Constitutional versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity

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CONSTITUTIONAL VERSUS ADMINISTRATIVE ORDERING IN AN ERA OF GLOBALIZATION AND PRIVATIZATION: REFLECTIONS ON SOURCES OF LEGITIMATION IN THE POST-WESTPHALIAN POLITY

Michel Rosenfeld

INTRODUCTION

Legal actors are increasingly caught in a concurrent trend toward globalization and privatization that forces them to confront a fast growing plurality of legal regimes.\textsuperscript{1} The trend toward globalization displaces the center of gravity of the legal order from the traditional Westphalian nation-state\textsuperscript{2} to the supranational or even the global arena.\textsuperscript{3} As a consequence of this, moreover, the unity and hierarchy of legal norms imposed by the constitution typical of the Westphalian nation-state\textsuperscript{4} tends to unravel, leaving legal actors at the mercy of inconsistent and at times even contradictory legal obligations stemming from discrepant sources of law. For example, the legal regime of the European Union (EU) can conflict with that of an EU member-state\textsuperscript{5} or with the international regime issuing from the United Nations (UN),\textsuperscript{6}

\textsuperscript{1} See Michel Rosenfeld, Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism, 6 INT'L J. CONST. L. 415, 415 (2008).

\textsuperscript{2} The Westphalian system refers to a concept of state sovereignty based on territoriality and the absence of a role for foreign actors within a nation’s domestic structures. See Andreas Osiander, Sovereignty, International Relations, and the Westphalian Myth, 55 INT'L ORG. 251 (2001).

\textsuperscript{3} See id. at 415-17.


and an individual citizen of an EU member-state risks facing contradictory legal norms—or apparently similar norms interpreted in contradictory ways—issuing respectively from her country, the EU and the European Convention on Human Rights (ECHR).\(^7\)

On the other hand, through privatization, legal actors can escape from the fetters of law emanating from the nation-state, and formerly public functions subject to criteria of accountability and transparency can become entrusted to non-governmental actors who can avail themselves of most of the benefits of those who operate within the private sphere. Two distinct phenomena are at play in connection with privatization in the present context: availing oneself of non-state legal regimes, and delegation of public functions to private actors. As an example of the first of these, multi-national corporations can make contracts pursuant to the *lex mercatoria* and thus avoid, at least in part, regulation by nation-states or supranational or international legal regimes.\(^8\) Examples of the second, in contrast, include privatization of traditional government functions, such as the running of prisons or the conduct of certain military operations such as occurred during the war that the United States fought starting in 2003 in Iraq.\(^9\)

The assault from above and from below on the unity and hierarchy secured by the constitution of the traditional nation-state has led one observer to conclude that the current expansion of legal pluralism has produced a “global disorder of normative orders.”\(^10\) Moreover, this situation seems aggravated by the fact that legal pluralism is complemented by ideological pluralism.\(^11\) Indeed, legal pluralism would seem much more manageable if there were a consensus on what constitutes the common good, but no such consensus prevails today within the bounds of most nation-states, let alone the transnational or international community.\(^12\) Notwithstanding the difficult challenges

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\(^7\) See Lech Garlicki, Cooperation of Courts: The Role of Supranational Jurisdictions in Europe, 6 Int’l J. Const. L. 509 (2008) (noting potential for conflict between the ECJ, the European Court of Human Rights (ECHR), and national constitutional courts and stressing that such conflicts have been avoided thus far because of ongoing dialogue among the courts involved).


\(^11\) See Rosenfeld, supra note 1, at 416.

\(^12\) See generally Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order (1996).
that are posed as a consequence of these developments, I have argued in previous works that cogent constitutional ordering for the post-Westphalian polity is certainly conceivable and most likely possible. Such ordering would depend on a successful integration of patterns of convergence and of divergence and on reliance on an ideological commitment to pluralism. Furthermore, such ordering would not yield a unified and hierarchical system of legal norms, but rather a plural one based on a combination of layering and segmentation of diverse legal regimes.  

What I will address in what follows is a different, but related question that becomes critical in light of the apparent breakup of the unity and hierarchical integrity of the constitutional order that prevails in the context of the Westphalian nation-state: Is the emerging ordering in a legal universe circumscribed by globalization and privatization better understood as a constitutional one or as an administrative one?  

Obviously, supranational legal regimes do function and can, as the EU most notably does, enjoy a high degree of legal legitimacy. Moreover, even international regimes with purported global scope are plausibly understood as constituting legitimate legal regimes. Furthermore, privatization need not result in escape from constitutional or other public regulation. Though the public-private dichotomy is deeply engrained in common law systems, and the U.S. Constitution, by and large, only protects fundamental rights against government action, there are certain important exceptions, including situations in which a private party performs a “public function.”

Under these circumstances, the central question posed above, whether a constitutional or an administrative paradigm better accounts for the workings of post-Westphalian legal regimes, is both a descriptive and a normative one. How do these regimes function? And what accounts (or should account) for their legitimacy? As we shall see in what follows, viewed from the perspective of the Westphalian polity, constitutional ordering relies on different criteria of legitimacy than its administrative counterpart. Are these respective criteria adaptable or
replaceable for the purpose of accommodating post-Westphalian legal regimes in their full diversity and plurality? For example, many scholars have characterized the EU as a supranational constitutional regime, even in the absence of a formal constitution. [19] Others, however, have regarded the EU regime as, above all, an administrative one,[20] or as a sui generis one.[21] Do these different characterizations matter in terms of the legitimation of the EU legal regime? Are any better suited than the others to buttress the supremacy of EU legal norms in the face of member-state challenges?[22]

Since supranational legal regimes seem bound to provoke significant changes in the internal workings of the national regimes that they impact,[23] and since privatization unsettles or undermines the traditional public-private divide,[24] the central question under consideration affects not only the legal regimes associated with the processes of globalization and privatization, but also the preexisting regimes that traditionally were fully incorporated within the Westphalian polity. Accordingly, the contrast between constitutional and administrative ordering and the public-private division should be examined in relation to all legal regimes, regardless of their origin or place within the current universe of legal relations. This, in turn, calls for a reexamination of public law and of the respective positions of constitutional and administrative law within public law as reconceived to meet its current challenges.

Thorough exploration of the question posed and of the numerous issues it raises requires a major undertaking that is far beyond the scope of this Article. My purpose here is much more modest: I seek to reflect preliminarily on some of the most salient jurisprudential issues and implications that arise in connection with harmonization and

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[19] See, e.g., KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001); MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 8 (1998). The EU did attempt to adopt a formal written constitution. The Treaty Establishing a Constitution for Europe (TCE) was signed on October 29, 2004 by all the (then) twenty-five member-states, but failed due to rejection in 2005 referenda in France and the Netherlands. The substantive provisions of the TCE were subsequently incorporated almost intact in the Treaty of Lisbon, which entered into force on December 1, 2009. See DORSEN ET AL., supra note 18, at 77.


[22] See supra note 5.

[23] See Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administraties der Belastingen, 163 E.C.R. 1, 2 C.M.L.R. 105 (1963). In upholding the right of a Dutch citizen to sue his own country under European law, the ECJ observed: “The [European] Community constitutes a new legal order . . . for the benefit of which the states have limited their sovereign rights . . . and the subjects of which comprise not only the Member States but also their nationals.” Id.

legitimation of the plurality of legal regimes in play under current conditions. With this in mind, I will proceed as follows: Part I will explore the conceptual underpinnings of the contrast between a constitutional regime and an administrative one; Part II will assess how these two regimes compare in relation to supranational entities, focusing mainly on the EU; Part III will concentrate on the challenges posed by privatization; and finally, Part IV will consider whether public law ought to be reconceived in light of the preceding analysis.

I. THE CONCEPTUAL UNDERPINNINGS OF THE CONTRAST BETWEEN CONSTITUTIONAL AND ADMINISTRATIVE REGIMES

Assertions regarding the existence of global constitutional regimes\textsuperscript{25} and of global administrative ones\textsuperscript{26} require comparing the former to the latter both in terms of functioning and of achieving and conferring legitimacy. Moreover, as the twentieth century Westphalian nation-state was based on a combination of constitutional and administrative ordering, it provides a promising baseline for analysis and comparison. Because conceptions of administrative law differ from one legal culture to the next,\textsuperscript{27} and because so do conceptions of the precise boundaries between the realm of constitutional law and that of administrative law,\textsuperscript{28} the discussion must remain schematic. It must draw on salient commonalities while ignoring or downplaying variants that are unlikely to meaningfully alter the overall picture.

Stripped to its essentials, the modern constitution is supposed to be that which the people, in whom sovereignty ultimately resides, gives itself as a charter for self-government. Thus, the “We the People” referred to in the Preamble to the U.S. Constitution\textsuperscript{29} figures as both the author and the beneficiary of the U.S. Constitution, by means of which it binds itself through a process that approximates a social contract to abide by its prescriptions.\textsuperscript{30} Consistent with this, the basis for legitimation of a constitution is contractual in nature. Just as the parties to an ordinary legal contract, each party to a social contract—i.e., each person who belongs to “the People”—becomes bound by the contract in question, by virtue of her agreement to its terms. And, moreover, the

\textsuperscript{25} See Fassbender, supra note 15, at 616.
\textsuperscript{26} See Benedict Kingsbury et al., The Emergence of Global Administrative Law, L. & CONTEMP. PROBS., Fall 2005, at 15-17.
\textsuperscript{27} See Susan Rose-Ackerman & Peter L. Lindseth, Comparative Administrative Law: An Introduction, in COMPARATIVE ADMINISTRATIVE LAW 1, 18 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).
\textsuperscript{28} Id. at 4-5.
\textsuperscript{29} See U.S. CONST. pmbl.
\textsuperscript{30} See ROSENFIELD, supra note 8, at 20.
fact of mutual agreement among all the parties involved provides the basis for justification both of the contractual relationship among the relevant parties and of the actual contractual terms agreed to. In other words, a social contractor is bound to the social contract because she agreed to it, and the particular terms of that social contract are fair and legitimate because they were freely agreed to by all those who must abide by them.

The actual terms of a constitution can vary as do those in various conceptions of the social contract. Going back to the origins of modern constitutions in the aftermath of the eighteenth century French and American revolutions, two distinct types of constitutional regimes have emerged. These are the American regime based on “checks and balances” and the French regime predicated on representative democracy through parliamentary rule oriented towards realization of the “general will.” At the highest level of abstraction, modern constitutionalism boils down to three essential components: defining and circumscribing the powers of government; adherence to the rule of law; and protection of fundamental rights. Moreover, whereas there are important differences between presidential systems such as the American one and parliamentary systems congruent with the traditional French one, the combination of the three essential components of constitutionalism require an apportionment of functions among distinct legislative, executive, and judicial powers. The U.S. Constitution apportions these functions among three separate and co-equal branches of government whereas in parliamentary systems there is typically no comparable separation between the legislative and the executive powers. Furthermore, modern constitutions typically entrench systems of representative democracy that are either unitary or federal in nature. In a unitary system, such as that of France, the entire citizenry is represented by a national legislature; in a federal system, such as that of

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31 For an extensive discussion of the similarities and differences among the social contract, as conceived by Locke, Hobbes, Rousseau and Kant, and the legal contract, particularly as it emerged during the era of freedom of contract, see Michel Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 IOWA L. REV. 769 (1985).

32 For Locke, the social contract’s main purpose is to secure inalienable natural rights; for Hobbes, to achieve security against violence; and, for Rousseau, to promote republican self-government. See id. at 857-63.

33 For a comparison of the American and French constitutional models, see ROSENFIELD, supra note 8, at 156-63.

34 See Michel Rosenfeld, Modern Constitutionalism as Interplay Between Identity and Diversity, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 3, 3 (Michel Rosenfeld ed., 1994).

35 See U.S. CONST. art. I (legislative powers); id. art. II (executive powers); id. art. III (judicial powers).

the United States, in contrast, representation is apportioned among the U.S. Congress and fifty state legislatures allowing for “checks and balances” among different clusters of representative democracy. In both unitary and federal Westphalian modern nation-state constitutional democracies, the constitutionally imposed unity and hierarchy of norms is secured through constitutionally enshrined mechanisms regardless of any actual division of powers or of clusters of democracy.

Even based on this cursory account, it becomes readily apparent that adapting the modern constitution for supranational uses might be highly problematic. Who corresponds to “We the People” at the supranational level? The EU’s attempt at constitution-making that resulted in the TCE seems particularly instructive in this respect. In the Preamble of the July 18, 2003 draft of the TCE, the authors of the latter were referred to as “the peoples” of the (then) twenty-five EU member-states, whereas in the final draft of the TCE issued on July 18, 2004, “the peoples” was replaced by the heads of state—starting alphabetically with the King of Belgium—of the twenty-five member states. Finally, the Treaty of Lisbon, as noted by Valéry Giscard d’Estaing, the President of the EU Constitutional Convention, is in essence the same as the rejected constitution with only the format changed to avoid referendums. Or, in other words, the treaty in question is in form a treaty as any other while in substance it presumably amounts to a constitution. Even if the Treaty of Lisbon could actually unmistakably function as a constitution, could it be legitimated as one in the absence of an EU “people”?

Upon further consideration, the lack of a single EU people may not be as determinative as it may seem initially. Indeed, if one probes a little deeper into the “We the People” of the U.S. Constitution and into social contract modeled constitutional legitimation, one notices that they cannot live up to the initial expectations listed above. On the one hand, the “We the People” that gave itself the 1787 U.S. Constitution was hardly representative of the “people” as it was then, and even less so of the American people as it is now. For one thing, the Framers of the Constitution who met in Philadelphia in 1787—fifty-five white, propertied men—were hardly representative of the country’s population as a whole as it stood then. Also, women and African Americans

37 See id. at 648-50.
38 In the U.S., the Constitution confers limited and enumerated powers upon the federal government, see U.S. Const. art. I, and guarantees the supremacy of valid federal law, see id. art. VI, while reserving for the states all the governmental powers not conferred by it onto the federal government, see id. amend. X.
39 See ROSENFELD, supra note 8, at 172-73, 303 n.37.
40 See La Boîte à Outils du Traité de Lisbonne, par Valéry Giscard d’Estaing, LE MONDE (Oct. 27, 2007) (Fr.).
41 See ROSENFELD, supra note 8, at 34-35.
were excluded from voting in state ratifying conventions, where popular approval for the new constitution was sought.\textsuperscript{42} Finally, because the United States is, to a very large extent, a country of immigration built upon the arrival of numerous waves of immigrants coming from all corners of the world over a span of more than two centuries, only a small fraction of today’s American people had ancestors in the United States at the time of the Constitution’s ratification.\textsuperscript{43}

To compound the problem, there is a fundamental disanalogy between the social contract and an actual legal contract. In a legal contract, all the parties involved actually agree to the same terms, and that agreement can be in a large number of cases the ultimate basis for the validity of the contract involved. Why does an agreement to exchange three apples for two oranges or three oranges for two apples constitute a valid contract? It is because the parties to it have actually agreed to be bound by its terms. In the case of a constitution, however, no unanimous \textit{ex ante} agreement by all those to be subjected to its prescriptions is ever likely to be possible. This is because ratification through referenda is never likely to be unanimous, and even if it were, it could not include the acquiescence of those yet unborn who would nonetheless in future generations be bound by their country’s constitution. Because of that, the social contract associated with a constitution would have to be, at least in part, hypothetical or counterfactual.\textsuperscript{44} And as such, the constitution in question would be valid and legitimate because its terms proved fair and reasonable, and not because of any elusive fact of agreement.\textsuperscript{45}

According to Habermas, laws are legitimate if they can be conceived as both self-imposed and binding.\textsuperscript{46} Adapting Habermas’s criterion for present purposes, constitutions could be deemed legitimate if they could be counterfactually reconstructed as a social contract-like arrangement to which a fair and reasonable person would subscribe and by which such a person would agree to be bound. In other words, every person involved would agree to join and be bound after determining that the constitution under consideration would be in the mutual interests of all those who would have to live under it. Moreover, a constitution could be counterfactually reconstructed as binding if it would have to be considered as being normatively compelling by any fair and reasonable member of the polity. Thus, for example, a right against torture or

\textsuperscript{42} Id. at 35.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 24.
\textsuperscript{45} Id. at 24-25.
equality among the sexes would emerge as indispensable in any decent society, and hence as fit to be made binding within all contemporary polities.

It is clear that in this adaptation of Habermas’s criterion of legal legitimacy, it is the normative content which is likely to become the subject of a social contract or a consensus that is determinative, and not the fact of entering into a contractual arrangement or of reaching a consensus. Even if reconstruction of a constitution as self-imposed and binding were necessary for purposes of its legitimation, however, it would not therefore be sufficient for the purposes in question. Furthermore, since not all constitutions are alike—and that holds also for those constitutions that would qualify overall as being fair and equal—there must be an additional essential component that accounts for differentiation among constitutions. That component is what I have elsewhere referred to as “constitutional identity,” which is at once related to and distinct from national identity in the context of the nation-state. Leaving aside the differences between these two identities, they both draw on the culture, history, traditions, and mores of the people within the relevant nation-state.

To recapitulate: Working constitutions that can satisfy relevant criteria of legitimacy must satisfy two sets of criteria. The first of these are the three functional criteria identified above: definition and limitation of the powers of government, guaranteeing adherence to the rule of law, and protection of fundamental rights. The second set of criteria, on the other hand, concern legitimation and they consist of a combination of democratic validation, a sufficient measure of fairness and reasonableness, and a sufficient foundation in the collective constitutional and extra-constitutional identities of the members of the relevant polity. Moreover, the first criterion of legitimation can be met through counterfactual reconstruction, but must nonetheless have some basis in fact. For example, as mentioned above, the “We the People” behind the U.S. Constitution was hardly representative of the U.S. population then, let alone now. Nonetheless, one can argue that except for its lack of equality provision (which was remedied with the adoption of the Equal Protection Clause after the Civil War) the U.S. Constitution should have been endorsed by the entire U.S. population. Even if one agrees with this argument, however, it is insufficient standing alone to satisfy the criterion of democratic validation. But if we add that there was some historic democratic validation through the ratification process—as flawed as it may have been—coupled with the

47 See ROSENFELD, supra note 8, at 10.
48 Id. at 11-12.
49 See supra notes 41-42 and accompanying text.
50 See U.S. CONST. amend. XIV.
fact that most contemporary U.S. citizens approve of the Constitution and are largely quite proud of it, then taken together the factual and counterfactual bases of the argument for democratic validation can plausibly be deemed sufficient.

For its part, the administrative regime is inextricably linked to the need and use of a bureaucracy and of bureaucratic rule to manage the increasingly complex, detailed and specialized interface between the state and society, which has become characteristic since the inception of the welfare state. Bureaucratic rule need not be based on constitutional rule. The two are therefore conceptually and functionally distinct. Bureaucratic administration is systemically rule-bound, and as such, at a minimum, it converges towards constitutionalism’s rule-of-law requirement—or, more precisely, towards a version of the latter requirement, namely rule-through-law. Indeed, for a large bureaucracy to function properly in the apportionment of government benefits, such as the dispensation of driving licenses or the distribution of welfare benefits, it needs to rely on rule-based functioning for both internal reasons relating to the viability and continuity of the bureaucratic mode of operation and external reasons relating to regularizing and rationalizing its dealings with those with whom it must interface.

Though not necessarily related to it, administrative regulation has long been closely linked to constitutional rule in various major legal cultures. The relationship between administrative and constitutional law is complex and subject to differing interpretations. It has been characterized as “uncertain, contested and deeply essential.” Moreover, the actual configuration of a given administrative system of regulation depends on the nature of the particular constitutional regime to which it is linked (e.g., presidential, parliamentary, federal, or

52 See Rose-Ackerman & Lindseth, supra note 27, at 1; see also Jürgen Habermas, Paradigms of Law, in HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 13, 14-19 (Michel Rosenfeld & Andrew Arato eds., 1998) (distinguishing between the “liberal-bourgeois” and the “social-welfare” paradigm of law, and linking the latter to the bureaucratic welfare state).
53 See Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. CAL. L. REV. 1307, 1338 (2001) (distinguishing between the German positivistic Rechtsstaat or “rule-through-law” and the Anglo-American “rule of law” with its due process and fairness components).
54 See Rose-Ackerman & Lindseth, supra note 27, at 1 (contrasting the German conception of administrative law as “concretized” constitutional law and its American counterpart as “applied” constitutional law).
55 Id. at 2.
unitary). Also, there is a seemingly inevitable overlap between the administrative and constitutional function. For example, both fundamental due process constraints and basic liberties constraints can equally impact constitutional and administrative rule.

With these caveats in mind and viewed in its most general terms, an administrative regime is supposed to play both a checking and enabling role. On the one hand, administrative regulation is designed to set legal limits on rapidly expanding bureaucratic power and organization. As such, in relation to bureaucratic power, the administrative regime is the equivalent of what the constitutional regime is in relation to the polity’s governing powers, namely its legislative and its executive powers. On the other hand, administrative regulation provides the legal and institutional means for state management or supervision of increasingly specialized fields that cannot be adequately handled without specialized expertise. Moreover, this second enabling capacity is supposed to allow for depoliticization of certain functions through the creation of independent regulatory agencies such as central banks. By the same token, the enabling capacity in question can also be used not to place certain specialized technical tasks above the fray of politics, but to isolate certain powerful private interests from the reaches of the democratic policy. In other words,

administrative law has sometimes served as a check on populist or democratic demands by giving organized and powerful economic interest groups a way to challenge policy. . . . Public law provisions that are justified as a check on overarching state power can also be a means of entrenching existing private interests.

Even on this brief account, it becomes apparent that the administrative regime can at once supplement, expand and contradict the main purposes of the constitutional regime to which it is linked.


58 This is dramatically illustrated in France where challenges to administrative regulations are ultimately decided by the Council of State (Conseil D’Etat) and those to parliamentary laws by the Constitutional Council (Conseil Constitutionnel). Thus, challenges to administrative regulations restricting wearing the Islamic veil in public schools were adjudicated in the former, see Conseil d’État, Étude relative aux possibilités juridiques d’interdiction du port du voile intégral (2010), available at http://www.conseil-etat.fr/cde/node.php?articleid=2000, while that brought against the law prohibiting wearing the Burka in public was decided in the latter, see Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345 (Fr.), available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-613-dc/version-en-anglais.88804.html.

59 See Rose-Ackerman & Lindseth, supra note 27, at 3.


61 See Rose-Ackerman & Lindseth, supra note 27, at 5.

62 Id. at 3.
Supplementation, for example, occurs when the administrative regime expands the relevant constitutional due process and fundamental rights protections, in whole or in significant part, within the ambit of state run bureaucratic rule. Expansion, on the other hand, takes place when the administrative regime allows for the provision of a governmental function, such as depoliticized central bank monetary policy, that the constitutional regime is not otherwise set up to provide. Finally, the administrative regime can become inconsistent with, and even at times in part contradict, the purposes of the constitutional regime, such as when it enables private actors to evade democratic controls or elected officials to avoid accountability for their decisions.

In the broadest terms, the constitutional regime ought to exercise some control over its administrative counterpart to the extent that the latter falls short regarding democratic accountability, rule of law (as opposed to law of rules) compliance, and basic protection of fundamental rights. At the same time, the administrative regime can supplement the constitutional regime by spreading the latter’s prescriptions throughout the realm of bureaucratic state action. Beyond that, it is difficult to generalize as views concerning the particular purpose and proper scope of constitutional regulation differ both within polities and among them. One telling example is the U.S. controversy over the unconstitutional delegation of powers to administrative agencies (such that they enjoy quasi-legislative, quasi-executive, and quasi-judicial powers) that the Constitution gives to the three federal branches of government. U.S. administrative agencies have been characterized by critics as constituting a “fourth branch of government,” and, beyond debates concerning the proper interpretation of the Constitution among originalists and non-originalists, those who embrace a narrow view of permissible delegation have a very different view of the legitimate scope of the constitutional regime than those who have a much broader view on the subject. Indeed, adoption of a narrow view concerning delegation seems to go hand in hand with an ideological stance in favor of less regulation, which ultimately separates Lockean conceptions of the constitution as a

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63 A constitution could of course explicitly provide for a central bank and command that it be insulated from partisan politics. Arguably, however, from a functional standpoint, a constitution is supposed to set mechanisms for democratically accountable policymaking, whereas administrative regulation seems better suited to protect those areas of policymaking that require insulation from democratic pressures in order to become optimized.

64 See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (holding unconstitutional as a violation of separation of powers the U.S. Congress’s attempt to have the Comptroller General determine program funding cuts to balance budget, which might have shielded elected representatives from responsibility in the eyes of their constituents).

65 See generally PIERCE ET AL., supra note 60, at 35-36, 49-59.

66 Id. at 31.

67 Id. at 58.
guarantor of the broadest possible private sphere from social-welfare egalitarian ones, which reserve a much greater space for redistribution through the public sphere. In short, a constitution designed to guarantee formal protection to individual rights and markets has much less use for pervasive state regulation than one meant to secure certain welfare guarantees and some measure of substantive equality.68

II. CONSTITUTION AND ADMINISTRATION AT THE SUPRANATIONAL LEVEL

As discussed above, at least up to the present, there is no supranational “people” and no transnational constitution that satisfies the requirements of hierarchy and unity achieved in Westphalian nation-states.69 On the other hand, there definitely are currently functioning supranational administrative regimes (most notably in the EU),70 as well as international ones with worldwide scope, such as the WTO.71 Given the criteria of legitimation for constitutions on the scale of the nation-state identified in the course of the preceding discussion,72 the three principal problems confronting supranational constitutionalism concern: hierarchy and unity, identity, and democracy. At least as it relates to the element of actual endorsement of the constitution through ratification, or otherwise, that combined with counterfactual ones lend support to the counterfactual conclusion that the relevant constitution has been self-imposed by those bound by it.73 Arguably, administrative regimes can avoid or circumvent these problems. They can seemingly function without the common glue provided by national or constitutional identity, and they have certainly endured even in the absence of democracy.74 Furthermore, although administrative regimes need hierarchy and unity to function properly much as nation-state constitutions do, it is by no means obvious that working administrative regimes depend on constitutional hierarchy and unity rather than on their own administrative version of the latter. Consistent with this, would it not be preferable from both the standpoint of a functional

68 Compare Dandridge v. Williams, 397 U.S. 471 (1970) (holding that the U.S. Constitution does not guarantee minimum welfare rights), with Gov’t of S. Afr. v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.) (holding that the South African Constitution provides for the right to a decent shelter, which obligates the government to undertake positive steps towards that end).
69 See supra text accompanying notes 39-40.
70 See generally Lindseth, supra note 14 (defending the thesis that the EU legal system is better understood as an administrative rather than a constitutional regime).
71 See Rose-Ackerman & Lindseth, supra note 27, at 1-2.
72 See supra text accompanying notes 49-53.
73 See supra note 46 and accompanying text.
74 See Rose-Ackerman & Lindseth, supra note 27, at 1.
account and that of legitimation to conceive of supranational and international legal regimes in administrative rather than constitutional terms?

One scholar has answered this last question in the affirmative with respect to the EU. As he puts it:

European governance is administrative, not constitutional. The process of European integration has had, without doubt, profound constitutional implications for its constituent states. It has . . . construct[ed] a new market-polity transcending national borders. Nevertheless, this polity has had great difficulty being understood as constitutional in its own right. That is, it has struggled to be seen as the embodiment or expression of a new political community . . . capable of self-rule through institutions historically constituted for that purpose. Rather, in this critical regard, the EU is fundamentally administrative, with a ruling legitimacy still ultimately derived from the historically constituted bodies of representative government on the national level.\(^75\)

In a nutshell, the thesis is not that the EU administrative regime is completely self-standing, but that it functions independently at the supranational level, with only national member-state constitutional oversight and legitimation.

In the case of the EU, member-state input occurs at two levels that are relevant to the present discussion: the treaty-making level (and with the failure of the TCE, the EU is “constituted” exclusively on the basis of treaties among the member-states);\(^76\) and on the member-state representation level (through its head of government on the EU Council), which together with the EU Commission, the EU Parliament and the ECJ add up to the legislative, executive, and judicial powers of the EU.\(^77\) In other cases involving international administrative regimes, by contrast, the corresponding member-state input for the most part occurs at the treaty-making level.\(^78\) Moreover, before proceeding any further, two important points bearing on the legitimation of supranational regimes must be briefly mentioned. First, in cases such as that of the WTO, where the equal contribution of all member-states is largely confined to the treaty-making stage, member-state “constitutional” input occurs only at the “constitution-making”

\(^75\) LINDSETH, supra note 14, at 1.

\(^76\) See Eleftheriadis, supra note 21, at 7, reprinted in DORSE ET AL., supra note 18, at 78.

\(^77\) See id. at 80-81.

\(^78\) For example, in the context of the WTO, representatives of the member-states’ governments have operated on a “club” model, relying on a system of confidential negotiations among the most powerful members. Richard B. Stewart & Michelle Ratton Sanchez Badin, The World Trade Organization: Multiple Dimensions of Global Administrative Law, 9 INT’L J. CONST. L. (forthcoming 2011).
moment. Additionally, in the case of the EU, the input in question takes place on an ongoing basis in the “constituted” administrative regime, which is thus being poised to legitimate its operation as well as its creation.  

Second, the member-state input discussed here may plausibly confer constitutional legitimacy to the EU or WTO from the internal standpoint of that member-state’s own constitution, but that in and of itself does not confer any constitutional legitimacy at the supranational level (at which the EU and WTO operates). Accordingly, if the thesis under consideration proves viable, only administrative legitimation would be possible at the supranational level. Presumably, that would be sufficient.

At the very least then, the constitutional legitimacy of a functioning transnational administrative regime would depend on the latter being based on a treaty among all of the nation-states coming within its sweep. But, notwithstanding the failed TCE, could a treaty ever provide sufficient constitutional legitimacy? Upon first impression, the answer would seem to be in the negative, as the typical Westphalian nation-state’s constitution creates or cements internal bonds of citizenship within a single polity whereas a typical treaty between two traditional sovereign states, such as a treaty between Countries A and B to guarantee the security of Country C, creates an “external” relationship for a limited-purpose common venture.

Beneath the surface of this basic distinction, however, matters are more complex. Some contemporary multilateral treaties, such as the ECHR, involve an (external) interstate relationship in relation to a subject matter—fundamental rights—that are typically internal. From the standpoint of fundamental rights, the ECHR looms as a hybrid between a treaty and (part of) a constitution: a treaty in form, but part of a constitution in substance. On the other hand, constitutions cannot be thought of exclusively as the purely internal expression of a polity that coheres as a unified whole. Indeed, as globalization and transnational
legal regimes become more firmly entrenched, constitutional rights tend to become more internationalized, while concurrently, international law becomes more constitutionalized. Thus, for example, certain countries, such as South Africa, are explicitly constitutionally empowered to consult foreign constitutional jurisprudence in the course of settling domestic constitutional issues, whereas certain transnational legal regimes, such as the EU (through the jurisprudence of the ECJ), have incorporated nation-state-based constitutional norms.

The fact that a constitution for a transnational legal regime may originate in a treaty (rather than a constituent act of the relevant peoples involved proceeding as one) may not be that significant. This would seem especially true if the eventual supranational constitution were to establish an altogether new constitutional model radically different from all of the models tailored to the particularities of the nation-state. One can imagine, for example, relations among the peoples involved, among the included member-states, and among the multiple institutional features deployed by the constitutional treaty, to be neither purely vertical nor purely horizontal, neither purely external nor purely internal. In that case, the distinction between contract and treaty would most likely lose much of its importance for the new order, thus eventually minimizing the relevance of whether or not a constitutional treaty is a treaty or a constitution.

With this in mind, the treaty-constitution (or treaty bearing sufficient functional equivalence to a partial constitution, as in the cases of the ECHR and WTO or a full-fledged one like that of the EU) would at a very minimum define the scope of the relevant supranational regime and provide the latter with the requisite consent of the peoples of those nation-states that become signatories. The scope can be one of limited purpose, such as in the case of the WTO, which regulates trade, or a general purpose one, such as in the case of the EU, as circumscribed by the series of treaties culminating in that of Lisbon. The nature and sufficiency of the consent of a nation-state signatory, on the other hand, would depend on two key factors: the actual constitution of the signatory state involved, and the most basic prescriptions of constitutionalism described above.

Individual constitutions vary in terms of the scope of legitimate delegations or the limitations of sovereignty through treaty-making.

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82 See Rosenfeld, supra note 1, at 425.
83 See DORSEN ET AL., supra note 18, at 4.
85 See supra notes 29-31 and accompanying text.
Thus, as evinced by cases spanning from Solange I in 1974\(^{86}\) to the Lisbon Treaty Case in 2009,\(^{87}\) the German Basic Law has been interpreted as quite significantly restricting the scope of legitimate delegation of sovereignty to the EU. By comparison, the French Constitution is much less restrictive.\(^{88}\) More generally, a nation-state’s constitution could conceivably authorize delegation of virtually all or none of its sovereignty powers to supranational regimes. Because of this, it seems more fruitful to concentrate exclusively on the requirements of constitutionalism.

Regarding constitutionalism, the question for the most part boils down to whether delegation “upward” to a supranational administrative regime can be deemed the functional equivalent to delegation “downward” to a national administrative regime. But even if the answer were in the affirmative, there would be a seemingly inescapable systemic issue that would loom as insurmountable. In “downward” delegation, administrative tendencies to operate in ways that contradict constitutional norms can be controlled or mitigated through deployment of the full panoply of existing constitutional powers. The same appears highly unlikely, however, in the case of treaty-based “upward” delegation. This is most obvious in cases in which the treaty essentially confines signatory nation-state input to the “constitution-making” moment. However, nation-state constitutional control is ultimately equally problematic in cases, such as that of the EU, in which nation-state government representatives also play an ongoing role in the “constituted” supranational administrative regime. Indeed, as the German Constitutional Court’s jurisprudence referred to above clearly underscores, ongoing nation-state input cannot systematically avoid internal transgressions within the nation-state as a whole pertaining to the latter’s separation-of-powers provisions or protection of fundamental rights.\(^{89}\) Moreover, these difficulties could not be avoided by having the nation-state supranational input completely mirror its internal constitutional ordering. Besides making the supranational regime completely unwieldy, the requisite mirroring would be altogether impossible to achieve to the extent that the multiple nation-states affected would have different constitutional orderings based their particular identitarian requirements, which as discussed above, are essential from the standpoint of constitutional legitimacy.\(^{90}\)

\(^{86}\) See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 9, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271 (Ger.).

\(^{87}\) Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267 (Ger.).

\(^{88}\) See DORSEN ET AL., supra note 18, at 111.

\(^{89}\) See supra notes 5, 87.

\(^{90}\) See supra text accompanying notes 47-48.
Another possibility would be to seek legitimation at the supranational rather than the national level. This would call for use of the relevant treaty and other available nation-state input as a component part of transnational legitimation. Based on the analogy between a treaty and a contract, signatory states would provide the factual component (or part of it in case the supranational pact is subject to approval by referendum within each of the signatory states) of the requisite factual/counterfactual democratic validation that needs to be in place before a constitutional regime can be deemed legitimate. That would leave counterfactual democratic legitimation, legitimation based on fairness and reasonableness, and legitimation stemming from a shared identity to be furnished by the relevant supranational administrative regime.\footnote{See supra notes 46, 48-53 and accompanying text.}

It seems obvious from the outset that some administrative regimes will inevitably fail to do their part in the above-sketched legitimation process, and that would particularly be the case for the more pervasive and more all-purpose among administrative regimes. Just as it seems highly improbable that an administrative regime could assume the democratic-legitimating and identitarian-validating functions of its constitutional counterpart within the confines of the nation-state, so too it seems unthinkable that that a supranational all-purpose administrative regime could successfully appropriate the aforesaid functions all to itself. Additionally, the EU’s perennial “democratic deficit”\footnote{See Mattias Kumm, \textit{Why Europeans Will Not Embrace Constitutional Patriotism}, 6 INT’L J. CONST. L. 117, 135 (2008); Judith Resnik, \textit{Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereigntism of the Nation-State}, 6 INT’L J. CONST. L. 33, 40 (2008).} and its difficulties in forging a common identity\footnote{See Dieter Grimm, \textit{Does Europe Need a Constitution? Demos, Telos and the German Maastrict Decision}, 1 EUR. L.J. 219, 282, 292-97 (1995).} amply illustrate this last point.

On the other hand, the best possible case for a potential administrative regime successful in supplanting its constitutional counterpart arises in the context of a limited-purpose regime in which democratic validation can be almost exclusively counterfactual and identity concerns highly minimized. The best apparent candidate, in this context, is a regime that is confined to administration based on depoliticized expertise in relation to a problem that everyone affected recognizes as crucial and wishes solved at all costs. For example, one could imagine a rapidly spreading deadly epidemic with the potential of wiping out all of humanity, which would prompt a worldwide concerted effort to come up with the best possible medical response.

The very statement of this last hypothetical suggests how unlikely it is that the above conditions could actually materialize. In real-life
cases of limited-purpose regimes, such as the WTO, matters are likely to be altogether different. Although the WTO has enjoyed considerable success in spreading trade liberalization, it has also come under fierce attack—and not only for its “club” culture mentioned above. Its critics also blame it for its secretive decision-making and its disregard of legitimate non-trade concerns. Moreover, all of this has been compounded by discord between developed and developing countries and by the economic rise of countries such as China, India, and Brazil, which are in some important respects ideologically different from the U.S. and other developed countries.

Consistent with the preceding observations, it seems that it is impossible to do away with the need for constitutional legitimation in the supranational, largely administrative-regime-ruled arena, except perhaps in the rarest of cases. However, even with respect to the latter, the better view is not that administrative legitimation displaces its constitutional counterpart, but rather that there is a complete convergence between the two. Indeed, in the worldwide deadly epidemic discussed above, delegation to experts seems highly justifiable under any conceivable constitutional or administrative ordering system. Beyond that, however, the convergence in question would be at best partial, and hence the justification for ultimate recourse to constitutional legitimation.

In the last analysis, supranational regimes cannot dispense with constitutional legitimation in favor of ultimate administrative validation. As I have detailed elsewhere, the constitutional legitimation involved departs from its counterpart in the hierarchically ordered and unified Westphalian nation-state. Supranational constitutional legitimation depends on harmonizing axes of convergence and divergence in a pluralistic legal universe marked by layering and segmentation, but it nonetheless remains constitutional, and hence irreducible to any viable conception of administrative legitimation.

III. THE IMPACT OF PRIVATIZATION ON THE NEXUS BETWEEN CONSTITUTION AND ADMINISTRATION

As mentioned at the outset, privatization comprises two distinct phenomena: privatization of an applicable legal regime as in the shift from a nation-state’s commercial law to lex mercatoria for purposes of
regulating business dealings among multinational commercial enterprises; and privatization of a traditional governmental function by “outsourcing it” to a private entity, such as replacing a state run police force by one operated by a private security firm. Moreover, there can be numerous shifts of power going from the public to the private realm that, strictly speaking, do not involve privatization, but that tend to produce effects that are largely functionally equivalent. For example, inasmuch as a regulated private industry captures its administrative regulators—a well-recognized risk—subjection to administrative oversight may work much like privatization. Indeed, that would occur where administrative rules are carved out to further the narrow interests of those meant to be regulated while shielding the latter from otherwise applicable general legal norms adopted by a democratically accountable legislature. Furthermore, if what amounts to roughly the functional equivalent of privatization (and may be referred to as “indirect privatization”) is also factored in, the potential sweep of privatization seems very far-reaching. Indeed, even constitutional norms can be enlisted in the quest to expand the scope of privatization. These norms can also be lined up for the cause, both as swords and shields. Thus, on the one hand, the U.S. constitutional ban on state aid to religious schools prescribed by the Establishment Clause has been significantly circumvented through the grant of state vouchers to parents with the full knowledge that most of the latter will use the money received from the state to pay for a religious school education for their children. On the other hand, U.S. congressional campaign financing legislation designed to achieve a greater leveling of the playing field, fairness, and transparency in electoral campaigns, was successfully attacked as being in violation of the freedom of expression rights of private parties, who use vast sums of money to vilify political candidates, thus potentially assuming a disproportionate role in influencing electoral outcomes while remaining legally entitled to retain their anonymity.

These developments call for a rethinking of the public-private divide, which I will briefly address in Part IV below. In this Part, I will only focus on how direct and indirect privatization is likely to affect constitutional and administrative legitimation and the proper nexus between the two. Before doing that, however, it is important to

99 See supra notes 8-9 and accompanying text.
100 See Rose-Ackerman & Lindseth, supra note 27, at 7.
101 See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (voucher system held not to violate Establishment Clause as parents free to choose between religious and secular private school though in fact 94% of vouchers used for religious education).
102 See Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876 (2010); see also Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 49 (2005) (arguing that the Supreme Court should approach the issue of campaign finance through a proportionality analysis, balancing the state or federal regulatory program with individual free speech rights).
emphasize two key independent points. First, privatization itself is
either good nor bad, and whether particular instances of it ought to be
lauded or condemned often depends to a significant extent on one’s
choice among contested ideologies. Second, privatization in no way
entails “going local” or shifting power “downward” from the state to the
individual or to discrete groups or institutions operating within the
ambit of a nation-state’s civil society.

As the welfare state becomes more intrusive and its administrative
apparatus more broadly encompassing, taking charge of areas such as
education, public health, public housing, social welfare, public
transportation, etc., it seems quite likely that certain kinds (or a certain
amount) of privatization may be in the public interest. If it were beyond
dispute cheaper and more efficient to entrust mail delivery service to
private couriers than to a state-run postal service, then it would seem
that privatization would amount to an unmitigated good. In other cases,
whether to endorse or condemn privatization may turn on differences in
ideology. Thus, if privatizing a municipal transportation system would
render it cheaper and more efficient overall, but would at the same time
tend to make it prohibitively expensive for its least-well-off users, then
those who maintain that the latter’s basic necessities need to be
guaranteed by the state would be likely to oppose privatization, whereas
others, adverse to state redistributive policies, would most probably
welcome it. In contrast, where privatization would only benefit narrow
interests and would all but eliminate accountability and transparency, it
would seem logical that a large majority of the citizenry would oppose
it.

Privatization may certainly involve “going local” in certain
instances, such as when mandatory public school education gives way
to private education,\textsuperscript{103} and perhaps eventually to homeschooling. But
in certain other cases, privatization may take place in a supranational
setting and even go hand in hand with globalization. Thus, if \textit{lex
mercatoria} were chosen to govern all commercial transactions among
supranational business enterprises, or if an entire field with a global
reach, such as the Internet, opted for self-regulation under a private
regime, then privatization could conceivably occupy an entire segment
of the global legal universe.

What the consequences of privatization ought to be for
constitutional and administrative ordering depends of course on the kind
of privatization involved. In some cases, there ought to be little or no
consequences. If a state monopoly on the retail sale of liquor were
ended, allowing private businesses to take over the field, and then if a

\textsuperscript{103} See, e.g., \textit{Pierce v. Soc’y of Sisters}, 268 U.S. 510 (1925) (holding Oregon’s mandatory
public schooling requirement violates parents’ constitutional right to chose a religious private
school for their children’s education).
state law subsequently were to prohibit alcohol sales to minors, no changes would be necessary to preserve the relevant status quo. Similarly, if no such law existed, but the state liquor stores adhered to the prohibition in question pursuant to an internally applicable government-executive rule, then privatization would require the state to adopt a law to the same effect to maintain the status quo. At the other end of the spectrum, if the state were to decide to outsource its entire existing police law enforcement functions to private businesses, then unless extensive administrative regulation and monitoring were brought to bear, and unless pertinent constitutional protections were extended to private operators performing a traditional public function (or are amended to be so extended), a major threat to fundamental rights protection and to maintenance of the rule of law would immediately ensue. And that threat would endanger not only the existing constitutional order, but also compliance with the minimum requirements of constitutionalism.\footnote{See supra notes 29-30 and accompanying text.}

One may argue that, if for none other than symbolic and identitarian reasons, certain core government functions, such as those involving the police or the army, ought not be outsourced, as public officials can command a certain measure of trust and accountability that no private operator could approximate.\footnote{See \textit{Verkuil}, supra note 9, at 1 (“When [government sovereign] powers are delegated to outsiders, the capacity to govern is undermined. A government appointment creates a public servant who . . . is different from those in the private sector. The office itself is honored. . . . Anyone who has served in government, from a buck private to a cabinet official, knows this feeling. And they also know that the public and private sectors have different boundaries.”).} But if they were nonetheless outsourced, the constitutional and administrative regimes ought to be conjointly adjusted to approximate as best as possible the accountability, transparency, fairness, and due process obligations of public actors. Depending on the circumstances, this may be achieved by assigning administrative functions to the appropriate private actor, such as requiring the latter to provide the same process to those upon whom it exercises power, as a regulatory administrative agency would do were it in the same situation.\footnote{See, e.g., \textit{Jackson v. Metro. Edison Co.}, 419 U.S. 345, 359, 365 (1974) (Douglas, J., dissenting & Marshall, J., dissenting) (arguing that the Court erred in not finding the privately owned public utility company’s actions to be subject to constitutional scrutiny); \textit{Pub. Utils. Comm’n v. Pollak}, 343 U.S. 451, 462 (1952) (finding the privately owned utility to be subject to constitutional protections as the utility operated under the regulatory supervision of a public agency).} Or, it may be best achieved by expanded administrative monitoring. In any case, the ultimate test of legitimacy would remain compliance with constitutional ordering and with the fundamental requirements of constitutionalism.

With respect to the second major concern, the privatization of legal regimes, the principal challenges that it poses remarkably track those
raised by the pluralization of legal regimes due to the proliferation of supranational public orderings such as those framed by the UN, the WTO, or the EU. Indeed, this becomes quite apparent if one compares a putative purely domestic private legal regime to a supranational one. Thus, suppose that in a purely domestic setting, state contract law provides that a seller bears the risk of loss or damage of sold goods prior to delivery to the buyer, but that pursuant to a private legal regime that is used by large business firms, the risk in question is imposed on the buyer. In that case, assuming the state law in question to be purely facilitative (there is no public policy reason to burden commercial sellers rather than buyers with the cost of insurance of sold goods in transit, but only convenience as parties to contracts often fail to address the issue at stake in their agreement) then privatization should bear no democratic or constitutional consequences and it should not materially impact the prevailing public-private divide. If, on the other hand, the circumvented law is not merely facilitative but grounded on substantive public policy choices supported by legislative majorities, such as a ban on the sale of goods manufactured with the use of child labor, then the private regime that would allow for circumvention of public policy could be duly neutralized. The full arsenal of state powers under the hierarchy and unity imposed by the state’s constitution could be brought to bear to curb—or if necessary completely dismantle—the offending private legal regime.

In sharp contrast, in the layered and segmented, non-unified, and pluralistic supranational arena, a supranational private regime—and such a regime would most certainly be a segmented one—would for all practical purposes fare exactly the same as its public law counterparts. The problem posed by a segmented supranational public law regime, such as the WTO, is that it can foster a conflict concerning legal entitlements or obligations without recourse to the hierarchy of norms or unity available in the constitutionally ruled Westphalian nation-state. The very same problem would arise with a supranational privatized legal regime, such as the lex mercatoria, which would likely encounter inconsistent and in part contradictory legal regimes at both the supranational and national levels without ultimately

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107 Private law regimes, as exemplified by the lex mercatoria, or by the set of private legal norms developed to regulate certain particular fields, such as the Internet, are well adapted for limited-purpose segmentary regulation, but not for full-purpose layered regulation, such as that provided by the EU, as the latter lacks the concentration and commonality of interests that the former typically has. See Rosenfeld, supra note 1, at 422-23.

108 See Armin von Bogdandy, Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law, 6 INT’L J. CONST. L. 397, 410 (2008) (pointing out that full EU implementation of WTO free-trade regulation would result in “reverse discrimination” within EU member-states as certain tariffs would have to be lifted from imported goods, but not for domestic ones).
being made accountable to any single one of them.\(^{109}\) Moreover, in the legally pluralistic supranational arena, privatized regimes are likely to be organized like public ones; to be internally bound by norms that are constitutional in form if not in substance, and that foster inner hierarchy and unity.\(^{110}\)

In view of these strong analogies, the conclusions concerning constitutional and administrative legitimation in the context of globalization—namely that one cannot dispense with supranational constitutional legitimation in favor of a largely self-legitimating administrative regime\(^{111}\)—also apply in that of privatization of legal regimes. Also, as the previous discussion indicates, concerning privatization in general, constitutional and administrative ordering may require adjustment and adaptation. But constitutional legitimation, either of a traditional kind or in line with the new realities of a layered and segmented supranational, legally pluralistic universe, remains an unwavering must.

IV. REVISITING THE PUBLIC-PRIVATE DIVIDE IN LIGHT OF GLOBALIZATION AND PRIVATIZATION

The public-private distinction has been both ever present and unwieldy in civil law as well as in common law jurisdictions. Kelsen found the distinction “useless” for “a general systematization of law,”\(^{112}\) and Paul Verkuil has remarked that “[i]f the law is a jealous mistress, then the public-private distinction is like a dysfunctional spouse . . . . It has been around forever, but it continues to fail as an organizing principle.”\(^{113}\) My aim here is rather modest. I do not seek to join the larger debate, but to concentrate exclusively on whether globalization and privatization as discussed above require any major change in the way we conceive the above distinction, and in particular whether they tend to render it useless in the context of the proliferation of a plurality of legal regimes that has become typical in the post-Westphalian era.\(^{114}\)

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109 There could be one exception to the general point under discussion in the case in which a privatized legal regime covered the exact same segment of the legal universe as an existing public regime, such as if there were a private regime that covered exactly the same ground as the WTO. In such a case, the private regime could be systematically made to yield to its public counterpart. But even in such an exceptional case, the yielding in question would not be complete unless there were sufficient congruity between the public regime involved and the national and supranational regimes with which it interacted.


111 See supra text accompanying notes 97-98.

112 KELSEN, supra note 4, at 207.

113 VERKUIL, supra note 9, at 78.

114 See generally Rosenfeld, supra note 1.
Moreover, I will approach the distinction from an exclusively conceptual and jurisprudential standpoint, thus largely ignoring institutional, professional and traditional concerns. In the broadest terms, as Verkuil notes in reference to common law jurisdictions, “[p]ublic law is inseparable from government. Private law traditionally encompasses the common law of contract, torts, and property that regulates relations among individuals.” Also, consistent with this distinction and as more systemically established in the civil law tradition, constitutional law, administrative law, and criminal law fall within the ambit of public law. In short, at the highest levels of abstraction, public law is the law that pertains to government—e.g., constitutional separation of powers or administrative procedure—or to the relation between the government and individuals to the extent that government imposes an obligation owed to it on individuals—e.g., criminal law—or directly confers a right or entitlement on the latter—e.g., laws pertaining to government dispensation of welfare assistance to the poor—or guarantees such individual right or entitlement—e.g., constitutional law both as commanding government self-restraint and as requiring positive government intervention necessary for purposes of upholding individual rights.

In contrast, in its paradigmatic Lockean incarnation, the role of government in private law would be purely facilitative. Thus, the legitimate role of contract law would ideally be limited to providing the means of enforcing whatever bargained for agreement the competent individual contractors had freely entered into. Obviously, if government departs more and more from a purely mediating role, and replaces freedom of contract with a contract law regime replete with directives and restrictions in the name of the public good. In other words, if contract law becomes increasingly paternalistic, then eventually it might appear to confound or cross the line between private and public law. For present purposes, however, suffice it that so long as

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115 It may be, for example, that the public-private distinction makes less and less sense and that it plays but an insignificant role under current conditions, but that, given its deep embeddedness in how law, legal institutions, the teaching of law and legal practices are organized, the costs of doing away with it would outweigh the benefits. In that case, the distinction could remain a useful convention in spite of all its shortcomings.

116 VERKUIL, supra note 9, at 80 (footnote omitted).


118 For example, constitutional law traditionally prohibits government from interfering with citizens’ exercise of the free speech rights it grants to them.

119 For example, constitutional law may require government to provide adequate housing to the indigent. See, e.g., Gov’t of S. Afr. v. Groothoom, 2001 (1) SA 46 (CC) (S. Afr.).

120 For further discussion of the Lockean vision, with particular emphasis on its account of legitimate contractual relations, see Rosenfeld, supra note 31, at 866-67.

121 See id. at 889.
law regulates interactions among individuals, whatever its substantive terms, it will be deemed to fall within the realm of private law.\textsuperscript{122}

Consistent with the preceding observations, globalization and privatization \textit{as such} are better understood as being completely independent from the public-private distinction as broadly recast above. This may be counterintuitive, as the main preoccupations regarding both globalization and privatization seem concentrated on illegitimate or unwise transfers of sovereignty powers traditionally pertaining to government within the bounds of the nation-state. Nevertheless, upon reflection, the separation advocated here has several heuristic and analytic advantages. Moreover, these advantages are easier to illustrate in the case of globalization than in that of privatization, but are ultimately equally availing in both cases.

The above-mentioned virtually exclusive focus on sovereignty, and in particular on the most notorious incidents of it, such as control over the constitution and its implementation or control over one’s borders,\textsuperscript{123} obscures the fact that the entire legal system of the Westphalian nation-state is unified and subject to constitutional, democratic, and identitarian constraints. Accordingly, any transfer away from that legal system to a supranational one raises the same issues of legitimacy.\textsuperscript{124} In theory at least, therefore, a transfer of the making or enforcement of contract law should raise the same legitimacy concerns as a comparable transfer in the realm of criminal law. It is of course quite likely that—politically and psychologically—transfer in the latter realm will be deemed much more objectionable than will transfer in the former. To risk a prison sentence based on legal norms adopted outside of one’s polity by legislators with whom one does not share a common culture and over which one has no electoral say, and to risk criminal conviction by a foreign judge or jury, do indeed seem far worse than having to entrust one’s contracts to foreign-crafted rules, or having one’s contract

\textsuperscript{122} This may mislead some into concluding that, under this proposed criterion criminal law would pertain to the realm of private law. That would be unwarranted, for although criminal law deals with certain acts among individuals, such as theft, it concerns the obligations that the accused criminal owes to society—represented by government—on account of his alleged crime, as opposed to his corresponding obligation to his victim. Accordingly, criminal punishment is separate and distinct from civil liability towards one’s victim.

\textsuperscript{123} \textit{Cf.} Conseil constitutionnel [CC] [Constitutional Court] decision No. 97-394DC, Dec. 31, 1997 (Fr.) (holding as an unconstitutional delegation of French sovereignty a treaty provision delegating to EU control over borders among EU member-states and providing for policy making on the subject by less than unanimous vote of EU Council). After this decision, France amended its constitution in order to remove impediments to adherence to the EU Amsterdam Treaty. See DORSEN ET AL., \textit{supra} note 18, at 110.

\textsuperscript{124} Even if a constitution allows a particular transfer to a supranational legal regime, as did the French Constitution through amendment in relation to the Amsterdam Treaty, \textit{see supra} note 123, this is not dispositive of the legitimacy issue. It may settle the issue formally without necessarily doing so substantively, as it is possible that a formally sanctioned transfer would fall short of the minimum prescriptions dictated by constitutionalism.
disputes adjudicated by a foreign judge. But even if the consequences be grave in the context of criminal law and light in that of contract law, the questions of legitimacy with respect to constitutionality, democracy and identity—i.e., why I should be subject to foreign mores and judges rather than to those who share my culture and traditions—are the same in both cases.

There is one case that seems to defy the above analysis, and that is the case in which private law is purely facilitative as it would be in an ideal Lockean freedom of contract regime. If the exclusive mission of contract law were to insure the greatest possible freedom of contract and the availability of contract enforcement pursuant to the relevant contractual terms forged by the agreement of the parties, then it would seem that the identity of the contractual facilitator would make no palpable difference. Under these ideal conditions, contract law and its enforcement would remain the same whether a supranational, a national or a privatized legal regime were to dispense it. And because of this, in substance there would be no constitutional or democratic legitimacy issue, and any remaining identitarian issue would be at best trivial. In other words, all constitutions would or should equally validate the ideal contract law regime at stake, and all polities would or should democratically enact it.¹²⁵ Finally, whereas one may prefer to have a fellow citizen adjudicate one’s contractual disputes rather than a foreigner, since culture and traditions would not figure in the eventual disposition of contractual disputes, preferences based on the nationality of the judge would be purely arbitrary.

In the end, the above case does not logically contradict the preceding analysis. The reason it appears to is because of an exceptional complete overlap of operative substantive norms regardless of the legal regime involved. The question concerning constitutional, democratic, and identitarian legitimacy does not disappear. But in this extraordinary purely ideal case, because there are no substantive differences, the normative prescriptions of any of the regimes identified above can be counterfactually attributed to all the others.

These latter considerations lead to a further insight concerning the possibility and plausible nature of supranational constitutionalism. Whereas complete overlaps are highly improbable, significant degrees of convergence concerning constitutional essentials, such as certain fundamental rights, can provide the basis for constitutional legitimation through counterfactual reconstruction. Indeed, if there is significant convergence among corresponding constitutional norms in different legal regimes, one can consider the norms of one of these regimes as if

¹²⁵ Alternatively, the contract regime in question would be so deeply steeped in natural rights and natural justice as to warrant a counter-majoritarian guarantee against arbitrary misuse of democratic powers.
they were incorporated into the others, thus fostering a certain measure of inter-regime constitutional legitimacy. This is what happened between the EU and Germany after *Solange I*, as the ECJ proceeded to incorporate the common constitutional traditions of the EU member-states. If the EU has enshrined a norm that substantively replicates a German constitutional norm, then an EU regulation that conforms to the enshrined norm can be construed as if it were legitimated by the German Basic Law.

Before applying the above analysis to privatization, it is important at the outset to note that there is an important difference for present purposes between the latter and globalization. Whereas globalization is in principle entirely indifferent as between public or private law, privatization is not. Indeed, some privatizations necessarily imply a shift from public to private law consistent with the description of these terms given above, while others do not. Suppose, for example, that a municipality decides to privatize a public transportation system it has operated for years and that after effectuating the transfer to private enterprises, it neither operates nor regulates the now deregulated business that has become subject only to the set of laws that are applicable to all private businesses. Before the privatization, the transportation system was legally structured as a relationship between the government and individuals; after the privatization, it was structured only as a relationship between individuals. Suppose now, on the other hand, that the government privatizes all prisons, but continues to run the existing criminal law system, to send prisoners to the now privatized prisons, to determine for how long, to decide whether or not to grant them parole, etc. In this latter case, privatization does not imply any shift to private law as defined above since all resulting legal relationships are in substance between government and individuals. The relationship between the private prison personnel and the prisoner may appear to be one among individuals, but in substance, the former relate to the latter in the role of agents of, or proxies for, the government.

How the metaphoric social contract that sets a constitution should apportion areas of legal interaction between government and individuals as against areas in which the government role is confined to providing and enforcing laws designed to mediate interaction among individuals depends on many different factors. What matters here is that it would be inappropriate consistent with the canons of constitutionalism and of rational governability to either reduce all legal interaction to the vertical

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126 *See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 9, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271 (Ger.).*

127 *See DORSE, supra note 18, at 89-90.*

128 *See supra notes 116-17 and accompanying text.*
government-individual mode, by, for example, instituting an ironclad state monopoly over all means of production, or to confine all legal relations to horizontal individual to individual to individual ones, thus, for example, making military and police protection exclusively dependent on private contractual arrangements.

Wherever the line is drawn, however, there is likely to be room for constitutionally sanctioned discretion where privatization can go hand in hand with transition to private law, and government assumption of responsibility for formerly private services can bring about a change from a private to a public law regime for the services at stake. Outside this zone of discretion though, privatization like globalization remains subject to the same constitutional, democratic and identitarian criteria of legitimacy.

CONCLUSION

The preceding analysis suggests that the profound changes brought about by globalization and privatization and by the consequent proliferation of legal pluralism and the spread of supranational and privatized layered and segmented legal regimes poses a series of difficult new problems, but does not, at least in the first instance, call for a substitution of constitutional ordering by its administrative counterpart or for a redrawing of the public-private divide. What is needed instead is a reconceptualization and adaptation of existing concepts. Constitutional ordering and legitimation cannot be dispensed with at the supranational level, but, by the same token, they cannot simply be transported from their nation-state matrix and be redeployed pretty much intact in a new supranational setting. What is needed is the discovery and articulation of functional equivalents that would track the relationship between constitutional and administrative ordering and the public-private divide as broadly depicted above. Moreover, these functional equivalents may well take on very different forms than their nation-state anchored counterparts.

The reflections undertaken above have been preliminary and they call for much more comprehensive and detailed further examination. Because of this, it is imperative to emphasize that the claim that present concepts and categories must be preserved, even if they must be rethought, is provisional. It is entirely possible that the dynamic process launched through a systematic rethinking will culminate in the forging of new, better adapted concepts and categories. For now, however, any such prediction would be mere speculation.