striking features of American national identity seems to be that it *does not exist as a means of integration but of deep division*. When the right wing majority of the Republican Party says ‘nation,’ they mean a nation without human rights activists, homosexuals, social democrats, or ‘Arabs,’ and even without a majority of the members and voters of the Democratic Party. At best, they are referring to precisely half of America, and many of them would support Supreme Court Justice Clarence Thomas’ anti-federal dissenter opinion in the *Term Limits* decision of the Court. When they vote in Congress, these right wing republicans vote as people of Georgia, and ‘not as the corporate agents for the undifferentiated people of the Nation as a whole.’¹⁴ Yet, when Americans to the left of the Republican Party say ‘nation’ in reference to many fundamental issues they mean exactly the opposite, a strong federal social welfare state, redistribution of wealth, a broad range of civic rights, a nationwide *great democratic community* (Dewey). Here the idea of a nation is a leftist concept, egalitarian, open for human rights, international law, and closely related to the project of a global democracy and even a global social welfare state, Franklin D. Roosevelt’s *One World*. It is not by accident (and this is very different from Europe) that the name of one of the oldest and still one of the leading leftist journals in the USA is called *The Nation*. Justice Thomas’ dissent in the 1995 decision was a strong statement against this idea of a nation and in this respect also against national unity.

So far I agree with Scheuerman. But my point is that in the US case already the *idea of the nation* is *deeply dividing the nation*, and it is precisely this divide that is reflected by the decision of 5:4 in the *Term Limits* case.

Paradoxically, this deep division of interests *and* values *makes American democracy strong and not weak* because—as we have seen during the last presidential campaign again—it confronts the voters with *real political alternatives* which are increasingly absent in the EU and the EU member states today. But again, *this* is not a difference in principle because it *may very well change tomorrow* once those conflicts that are currently repressed by efficient technocratic politics come to the fore. Only during the performance of the then fighting parties will it become clear if the respective constitutional regime will become strong or weak. This question cannot be secured by law. The only thing we can say is that the probability is relatively high that a constitutional law that does not work in times of technocratic standstill or business as usual (because it is only symbolic or nominalist) will neither work in times of crisis and open conflict—although under a nominalist constitutional regime like Brazil the fight for right, Ihering’s *Kampf ums Recht*, could become a fight for a more normative constitution that *makes* it strong. Often politics that takes a risk can change much, and if it does not—as witnessed by the European political class today—this can cause serious damages, devolution, and regression.¹⁵ If politics were to remain technocratic as is the case in Europe, the price would be a serious legitimation crisis (another law of sociology); and this is what we now have to face in Europe. The most recent example was the French referendum of 2005, which was followed by technocratic business as usual, silencing and bypassing of the European public, at the predictable price of another disastrous failure of the post-constitutional and quasi-constitutional treaty of Lisbon—the Irish referendum confronted technocracy with truth.¹⁶

EGALITARIANISM, DEMOCRACY, AND CRISIS

Scheuerman rightly emphasizes that the particular point of my analysis of global and regional constitutionalism (or juridification/*Verrechtlichung*) is to show:

1. that international institutions and organizations are *strongly in need of democratic reforms*, and
2. that there is no democracy without *egalitarian procedures of decision making*, or that there is no democracy if it is less democratic than nation states, which have normative democratic constitutions.

Everything that is less democratic than this is *no democracy*. Methodologically, one must combine ‘abstraction and re-specification’ (Luhmann) in the right way, and as such the *abstraction* of the concept of the *constitution* from the context of the state must maintain (a) the basic idea of *human rights*, i.e. Kant’s one and only human right of (individual and political) *equal freedom*, and (b) the principle of *democratic self-determination*. These two basic ideas, put forth by nearly all national constitutional textbooks today, must be *re-specified* in the new context of those inter-, trans- and

supranational organizations which, explicitly or implicitly, formally or informally, make binding decisions.

Normatively, egalitarian procedures of decision making are absolutely indispensable for anything that is called democracy, but they are not enough for the *democratic legitimation* of binding decisions. Democratic *legitimation*—and here I strongly agree with Habermas—*does not rely on votes* but bluntly speaking, on *truth*: ‘A post-truth-democracy could no longer be democratic.’¹⁷ The point here is that *truth* itself (in a communicative-pragmatist understanding) is *internally democratic*, and to be sure, not because of *votes* and *majorities* but because of *voices* and *arguments*; not because of *equal access* of those affected to *decision-making* procedures but because of *equal access* for anybody (dead or alive) who can put forth a seriously intended argument or objection to a public debate. This means that this debate must be democratic in the sense of being *completely inclusive* of any possible contribution (no matter if—from our *present* and necessarily *particular* perspective—it appears idiotic or humorous) to an ongoing *process of problem-solving* (that depends on propositional truth and the universalability or universal of normative claims). The will of the majority then has the important function of mediating the provisional result of an ongoing problem-solving discussion with the daily need for decisions, hence, to couple communicative and administrative power structurally.¹⁸ Constitutions that are *democratic* can therefore be described as the *structural coupling of inclusive deliberation and egalitarian decision making, and of communicative and administrative power by law*.

This idea of a constitution is all we need. What we do not need are concrete models and utopian designs of good and democratic institutions beyond the nation state. The idea I have in mind and that I have tried to develop in my papers is less normative than Scheuerman seems to think. I try to avoid any idea about a final stage of the political union of Europe or of the globe for two reasons. First, I think that in order for these reforms to be democratic, it is the *people* themselves who, in unpredictable constellations of change and as far as it is possible, must decide about concrete *institutional reforms* (under pressure of time, power and social fights). Second, the construction of concrete institutional settings is what Hegel would have called a bad abstraction (*schlechte Abstraktion*). This is because the respective final stage of a developmental period in history is due to a blind or uncontrollable *social evolution* which at best can be influenced indirectly and *ex post*.¹⁹ The point here is that even if the people or a specific constitutional convention decides about a constitutional text book and the basic political and legal structure of their society, it is the evolutionary process that follows which will determine if this project will lead to a working (or a failed) democratic nation state with a so-called *Gewaltmonopol*, or to some other and completely new formations of stable (or unstable) democratic institutional arrangements (as new as the democratic nation state was—let us say—in about 1800 or 1850).

Therefore, my reference to a normative background is mostly *negative*. The normative basic idea of a democratic constitution (point (a) and (b) above) is all we need to formulate an *immanent criticism* of the existing institutions on all levels of the existing global system of national, inter-, trans-, and supranational organizations.

Therefore, in addition to the two points I make above, instead of constructing normative green table projects I have suggested that:

3. we should go back to Marx and Adorno, and develop a *negative theory of the world society* that allows us to *explain* (by assumptions about structures of hegemony and class-rule) *why* the already existing global legal and constitutional system is in *bad shape*, and to figure out where the social *contradictions* are, which could lead to a crisis of the existing society, but also could be used as a hand gear for *emancipatory interests* and *social liberation movements*.

Different from Scheurman's presumption (and different from Habermas insofar as he tries to make concrete suggestions for the reform of the EU and the United Nations), I do not care about these well-intended suggestions and models (which may indeed have some practical value, I will not deny that). But the project I follow in my papers and books of the last decade is that of a social scientific renewal of the idea of a *determined negation* of the world society's unegalitarian and undemocratic constitutional regime.²⁰ This part of my project is more sociological than philosophical or political, and for the aim of a reconstruction of *immanent criticism* and *determined negation* the analysis and sociological observation of *law* is very helpful. This is so because law is a normative reality that always already mediates *between* constellations of (class-) *interests* on the one hand, and philosophical, religious, cultural, or political *ideas* and ethical projects on the other hand. Law is at once normative and real. In particular, its basic norms resemble the beginnings of a *practical philosophy of mere ethical relevance* with statements that sound good and innocent: 'All men are free and equal,' 'The dignity of man is untouchable,' 'All power stems from the people,' etc. But internal to a system of *legal norms*, these sentences are also positive law in the sense that they have *real consequences* for people—for better *and* for worse. Therefore, Hegel rightly has called law the *objective spirit* of the civil society.

My idea is simply to carry out something similar to what Marx did with legal terms like 'private property' or 'contract.' That is, I look to analyze the legal structure of the European Treaties or the different UN regimes in a way that allows us to identify central contradictory elements in the structure of the respective legal systems. In my case these are contradictions between high-sounding *declarations of democracy*, more or less well established and concretized systems of *equal rights*, more or less working *rule of law regimes* on the one hand, and an *undemocratic* and deeply *non-egalitarian constitutional law of checks and balances* that regulates the internal competences and legal actions of and between national and international legal organs on the other hand. These contradictions now favor the emergence of a new *transnational ruling class*, and they support the stabilization of global economic, political, cultural, and legal hegemonies; but, insofar as they also *enable* the formation of *counter-hegemonies*.

Without bringing the people and social movements back in, without the pressure and communicative power of a global public (which builds a continuum with

regional and national publics), and without the mobilization of the more bureaucratic power of parties and non-governmental organizations, *nothing will change*. Only if the strive and hope for change that evolves from below joins together with legal formalism and expert knowledge can the established and complex institutional structures of a world society *be changed*—not by theory but by political praxis, by communicative and administrative power, by luck, good ideas, and intelligence.

STATE, CONSTITUTION, AND THE WESTERN LEGAL TRADITION

‘State’ and ‘constitution’ are relatively young historical notions are closely connected with historical narratives. The *old* paradigmatic meta-narrative (that still fuels the mainstream political, philosophical, legal, or social theory of the state) presupposes (a) that the emergence of the *modern state* begins no earlier than the 16th and 17th centuries (*Frühe Neuzeit*). (b) The emergence of this state is reflected theoretically in the political philosophy of Bodin, Hobbes, Spinoza, and Locke, and (c) the distinctive features of the state are *rule over a specific territory*, a *sovereign ruler*, and his *subjects* which then (beginning with the English Revolution) are transformed into a *nation of citizens*. Following this (until now hegemonial) meta-narrative, (d) the history of *modern public law* begins with the *Jus Publicum Europaeum* after the peace of Tordesillas in 1494, and later still the peace of Westphalia in 1648.²¹ *Constitutions* from this point of view are (e) *written constitutions* which are no older than the French and American Revolutions of the late 18th century, hence, (f) the *constitutional nation state* is the paradigm case of modern statehood.

Yet, in the last decades the old and still leading paradigm has come more and more under attack, and at the same time the idea, analysis, and description of the nation state has come to focus more on the dark side of the nation state, historically, as well as in the present.²² One of the main problems with the old paradigm and the old meta-narrative is that they *exclude too many alternatives*. This is partly so because they locate the *break* between *ancient* (or *medieval*) stratified societies based on family relations and *modern* functionally differentiated societies which are based on formal organizations (like states or industrial corporations) and membership (like citizens or employees), relatively *late in history*, between the 16th/17th and 18th centuries (Koselleck’s *Sattelzeit*). Now, I am not a specialist in this field of history but as far as I can see, there are now many studies that challenge this well-established narrative of the modern state, modern law, and modern constitutional regime. They all suggest that the *origin of the modern society* is located deeper or earlier in history, and trace it back to the time of the first European legal revolution (or the then so-called reforms) of the 11th and 12th centuries.²³ What we can observe already since that time is:

1. The *functional differentiation* of an autonomous *legal system* (autopoiesis of law) which for the first time in history was centered around a full-fledged *system of courts*, and was enabled by an academically educated class of *professional jurists* and an academic culture of argumentation.²⁴

2. The emergence of the modern system of *universities* as the center of the beginning of *functional differentiation of science*.²⁵
3. The emergence of the first *modern state* which was not the territorial nation state but the *universal state of the church*, the clerical *Anstaltsstaat* which Max Weber has already referred to as the '*erste rationale Bürokratie*'—the 'first rational bureaucracy' of world history, and the beginning of the '*moderne anstaltsmäßige Staatsverwaltung*'—the 'modern corporative state administration.'²⁶

Although there were no written constitutions in the 12th century, there existed for the first time in history a clearly developed *system of constitutional law*, first within the church state, then expanding to the slowly emerging territorial kingdoms and the republican avant-garde of the *new* city-states which for the first time in history *combined* the self-rule of citizens with an advanced system of public law.²⁷ There existed a dense network of legal regulations between and (via the papal world court) above all these political entities. The first modern constitution was *European*, not national. This constitution worked in a strikingly similar way as Treaties of the European Communities or the European Union do today, because it consisted *first*, of a mix of direct and indirect *supremacy of papal legislation and jurisdiction* (today: European Law Supremacy; the European Courts of Justice and Human Rights as a system of transnational supreme courts). *Second*, and similar to the European Union, it had a *direct effect* since everybody (who was wealthy enough) could appeal to the (usually acknowledged) highest authority of the papal court in Rome. *Third*, at the same time, *supremacy and autonomy went well together*. Despite *papal law supremacy*, canon and civil law regulated the legal relation between the *equal and autonomous political powers* of the Pope, the emperor and kings, who all were equal sovereigns *under the European common law*.²⁸ This resembles the strong role and *autonomy of the nation states* that consists together with the *European law supremacy* and obliges the Union to take care of the national identity of its members (Art. 6 Para 3 European Union Treaty).

Now, already (but also only) since the time of the legal revolution of the 11th and 12th centuries, law has not only become a functionally autonomous system but also the normative idea of law changed deeply. The old Roman law was primarily functionally determined; it was a medium of coordination between the members of the ruling classes and of repression against the lower classes, a repression which mostly took place outside the law.²⁹ Yet, for the Canonists of the 12th century, law no longer could be reduced to its societal function because it played an important role in the process and history of salvation; it was designed for the implementation of justice already in this world, and was a medium for the improvement of society. Since that time, one can say that law was no longer a Luhmanian immunity system alone, functioning to stabilize reciprocal expectations, but was a medium for changing the world and realizing emancipatory claims. The double encoding of law as a systemic medium of repression and emancipation became the signature of modern law. Only this double encoding can explain why the ideas of legal freedom and equality, which were not all realized in medieval law, gained such immense symbolic and legal power

during the following centuries, and in particular during the revolutionary periods of the protestant legal revolutions of the 16th and 17th centuries, and the constitutional revolutions of the 18th century.

The papal revolution was the first *constitutional revolution* in history.³⁰ On the metaphysical grounds of the *Corpus Christi* dogma the medieval jurists legalized and juridificated (*verrechtlicht*) the whole universe, the mortal and the post-mortal existence of men, and in particular they *constitutionalized* the two earthly bodies and swords of the *Corpus Christi*. The first *European constitutional law* already made the universal claim to be the constitutional law of the world, or *world law*. This claim was the starting point for a deeply ambiguous progress because it not only implied the rule of law and the constitutional limitation of arbitrary power, but at the same time it was the starting point of the long and bloody period of western imperialism that always was an *imperialism of law*, and included not only external, but also internal imperialism.³¹

In the end, the ambivalent outcome of the papal revolution was not an emancipation of the people but the alliance of church (*oratores*) and princes/landlords (*bellatores*) for a better expropriation of the *laborantes* (mostly peasants).³² The emergence of modern law has enabled a much better and much more effective system of domination and expropriation, and this was such a great advance for the ruling classes that they have successfully repeated it in one way or another in all the revolutions that followed. Before the revolution they needed the people to make the revolution, then after the revolution they needed people in order to expropriate them. But despite this dark side of law, the great *emancipatory advance* of the same western legal tradition consisted not only in the first and reluctant emergence of subjective rights, rule of law and legal universalism,³³ but also in the *coordination of conflicting powers and colliding systems and spheres of value*. Hence, the greatest advance of the first legal revolution (that was transformed and expanded during the following revolutions) was not only, as Berman writes, the *dialectical reconciliation of opposites*,³⁴ but also the dialectical (and procedural) reconciliation of *lasting* opposites, of *lasting* conflicts, differences and contradictions between interests, systems, and values.³⁵

The central point here is that the western legal tradition emerged from the terror and fanaticism of a series of great revolutions. But in the end, the resulting constitutional regimes established legal conditions for a (at least less violent) struggle for equal rights *within* the right, and this worked even within a system of strong hegemonic powers, class domination, etc.³⁶ There is some evidence that from revolution to revolution the political system *and* the political communities have *learned* to cope with greater heterogeneity, diversity and difference, and at the same time have increased egalitarian self-determination and social inclusiveness.³⁷ This improbable development seems to be enabled *not* by an ever closer integration of society, but to the contrary by *legally organized* disintegration and growing heterogeneity, as already Spencer observed as another sociological law; namely that ‘the state of homogeneity is an unstable state,’ whereas political and social stability in general and in modern societies in particular, depends on increasing and accelerated ‘heterogeneity,’ ‘differentiation,’³⁸ and—as we should add with

Parsons—on formal and individualized ‘social inclusion.’³⁹ If this is true then it could be the case that political and legal communities with a *monopoly of power* are less stable and effective than a highly differentiated *legal* community that has even decentered this last *monopoly* that stems from the myth of a state (or a people) as a *subject* of its own will, and that exists as a spectre beyond the law. Law needs means *enforcement* (state I) but no *monopoly* of power (state II). What we need for global constitutionalism today is a world state I, not a world state II.

One can describe the great transformation at the threshold of modernity, the emergence of modern constitutional law in the storms of the papal and all the following great revolutions with Chantal Mouffe as a transformation from *antagonism to agonism*⁴⁰—if one keeps in mind (against Mouffe), not only the constitutive role of law and (what Schmittians like Mouffe hate mostly) the ‘*Juridifizierung der Politik*’ (juridification of politics)⁴¹ that enables the Mouffeian transformational process. We also can see now (and again different from Mouffe) that neither the Polis (which was a pre-legal or at best proto-legal community) nor the nation state were the origin of the great transformation from antagonism to agonism, but the *universal state of the church*, and only then did the *pluriversum* of princes and cities began to copy the legal and administrative advances of the church.

This *first* and (as the nation state during most of the time of its history) non-democratic *modern state* was already a *world state*—if a state is a legal organization that regulates the relations of its organs by law (Kelsen), that is, if it is a state I (see above). It is evident that this kind of modern state is very different from the model of the classical *nation state* which is defined by the so-called monopoly of power (state II), and the unity of territory and citizens. We can call both kinds of political communities *states*, and in his paper Scheuerman is also referring to a type of a projected world state or a European state that should not be identical with a global or European nation state (state II). But he and Rainer Schmalz-Bruns (to whom Scheuerman refers) do not make very clear why their (post-national) alternative to the classical nation state is so different.⁴² This remains unclear because both insist that a democratic global or European state must have the three famous qualities (and in particular the monopoly of power) that the leading jurist of German *Staatswillenspositivismus*⁴³ once has specified.

What we can learn from the history of modern law is that there are at least *two different evolutionary paths* in *co-evolution* since the emergence of the earliest modern state during the 12th century. This co-evolution was activated by the emergence of the *universal legal state of the church*, and only a short time later the European kingdoms started to copy the path-breaking administrative and legal inventions of the church and the canon law, and they transformed it into a *segmented pluriversum of states*.⁴⁴ Both belong together, both are structurally coupled. The emerging territorial and later *nation states* were very successful in their job of state-building. They have to be distinguished sharply from the powerful but weakly integrated *empires* (Rome) and the (more or less) powerless but strongly integrated *city-states* of old Europe.⁴⁵ But the *pluriversum of states* never led to the vanishing of the trans-territorial alternative of a *universal state* (or at least a *universal constitutional regime*)⁴⁶

from the realm of evolutionary paths that are modern. The failure of the old paradigmatic meta-narrative of the modern state was to cut off the roots that connect the supposedly *single* modern plurality of states structurally with the *equally modern* universal legal state. But if we turn away from the blind spot of the old meta-narrative, we must recognize that the *universal* alternative to the nation state that (a) *co-originated* with the *pluriversum* of states, and (b) was kept alive as an immense body of power first within the Church of Rome, which still exists, and is again an important global player today. Later, and after the final decay of the spectre of the Roman Empire (*Römisches Reich Deutscher Nation*), in the 18th century different forms of regional *Bundesgenossenschaften* or confederations followed, and (federal) continental *empires* like Russia and the USA during the 19th century became important global political powers. Following the revolutionary changes in national and international law between 1941 and 1951, a new global system of (partly very powerful) legislative, judicial, and administrative organizations emerged beyond the nation state, on global and regional levels, building a new kind of *universal legal community* or 'legal state' which one could call a *world state* (in the sense of state I), even if today this is a more or less *imperial world state*,⁴⁷ and again this is not so far removed from the powerful church of the 12–16th centuries.

The historical universal legal state of the church never became democratic, and the secularized universal legal state which we have today is not yet democratic, but—if we take into account that the pluriversum of modern states also has deep medieval roots—we must recognize that it also took a long time and many revolutionary transformations to get the territorial state at least considerably democratic. Both kinds of modern states (I and II) are at an equal distance from democracy. Why then should it not be possible to get global political players like the European Union or the United Nations democratic? Both are missing Jellinek's Holy Trinity of power, people, and territory but both do work as good, or sometimes much better than many, if not most of the nation states that exist at the beginning of the 21st century. They do not work, as well as Germany or the Netherlands, but are much better than Tanzania or Ukraine. Something very similar to the above-mentioned *contradiction* between *egalitarian rights* and an *undemocratic law of checks and balances* also stood at the beginning of the long process of national democratization.

What we further can learn from the history of constitutional law is that all great legal revolutions were at once *regional or national revolutions* and *revolutions of international law*, and always they were founded on inter- or supranational law and respective treaties. It was not the claim of Gregor VII for sovereignty of the Pope that created the medieval constitutional order, but the *Concordat of Worms* and a lot of other treaties and treaty regimes that followed it. These regimes have institutionalized a complex European legal regime that divided power between the church and the secular rulers. And later, the so-called absolute states of Europe, the Hobbesian and Schmittian paradigm cases of sovereign states (which by the way all were constitutional monarchies) were constituted by the binding force of *international law*, like the *Treaty of Augsburg* 1555. The same is true with the *US-Declaration of Independence* which, together with the human right of equal

freedom, created a *completely new international law* based on the *right of the people to self-determination*—which became positive international law only after 1918 but delimited and constituted a specific zone of international law valid for both Americas a short time after the American revolution. (To be sure, here as in all revolutions we can observe a negative dialectical intertwining of emancipatory movements and bloody imperialism.)

Perhaps historical considerations of this kind can make it easier to understand how outstanding Kelsen's turn from the end of the First World War was when he simply *per definition* turned the perspective around, and saw the world of states from the point of view of a world state which he (not horrified by juridification like Schmitt) simply identified with international law. Yes, we can say Kelsen is correct, the network of international law already constitutes a state, and all nation states (again to the horror of people like Schmitt) are simply organs of a *world state* that transfers specific legal competencies to them, along a continuum of greater and smaller amounts of competencies. Sure, this Kelsian world state is (in Kelsen's terminology) a *primitive state* (state I a) compared with the great nation states of that time (which already were much less great in 1918 than in 1914). But this was not always the case, and in the 12th and 13th centuries the universal state of the Church was (in Kelsen's primitive evolutionary scheme of 'primitive vs. modern/civilized states') already a fairly well-developed *modern state* (state I b) with a lot of far-reaching competencies of its own, including a well-functioning world court with the competence to make final judgments. If we now compare the situation at the end of the First World War with that at the end of the Second World War or the present state of international law, then we have to say that the *system of global constitutional regimes* that was founded during 1941 and 1951 already had reached the evolutionary stage of a *world state that is modern* (state I b). Unfortunately, 'modern' does not mean 'democratic'. But all we need from constitutional law to begin with the democratization of the existing world state exists already. Hence, to talk about global democracy today is not completely utopian, be it with or without the monopoly of power which becomes more and more ominous the closer one looks at it.

NOTES

1. William E. Scheuerman, 'All Power to the (State-less?) General Assembly!' *Constellations* 4 (2008): 485–92; and Hauke Brunkhorst, 'State and Constitution – A Reply to Scheuerman', *Constellations* 4 (2008): 493–501.
2. Hauke Brunkhorst, '*Solidarity: From Civic Friendship to a Global Legal Community*', trans. Jeffrey Flynn (Cambridge, MA: MIT Press, 2005).
3. On open states, see Rainer Wahl, '*Verfassungsstaat, Europäisierung, Internationalisierung*' (Suhrkamp: Frankfurt, 2003); and Udo Di Fabio, '*Das Recht offener Staaten*' (Mohr: Tübingen, 1998).
4. Colin Crouch, '*Post-Democracy*' (Cambridge, MA: Polity Press, 2004).
5. Klaus Dieter Wolf, '*Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft*' (Baden-Baden: Nomos, 2000); see for an ambitious attempt of

- (phenomenological) explanation: John W. Meyer, 'World Society and the Nation-State', *American Journal of Sociology* 103 (1997): 144–81.
6. Hauke Brunkhorst, 'Die Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit,' in *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, ed. Matthias Albert and Rudolf Stichweh (Wiesbaden: Verlag für Sozialwissenschaften, 2007), 93.
 7. See Bardo Fassbender, 'Der offene Bundesstaat. Studien zur auswärtigen Gewalt und zur Völkerrechtssubjektivität bundesstaatlicher Teilstaaten in Europa' (Tübingen: Mohr, 2007).
 8. For the difference between symbolic, nominalist, and normative constitution see Karl Löwenstein, 'Verfassungslehre' (Mohr: Tübingen, 1997), 148ff; further developed and updated by Marcelo Neves, 'Verfassung und positives Recht in der peripheren Moderne' (Dunker & Humblot: Berlin, 1992).
 9. On the European Union see Karen J. Alter and Sophie Meunier-Aitsahalia, 'Judicial Politics in the European Community. European Integration and the Pathbreaking *Cassis de Dijon* Decision', *Comparative Political Studies* 4 (1994): 535–61; Alter, 'The European Court's Political Power', *West European Politics*, 19, no. 3 (1996): 458–87; Alter, 'Who Are the 'Masters of the Treaty?': European Governments and the European Court of Justice', *International Organization* 52 (1998): 121–47; on China see Gunthart Gierke, 'Die Schlichtung im chinesischen Recht' (Hamburg: Mitteilungen des Instituts für Asienkunde 211, 1992). Only in recent years China started to overcome the old imperial structure that lasted throughout the Mao-period of modern China and goes back to the times of the mandarins, who—different from the European state—like system of *clerici*—administration—never ever had any chance to rule efficiently over the local lords, for an instructive comparison see Robert I. Moore, 'The First European Revolution', chap. V (Oxford: Blackwell, 2000), 5. The microphysics of power was a European invention and closely connected with the evolution of modern law.
 10. For the same thesis from a very different theoretical framework, see Hannah Arendt, 'On Revolution' (London: Penguin Books, 1965); Brunkhorst, 'The Productivity of Power: Hannah Arendt's Renewal of the Classical Concept of Politics', *Revista de Scientia Política* (RCP) 26, no. 2 (2006): 125–36.
 11. Franz Neumann, 'Behemoth. Struktur und Praxis des Nationalsozialismus 1933–1944' (Frankfurt: Fischer, 1993).
 12. Brunkhorst, 'The Legitimation Crisis of the EU', *Constellations* 13, no. 2 (2006): 173–4; and Scheuerman is quoting this in approval (see this volume).
 13. Scheuerman in this volume (see fn 22).
 14. U.S. Term Limits, Inc. vs. Thornton (514 U.S. 858), Justice Thomas, dissenting.
 15. See Jürgen Habermas/Frank Walter Steinmeier, 'European Prospects', *Philosophy meets Politics* IX (Essen: Klartext Verlag, 2008).
 16. Hauke Brunkhorst, 'Unbezähmbare Öffentlichkeit. Europa zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung,' *Leviathan* 1 (2007): 12–29; Hauke Brunkhorst, 'Der Mythos des existenziellen Staates. Das Europäische Kontinuum nationaler und gemeinschaftlicher Gewalten', *Leviathan* 4 (2008), 490–500.
 17. My translation. The German original goes: A 'post-truth-democracy'... wäre keine Demokratie mehr.' Jürgen Habermas, 'Religion in der Öffentlichkeit,' *Naturalismus* 119–154; in: Zwischen *Naturalismus* und Religion, Frankfurt: Suhrkamp 2005 ... here: 150f.
 18. Jürgen Habermas, 'Faktizität und Geltung' (Frankfurt: Suhrkamp, 1992), 187. For Jürgen Habermas this transformation is at the core of modern democratic constitutional law, yet, it has older origins that go back to the double encoding of law as repressive and emancipatory in canon law (see below).
 19. That is, by the way, one of the reasons why Jürgen Habermas made the basic distinction between system and life-world in his *Theory of Communicative Action*.

20. For what I intend is rightly seen by Lambert Zuidervart, *Social Philosophy after Adorno* (Cambridge: Cambridge University Press, 2007), 164ff.
21. Nearly as influential as the myth of the Jellinekian Holy Trinity of state constituents is now Carl Schmitt, *Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker und Humblot, 1988 [1950]).
22. Paradigmatic: Michel Foucault, *Überwachen und Strafen. Die Geburt des Gefängnisses* (Frankfurt: Suhrkamp, 1977); see also the lectures from the 1970s, Foucault, *Geschichte der Gouvernementalität I und II* (Frankfurt: Suhrkamp, 2004); and for a more conventional historical research, see Wolfgang Reinhard, *Geschichte der Staatsgewalt* (München: Beck, 1999); Philip S. Gorski, *The Disciplinary Revolution. Calvinism and the Rise of the State in Early Modern Europe* (Chicago: University of Chicago Press, 2003).
23. See only: Harold Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983); Harold Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Cambridge, MA: Cambridge University Press, 2006); Robert I. Moore, *First European Revolution*, chap. V (Oxford: Blackwell, 2000); Norman F. Cantor, *Medieval History. The Life and Death of a Civilization* (London: Macmillan, 1969); Leidulf Melve, *Inventing the Public Sphere. The Public Debate during the Investiture Contest (c. 1030–1122)* (London: Brill, 2007); K.J. Leyser, 'The Polemics of the Papal Revolution', in *Trends in Medieval Political Thought*, ed. Beryl Smalley (New York: Barnes & Noble, 1965), 42–6; Johannes Fried, *Zu Gast im Mittelalter* (München: Beck, 2007); Johannes Fried, *Das Mittelalter. Geschichte und Kultur* (München: Beck, 2009); Peter Brown, 'Society and the Supernatural: A Medieval Change', *Daedalus* (Spring 1975): 133–151, here: 142ff; James A. Brundage, *Medieval Canon Law* (London: Longman, 1995): 34f, 39f, 53, 55f, 111, 154ff, 164ff (positivization of law), 119 (modernity), 98ff (constitutional law), 62ff (professionalization), 80, 165ff (subjektive rights), 152 (funktional differentiation); Peter Landau, 'Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien', in *Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien*, Baden-Baden: Nomos 1996, ed. Heinrich Scholler, 23–47; Joseph Reese Strayer, 'On the Medieval Origins of the Modern State' (Princeton, NJ, 1970); Joseph Reese Strayer, 'Philip the Fair – A "Constitutional" King', *American Historical Review* 62 (1956): 18–32; C. Warren Holister and John W. Baldwin, 'The Rise of Administrative Kingship: Henry I and Phillip Augustus', *American Historical Review* 83 (1978): 867–905; Brian Tierney, 'Religion, Law, and the Growth of Constitutional Thought 1150–1650' (Cambridge, MA: Cambridge University Press, 1982), 1, 16ff; and James A. Brundage, 'The Rise of the Professional Jurist in the Thirteenth Century', *Syracuse Journal of International Law and Commerce* 20 (1994): 185–90.
24. James A. Brundage, 'Rise of the Professional Jurist in the Thirteenth Century', *Syracuse Journal of International Law and Commerce* 20 (Zu Brundage, 1994), 185–190 and Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt: Suhrkamp, 1993), 25, 263, 265.
25. Ludger Honnefelder, *Woher kommen wir? Ursprünge der Moderne im Denken des Mittelalters* (Berlin: Berlin University Press, 2008); Johannes Fried, *Das Mittelalter. Geschichte und Kultur* (München: Beck, 2009), 225ff, 358ff.
26. Max Weber, *Wirtschaft und Gesellschaft* (Köln: Kiepenheuer, 1964), 432, 549, s. a. 480, 615f; Harold Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge MA: Harvard University Press, 1983); Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (Göttingen: Vandenhoeck, 1967), 74f; Strayer, *Medieval Origins of Modern State* (Princeton, NJ: Princeton Univ. press, 1970).
27. See Heinrich Mitteis, 'Der Staat des hohen Mittelalters: Grundlinien einer vergleichenden Verfassungsgeschichte des Lehnzeitalters' (Köln: Böhlau, 1986), 229; Harold Berman, 'Recht und Revolution'.

H. Brunkhorst

28. See Johann Friedrich von Schulte, *‘Geschichte der Quellen und Literatur des Canonischen Rechts’* (Stuttgart: Enke, 1875), quoted from the reprint Graz: Akadem. Druck- und Verlagsanst. 1956, 93f, 96, 99, 101f, and 168f.
29. See Uwe Wesel, *‘Geschichte des Rechts’* (München: Beck, 1997), 156.
30. Harold Berman, *Recht und Revolution*, Vol 1; for an early application of this term to the papal revolution see Heinrich Mitteis, *‘Der Staat des hohen Mittelalters: Grundlinien einer vergleichenden Verfassungsgeschichte des Lehnzeitalters’* (Köln: Böhlau, 1986), 229; Geoffrey Baraclough, ed. *‘Introduction’*, in *Medieval Germany, 911–1250. Essays by German Historians* (Basil Blakwell: Oxford, 1938).
31. Antony Anghie, *‘Imperialism, Sovereignty and the Making of International Law’* (Cambridge, MA: Cambridge University Press, 2004); and David Kennedy, *‘The Dark Sides of Virtue’* (Princeton, NJ: Princeton University Press, 2004).
32. Jacques Le Goff, *‘Kultur des Europäischen Mittelalters’* (München: Droemer, 1970), 447; for a brilliant analysis of the dialectic of enlightenment of the first European revolution see Robert I. Moore, *‘First European Revolution’*, chap. V (Oxford: Blackwell, 2000).
33. Landau, *‘Die Anfänge der Unterscheidung von Ius Publicum und Ius Privatum in der Geschichte des kanonischen Rechts’*, in *Das Öffentliche und Private in der Vormoderne*, ed. Gert Melville and Peter von Moos (Köln: Böhlau, 1998), 629–38; Johannes Fried, ed. *‘Über den Universalismus der Freiheit im Mittelalter (München: Beck)’*, in *Zu Gast im Mittelalter* (2007), 143–172, hier: 159, 160ff; John of Salisbury, *‘Policraticus, II/22; IV/2/7/8, VI/25u.26, VII/25, VIII/17’*; Cary J. Nederman, *‘John of Salisbury’* (Tempe, AZ: Arizona Center for Medieval and Renaissance Studies, 2005), 51ff; Cary J. Nederman, *‘Introduction: Discourse and Contexts of Tolerance in Medieval Europe’*, in *Beyond Persecuting Society: Religious Toleration Before the Enlightenment*, ed. Laursen and Nederman (Philadelphia, PA: University of Pennsylvania Press, 1998), 13–24, here 22; Nederman, *‘Toleration. Skepticism, and the ‘Clash of Ideas’: Principles of Liberty in the Writings of John of Salisbury’*, in *Beyond Persecuting Society*, ed. Laursen and Nederman (Philadelphia: Univ. of Pennsylvania Press, 1997), 53–70, here 55, 58, 60, 65f; Hans Liebeschütz, *‘Medieval Humanism in the Life and Writings of John of Salisbury’* (London: Warburg Institute, 1950), 55ff.
34. Harold Berman, *‘Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition’* (Cambridge MA: Cambridge University Press, 2006), 5f.
35. *Law of collision* or *‘Kollisionsrecht’* (Joerges, Teubner, Fischer-Lescano) has deep roots in Western constitutional law.
36. For a Gramscian actualization of Iherings famous *‘Kampf ums Recht’*, see: Sonja Buckel, *‘Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts’* (Weilerwist: Velbrück, 2007). For an idea of constitutions as *‘konsentierete Dissensgrundlagen’*, see Görg Haverkate, *‘Verfassungslehre. Verfassung als Gegenseitigkeitsordnung’* (München: Beck, 1992), 143.
37. See Hauke Brunkhorst, *‘Solidarity: From Civic Friendship to a Global Legal Community’*, trans. Jeffrey Flynn (Cambridge, MA: MIT Press, 2005).
38. Herbert Spencer, *‘First Principles, § 154; Principles V (Political Institutions), § 454’* (London: Williams and Norgate, 1882), 288; Niklas Luhmann, *‘Die Gesellschaft der Gesellschaft’* (Frankfurt: Suhrkamp, 1997), 499.
39. Talcott Parsons, *‘The System of Modern Societies’* (Englewood Cliffs, NJ: Prentice Hall, 1972).
40. Chantal Mouffe, *‘On the Political’* (London: Routledge, 2005), 20: *‘We could say that the task of democracy is to transform antagonism into agonism.’* I would say differently that this is the task of the juridification of politics.
41. Johannes Fried, *‘Die Entstehung des Juristenstands im 12. Jahrhundert’*, Köln Böhlau 1974, 61, 140.

42. See Rainer Schmalz-Bruns, 'An den Grenzen der Entstaatlichung. Bemerkungen zu Jürgen Habermas' Modell einer 'Weltinnenpolitik ohne Weltregierung', in *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik*, ed. Peter Niesen and Benjamin Herboth (Frankfurt: Suhrkamp, 2007), 269–93.
43. *Staatswillenspositivismus* seems to be nearly untranslatable, it means: statutory positivism centered within a state which functions as the constitutive or engendering subject of all legal norms. Caldwell's translation is 'statutory positivism' (this fits broadly but lacks the very point of the state a meta-subject), see: Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law* (Durham: Duke University Press, 1997).
44. Strayer, *Medieval Origins of Modern State* (Princeton, NJ: Princeton Univ. press, 1970) 22.
45. *Ibid.*, 11f.
46. The word 'state' doesn't matter here. This word came into general use only since the 19th century mostly to describe the pluriversum of European and western states, and in earlier times most princes have preferred to speak of their kingdom or the respective form of government. I am not sure if not the general use of 'state' stems not from the oppositional against absolutism during the 18th century, who characterized the state usually as a superfluous authoritarian machinery to which they opposed the term civil society. The French Declaration of human and civic rights from 1789 avoids the word state completely. Only since Hegel and then in German Staatsrecht *the state* became a subject of its own.
47. B.S. Chimni, 'International Institutions today: An Imperial Global State in the making', *European Journal of International Law* 15, no. 1 (2004): 1–37; For the notion of statehood (without *Gewaltmonopol*) and further discussion of state and/or global constitutionalism see Albert and Rudolf Stichweh, ed. *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung* (Wiesbaden: Verlag für Sozialwissenschaften, 2007).