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**Abstract:**

*During the last two decades, extraordinary legal developments have taken place at the regional and global level, as the world of international law has become inhabited by a growing number of organizations designed to govern phenomena cutting across state borders and affecting the life and wealth of individuals world-wide. This evolving reality has challenged traditional understandings of international law and increasingly scholars have resorted to the language of constitutionalism to describe the variety of regimes that by now exist beyond the states. The purpose of this essay is to discuss how comparative law can inform the discussion about the alleged constitutionalization of international law and provide insights to understand several features of the structure, functioning and finality of global governance institutions. In particular, the essay argues that a comparative analysis, grounded on historical studies, of experiences of federal governance offers a valuable perspective to analyse the phenomena of transnational governance and suggests that steps should be made to re-evaluate a long thread of legal practice and political thought that, from Althusius to the Federalist Papers, has offered original models and ideas to conceptualize constitutional regimes which were neither national nor international, but rather a mixture of both. Comparative federalism can today supply a rewarding framework to explain the developments occurring on a global scale. Indicating the path for future scholarly research in the field, the essay begins exploring the mysteries of global governance through the prism of federalism, identifies three recurrent features of transnational constitutional regimes - pluralism, subsidiarity and liberty - and underlines how these find correspondence in the experiments of federal governance of the past.*

**THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW: A COMPARATIVE FEDERAL  
PERSPECTIVE**

Federico Fabbrini \*

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## 1. INTRODUCTION

The last two decades have witnessed the rise of new forms of transnational cooperation among sovereign states, both at the regional level and on a global scale. The end of the Cold War and the unprecedented transformations which are generally described under the notion of globalization have created enormous pressures for governments to establish new, or expand existing, systems of governance *beyond the states*. A number of organizations with either a regional or a thematic focus (eg, security, trade, human rights or the environment) have blossomed world-wide: the European Union (EU), the United Nations (UN), the World Trade Organizations (WTO), the Association of Southeast Asian Nations (ASEAN), the European Convention on Human Rights (ECHR) are some among more than hundreds of transnational regimes that today occupy an increasingly populated global legal space. These organizations are certainly not states. Yet, they have complex institutional systems, they exercise a broad array of governmental powers and they directly affect the life and wealth of millions of individuals. As such, this evolving reality has challenged traditional understandings of international law and increasingly scholars have resorted to the language of constitutionalism to describe the variety of regimes that by now exist at the transnational scale.

The purpose of this essay is to discuss how a comparative, historical perspective can inform the discussion about the alleged constitutionalization of international law and provide original insights to understand several features of the structure, functioning and finality of governance regimes at the regional and global level. In particular, the essay argues that a comparative analysis, grounded on historical studies, of experiences of federal governance can enrich our understanding of the dynamics currently taking place in the transnational setting and qualify the claim that the constitutionalization of international law constitutes an entirely new and unprecedented development. To this end, the essay points to the advantage of re-evaluating a long thread of legal practice and political thought that, from Althusius to the *Federalist Papers*, has offered original models and ideas to conceptualize constitutional regimes which were neither national nor international, but rather a mixture of both, and maintains that comparative federalism can today perhaps supply a rewarding prism through which to look at the developments occurring on a transnational scale.

This essay overviews the rise of constitutional regimes beyond the states and introduces a discussion on the potentials of federalism to make sense of this new legal reality, with the aim to sketch the outline of a more comprehensive research agenda. By analyzing the emergence of forms of constitutional ordering at the transnational level through the prism of the practice and theory of federalism, the essay seeks to flag some recurrent features of the structure, functioning and finality of regional and global governance institutions. The essay argues that pluralism, subsidiarity and the purpose to enhance liberty are characteristics of most contemporary constitutional regimes beyond the states and emphasizes how these correspond, at the same time, to constitutive features of federal arrangements of the past. The essay is structured as follows. Section 2 summarizes the rise of governance regimes beyond the states. Section 3 overviews the scholarly literature on the constitutionalization of international law. Section 4 re-conceptualizes the transformations occurring on the regional and global arena in light of federalism and Section 5 discusses how this approach can help to identify several recurrent features of transnational constitutional regimes, hence outlining possible new avenues for research. By combining the analysis of new forms of international law with the insights of comparative law, the essay seeks to contribute to improve our understanding of systems of global governance in which sovereignty is ever more fragmented and evanescent.

## 2. THE RISE OF CONSTITUTIONAL REGIMES AT THE GLOBAL LEVEL

During the last two decades, extraordinary legal developments have taken place on the global scale. Since the end of the Cold War, the world of international law has become inhabited by a growing number of organizations designed to govern and manage phenomena that cut across state borders and affect the life and wealth of individuals world-wide.<sup>1</sup> These organizations range in geographical scope, from regional bodies to institutions grouping the (quasi) totality of states world-wide. They have varying thematic focuses, from functional regimes, focused specifically on eg the protection of human rights, the enhancement of trade, or the conservation of the environment, to entities which enjoy broad governmental powers and pursue multiple objectives. They have more or less sophisticated decision-making structures, from simple regulatory bodies to complex machineries for law-making and adjudication. And they differently combine public and private elements, reflecting the interests of a plurality of stakeholders.

Despite their differences, however, all these global governance institutions present several common characteristics. First, they are subject to a high degree of legalization, exercising a broad array of powers through law.<sup>2</sup> Second, they take legal decisions that directly affect not only states, but also individuals or private entities.<sup>3</sup> Third, they entertain with states a complex relation, which defies conventional understandings of international law based on state consent.<sup>4</sup> States certainly play a crucial role in the establishment of these organizations, mainly resorting to traditional instruments of international law such as treaties. Nevertheless, once they are created, these institutions start living a life of their own, which operates to various degrees outside state control.<sup>5</sup> 'International law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms.'<sup>6</sup> As a growing literature has underlined, globalization has profoundly changed the nature of public authority, by reducing the centrality of the state and creating sites of authority beyond it, below it, as well as besides it (in the realm of private regulation and enforcement).<sup>7</sup>

A prime example of these phenomena is the EU. In the context of regional integration in Europe, in fact, the EU experienced a progressive development from a (mainly) Economic Community (EEC) into a Union now endowed even with a shared citizenship, a single currency and a Charter of Rights. The EU member states have directly enlarged the constitutional mandate of the EU through subsequent amendments to the founding treaties. At the same time, a key contribution to the development of the EU has been provided by the internal actions of the EU institutions themselves. While the role of the EU Court of Justice

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<sup>1</sup> See eg Joel Trachtman, *The Future of International Law: Global Government* (CUP 2013) 1 (defining 'international government [a]s nothing more than an intensification of international law.') and Charlotte Ku, *International Law, International Relations and Global Governance* (Routledge 2012).

<sup>2</sup> See Kenneth Abbot et al, 'The Concept of Legalization' (2000) 54 *Intl Organization* 401 (defining as highly legalized institutions those in which rules are obligatory on parties, are precise and in which authority to interpret and apply these rules has been delegated to third parties acting under the constraint of rules).

<sup>3</sup> See Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment' (2002) 43 *Harvard Intl LJ* 1, 13 (speaking about the 'individualization of international law').

<sup>4</sup> See Louis Henkin, 'Human Rights and State "Sovereignty"' (1996) 25 *Georgia J Intl & Comparative L* 31, 33 (emphasizing how international law, especially in the areas of human rights, now includes important norms to which some states have not consented).

<sup>5</sup> Gordon Silverstein, 'Globalization and the Rule of Law: "A Machine that Runs of Itself?"' (2003) 1 *I-Con* 427.

<sup>6</sup> Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *EJIL* 907.

<sup>7</sup> See Peer Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power' (2012) 76 *Law and Contemporary Problems* 117; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012).

(ECJ) in fashioning a constitutional framework for a federal-type structure in Europe has been famously emphasized,<sup>8</sup> also the EU political branches – the Commission, the Parliament and even the Council, in which the states are represented – have been crucial in expanding the powers of the EU into new policy areas and strengthening the position of natural and legal persons as direct recipients of EU goods and values.

Nevertheless, the developments that have taken place in the EU are in no way *sui generis*. At the global scale, the UN has emerged as the most important institutions in the management of security challenges world-wide, heavily increasing its involvement in activities of peace-making and peace-keeping. In the context of the fight against terrorism, in particular, the UN Security Council (UNSC) has acquired sweeping powers to prevent threats to international security, by directly targeting individuals and entities suspected of financing terrorism and requiring the states world-wide to freeze their funds.<sup>9</sup> While the confusion of executive, legislative and judicial powers in the hand of the UNSC has been recently at the center of major criticism<sup>10</sup> – as well as of forms of judicial resistance by some domestic courts<sup>11</sup> – the recent expansion of the sphere of action of the UNSC attests to the evolution that has taken place under the framework of the UN Charter.

In addition, similar developments have been witnessed in sector-specific areas such as human rights. In this field, a plurality of transnational institutions specifically charged to adjudicate human rights' claims have blossomed around the world, significantly strengthening the mechanisms of external supervisions over the human right practice of states. Hence, in the European continent, the ECHR has been recently amended to give the European Court of Human Rights (ECtHR) mandatory jurisdiction to hear, after the exhaustion of domestic remedies of recourse, individual applications against any authority of the 47 contracting parties to the ECHR which has allegedly violated a right protected under the ECHR.<sup>12</sup> The ECtHR moreover can condemn a state, compel it to pay damages and require it to redress systematic violations of the ECHR by amending its internal legislation when this is held incompatible with the ECHR. Albeit with different powers, similar regimes of human rights protection currently exist also in America and Africa,<sup>13</sup> and have been under discussion in Asia as well as on a world scale.<sup>14</sup>

Functional organizations have also flourished in the field of economic governance, both at the transnational and regional level.<sup>15</sup> While the WTO – which overhauled the Global Agreement on Trade and Tariffs (GATT) – operates as the main platform to manage and enforce free trade across a large chunk of the world population, specific institutions aimed at integrating regional markets have been established in North America (Nafta) South America (Mercosur and the Andean Community), West Africa (Ecowas), the Asia-Pacific

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<sup>8</sup> Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 AJIL 1.

<sup>9</sup> Erika De Wet, *The Chapter VII Powers of the UN Security Council* (Hart 2004).

<sup>10</sup> See eg Enzo Canizzaro, 'The Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 Intl Organizations L Rev 89.

<sup>11</sup> See Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351 (striking down a EU regulation implementing UN sanctions on due process grounds).

<sup>12</sup> See eg Hellen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (OUP 2008).

<sup>13</sup> See eg Olivier De Schutter, *International Human Rights Law* (CUP 2010).

<sup>14</sup> See eg Tae-Ung Baik, *Emerging Regional Human Rights Systems in Asia* (CUP 2012) and Martin Scheinin, 'Towards a World Court of Human Rights', research report within the framework of the Swiss initiative to commemorate the 60<sup>th</sup> anniversary of the UDHR (2009).

<sup>15</sup> Ernst-Ulrich Petersmann, 'International Economic Law, "Public Reason" and Multilevel Governance of Interdependent Public Goods' (2011) 14 J Intl Economic L 23.

(Apec) and the Caribbean (Caricom). But this list is by no means complete.<sup>16</sup> An intricate web of transnational organizations – usually known by their acronyms – today regulates policies as varied as collective-defense (Nato), finance (IMF, World Bank and the Basel Committee), health (WHO), food (Codex Alimentarius Commission), labor (ILO), sport (WADA) or the protection of cultural heritage (Unesco) – not to mention, of course, the creation of an International Criminal Court (ICC) empowered to prosecute war crimes, genocide and crimes against humanity (almost) everywhere in the world.<sup>17</sup>

The impressive developments that have recently taken place at the global level have called into question traditional conceptions of the nature of law premised on the theory of sovereignty.<sup>18</sup> Under the Westphalian paradigm which emerged in Europe with the formation of territorial states in the 17<sup>th</sup> century, and was spread by Europe around the world in the ensuing centuries, two separated body of laws governed action by states – constitutional law, regulating the exercise of public power *within* sovereigns; and international law, prescribing rules of conduct *among* sovereigns.<sup>19</sup> The sovereignty-based strict separation between municipal constitutional law and international public law, however, has been increasingly challenged by the emergence of a body of transnational law, blurring the distinction between domestic and foreign affairs.<sup>20</sup> As it has been argued, the rise of mechanisms of authority and sources of law in the context of global governance eroded ‘the classical separation model for dealing with international affairs [...which] involved a fairly strict separation between the domestic and the international.’<sup>21</sup> Although instruments of international law, such as treaties, are still heavily employed in the context of global governance, the blurring of boundaries between internal and external law, and the capacity of supranational institutions to directly affect through law the actions of individuals and firms bypassing state intermediation have challenged the continuing validity of the notion of sovereignty,<sup>22</sup> and called for a profound rethinking of the boundary between national constitutional law and international public law.<sup>23</sup>

### 3. AN OVERVIEW OF THE LITERATURE

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<sup>16</sup> For a comprehensive taxonomy of institutions operating at the global level, including entities which are more administrative/regulatory than constitutional, see Sabino Cassese, *The Global Polity* (Global Law Press 2012).

<sup>17</sup> William Schabas, ‘The International Criminal Court at a Crossroads’, in Antonio Cassese (ed), *Realizing Utopia* (OUP 2012).

<sup>18</sup> For the paradigmatic elaboration of the theory of sovereignty at the dawn of the modern age see of course, Jean Bodin, *Les Six Livres de La Républiques* (1576). For a contemporary analysis see Michel Troper, ‘The Survival of Sovereignty’ in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments – The Past, Present and Future of a Contested Concept* (CUP 2010) 132.

<sup>19</sup> See Wilhelm Grewe, *The Epochs of International Law* (De Gruyter 2000) and Neil MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (OUP 1999).

<sup>20</sup> Rafael Domingo, *The New Global Law* (CUP 2011).

<sup>21</sup> Nico Krisch, ‘Global Governance as Public Authority: an Introduction’ (2012)10 I-Con 976, 977-978.

<sup>22</sup> For a criticism of the viability of the legal concept of sovereignty today see Sabino Cassese, ‘L’erosione dello Stato: Una vicenda irreversibile?’ in Sabino Cassese, *La Crisi dello Stato* (Laterza 2002) 44. For a more popular perspective see then Philip Stephens, ‘Nations Are Chasing the Illusion of Sovereignty’ *Financial Times* (6 June 2013).

<sup>23</sup> This point has been emphasized both from the perspective of constitutional law and from that of international law. Compare Ernst Young, ‘The Trouble with Global Constitutionalism’ (2003) *Texas Intl L J* 527, 545 (noticing, albeit grudgingly, that it ‘is just increasingly unrealistic to study constitutional structure without including supranational institutions and constitutional rights without including the corpus of international law’) and Trachtman (n1), 18 (arguing that ‘the central crisis in international law’ is due to the multiplying of the exceptions to the Westphalian paradigm).

In response to these profound transformations, legal scholarship has advanced a number of perspectives to re-conceptualize the developments occurring beyond the states.<sup>24</sup> These perspectives range in scope, taking inspiration from alternative conceptual legal traditions and combining in different ways empirical and normative claims about the *Sein* and the *Sollen* of global governance. Drawing upon the resources of domestic administrative law, for instance, the ‘global administrative law’<sup>25</sup> project has examined the phenomena of global regulatory governance mainly from an empirical perspective, albeit attentive to normative principles of due process and accountability.<sup>26</sup> The project on ‘public authority in international institutions’, instead, has sought to construct from a normative viewpoint a doctrinal edifice on the exercise of public authority at the international level by exporting principles existing in the national context.<sup>27</sup> An increasingly important perspective on the transformation taking place at the transnational scale, finally, is represented by the scholarship on the constitutionalization of international law. As much as ‘constitutionalism has become the dominant currency of the debates on European integration,’<sup>28</sup> scholars have increasingly resorted to the idea of constitutionalism also to make sense of the changes taking place in global governance.<sup>29</sup>

The scholarship on the constitutionalization of international law is quite diversified. To begin with, as Vicki Jackson explained, this scholarship pursues at least two separate research projects:<sup>30</sup> On the one hand, it examines whether, within the field of international law, some norms are becoming constitutional in character vis-à-vis other norms of international law; On the other hand, it considers whether transnational or supranational law, or portions of it, is being constitutionalized vis-à-vis domestic law. A leading example of the first perspective is offered by Joel Trachtman’s analysis of how forms of enabling, constraining and supplemental constitutionalization have emerged in the international area in order to respond to the increasing demand for legalization.<sup>31</sup> The second perspective, instead, is at the center of the manifold analysis that have stressed the growing centrality and the pervasive impact of law generated beyond the states in the legislative, judicial and administrative practices of the states.<sup>32</sup>

Secondly, the literature on the constitutionalization of international law includes scholarship which is analytical in nature, and scholarship which, on the contrary, explicitly embraces a normative perspective. Hence, while several studies have empirically underlined

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<sup>24</sup> See eg Neil Walker, ‘Intimations of Global Law’, Montesquieu Lecture delivered at Tilburg Law School, 21 June 2012.

<sup>25</sup> See eg Benedict Kingsbury, Nico Krisch and Richard Stuart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

<sup>26</sup> See Sabino Cassese, ‘A Global Due Process of Law?’, in Gordon Anthony et al (eds), *Values in Global Administrative Law* (Hart 2011) 17; and Giacinto della Cananea, *Al di là dei confine statuali: Principi generali del diritto pubblico globale* (Il Mulino 2009).

<sup>27</sup> See eg Armin von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010).

<sup>28</sup> Miguel Poiaras Maduro, ‘How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union’, Jean Monnet Working Paper No. 5/2004, 3.

<sup>29</sup> See eg Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009); Jeffrey Dunoff and Joel Trachtman, ‘A Functional Approach to International Constitutionalization’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 3.

<sup>30</sup> Vicki Jackson, ‘Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges’ (2010) 8 *I-Con* 517, 519.

<sup>31</sup> Trachtman (n 1) 253.

<sup>32</sup> See eg Stephen Gardbaum, ‘Human Rights and International Constitutionalism’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 233.

how ideas of constitutionality can be helpful to explain international governance frameworks as they exist *de lege lata*,<sup>33</sup> a large component of the literature on global constitutionalism adopts an aspirational approach, aimed at promoting *de jure condendo* the values of constitutionalism at the transnational scale.<sup>34</sup> From this point of view the constitutionalization of international law is pursued as a way to tame the fragmentation of international law;<sup>35</sup> or alternatively as a tool to compensate for the diminishing importance of constitutionalism at the domestic level.<sup>36</sup> In this case, as it has been argued, the idea of 'global constitutionalism grapples with the consequences of globalization as a process that transgresses and perforates national or state borders, undermining familiar roots of legitimacy and calling for new forms of checks and balances as a result.'<sup>37</sup>

Thirdly, scholars employ the language of constitutionalism to make sense of the new reality of transnational governance at different levels of scale. Erika de Wet, for instance, has argued the case for an emerging international constitutional order, consisting of a society, a value system and structures of enforcement.<sup>38</sup> Other scholars, on the contrary, have applied constitutional concepts to specific international regimes, rather than to the global order as such. The outburst of the constitutionalist idea is obviously paramount in the European setting. Here, for several decades now, lawyers have conceptualized in constitutional terms the developments occurring beyond the states, in the architecture of the EU.<sup>39</sup> And, despite the failure of the project of Constitutional Treaty, the case law of the ECJ has continued to provide support for this reading.<sup>40</sup> At the same time, also the ECHR has been more and more the object of constitutionalist interpretations, aimed at emphasizing the features of the ECtHR as a constitutional court.<sup>41</sup> Yet, the discourse of international constitutionalism has not stopped at Europe's edges. In the late 1990s, Bardo Fassbender famously characterized the UN Charter as the Constitution of the international community,<sup>42</sup> and recent events have contributed in strengthening this understanding.<sup>43</sup> At the same time, constitutional language is frequently employed in relation to global entities operating in the field of trade or the environment.<sup>44</sup>

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<sup>33</sup> See eg Julian Arato, 'Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations' (2012) I-Con 627.

<sup>34</sup> See eg Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007).

<sup>35</sup> See eg Lucas Lixinski, 'Taming the Fragmentation Monster through Human Rights? International Constitutionalism, "Pluralism Lite" and the Common Territory of the Two European Legal Orders' in Vicky Costa et al (eds), *The EU Accession to the ECHR* (Hart Publishing 2014).

<sup>36</sup> See eg Anne Peters, 'Compensatory Constitutionalism: the Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden J Intl L* 579.

<sup>37</sup> Antje Wiener et al., 'Editorial: Global Constitutionalism, Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1, 6.

<sup>38</sup> See eg Erika de Wet, 'The International Constitutional Order' (2006) 55 *ICLQ* 51.

<sup>39</sup> See eg Joseph HH Weiler, *The Constitution of Europe* (CUP 1999) and Paul Craig, 'Constitutions, Constitutionalism and the European Union' (2001) *ELJ* 125.

<sup>40</sup> See eg Leonard Besslink, *A Composite European Constitution* (Europa Law Publishing 2007) and Stefan Griller, 'Is this a Constitution? Remarks on a Contested Concept' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008), 21.

<sup>41</sup> See eg Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 *Human Rights L Rev* 655.

<sup>42</sup> Bardo Fassbender, 'The UN Charter as the Constitution of the International Community' (1998) 36 *Columbia J Transnational L* 529.

<sup>43</sup> See Bardo Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 133.

<sup>44</sup> See eg Joel Trachtman, 'The Constitutions of the WTO' (2006) 17 *EJIL* 623 and Daniel Bodansky, 'Is there and International Environmental Constitution?' (2008) 16 *Indiana J Global L Studies* 565.



Needless to say, the idea that constitutionalism should be the lens through which to analyze global governance meets several criticisms. At one end of the spectrum, scholars anchored in the theory of sovereignty have rejected the idea that constitutionalism and the state can be disarticulated and strongly reaffirmed the centrality of sovereignty as the basis for constitutional government.<sup>45</sup> Drawing on a bicentennial tradition that conceived of state, people and constitution as the three elements of a magic triangle, those positions have rejected the view that constitutionalism could exist in supranational or transnational settings and, at the same time, sought to limit the impact of these changes.<sup>46</sup> However, the discourse about global constitutionalism has also been under attack by scholars at the opposite end of the spectrum. Others, in fact, have denied the claim that constitutionalism and global governance can be reconciled, and described the pluralism of global law as an entirely new feature of post-national contemporary legal reality.<sup>47</sup> From this perspective, therefore, the developments occurring beyond the state constitute a fundamental departure in the organization of public authority from constitutionalism toward pluralism – with the conclusion that the idea of constitutionalism should be put to rest.<sup>48</sup>

Yet, the arguments challenging the constitutionalization of international law have been resisted with strong counter-arguments.<sup>49</sup> In particular, a very articulate defense of constitutionalism beyond the state has been offered by Mattias Kumm.<sup>50</sup> In Kumm's view, the skepticism against the application of constitutional language to international law is the product of a statist paradigm of thought, which conceives of constitutionalism exclusively through the vocabulary of sovereignty.<sup>51</sup> To counter this view, Kumm proposed 'a revolution in legal thinking'<sup>52</sup> with the introduction of a new paradigm of constitutional thought – what he called a 'cosmopolitan paradigm of constitutionalism.'<sup>53</sup> Whereas national scholarship has 'inappropriately narrowed, morally misconstrued, and falsely aggrandized national constitutionalism by analytically connecting it to a statist paradigm of law,'<sup>54</sup> Kumm encourages scholars to free constitutionalism from the confines of sovereigntist thinking and to re-conceptualize it in cosmopolitan terms as a new 'framework for a general theory of public law that integrates national and international law.'<sup>55</sup> Reconceived in this manner, constitutionalism provides an accurate account of the structural features of contemporary legal and political practice and can be meaningfully employed to explain the transformations occurring on a global scale.<sup>56</sup>

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<sup>45</sup> See eg Jeremy Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press 2005).

<sup>46</sup> See eg in the context of the debate about EU constitutionalism Paul Kirchhof, 'Der Deutsche Staat im Prozeß der Europäischen Integration' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland VII* (Müller Verlag 1992), 855.

<sup>47</sup> See eg Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010).

<sup>48</sup> See eg in the context of the debate about EU constitutionalism Matej Avbelj, 'Questioning EU Constitutionalisms' (2008) 9 *German Law Journal* 1.

<sup>49</sup> See also Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (CUP 2009) 326 (explaining that pluralism is not an alternative to constitutionalism, but rather a component of it, in those systems characterized by structural or institutional heterarchy).

<sup>50</sup> Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009), 258.

<sup>51</sup> *ibid*, 260.

<sup>52</sup> *ibid*, 261.

<sup>53</sup> *ibid*, 263.

<sup>54</sup> *ibid*.

<sup>55</sup> *ibid*, 264 (emphasis omitted).

<sup>56</sup> *ibid*, 266.

This essay joins the debate about the constitutionalization of international law by contextualizing the transformations currently taking place at the transnational level in a broader historical and comparative context. In particular, the essay purports to qualify the statement that the conceptual integration of constitutional law and international law requires a ‘Copernican turn’ in legal thinking.<sup>57</sup> If at the dawn of the 21<sup>st</sup> century, constitutionalism is on the verge of leaving the safe port of the nation-state to navigate the transnational seas of global governance, this essay asks whether this represents an unprecedented conceptual change in the organization of political authority. As I shall try to argue, the challenges we are currently experiencing in the context of transnational governance are not entirely new, having been at the heart of the theory and practice of federalism for many centuries before, and after, the rise of the nation states. Seen from this broader historical and comparative perspective, the contemporary debate about the constitutionalization of international law appears as much a ‘Copernican turn’ as a return to Aristarchus after a few centuries of Ptolemaic doctrine.

#### 4. A REVIVAL OF FEDERALISM?

This essay claims that a comparative, historical perspective can contribute to the debate about the alleged constitutionalization of international law by suggesting that the transformations currently taking place in the transnational arena constitute a revival of federal ideas. In particular, the argument of this essay is that the rise of global constitutional regimes can be re-conceptualized through the prism of federalism. As a leading contemporary scholar of federalism has explained, the idea of federalism, much like that of democracy or republicanism, is part of the classical terminology of political philosophy, and as such escapes clear-cut definitions.<sup>58</sup> By federalism, however, I mean here a constitutional theory and a model of institutional design for the governance of a compound system which is *not a state, but rather a union of states*. More specifically, for the purpose of my argument federalism should be understood as a constitutional regime that is created by sovereign states acting through a legal instrument of contractual nature (be it a treaty or a constitution) and that is endowed with an heterarchical system of governance in which the autonomy and continuous existence of the constituting entities is secured and yet combined with the authority and governmental capacity of the constituted union.

Albeit imperfectly, this definition seeks to merge the most distinctive features of federalism as they have been unveiled by the rich scholarship in the field.<sup>59</sup> First, it reflects the idea of federalism as ‘a system of law and structure of power.’<sup>60</sup> Second, it emphasizes federalism’s ability to combine ‘self-rule’ and ‘shared-rule’, the promotion of diversity together with the protection of a meaningful form of unity.<sup>61</sup> Third, it clarifies the nature of federalism as a ‘half-way house between interstate and intrastate relations,’<sup>62</sup> underlining how, on the one hand, states remain autonomous entities within the federal union (without dissolving themselves within it) and, on the other, the union itself is endowed with an authority and capacity to act (potentially directly vis-à-vis the citizens of the states) akin to that possessed

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<sup>57</sup> *ibid*, 263.

<sup>58</sup> Daniel Elazar, *Exploring Federalism* (Alabama University Press 1987) 15

<sup>59</sup> On federalism see also Olivier Beaud, *Théorie de la Fédération* (Presses Universitaires de France 2007). For a comparative analysis of federal systems world-wide see instead Ronald Watts, *Comparing Federal Systems in the 1990s* (Queen’s University 1996).

<sup>60</sup> Samuel Beer, *To Make a Nation: The Rediscovery of American Federalism* (Harvard University Press 1993) 23.

<sup>61</sup> Elazar (n 58) 5.

<sup>62</sup> Murray Forsyth, *Union of States: The Theory and Practice of Confederation* (Leicester University Press 1981)16.

by the states themselves. Fourth, it stresses the crucial role of law in creating the federal regime as a voluntary process of coming together of pre-existing states,<sup>63</sup> and simultaneously underplays the distinction between constitutional law and international law as the source for the creation of the union.<sup>64</sup> With this conceptual tailoring, I am convinced that federalism can provide an important contribution to the analysis of contemporary forms of constitutional regimes at the transnational level.

The usefulness of resorting to the federal idea to appraise the changes brought about by globalization has already been emphasized by political scientists and political theorists. As the late Daniel Elazar argued, ‘much if not most of what is happening to bring about th[e] constitutionalization [of international law] is what classically has been known as federalism.’<sup>65</sup> And as Jean Cohen has recently explained, federalism ‘may provide the missing concept needed to theorize a mode of political integration (via extension) that is normatively attractive and analytically necessary to make the discourse of the constitutionalization of international law and regional or global ‘governance institutions’ meaningful.’<sup>66</sup> Nevertheless, the revival of federalism has not made its way, yet, in the field of public law. Despite the invitation to reconsider the divide between constitutional law and international law in light of the comparable problems (of uncertainty, enforcement and sovereignty) that these two bodies of public law face,<sup>67</sup> the rise of transnational constitutionalism has not resulted in a re-consideration of the experience of federalism as a possible conceptual benchmark to explain contemporary reality.

The neglect of federalist thinking in the analysis of the constitutionalization of international law is largely due to the progressive assimilation between *federalism* and the *federal state* that has occurred in Western legal thought over the last two centuries.<sup>68</sup> Since the 19<sup>th</sup> century, in fact, public lawyers (especially in Europe) have come to consider federalism simply as a theory for the political organization of a *sovereign state* and as a technical devise to decentralize competences within a single, hierarchical constitutional system. This statist bias has significantly reduced the scope of application of the federal idea, by equating federalism to a purely national phenomenon.<sup>69</sup> Nevertheless, this *reductio ad unum* of the theory and practice of federalism is by no means justified: in fact, as Kalypso Nicolaïdis has noticed, ‘the ‘federal’ emerged prior to or in contrast with the ‘state’, before the two converged.’<sup>70</sup> From an historical perspective, federalism constituted a common instrument to organize public authority before the rise of the territorial state.<sup>71</sup> It seems therefore time ‘to recuperate insights from the federal vision while freeing it [...] from the statist paradigm.’<sup>72</sup>

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<sup>63</sup> Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model* (1999) 10 J of Democracy 19.

<sup>64</sup> Bruce Ackerman, ‘The Rise of World Constitutionalism’ (1997) 83 Virginia L Rev 771, 776 (arguing that ‘the (uncertain) transformation of a treaty into a constitution, [which] is at the center of the European Union today [...] was at the center of the American experience between the Revolution and the Civil War.’).

<sup>65</sup> Daniel Elazar, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (Rowman & Littlefield 1998) 3.

<sup>66</sup> Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (CUP 2012) 83.

<sup>67</sup> Jack Goldsmith and Daryl Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ (2009) 122 Harvard L Rev 1791.

<sup>68</sup> Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009) 22.

<sup>69</sup> See for a discussion in the EU context, Tim Koopmans, ‘Federalism: the Wrong Debate’ (1992) 29 CMLR 1047

<sup>70</sup> Kalypso Nicolaïdis, ‘Conclusion: The Federal Vision Beyond the Federal State’ in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision* (OUP 2001) 441.

<sup>71</sup> Elazar (n 58) 115.

<sup>72</sup> Cohen (n 66) 82 (emphasis removed).

Before the dawn of the Wesphalian era, federalism was the predominant constitutional theory and instrument of governance for compound systems that were *not* states. As a plurality of examples from modern history reveals – from the United Provinces of the Netherlands to the Swiss Confederation, from the Hanseatic League to the Holy Roman Empire and later the German *Bund* – federalism was a widely used institutional mechanism to organize public authority in ways which was compatible with the self-rule of the federated entities while permitting shared-rule by the confederate body in its collective capacity.<sup>73</sup> These experiments – which were supported by the theorization of legal scholars such as Johannes Althusius, Hugo Grotius or Samuel Pufendorf, among others – attempted to consociate pre-existing political units through a *foedus* (in Latin: a pact) for the achievement of specific purposes, such as security, welfare or trade.<sup>74</sup> As such, federalism was conceived as ‘a species of international law’<sup>75</sup> – an intermediate form of regulation between the *ius civitatis* (domestic law) and the *ius gentium* (in modern parlance: international law).

The most sophisticated constitutional experiment in federal governance was achieved in America where the Articles of Confederations of 1781 *and* the Federal Constitution of 1787 designed a regime which – in the celebrated words of James Madison in the *Federalist Papers* No. 39 – was ‘in strictness, neither a national nor a federal Constitution, but a composition of both.’<sup>76</sup> Although the adoption of the Constitution of the United States (US) is retrospectively identified as the date of birth of the federal state model, and as the conventional watershed between (ancient) confederalism and (modern) federalism, a contextual analysis shows that ‘the principal difference between the Constitution of 1787 and the Article of Confederation was one of means rather than ends.’<sup>77</sup> As it has been highlighted, because in the English language of the 18<sup>th</sup> and early 19<sup>th</sup> century, ‘confederation and federation were used as synonyms,’<sup>78</sup> the US Constitution continued to partake of the mixed (con)federal nature of its predecessor, as a system laying in between domestic law and international law.<sup>79</sup> Indeed, ‘[t]he new American republic was in this sense a hybrid system of governance that combined international with national modes of governance.’<sup>80</sup>

As Peter Onuf and Nicholas Onuf have underlined, the founders of the American (con)federation drew on a long tradition of political thought and practice and sought to create in the context of the US a union which would abide simultaneously by republican principles in the domestic affairs of each of the states and by Enlightenment principles of international relations among the states.<sup>81</sup> In doing so, they largely set aside ‘the problem of

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<sup>73</sup> See Leslie Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Johns Hopkins University Press 2001) and Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (CUP 2009).

<sup>74</sup> See Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave 2005) and Heinz Eulau, ‘Theories of Federalism under the Holy Roman Empire’ (1941) 35 *American Political Science Rev* 643.

<sup>75</sup> Elazar (n 58) 141.

<sup>76</sup> *The Federalist Papers*, No. 39 (James Madison) (1787) [see Karmis & Norman, supra note 74, 129].

<sup>77</sup> Elazar (n 65) 75.

<sup>78</sup> Dimitrios Karmis and Wayne Norman, ‘The Revival of Federalism in Normative Political Theory’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave 2005) 6.

<sup>79</sup> Schütze (n 68) 22.

<sup>80</sup> Daniel Halberstam, ‘Federalism: Theory, Policy, Law’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 576, 578.

<sup>81</sup> Peter Onuf and Nicholas Onuf, *Federal Union, Modern World. The Law of Nations in an Age of Revolutions, 1776-1814* (Madison House 1993).

sovereignty, which so beleaguers the world today.’<sup>82</sup> As a reading of the *Federalist Papers* confirms,

[i]n creating a ‘compound republic’ the founders revived the view that political associations occupy positions in a framework of ascending levels, none of which can claim the ultimate, unlimited sovereign authority. The union obtained powers suiting the needs of a state without eliminating the republics composing it or drastically changing their character. Ignoring the early modern political discourse that Bodin precipitated, the founders invoked Montesquieu to call their creation a federal republic, as if it were conceptually indistinguishable from a mere confederation of sovereign states.<sup>83</sup>

Despite this origin, the subsequent evolution of the US – especially after the Civil War – has produced a profound redefinition of the US constitutional system of governance,<sup>84</sup> and today the US is certainly an example of a federal *state* (although important remnants of the federal founding pervade the current regime).<sup>85</sup> Arguably, an important pressure for the US to overcome its (con)federal organization was produced during the 19<sup>th</sup> century by the practice of international relations dominated by European states and grounded on the Westphalian theory of international law. As Hendrik Spruyt has explained, the emergence of the sovereign states increasingly undermined the viability of competitive forms of political organization which lacked analogous means of internal hierarchy and enforcement.<sup>86</sup> As a result, while federal systems consolidated into sovereign federal states, federalism ‘has been relegated to the dustbin of history and deemed an anachronism ever since the system of sovereign states triumphed in Europe.’<sup>87</sup>

Nevertheless, the transformations occurring today at the regional and global scale, have signaled a possible revival of the (con)federal idea. As it has been stated, ‘[t]he world as a whole is in the midst of a paradigm shift from a world of states, modeled after the ideal of the nation-state developed at the beginning of the modern epoch in the [17<sup>th</sup>] century, to a world of diminished state sovereignty and increased interstate linkages of a constitutionalized federal character.’<sup>88</sup> Hence, the study of the contemporary rise of constitutional regimes beyond the states could benefit from the conceptual instruments offered by the theory and practice of federalism – i.e. of compound constitutional regimes which are different from federal states. A comparative and historical perspective, in other words, can shed new light on the challenges that the international system is currently experiencing, since, as Daniel Halberstam has argued, federalism can ‘lay the foundations for understanding the constitutional significance of arrangements among multiple levels of authority,’ from local institutions all the way up to global governance regimes.<sup>89</sup>

## 5. THE FEDERAL FEATURES OF CONSTITUTIONAL SYSTEMS BEYOND THE STATES

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<sup>82</sup> *ibid*, 26.

<sup>83</sup> *ibid*, 28.

<sup>84</sup> See Bruce Ackerman, *We the People. Volume 2: Transformations* (Harvard University Press 1998).

<sup>85</sup> See Ernst Young, ‘Protecting Member States Autonomy in the European Union: Some Cautionary Tales from American Federalism’ (2002) 77 NYU L Rev 1612.

<sup>86</sup> Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton University Press 1994).

<sup>87</sup> Cohen (n 66) 11.

<sup>88</sup> Elazar (n 65) 17.

<sup>89</sup> Halberstam (n 80) 577-578.

Re-conceptualizing the rise of constitutional regimes at the regional and global level through the prism of federalism does not only satisfy a desire for definitions.<sup>90</sup> Adopting a federalist approach to the study of transnational governance may help to navigate the ‘mystery of global governance’<sup>91</sup> and identify a number of recurrent features which characterize the structure, functioning and finality of constitutional systems beyond the states. A number of scholars have attempted to identify several core principles of transnational constitutional regimes, but this endeavor has been carried out from a normative, top-down perspective, aimed also at shaping the development of global governance *de lege ferenda*.<sup>92</sup> This Section, instead, adopts a bottom-up approach and seeks to identify several recurrent features of transnational constitutional regimes in light of the comparative analysis of historical experience of federal governance undertaken above. The interest here is not to indicate by what principles transnational governance institutions should abide, but rather to emphasize how many of their current features reflect long-standing elements of federalism’s practice and theory. As I shall try to point out, the features of contemporary regional and global governance regimes represent a break with the statist model of constitutional authority. However, when seen from an historical and comparative perspective, they correspond to those of federal experiments and theorization of the past.

Needless to say, because systems of public authority beyond the states currently come under a variety of forms, the attempt to compare them and to identify several recurrent features is not an easy task. Certainly, it would require much more consideration than what is permitted in the format of a short essay. In what follows, therefore, I will only try to sketch the contours of what are some recurrent features of regional and global governance institutions, in the hope to trace the path for a future research agenda. In my view, in particular, it is possible to recognize in constitutional regimes beyond the states, and to reconnect to the theory of federalism, three features – a structural, a functional and a purposive one. Synthetically, I label these features *pluralism*, *subsidiarity* and *liberty*. I will try to say a few words on each.

### 5.1 Pluralism

A first feature that permeates the *structure* of transnational constitutional regimes is, in my view, that of pluralism. All the organizations that recently emerged at the regional and world-wide level are characterized by a fragmentation and dispersion of powers. As was explained in Section 2, all global governance institutions are endowed with some powers of decision-making or adjudication. Yet, these powers are not unlimited but rather coexist with, and are counterbalanced by, the powers of the constituting member states, which continue to retain crucial competences. Moreover, within the internal structure of global governance institutions, powers are often distributed between a plurality of bodies and entities, which exercise different functions and tasks, and which enjoy different forms of legitimacy. As a result, the structure of constitutional regimes beyond the states reveals the lack of a single, supreme locus of authority, capable of taking an ultimate decision. Rather, these regimes follow a logic of pluralism, in which power is dispersed along vertical and horizontal axes. Resorting to the terminology developed by Daniel Halberstam, it is

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<sup>90</sup> See Elazar (n 65) 12 (noticing ironically that if something ‘looks like a duck, walks like a duck, and quacks like a duck, it is highly likely to be a duck.’).

<sup>91</sup> See David Kennedy, ‘The Mystery of Global Governance’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) 37.

<sup>92</sup> See eg Kumm (n 50) 323.

possible to say that transnational constitutional regimes are heterarchical systems, rather than hierarchical ones.<sup>93</sup>

Pluralism is a defining feature of the EU system of governance in which power is divided between the member states and the EU, as well as between a plurality of institutions within the EU itself. In fact, a new scholarly movement which named itself ‘constitutional pluralism’ has recently seen its birth in Europe.<sup>94</sup> As Miguel Maduro has argued, constitutional pluralism seeks to empirically explain ‘the phenomenon of plurality of constitutional sources and claims of final authority which create a context for potential constitutional conflicts which are not hierarchically regulated,’<sup>95</sup> and to normatively justify its existence as the best fit for the EU.<sup>96</sup> At the same time, pluralism also shapes the structure of human rights regimes.<sup>97</sup> In the context of the ECHR, for instance, pluralism explains the complex dialogue between the ECtHR and the member states that are parties to the ECHR, as well as their supreme and constitutional courts. Moreover strong pluralist features are evident in global and regional trade organizations or in the context of the UN: albeit the hegemonic tendencies of the UNSC have not gone unnoticed, the UN Charter designs a bulk of horizontal separation of powers between multiple bodies, which adds upon the vertical separation of powers between the UN and its member states.<sup>98</sup>

While the pluralism of regional and global constitutional regimes may seem groundbreaking from a statist perspective, this is really nothing new from the point of view of federalism.<sup>99</sup> Contrary to the Westphalian system – in which authority is hierarchically organized, with a clear sovereign body entitled to speak the last word – in federal systems there is no ultimate power-center, but rather a plurality of institutions sharing power.<sup>100</sup> As has been underlined, indeed, ‘pluralism provides the conceptual background to all modern federal thought’<sup>101</sup> and ‘federalism emphasizes constitutionalized pluralism and power sharing as the basis of a truly democratic government.’<sup>102</sup> Pluralism was a distinctive feature of confederal unions in modern Europe.<sup>103</sup> And famously, James Madison defined the US constitutional system as a pluralist regime when he stated, in *Federalist Papers* No. 51, that ‘[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.’<sup>104</sup> This feature, of course, surprised Alexis de

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<sup>93</sup> Halberstam (n 49) 326.

<sup>94</sup> Julio Baquero Cruz, ‘The Legacy of the *Maastricht-Urteil* and the Pluralist Movement’ (2008) 14 ELJ 389.

<sup>95</sup> Miguel Maduro, ‘Three Claims of Constitutional Pluralism’ in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012), 69-70.

<sup>96</sup> Mattias Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty’ (2005) 11 ELJ 262.

<sup>97</sup> Alec Stone Sweet, ‘A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe’ (2012) 1 Global Constitutionalism 53.

<sup>98</sup> Thomas Frank, ‘Preface: International Institutions: Why Constitutionalize?’ in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (CUP 2009) xi.

<sup>99</sup> See also Paul Schiff Berman, ‘Federalism and International Law through the Lens of Legal Pluralism’ (2008) 73 Missouri L Rev 1149, 1152 (suggesting the comparability of the US federal system with other pluralist and transnational arrangements characterized by jurisdictional redundancies).

<sup>100</sup> Jeffrey Goldsworthy, ‘The Debate About Sovereignty in the United States: A Historical and Comparative Perspective’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 423.

<sup>101</sup> Schütze (n 68) 15.

<sup>102</sup> Daniel Elazar, ‘Federalism, Diversity and Rights’ in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman & Littlefield 1996) 2.

<sup>103</sup> See eg Marlene Wind, ‘The European Union as a Polycentric Polity: Returning to a Neo-Medieval Europe?’ in Joseph H H Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 103.

<sup>104</sup> *The Federalist Papers*, No. 51 (James Madison) (1787) [see Karmis and Norman (n 74) 131].

Tocqueville, when he described the US as a regime of ‘divided sovereignty’<sup>105</sup> – a definition that has made its way up to contemporary jurisprudence of the US Supreme Court.<sup>106</sup> Almost two hundred years after Tocqueville’s visit to America, we should be less surprised to see pluralism as a defining principle of constitutional regimes beyond the states.<sup>107</sup>

## 5.2 Subsidiarity

A second, *functional* feature which seems to be germane to constitutional regimes beyond the states is that of subsidiarity. Subsidiarity serves as a criterion for the exercise of competences in pluralist regimes in which there are multiple and overlapping layers of decision-making authorities. Because, as was previously underlined, regional and global governance institutions add upon the states, but do not replace them, all these regimes are characterized by overlapping levels or units of government. As a result, they all face the question of when should powers be exercised by a higher level of government rather than by a lower one, or (to avoid the hierarchical connotations of the terminology of ‘levels’) when they should be exercised by the authority with the broader jurisdictional reach rather than by one with a narrower scope. Subsidiarity answers this question by requiring that decisions be taken by default at the lower unit of government unless when this unit is unable to achieve the objective for which action is sought and, at the same time, a higher unit is better able to do so. Hence, subsidiarity ‘regulates how to allocate or use authority within a political or legal order [...] that disperse[s] authority between a center and various member units [...] holding[] that the burden or arguments lies with attempts to centralize authority.’<sup>108</sup>

In the framework of the EU, subsidiarity has acquired the status of a written principle of constitutional law since the Maastricht Treaty of 1992.<sup>109</sup> In its current version, Article 5 of the EU Treaty proclaims that in areas of shared competences between the EU and the member states, ‘the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’ Subsidiarity is also a crucial facet of human rights regimes world-wide.<sup>110</sup> In the ECHR context, for instance, subsidiarity is both reflected in the treaty procedural requirement that plaintiffs exhaust domestic remedies before appealing to the ECtHR, as well as in the jurisprudential doctrine that recognizes a margin of appreciation to the contracting parties in their interpretation of the ECHR whenever a transnational consensus on a given fundamental right is (still) lacking. The principle of complementarity codified in Article 17 of the ICC Statute, then, is consistent with subsidiarity, as prosecutions will only be commenced at the international level if states are unwilling or unable to carry them out at the domestic level. Finally, subsidiarity arguably shapes the function of the UN: pursuant to the UN Charter, in fact, the UNSC is empowered to act only when threats to peace or security reach a critical threshold, which implies that

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<sup>105</sup> Alexis de Tocqueville, *Democracy in America* (Vol 1 1837) [see Karmis and Norman (n74) 159].

<sup>106</sup> See *US Term Limits, Inc v Thornton*, 514 U.S. 779, 838 (1995) (Kennedy J concurring, defining US federalism as the attempt ‘to split the atom of sovereignty’).

<sup>107</sup> Robert Schütze, ‘Federalism as Constitutional Pluralism. “Letter from America”’ in Matej Avbelj and Jan Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012), 185.

<sup>108</sup> Andreas Follesdal, ‘The Principle of Subsidiarity as a Constitutional Principle in International Law’ Jean Monnet Working Paper No. 12/2011, 6.

<sup>109</sup> George Berman, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994) 94 *Columbia L Rev* 332.

<sup>110</sup> Paolo Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *AJIL* 38.



action should be left to other actors when the stability of the international community as a whole is not jeopardized.

Seen in this vein, subsidiarity as it has emerged in regional and global constitutional regimes relates to a long-standing feature of federalism. Despite Daniel Elazar's criticism of the theological origins of the principle of subsidiarity – with its rooting in Catholic (hierarchical) theology, rather than in the Jewish and Protestant tradition of (heterarchical) covenants between men and God<sup>111</sup> – Daniel Halberstam has convincingly explained that 'the key theoretical concept underlying a general theory of federalism is what Europeans call 'subsidiarity'.<sup>112</sup> Subsidiarity crucially explains how confederal unions first came about in modern Europe: the Swiss Confederation, eg, was established as a subsidiary organization, mainly for self-defense purposes, which left to the cantons all matters that did not require trans-cantonal coordination.<sup>113</sup> Subsidiarity still shape today the architecture of Swiss federalism, as for instance it provides one of the grounds for appeals to the Swiss Federal Tribunal on constitutional matters.<sup>114</sup> At the same time, even though the Constitutional Convention that drafted the US Constitution did not codify an explicit principle of subsidiarity,<sup>115</sup> the logic of subsidiarity heavily shapes the attribution of legislative competences to the US Congress in Article I, § 8 by assigning 'power to the smallest unit of government that internalizes the effects of its exercise.'<sup>116</sup> Equally, in a global world, problems of externalities and collective action require that functions be assigned to the authorities that are better positioned to handle them, and subsidiarity works as the principle to achieve this result.

### 5.3 Liberty

Whereas pluralism and subsidiarity represents recurrent structural and functional features of constitutional regimes beyond the states, I would like to suggest that a third, *purposive* feature can be detected in many new transnational arrangements emerging at the regional and world-wide stage. I would submit that this feature is connected to the enhancement of *liberty*. Put bluntly: I am fully aware of the cumbersome connotations that a term such as liberty conveys. So I want to make clear that, in my view, this feature is certainly revealing itself nowadays only in asymmetrical and multifaceted ways in the various regional and global constitutional regimes. Whereas pluralism and subsidiarity seem to be widespread features of transnational constitutional regimes, the enhancement of liberty is a property not visible in all of them. Yet, with these caveats, I would tentatively say that the enhancement of liberty is a recurrent finality accustoming many transnational regimes emerging beyond the states. Crucially, liberty here should be intended as a form of 'federal liberty'<sup>117</sup> – that is as a liberty that individuals, as free and autonomous agents, exercise within the bounds of the constitutional system, and subject to the counter-veiling pressures that are brought about by demands for self-governance.

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<sup>111</sup> Daniel Elazar, 'The United States and the European Union: Models for their Epochs' in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision* (OUP 2001) 31, 42.

<sup>112</sup> Halberstam (n 80) 585.

<sup>113</sup> Max Frenkel, 'The Communal Basis of Swiss Liberty' (1993) 23 *Publius* 61.

<sup>114</sup> See Art 113, Loi Fédérale sur le Tribunal Fédéral du 17 Juin 2005, RO 2005 p. 3829 (Switz.) (regulating 'subsidiarity recourse' to the Federal Tribunal).

<sup>115</sup> See Max Farrand (ed), *The Records of the Federal Convention* (Yale University Press 1911) 20-21 (reporting James Randolph's proposal to empower Congress 'to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation') cited in Halberstam (n 80) 586.

<sup>116</sup> Robert Cooter and Neil Siegel, 'Collective Action Federalism: A General Theory of Article I, Section 8' (2010) 63 *Stanford L Rev* 115, 144 (emphasis removed).

<sup>117</sup> Elazar (n 65) 69.

The trend toward the enhancement of liberty is quite straightforward in human rights regimes, or in the framework of the ICC, whose finality are precisely to protect fundamental rights and the liberty of men and women to decide how to lead a decent life. An analogous phenomenon, at the same time, seems to characterize regional or global economic organizations whose main purpose is to reduce barriers to trade, thus enlarging the space for the exercise of economic rights and free market initiative. While international economic law is not necessarily framed as mechanisms to enhance liberty, certainly its effect is to empower economic actors to exercise their freedom of enterprise through a larger geographical arena. In a more complex way, then, I would posit that also processes of regional political integration such as those epitomized by the EU contribute to strengthen liberty and human agency – not only because of the external constraints that the EU places on human rights restrictions by the states, but also because of the opportunities that the EU offers to its citizens to autonomously decide about their destiny through new forms of supranational representation.<sup>118</sup>

Yet, as I acknowledged above, relevant counter-examples exist. The most prominent one may be represented by the action of the UNSC which, in the context of the struggle against terrorism, has developed an invasive architecture of sanctions, profoundly challenging the protection of liberties and rights across the globe.<sup>119</sup> The global counter-terrorism regime established by the UNSC proved so detrimental to fundamental rights that even courts with a tradition of deference vis-à-vis the UN felt compelled to side-step UN obligations in order to reaffirm the protection of fundamental rights and liberties protected within their (transnational) legal orders.<sup>120</sup> Nevertheless, protection of liberties and human rights do actually feature as one of the main purposes of the UN – being enshrined in Article 1(3) of the UN Charter, as a cornerstone of the new world order to be built on the ashes of World World II.<sup>121</sup> Increasing calls, therefore, have been made for the UNSC to return to the spirit and the letter of the UN Charter and put aside a regime that has threatened fundamental liberties world-wide.<sup>122</sup> Although it is too early to say whether these calls for greater due process and procedural justice will contribute to change the practice of the UNSC, the fact remains that the value of liberty under the UN Charter has so far remained under-enforced.

Bearing this important caveat in mind, I would like to emphasize that the finality to enhance liberty that currently emerges in many transnational constitutional arrangements corresponds to a constitutive feature of federal regimes of the past. To make this point, it may be helpful to recall the theoretical justification of federal regimes and to compare it with the justification advanced to legitimize the creation of the sovereign state. The idea that the preservation of liberty is the main finality of federalism as a form of political organization is well reflected in the work of Montesquieu: while, pursuant to the language of his time, Montesquieu couched the liberty purpose of federal systems under the notion of

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<sup>118</sup> For an assessment of civil, political and social rights in the EU, in comparative perspectives with the US see Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP 2014).

<sup>119</sup> Kim Lane Scheppele, 'Global Security Law and the Challenge to Constitutionalism after 9/11' [2011] PL 352.

<sup>120</sup> See *Nada v Switzerland*, App. No. 10593/08 (ECtHR, 12 September 2012) (ECtHR finding Switzerland in violation of the ECHR for the implementation of UN counter-terrorism sanctions).

<sup>121</sup> See also Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) (discussing the values promoted in the aftermath of World War II through the creation of the UN, as epitomized by the drafting of the Universal Declaration of Human Rights).

<sup>122</sup> See eg Erika de Wet, 'From *Kadi* to *Nada*: Judicial Techniques Favoring Human Rights over United Nations Security Council Sanctions' (2013) 12 Chinese J Intl L.

republicanism,<sup>123</sup> he clearly emphasized that the creation of a ‘society of societies’ was instrumental to withstand foreign force while avoiding internal despotism – and thus ensuring a space for freedom and self-governance.<sup>124</sup> This view contrasts with the teleology at the origins of the Westphalian state, at least as epitomized in the paradigmatic work of Thomas Hobbes: As *The Leviathan* made clear,<sup>125</sup> the creation of the state was not concerned with the preservation of liberty, but rather pursued the end of security, and therefore required the citizenry to renounce every right, except the right to life, for the greater purpose of securing the stability and peace of the *res publica*.<sup>126</sup>

Of course, theoretical disquisitions about the teleological origins of federalism and statism do not necessarily reflect the historical reality of the formation of territorial public authority both in the form of the state and union of states.<sup>127</sup> Yet, it is noteworthy that the American Founders proclaimed that securing the blessing of liberty was the key finality of the act of union and designed a system in which multiple separations of powers would prevent government overreaching and preserve freedom.<sup>128</sup> The US federal experience, otherwise, also shows the manifold dimensions of the idea of liberty, with its alternative meanings of both ‘communal liberty’ (the liberty of the communities to govern themselves freely) and ‘individual liberty’ (the liberty of the individuals to act as free agents regardless of community constraints).<sup>129</sup> Reconciling these two dimensions of liberty has been a hard challenge in any federal regime and, although in the US experience the latter has step by step taken over the former, a comparative analysis reveals a more uneven picture.<sup>130</sup> Whatever the ultimate meaning of liberty, though, the point that I am trying to make here is that the difficult search for a way to maximize liberty is a *fil rouge* that runs from the early experience of federal governance to many modern experiments of global constitutionalism. Whether this pattern will consolidate in the context of global governance remains a fascinating question worth further exploration.

## 6. CONCLUSION

The transformations of the global legal arena have increasingly attracted the attention of lawyers, and constitutionalism is now regarded as the *lingua franca* to be spoken in the transnational *agorà*. This essay suggested that comparative law, especially the theory and practice of federalism (as distinct from the federal state), can provide a useful prism through which to enrich our understanding of the phenomena occurring at the global stage. While the debate about the constitutionalization of international law has divided scholarship, this essay explained that the rise of transnational forms of governance is not novel, but rather finds enlightening precedents in experience and theorizations of federalism. Sketching the outline for future research, the essay has attempted to draw insights from a comparative, historical analysis of federalism and to identify three general features that characterize constitutional regimes beyond the states. Tentatively: pluralism, subsidiarity and liberty have been branded as recurrent features of the structure, functioning and purpose of new

<sup>123</sup> See Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997).

<sup>124</sup> Montesquieu, *The Spirit of the Laws* (1748) book IX, ch 1 [see Karmis and Norman (n 74) 55].

<sup>125</sup> Thomas Hobbes, *The Leviathan* (1651).

<sup>126</sup> See for a jurisprudential discussion of the legacy of Hobbes’ work on legal thinking David Dyzenhaus and Thomas Poole (eds), *Hobbes and the Law* (CUP 2012).

<sup>127</sup> See eg Gianfanco Poggi, *Lo Stato* (Il Mulino 1992) (discussing the sociological origins of the state).

<sup>128</sup> Akhil R Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 1998).

<sup>129</sup> James Gibson, ‘Freedom, Pluralism and Federalism: An Enigmatic Trio?’ in Sarah Baumgartner Thurow (ed), *E Pluribus Unum. Volume 2: Constitutional Principles and the Institutions of Government* (University Press of America 1988) 222.

<sup>130</sup> See eg Daniel Elazar, ‘Communal Democracy and Liberal Democracy’ (1993) 23 *Publius* 3.

transnational regimes (from the EU to the ECHR, the UN and the WTO). While much research remains to be done, federalism seems to offer a new, yet old, perspective to the study of an ever more integrated global legal world.