

CONSTITUTION-MAKING AS A TECHNIQUE OF INTERNATIONAL LAW: RECONSIDERING THE POSTWAR INHERITANCE

ANNA SAUNDERS, UNIVERSITY COLLEGE LONDON¹

Over the last three decades, international lawyers and institutions have come to understand constitution-making as an accepted technique of international law and a means of delivering peace and security. In defending this technique from its critics, scholars have drawn on a particular tradition of constitution-making developed in the postwar period and in respect of the Allied occupations of Germany and Japan. That tradition understands constitutionalism as a lawful form of international action, allowing for temporary forms of international rule, and juridically distinct from material concerns. I explore the building of this tradition through the work of three legal scholars: Ernst Fraenkel, Quincy Wright, and Carl Friedrich. I argue that reimagining constitutionalism for the coming decades requires rethinking this separation between the juridical and the material, as well as asking what constitutionalism demands of the laws governing the global economy.

I. INTRODUCTION

Over the course of the last half century, civil war and conflict in the decolonised world has come to be seen as a threat to international peace and security. International lawyers, who since at least 1945 have understood a central task of international law to be the maintenance of that peace, have developed a raft of legal practices designed to limit the severity of such conflict, to manage its consequences, and to prevent its occurrence. One such practice is the international practice of constitution-making. That practice — the practice of reshaping the legal order of a state through the revision of constitutions, or the making of new ones — has occupied the imagination and vocabulary of international law and lawyers over the past three decades. Scholars have commented that ‘[c]onstitution-making, traditionally the hallmark of sovereignty and the ultimate expression of national self-determination, is increasingly becoming an object of international law’.² So too has the promotion of international peace and

¹ This work is drawn from my MPhil thesis completed at Melbourne Law School with the Laureate Program in International Law and with the support of a Melbourne Research Scholarship. I am grateful to Anne Orford and Hilary Charlesworth for their supervision and guidance as well as to Antony Anghie, Gunter Frankenberg, Dylan Lino, Megan Donaldson, Kathryn Greenman and Ntina Tzouvala for comments on the thesis or on this article in draft. Competing interests: The author declares none.

² Philipp Dann and Zaid Al-Ali, ‘Internationalized Pouvoir Constituant: Constitution-Making under External Influence in Iraq, Sudan and East Timor’ (2006) 10 *Max Planck Yearbook of United Nations Law* 423, 424. See also H Ludsin, ‘Peacemaking and Constitution Drafting: A Dysfunctional Marriage’ (2011) *University of Pennsylvania Journal of International Law* 239; Emily Hay, ‘International(ized) Constitutions and Peacebuilding’ (2014) 27 *Leiden Journal of International Law* 141; Catherine Turner and Ruth Houghton, ‘Constitution-Making and Post-Conflict Reconstruction’ in Matthew Saul and James A Sweeney (eds), *International Law and Post-Conflict Reconstruction Policy* (Taylor & Francis, 2015) 119; Vijayashri Sripathi, *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands* (Oxford University Press, 2020). In this article, I focus mainly on constitution-making as a technique of peace and security rather than its broader set of entanglements with the development project: cf Sripathi, *UN Auspices* (n 2) 358.

security through constitution-making become a more explicit concern of international diplomatic, economic and military interventions in the decolonised world.

International institutions, organisations, and advisors have, since the post-Cold War period, been involved in a number of national constitution-making processes. Practices framed through the language of constitution-making may take the form of some advice or assistance to that work, requirements placed on that work, or in some cases direct administration of that work. To varying degrees, the language of international law also shapes and makes demands of these processes, articulates justifications for practices of sanction or intervention that enable them, or seeks to preserve their outcome through internationalised mechanisms for protection and supervision.³ Constitution-making has been understood as part of a suite of solutions that afford an opportunity to end or prevent conflicts occurring within states, to enable peaceful political transitions, or to consolidate peace.⁴ Although some forms of constitution-making, such as those under internationally-sanctioned forms of military occupation or direct administration of populations, have declined from the second decade of the twenty-first century, this has not led to a cognate turn away from constitution-making as an activity or framing device for the work of international institutions.⁵ Instead, in 2020, the Office of the Secretary-General issued a new set of guidelines for the involvement of United Nations officials in constitution-making processes, including as an aspect of ‘conflict prevention or resolution efforts’, described as ‘derived from lessons learned from UN constitutional assistance experiences’.⁶ Scholars have observed that international institutions have continued to exhibit ‘an apparently countervailing rise in faith in constitutions and constitution-making’ as a means of promoting, managing or understanding political transitions.⁷

This articulation of constitution-making as part of the work of international institutions represents a new approach to the idea, hard-won by newly independent states during the period of decolonisation, that international law should recognise ‘the freedom of choice of the political, social, economic and cultural system of a State’, and realise that freedom through a commitment to the principles of self-determination and non-intervention.⁸ As I will argue, it does so through positioning ‘local ownership’, facilitated by international actors within the

³ Dann and Al-Ali (n 2) 424; Christine Bell, ‘Introduction: Bargaining on Constitutions — Political Settlements and Constitution-Building’ (2017) 6 *Global Constitutionalism* 1, 18.

⁴ World Bank Group and United Nations, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (The World Bank, 2018) 145. Although much of the literature approaches this question using the frames of peace-making, *lex pacificatoria*, occupation, or transitional justice, I focus instead on constitution-making as a technique.

⁵ On constitution-making under international administration see Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and Statebuilding* (Oxford University Press, 2004) ch 7; Anne Orford, ‘International Territorial Administration and the Management of Decolonization’ (2010) 59 *International and Comparative Law Quarterly* 227.

⁶ *Guidance Note of the Secretary-General on United Nations Constitutional Assistance* (September 2020). Previous notes included the UNDP *Guidance Note on Constitution-Making Support* (2014) and the UN Secretary-General’s *Guidance Note on United Nations Assistance to Constitution-Making Processes* (2009).

⁷ Bell, ‘Bargaining on Constitutions’ (n 3) 18. See also Berghof Foundation and United Nations Department of Political and Peacebuilding Affairs, *Constitutions and Peace Processes: A Primer* (Berghof Foundation, 2020); Cheryl Saunders, ‘International Involvement in Constitution Making’ in David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar, 2019) 69.

⁸ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, 133 [263].

field of international constitution-making, as a method of realising this principle and of facilitating political freedom. The idea that international actors, institutions or laws should have some formal role to play in defining the processes and norms of constitution-making thus represents a significant expansion of the disciplinary sensibilities of international law in and of itself, aside from more substantive debates over what that process should look like and what norms it should reflect. Yet scholarly recognition that constitutions are defined as much by the outside world as the interior life of the state (and that neither intellectual influence nor social reality can be contained by such categories) has not resolved the normative questions of imposition and independence that are raised by an international order in which power is unequally distributed, to which the principle of self-determination has been understood to attend.⁹ Nor has it resolved the question of the relationship of international constitution-making to economic structures and material interests, a question that is also implicated in the principle of self-determination but which international institutional actors have not centred as a concern.¹⁰ As the influence of Western states declines relative to other global powers, there is significant uncertainty over how this legal legacy will be taken up and interpreted in new projects of regional or geopolitical ordering.¹¹

In this article, I argue that the politics, practices and teleology of international constitution-making, as currently articulated by key institutional actors and scholars, evidence what I term a selective technicity: an interest in engaging with local politics and local questions of distribution, but a reluctance to consider the implications of international economic structures, material interests, and their relationship to written constitutions, for that politics and for that distribution. I further argue that while part of this reluctance can be understood as the product of accounts of the field by scholars in the present (on whose work international institutions have drawn) those accounts, and their reception as authoritative, have been enabled by scholarly, theoretical, methodological, and political choices made by scholars in the past. These choices are what I term here the ‘postwar inheritance’. Tracing this postwar inheritance, I argue, enables us to ask better questions about how we might transform this field for our present moment and for the set of intersecting crises with which our world is faced.

The article proceeds as follows. I begin in part II by outlining the landscape of international constitution-making as it is found in the documents of international institutions, its relationship to state and regional actors and to scholarly production, and its significance for the discipline of international law. Here I focus particularly on the guidelines and policies issued by the Secretary-General, by key agencies within the United Nations, and by the World Bank.¹² I show that, in conversation with scholars, these institutions have developed a broad

⁹ On constitutional orders as ‘permeable’ see Jacco Bomhoff, David Dyzenhaus and Thomas Poole (eds), *The Double-Facing Constitution* (Cambridge University Press, 2020).

¹⁰ See below part IIA. On the complex and shifting relationship between national self-determination and opposition to international domination, see Deborah Whitehall, ‘A Rival History of Self-Determination’ (2016) 27 *European Journal of International Law* 719.

¹¹ See Anne Orford, ‘Regional Orders, Geopolitics and the Future of International Law’ (2021) 74 *Current Legal Problems* 149.

¹² Although it is not the object of this article to comprehensively map current practice, a fuller description would include the work of regional organisations — in particular the African Union and the Organisation of American States.

and generally shared account of what the practice of ‘constitution-making’ entails, and that this account assists in sustaining a particular interpretation of international law and of local ownership. I then explore the way that scholars within the field have retrieved the history of the postwar constitution-making projects in order to set out particular accounts of the practices and teleology of the field. The framing of many of these projects as contextually informed has meant that it can be difficult to gain a sense of the current politics of the field, or in other words, what is at stake in the question of whether international institutions adopt the vocabularies and techniques of constitutionalism. The predominantly pragmatic way of thinking and theorising about international forms of constitution-making that has been adopted by scholars within the field has led to a sense that the problems of the field are procedural and contextual in nature, rather than that there might be some limit to the forms and vocabularies of constitution-making that the discipline has inherited, or that they might impede international lawyers and constitutional theorists in asking different questions about the relationship of law to violence and conflict within the decolonised world. Placing these accounts in conversation with critiques of these practices and their relationship to structural concerns therefore assists in describing the shape of the field in its present form.

In part III, I turn to the histories and theories of international constitution-making developed in the postwar period in order to illustrate the particular tradition of constitutionalism that they represent, developed by scholars within the United States and in conversation with German and Jewish emigré scholars, and which I suggest continues to be significant for international lawyers and institutions in the present. I begin by exploring a foundational theoretical and methodological debate between Franz Neumann and Ernst Fraenkel. I then continue with the accounts of constitution-making and their relationship to the international found in the work of the international lawyer Quincy Wright and the constitutional scholar Carl Friedrich. In retrieving their work, I show that the questions at stake in the formation of that tradition included the understanding of constitutionalism as limited to a set of formal practices rather than the relationship of those practices to material questions, its self-containment as a project and field of social-scientific study, and its relative separation from projects of global economic ordering.¹³ As I discuss in part II, it is this orientation, or loose set of what I term epistemic boundaries, that has helped to make accounts of the practices and teleology of the field possible and to insulate those accounts from the broader questions being raised by other scholars. I then show, in part IV, and by particular reference to the principle of local ownership, how this recovery can assist us in retheorising the terms on which international constitution-making is conducted, and to move toward reshaping that project for the present. I argue that

¹³ I do not, however, argue that this is the only possible history or ‘origin’ of international constitution-making practices. Instead, I am working with Anne Orford’s suggestion that international legal scholars should take ‘responsibility for our own creativity and generativity in the project of making the law and making its history’: Anne Orford, *International Law and the Politics of History* (Cambridge University Press, 2021) 9–10. On alternative possible histories see, eg, Kerry Rittich, ‘Occupied Iraq: Imperial Convergences’ (2018) 31 *Leiden Journal of International Law* 479, 499 (on Eastern Europe); Cait Storr, *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (Cambridge University Press, 2020); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007) ch 3 (on the League mandates); Sripathi, *UN Auspices* (n 2) 152ff (on UN trusteeship); and Asli Bâli and Aziz Rana, ‘Constitutionalism and the American Imperial Imagination’ (2018) 85 *University of Chicago Law Review* 257 (on constitutionalism as a project of US elites).

our present moment invites both international lawyers and constitutional theorists to reconsider the postwar inheritance, and that the account I present here opens up new ways of thinking about what it might mean for constitutional orders to be responsive to social demands.

II. THE LANDSCAPE OF INTERNATIONAL CONSTITUTION-MAKING

In this part, I explore the articulation of constitution-making as an international legal practice of peace and security over the last three decades, and explain how this practice is conceived of and justified in the policy documents of international institutions. The discipline of international law has witnessed a long history of international practices of constitution-making, both in the aftermath of colonial war or violence as well as during the period of formal decolonisation.¹⁴ Yet the present period is distinctive both in terms of the professionalisation of these practices and their formalisation as part of the work of international institutions. In 2013, Nicolas Haysom, then- Deputy Special Representative for the UN Secretary-General for Afghanistan (Political Affairs), noted ‘a growing appreciation of both constitutional design as well as constitution-making processes in laying a foundation for inclusive, stable democracies’.¹⁵ As I describe below, international institutions, in collaboration with scholars, states, and non-governmental organisations, have worked to develop guidance for this practice, to find ways to share comparative knowledge, and to create a distinct and recognisable field oriented toward the possibility of these practices in the future.

I begin by offering an account of that field and its understanding of the practice of constitution-making as it has developed over the past three decades. I show that the authority of international actors to conduct that practice is currently understood through the framework of local ownership, but that the specific way that those constitution-making practices are understood has led to an emphasis on political inclusion rather than social ownership or economic self-determination. I argue that this understanding of constitution-making is symptomatic of deeper tensions within the field, and that these tensions can be understood through tracing the role of history in the field today. Prominent scholars have drawn on the history of the post-war constitution-making projects in Germany and Japan in order to offer an account both of the teleology of the field and of the practices with which it should be concerned. At the same time, critiques from international lawyers at least partly concerned with the relationship of international constitution-making to material interests and economic structures were not evidently received as relevant for the field. My argument here is that history performs a dual role: first, a visible retrieval of this history in order to perform the work of reproducing the field in the present; and second, the more diffuse but nonetheless significant work of how the epistemic boundaries of the field have been oriented in the past that helps that retrieval to make sense (the subject of inquiry in part III). Both this retrieval as well as its theoretical

¹⁴ For example, the institutional settings noted in n 13, as well as practices of constitution-making by the British in mandatory Iraq in the 1920s and after the end of formal empire in Africa, especially during the 1950s and 1960s, by the United States in Cuba at the turn of the twentieth century or in the Philippines in the 1930s, or by the Soviet Union in the 1920s.

¹⁵ United Nations, *UN Constitutional*, Issue 1 (2013/2014) 2.

antecedents, I suggest, are critical to grasping the politics of constitution-making as an international practice, as well as to understanding its current limits.

A. *Building a Technique: Institutions, Scholarship, and the Projects of International Law*

The reports and policy documents of international institutions and non-governmental organisations from the last three decades depict constitution-making as an increasingly central field of international engagement.¹⁶ International actors understand constitutions to be not only the founding instrument of the modern nation-state, but as a key means through which law acts to distribute power and wealth and to structure the politics of a society. As such, they are concerned not only with the outward-facing aspects of the constitution but how they structure the social relations and market orders within a state. Released in 2020, the latest Guidance Note from the Secretary-General on United Nations Constitutional Assistance (‘Guidance Note’ or ‘Note’) describes a constitution as ‘a state’s foundational legal instrument establishing rights, institutions and processes that guide how the state functions and power and resources are shared’.¹⁷ For this reason, the Guidance Note positions involvement by United Nations actors and their partners in constitution-making as significant for several different fields of international engagement, including state-building, conflict prevention and resolution, as well as the promotion of human rights and sustainable development. According to the Note, constitution-making is a ‘central aspect’ of this landscape and ‘UN engagement in, and assistance to, constitution making is increasingly a core component of ... strategies’ designed to secure peace.¹⁸

This emphasis on international assistance to constitution-making, as a means of achieving international peace and security, has been facilitated by the production of expert knowledge and academic work on the practice, design and theory of constitution-making.¹⁹ International institutions collaborate with ‘a wide network of academics and practitioners’ which they may, in a given situation, identify as offering relevant expertise to actors engaged in a constitution-making process within a state.²⁰ Within the academy, constitution-making projects and initiatives have proliferated, the aims of which include the provision of expert advice and training, and the promotion of dialogue between scholars and practitioners of

¹⁶ See, eg, notes cited at n 6, as well as International IDEA, *Constitution-Building after Conflict: External Support to a Sovereign Process* (May 2011); Rhodri C Williams, *Constitutional Assistance and the Rule of Law in Post-Conflict Transitions: An Overview of Key Trends and Actors* (Folke Bernadotte Academy, 2013), ‘Foreword’, 9 (written by FBA Director General Sven-Eric Söder); Andy Carl, *Constitution Making in Contexts of Conflict: Paying Attention to Process* (Berghof Foundation, 2019); Michele Brandt et al, *Constitution-Making and Reform: Options for the Process* (Interpeace, 2011).

¹⁷ *Guidance Note* (n 6).

¹⁸ *Ibid.* See also Bell (n 3) 19, arguing that constitutions have an ‘implicit theory ... of conflict resolution’; Al-Ali (n 89) 91: ‘External actors should ... always work on the basis that poor governance represents as important a threat to peace as the failure to guarantee equality or to guarantee other fundamental rights under a constitution’.

¹⁹ See Sara Kendall, ‘Inscribing the State: Constitution Drafting Manuals as Textual Technologies’ (2020) 11 *Humanity* 101.

²⁰ *Constitutional Focal Point* (n 35).

constitution-making, with or without international institutional support.²¹ Prominent academics in constitutional law have also lent their expertise, and the normative authority of their discipline, to international institutions and states engaged in projects of constitution-making indirectly, through the production of reports and resources,²² and more directly through consulting work or engagement with international actors or domestic constitution-making bodies.²³ Non-governmental organisations working in this area have likewise diverted increased resources to both constitution-making research initiatives and the development of a broader ‘community of practice’ within which ideas and knowledge about the constitution-making process can circulate.²⁴ Broader changes within the academy, including the growing membership and activity of international societies and journals of public law, and the tendency for increased collaboration across national and regional boundaries have also facilitated a complex set of normative borrowings and the development of a specifically internationalist (as opposed to comparative) outlook on constitutional law. Christine Bell has described this outlook in terms of a conversation about ‘whether and how international law regulates polity formation and the exercise of constituent power at the domestic level’.²⁵

The questions of what a ‘constitution’ consists of, and where it is to be found, have long been deeply contested among scholars.²⁶ The consolidation and professionalisation of constitution-making as an international field of engagement, however, has meant that international actors and policy documents have articulated a flexible but nonetheless distinct and broadly shared understanding of what the practice of ‘constitution-making’ entails. As used by international institutions and actors, this language refers to the preparation of a new constitution as well as the amendment or significant reinterpretation of an existing constitution. As such, it encompasses not only the drafting process of the written document of the constitution but also its institutional implementation.²⁷ It also includes consultation,

²¹ See, eg, International IDEA, ‘What We Do’ <<https://www.idea.int/our-work#whatwedo>>; Max Planck Foundation for International Peace and the Rule of Law, ‘Projects’ <<http://www.mpfpr.de/projects/>>; Constitution Transformation Network, ‘What Do We Do?’ <<https://law.unimelb.edu.au/constitutional-transformations#Whatdowedo>>; The Center for Constitutional Transitions, ‘Our Work’ <<http://www.constitutionaltransitions.org/what-we-do-2/>>. On the strikingly ad hoc nature of some scholarly engagements, see the account of the constitution-making process in Tunisia in Alicia Pastor y Camarasa, ‘Demystifying How Constitutions are Made: External Actors’ Modes of Actions in the 2014 Tunisian Constitution’ (2022) 1 *Michigan Journal of Law and Society* 51, 74.

²² On the production of constitution-building manuals or handbooks, see Kendall (n 19). Cf Saunders (n 7) 72, 87–8 (critiquing the idea that constitutional assistance can be understood as ‘technical’, and the language of ‘best practice’).

²³ Scholarly or first-hand accounts of this involvement include Coel Kirkby, ‘Commonwealth Constitution-Maker: The Life of Yash Ghai’ in Richard Drayton and Saul Dubow (eds), *Commonwealth History in the Twenty-First Century* (Palgrave Macmillan, 2020) 61; Pastor y Camarasa (n 21) 75, 96–7; Noah Feldman, ‘Imposed Constitutionalism’ (2005) 37 *Connecticut Law Review* 857.

²⁴ See discussion at Williams (n 16) 47.

²⁵ See Christine Bell, ‘What We Talk About When We Talk About International Constitutional Law’ (2014) 5 *Transnational Legal Theory* 241, 266. David Kennedy has argued, however, that although this general distinction can be put in terms of a comparative project that emphasises difference over an international project that emphasises order, the two projects have often had more of a symbiotic than an oppositional relationship: David Kennedy, ‘The Disciplines of International Law and Policy’ (1999) 12 *Leiden Journal of International Law* 9, 62ff.

²⁶ For recent work on these topics see Bomhoff, Dyzenhaus and Poole (n 9); Marco Goldoni and Michael Wilkinson, ‘The Material Constitution’ (2018) 81 *Modern Law Review* 567.

²⁷ Some reports use the language of constitution-building to describe this broader concept. See *Primer* (n 7) 26.

engagement and in some cases, electoral approval of a national public in respect of that document and its projected operation, although organisations caution against drawing an equivalence between any particular moment and a constitutional mandate.²⁸ Given the close relationship that these actors have articulated since the turn of the millenium between peace and security and constitution-making, particular attention has been paid to aspects of the constitution that might be formalised as part of peace negotiations.²⁹ The 2020 Guidance Note sets out this understanding as follows:³⁰

The UN has a broad understanding of constitution making that encompasses not only the drafting or amending of a constitution in formally established processes, but also, for example, decisions about constitutional issues that may occur relatively early in a peace process or when transitional arrangements for exercising public power and basic principles for governance are agreed. It also includes implementation activities in the period following constitutional adoption; for example, establishing and setting up constitutionally mandated institutions or the promulgation of constitutionally mandated laws.

Early instances of this practice were undertaken in specified contexts under Security Council authorisation, with the first often being dated to the UNTAG operations in Namibia at the close of the Cold War, and subsequent iterations conducted as an aspect of the experiments in ‘international transitional administration’ in the two decades thereafter.³¹ From at least 2015, international institutions began to argue for an extended timeline for international involvement in constitution-making, both before and after conflict. This corresponded with a broad approach to the peace-related work of international institutions as ‘need[ing] to be liberated from the strict limitation to post-conflict contexts’ in order to facilitate a more holistic approach to securing peace.³² The 2018 World Bank-United Nations report ‘Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict’, relying on the work of legal scholars, argued that ‘[t]ranslating a political settlement into a more sustainable process of constitutional change, institutional reform, and modified legal frameworks [wa]s complicated and often require[d] multiple iterations’.³³ Accordingly, it called for an increased emphasis on the surveillance and monitoring of constitutional implementation, as well as the initial period of constitution-making after conflict, suggesting that the process may require ‘sustained, long-term attention and periodic renegotiation’.³⁴ The existence of constitution-making as a broader field of practice now involves a wide range of international actors, both within and outside the UN

²⁸ See, eg, International IDEA, *Constitution-Building after Conflict* (n 16) 11; Williams (n 16) 15.

²⁹ See, eg, Sujit Choudry, ‘Civil War, Ceasefire, Constitution: Some Preliminary Notes’ (2012) 33 *Cardozo Law Review* 1907, 1921.

³⁰ *Guidance Note* (n 6).

³¹ The UN Peacekeeping website states that ‘[t]he UNTAG operation [in Namibia] had many novel features and constituted an evolutionary step beyond the United Nations traditional role of peacekeeping and the monitoring of self-determination processes’: United Nations, ‘Namibia: UNTAG’ <<https://peacekeeping.un.org/sites/default/files/past/untagFT.htm>>. On ITA as a phenomenon see generally Orford, ‘International Territorial Administration’ (n 5).

³² *The Challenge of Sustaining Peace: Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture* (29 June 2015) 17.

³³ *Ibid* 144, citing Christine Bell and Kimana Zulueta-Fulscher, ‘Sequencing Peace Agreements and Constitutions in the Political Settlement Process’ (International IDEA, 2016).

³⁴ *Ibid* 144, 278ff.

system. Within the UN system, these actors are coordinated through the UN Department of Political and Peacebuilding Affairs' (DPPA) Constitutional Focal Point, tasked with coordinating and sharing information among different UN agencies and entities through members of a working group.³⁵ The Focal Point also aims to 'strengthen[] UN relationships with external actors providing constitutional assistance'. In respect of actors outside the UN system, the Guidance Note takes the position that 'national actors' should 'play the main coordination role'.³⁶ Nonetheless, it suggests that the UN may act to facilitate the involvement of both regional organisations and foreign states in constitution-making processes.³⁷

Early justifications for the involvement of international actors in constitution-making included encouraging adherence to international legal obligations and standards, especially human rights norms.³⁸ But beyond substantive norms, the relationship between international law and constitution-making has in the past two decades been articulated centrally in the language of procedure, and the potential for a guided constitutional process to transform societies affected by conflict.³⁹ The 2020 Guidance Note focuses on support in the identification of a structure and timetable for constitution-making processes, the building of inclusive processes and public consultations, as well as the implementation of procedural rules.⁴⁰ As a question of process, international institutions have emphasised that the drafting and consultation period should be understood as an 'exceptional opportunity for a state to create a common vision of its future', with consequences for prospects of peace into the future.⁴¹ This is described as a 'transformational exercise ... an opportunity for people to engage in a healthy debate on the nature of the state and state power ... experience democratic governance practices and learn about relevant international principles, practices and standards'.⁴² Scholars have suggested that longer time frames for constitution-making may, depending on the political situation, be more beneficial, since they are thought to enable a more deliberative and inclusive process of negotiation, and the building of political relationships that engage previously

³⁵ The Focal Point sits within the Mediation Support Unit in the Policy and Mediation Division of the UN Department of Peacebuilding and Political Affairs (DPPA). As of 2019, the Focal Point 'leads an informal coordination structure comprised of DPPA, DPO, OHCHR, UNDP, UNICEF, and UN Women dedicated to information sharing and making UN constitutional support to Member States more effective and efficient': *DPPA Constitutional Focal Point: Constitutional Assistance and Support Provided by DPPA* (January 2019) <<https://peacemaker.un.org/node/3600>>. See also *Guidance Note* (n 6) 7–8 (referring to the inter-agency Constitutions Working Group).

³⁶ *Guidance Note* (n 6).

³⁷ *Ibid* 5. Examples of UN collaboration with state actors include the involvement of Australian Aid with UNDP in Mindanao, or the Coalition partners with UNAMI in Iraq. Regional organisations such as the African Union, European Union and Organisation of American States have also developed trading, financial and political sanctions regimes which may apply in the event of changes of government deemed to be unconstitutional, and which scholars have articulated as an aspect of this broader field of practice: see Micha Wiebusch, 'The Role of Regional Organizations in the Protection of Constitutionalism' (International IDEA Discussion Paper 17/2016).

³⁸ See Jamal Benomar, *Constitution-Making and Peace-Building: Lessons Learned from the Constitution-Making Processes of Post-Conflict Countries* (United Nations Development Programme, August 2003) 14. In the words of the Guidance Note, the UN is required to 'consider appropriate steps to share its observations and engage with state authorities and other national actors when there are opportunities to strengthen' commitments to international norms and standards (n 6). See also Office of the High Commissioner of Human Rights, *Human Rights and Constitution-Making* (2018).

³⁹ Saunders (n 7) 84; Brandt et al (n 16).

⁴⁰ *Guidance Note* (n 6).

⁴¹ *Ibid*.

⁴² *Ibid*. See also Bell (n 3) 19–20. I return to this in Part IV below.

marginalised groups in society.⁴³ In this context, expert assistance is thought to play a key role through providing ‘support on transitional political arrangements, designing constitutionmaking processes, engaging the public and managing public consultation, constitutional design and management of constitution-making bodies’.⁴⁴ Early iterations of policy proposals for international constitution-making imagined this as a process of ‘civic education’ through which local publics were taught to translate political aspirations into constitutional forms.⁴⁵

This shift to process can be understood as a means through which international institutions understand the legality of constitution-making practices. As explained in official documents, the principle of ‘local’ or ‘national’ ownership is the idea that external actors ‘refrain from imposing solutions’ but instead act as far as possible to facilitate the choices of local actors.⁴⁶ In that sense, ‘local ownership’ can be understood as a gloss on, or interpretation of, the international legal principle of self-determination.⁴⁷ Scholars and international institutions involved in the project of constitution-making chose to give the question of local ownership shape and substance by turning to the inclusion of particular social groups — ‘social, cultural, religious and minority groups, as well as women, youth, civil society groups and professional organizations’ — within constitution-making processes.⁴⁸ In practice, this has often meant a focus on the identification of relevant marginalised groups, especially women, and on the creation of consultation mechanisms or the preservation of space for their formal representation in constitution-making processes.⁴⁹ It has also meant the taking into account of

⁴³ See *Primer* (n 7) 35.

⁴⁴ *Guidance Note* (n 6).

⁴⁵ Benomar (n 38). See also Tom Ginsburg, ‘Constitutional Advice and Transnational Legal Order’ in Gregory Shaffer, Tom Ginsburg and Terence C Halliday, *Constitution-Making and Transnational Legal Order* (Cambridge University Press, 2019) 26, 38.

⁴⁶ *Primer* (n 7) 17. Although this recognition of the importance of local ownership dates back at least to the first Guidance Note from the Secretary-General in 2009, it was strongly reaffirmed in the 2020 restatement.

⁴⁷ *Charter of the United Nations* art 1(2); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA, UN Doc A/RES/2625(XXV). For contemporary commentary on this relationship see Matthew Saul, ‘Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement’ (2011) 16 *Journal of Conflict and Security Law* 165.

⁴⁸ *Primer* (n 7) 64–6. See also Sripathi, *UN Auspices* (n 2) 346ff (noting the emphasis on inclusion of women, minorities and youth as animating international forms of constitution-making); Clare Castillejo, ‘Inclusive Constitution Making in Fragile and Conflict-Affected States’ (Norwegian Centre for Conflict Resolution, 2018). UN agencies and international constitutional advisors have produced guidance for constitution-makers and mediators based on empirical claims that processes that are more inclusive along these lines are ‘more likely to identify and address the root causes of conflict’: *Primer* (n 7) 17; *United Nations Guidance for Effective Mediation* (New York, 2012).

⁴⁹ A useful set of examples is at *Primer* (n 7) 64–5. For UNSC resolutions that the representation of women in peace processes is an essential means for promoting peace and security, see UNSC Res 1325 (31 October 2000); UNSC Res 2493 (29 October 2019). See generally Tiina Pajuste, ‘Inclusion and Women in Peace Processes’ in Marc Weller, Mark Retter and Andrea Varga (eds), *International Law and Peace Settlements* (Cambridge University Press, 2021). For critical accounts of international practices nominally designed to facilitate the inclusion of women, see Turner and Houghton (n 2) 136 (Somalia); Hilary Charlesworth, ‘The Constitution of East Timor’ (2003) 1 *International Journal of Constitutional Law* 325, 332. See also Hart’s explicit reference to the poor as among those social groups excluded from constitution-making processes, which has not been widely taken up in the institutional literature: Vivien Hart, ‘Constitution-Making and the Right to Take Part in a Public Affair’ in Laurel Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (US Institute of Peace Press, 2010).

such marginalisation when offering a range of ‘design options’ for new constitutional settlements, leading to particular emphasis on ‘decentralised’ models of governance such as federalism or consociationalism that claim to facilitate the dispersal of power along these axes of exclusion.⁵⁰ Through the design and supervision of processes for drafting and adoption, international advisors understand themselves as facilitating the inclusion of particular aspects of society that are understood as having been excluded from previous political settlements. Institutional mechanisms by which international actors are able to facilitate this inclusion, such as quotas of representation in constitutional assemblies, are invoked as a rationale for international presence and involvement in constitutional processes.⁵¹ In line with the idea that inclusion provides a practical means of fulfilling an in-principle commitment to local ownership, the 2020 guidance note identifies the facilitation of this participation in the constitutional process as the ‘main goal’ of international actors.⁵²

Centering the principle of local ownership can also be understood as a response to concerns regarding constitutional imposition. Scholars have observed that there is an ‘obvious tension’ between an international mandate for constitution-making processes, on the one hand, and local ownership of the product of any such process.⁵³ Official institutional documents therefore emphasise the importance of adopting a contextual rather than technical approach, and urge a full assessment of the historical and legal situation in a given state before engaging with the modes and substance of constitution-making.⁵⁴ Circulars to UN officials engaged in processes of constitution-making emphasised that it was the role of the constitutional advisor to engage with and draw upon the knowledge of local actors in order to properly understand the varying ‘pathologies’ of different states for which well-selected techniques of constitution-making could be the cure.⁵⁵ This emphasis is also found in scholarly literature that depicts the endeavour of constitution-making as flexible, rather than normatively bounded, and responsive to different forms of knowledge and political demands that might be posed by peoples engaged in political struggle.⁵⁶ As a result, the figure of the constitutional advisor has come to occupy a significant role in the field, as well as within the documents and policies of international institutions. UN guidance now emphasises the assessment of context as determinative of threshold questions regarding the involvement of international institutions, as well as the nature and extent of that involvement.⁵⁷

⁵⁰ See, eg, Asli Ü Bâli, ‘Artificial States and the Remapping of the Middle East’ (2020) 53 *Vanderbilt Journal of Transnational Law* 405; Darin E W Johnson, ‘Conflict Constitution-Making in Libya and Yemen’ (2018) 39 *University of Pennsylvania Journal of International Law* 293, 329ff.

⁵¹ *Primer* (n 7) 64–6.

⁵² *Guidance Note* (n 6). A tension remains, however, between inclusion as a path to broad-based democracy, and the power imbalance between social groups that is depicted as requiring a certain level of concessions to existing elites. See Saunders (n 7) 83; *Primer* (n 7) 27.

⁵³ Ginsburg, ‘Constitutional Advice’ (n 45) 43. See also Turner and Houghton (n 2).

⁵⁴ *Primer* (n 7) 14, 74.

⁵⁵ Sumit Bisarya, ‘Unpacking Context’ in United Nations, *UN Constitutional*, Issue 5 (2016) 6.

⁵⁶ Scholars have urged international actors to adopt a ‘sensitivity to context’ and to create greater space for politics within constitution-making processes: Hay (n 2) 150. See also Turner and Houghton (n 2); Saunders (n 7) 89. This, too, is reflective of broader trends in post-conflict statebuilding literatures: see Charlesworth, Bowden and Farrall (n 79).

⁵⁷ *Guidance Note* (n 6).

As international lawyers have long observed, any emphasis on ‘local’ ownership or participation by international actors that does not accept that governments are representative of the people they govern necessarily entails the question of how to define those local actors whose ownership is desired, and the form that ownership might take,⁵⁸ as well as its relationship to broader questions raised through the principle of self-determination. This is particularly the case in the context of constitution-making as a technique for realising international peace and security, and the disparity in resources, institutional capacities, and military power between international and local levels, and as between local groups, with which it is often associated. Much is therefore at stake in whether the activity of international constitution-making is characterised as a question for international law or as a question for other kinds of law. Both more committed and more critical accounts of the activity of international constitution-making often frame it as a transnationalised practice rather than an international one.⁵⁹ Yet international institutions that engage in this work are founded through treaties relying on the principle of state consent, a principle that remains foundational to international legal thought and practice. Legal scholars’ understanding of the nature, history, and present role of the United Nations also remains indelibly linked to the promise of self-determination: the ability of peoples to choose the legal, political and economic forms of government under which they live.⁶⁰

In emphasising the question of local ownership, as well as through stating that United Nations involvement in or assistance to constitution-making processes ‘will normally take place based on a Security Council or other UN legislative mandate or in response to a request from a national government’, official guidance can be understood as remaining concerned with these sources and boundaries of international authority.⁶¹ Yet over the past several decades, the ‘move to institutions’ and the gradual professionalisation and specialisation of fields of international practice means that much of the shape of that activity has come to be addressed as a question for expert vocabularies rather than a question for peoples.⁶² The articulation of constitution-making as a field of practice and scholarship also reflects the maintenance by United Nations officials of the standing capacity and institutional framework for engaging in these operations. This is a significant development, one reflecting what Anne Orford has described as the expansion of ‘forms of executive action undertaken by international actors in the decolonised world’.⁶³ In such a context, vocabularies shaped through the landscape of institutional and professional practice may come to guide scholarly interventions and to inflect legal interpretation of norms derived from treaty and custom. Here, I suggest, the particular vocabulary that is shaping the interpretation of international law and of self-determination is

⁵⁸ See, eg, Anne Orford, *Reading Humanitarian Intervention* (Cambridge University Press, 2003) 147–57.

Constitutional scholars too have in recent decades tended to observe that the ‘people’ for whom a constitution operates as legal compact are better understood as forged through the constitution rather than pre-existing it.

⁵⁹ Gregory Shaffer, Tom Ginsburg and Terence C Halliday, *Constitution-Making and Transnational Legal Order* (Cambridge University Press, 2019); Günter Frankenberg, ‘Constitutional Transfer: The IKEA Theory Revisited’ (2010) 8 *International Journal of Constitutional Law* 563, 572.

⁶⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, 133 [263]; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA, UN Doc A/RES/2625(XXV).

⁶¹ *Guidance Note* (n 6).

⁶² See David Kennedy, ‘The Move to Institutions’ (1987) 8 *Cardozo Law Review* 841.

⁶³ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011) 5.

the vocabulary of constitution-making, and the practices with which that vocabulary is currently associated.

Asking what that vocabulary entails, and how it is shaping interpretations of self-determination and the scope of international authority, is especially timely given recent expression of the project's relationship with the international financial institutions. The expansion in the scope and duration of constitution-making projects, as an aspect of the post-Cold War emphasis on achieving security in the decolonised world through humanitarian and development activities, corresponded with an explicit emphasis on collaboration with international financial institutions. International involvement in constitution-making, as an integral part of the preventive approach to conflict expressed through the language of 'sustaining peace' jointly published in 2018 by the United Nations and the World Bank, sat alongside a focus on foreign investment and development aid, the potential contribution of private actors to peace processes, the greater participation of women and youth in peace processes, and the need for security sector reform.⁶⁴ In part, this collaboration between the UN and the World Bank was framed as a means of addressing demands for additional funding and capacity.⁶⁵ In part, however, it reflected a shift in justifications for international peacebuilding more generally. Calls to consider constitution-making as a strategy for international peace and security here stemmed from the realist assertion that conflict might be more a question of contemporary struggles over 'resources' than 'historic' tensions between social groups.⁶⁶ Aspects of these policy documents noted the concerns with corporate trading activity and land acquisition in the agricultural and mining sectors that had led to the displacement of peoples.⁶⁷ They also drew on scholarship arguing that governments that had been able to deliver forms of redistribution had prevented the recurrence of conflict.⁶⁸

This acknowledgment led to a tentative embrace of certain forms of redistribution as a part of international assistance to constitution-making. Unlike previous official documents, the 2018 report emphasises the importance of constitutional structures not only as a mechanism for inclusion but as a means through which that inclusion might deliver a more equal and politically acceptable distribution of wealth. It positions constitutional techniques for the dispersal of political power through law, including devolution, decentralisation and federalism, not purely as exercises in sub-national self-determination but as a means by which a 'balance of power' can be produced between different groups while also enabling 'goods and services' to be adequately delivered by a competent authority.⁶⁹ This same emphasis on the centrality of wealth and the distribution of social goods to the persistence of conflict can be seen in the 2020 Guidance Note, which describes the constitution as 'inextricably linked' to questions about, *inter alia*, 'the allocation of resources'.⁷⁰ Here too, constitution-making is depicted as a means

⁶⁴ *Pathways for Peace* (n 4).

⁶⁵ *Ibid.* For pioneering work on the relationship of the IFIs to the work of international peace and security see Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443.

⁶⁶ See *Pathways for Peace* (n 4) 144; cf Benomar (n 38).

⁶⁷ *Pathways for Peace* (n 4) 91, 148–9.

⁶⁸ *Ibid.* 21.

⁶⁹ *Pathways for Peace* (n 4) 146.

⁷⁰ *Guidance Note* (n 6). See also *Primer* (n 7) 5–6, 20–1.

of ordering conflict-afflicted societies that have been unable to resolve problems of material inequality and resource capture, understood as the ‘root causes of the violent conflict’.⁷¹

Despite this distributional shift, theoretical understandings of what the constitution *was*, and the practices that should be understood as constituting it, have remained largely consistent with previous articulations of constitution-making as political process, written document, and institutional implementation. Put differently, unlike the understanding of local ownership as political inclusion and political freedom that has been at the heart of scholarly and institutional descriptions of what constitution-making *is* as a practice (and how it should influence understandings of international authority), the focus on redistribution has been a predominantly pragmatic rather than normative shift. While projects of international constitution-making have emphasised the political aspects of self-determination, they have been less interested in how practices might be reconceived in order to accommodate the dimensions of self-determination that deal with questions of a people’s choice of economic system or with collective social freedom. Questions of material equality are, in the core documents that I described above, generally not understood as relevant to the ‘main goal’ of facilitating political inclusion but as subsidiary questions addressed through the language of international commitments to economic and social rights, or federalisation, or as benefits to be derived from foreign investment.⁷² Rather than focusing on constitutional methods for reimagining property rights, or viewing the authority of international actors as contingent on ensuring social ownership, scholars and practitioners have tended to imagine the constitution’s role in that redistribution in terms of a more minimalist redrawing of federal boundaries around particular contested areas of territory or resources.⁷³ In line with the policies of the international financial institutions, writing on constitution-making has also often been coupled with an emphasis on the role of constitutions in ‘ensuring predictability of state action and the security of private transactions through the legal system’.⁷⁴ In official United Nations circulars, for example, proposals for federalisation and decentralised access to land and resources, such as in Mindanao in the southern Philippines, have been accompanied by assumptions about the benefits to be derived from the opening and hospitality to foreign investment.⁷⁵ Commentary published by other institutional actors, such as the World Intellectual Property Organization, has described the inclusion of protections for patents in new constitutional settlements as part of a broader and rights-consistent process of ‘constitutionalization’.⁷⁶ This reflects the relatively pragmatic way that practices espoused by scholars and practitioners of international constitution-making in the

⁷¹ *Primer* (n 7) 48.

⁷² *Guidance Note* (n 6); *Primer* (n 7) 23; *Pathways for Peace* (n 4) 146, 196, 207.

⁷³ See, eg, Centre for Constitutional Transitions, International IDEA and UNDP, *Decentralization in Unitary States: Constitutional Frameworks for the Arab States Region* (2014); Asli Ü Bâli, ‘Artificial States and the Remapping of the Middle East’ (2020) 53 *Vanderbilt Journal of Transnational Law* 405. A notable exception is Amanda Cats-Baril, *Moving beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building* (International IDEA, 2019) 32.

⁷⁴ Yash Ghai and Guido Galli, *Constitution-Building Processes and Democratisation* (International IDEA, 2006) 8. On this approach, see generally the World Bank’s Doing Business Index, which operated from 2002–2021 and as at the time of writing is in the process of being reformulated.

⁷⁵ United Nations, *UN Constitutional*, Issue 9 (2019/2020) 9 (federalism would ‘open[] the way for business to enter mineral-and-resource-rich southern Mindanao in a more comprehensive manner’).

⁷⁶ Ahmed Abdel-Latif, ‘Egypt and Tunisia Underscore the Importance of IP’ (August 2014) *WIPO Magazine* <https://www.wipo.int/wipo_magazine/en/2014/04/article_0008.html>.

English-speaking world have often been consonant with, rather than perceived as a site of resistance to, the strategies for development-through-investment and protections for international property that have been promoted through other aspects of the international institutional and legal architecture.⁷⁷

In the next section, I argue that this approach to understanding questions of local ownership and the legality of international constitution-making reflects a deeper tension within the field. I do so through exploring the framings that different scholars used to characterise those practices, focusing either on a legalist account of those practices, or drawing them into relation with broader questions of economic structure. I further show how histories of postwar constitution-making were central to depicting a narrower account of that constitution-making, and the implications of this for scholarly debate and political action.

B. Renewing the Field of International Constitution-Making: History, Teleology, Practice

Techniques of constitution-making, and their realisation through international institutions and actors, have been understood as part of the contemporary project of international law.⁷⁸ At the same time, international institutions and international lawyers have continued to question whether, and in what circumstances, United Nations involvement in the process of constitution-making should be understood as lawful. This questioning became particularly pronounced as the debates about the failures, controversies and politics of the involvement of international institutions in projects of constitution-making intensified during the first decade of the twenty-first century. These critiques corresponded with a broader shift in international law from a more triumphant or at least optimistic disciplinary moment following the end of the Cold War and the proliferation of international institutions and multilateral treaties, to a more anxious, self-reflective and pluralist moment from the second decade of the twenty-first century.⁷⁹ In this part, I suggest that aspects of these debates can be fruitfully read not just as debates over the legality of constitution-making but also as debates over what those practices of constitution-making *were* and how to frame and analyse them as a phenomenon: questions that, as I argued above, are central to the vision of international law being offered by the field.

Many critiques of international constitution-making offered during this period were essentially regulatory in orientation. They focused on the absence of clear international standards that might guide the activity of international constitution-making and limit the ability of states or international actors to act according to their interests or in ways that were perceived as undemocratic. Fundamental norms such as the political self-determination of peoples, some international lawyers argued, were too imprecise to effectively limit international action.⁸⁰ So too was it difficult to determine where the boundaries of lawful international action might lie

⁷⁷ Cf Sripati, *UN Auspices* (n 2); Frankenberg (n 59).

⁷⁸ See the sources cited at n 2.

⁷⁹ See Orford, *Politics of History* (n 13) 20; and for a snapshot from the beginning of this decade, the introduction to Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Cambridge University Press, 2009).

⁸⁰ Dann and Al-Ali (n 2) 451; Nehal Bhuta, 'New Modes and Orders: Difficulties of a *Jus Post Bellum* of Constitutional Transformation' (2010) 60 *University of Toronto Law Journal* 799, 824–5.

from the text of authorising instruments, such Security Council resolutions.⁸¹ Scholars commented that norms and frameworks perceived to have a humanitarian orientation, such as those drawn from international human rights law or the laws of war, had in practice tended to operate to facilitate aspects of constitutional transformation, such as the inclusion of bills of rights, rather than to foreclose them.⁸² A second set of critiques from international lawyers centred more directly on concerns over imposition.⁸³ These critiques focused on whether, regardless of whether or not laws existed to guide or direct the work of constitution-making, those laws might in fact be, or be seen to be, complicit in projects of domination or exploitation, or in new forms of undesirable international rule.

The effect of this was that a broad swathe of practices were subject to criticism from international lawyers. Yet rather than advocating for a turn away from constitution-making, many of these critiques tended to recommit themselves to the need for international constitution-making projects. As David Kennedy has argued, this work of renewal has in various ways been critical to sustaining the discipline of international law: ‘performances of renewal, criticism, and reform’ are not only political responses to contemporary events but have been ‘central to professional identity and competence’.⁸⁴ Critiques concerned with the possible exercise of arbitrary power sought mechanisms for restraining and guiding that power in some fashion — whether by multilateral agreement,⁸⁵ by a more ethical and neutral internationalism,⁸⁶ or by a more flexible set of norms that left some space for political negotiation or contingent decision-making in line with the perceived needs of particular situations.⁸⁷ Critiques concerned with the appearance of imposition took a more managerial approach to answering this question, focusing on issues of perception and public relations rather than on whether constitution-making processes could or should be normatively understood as externally imposed. They argued that what was essential was to avoid the ‘impression that the exertion of influence on the nation building process from outside is a renewed form of neo-colonialism’,⁸⁸ but did not, in general, conclude that creating this impression required a substantially reimagined project in and of itself. Instead, the involvement of international actors (as opposed to powerful states) coupled with an increased sensitivity to such perceptions was often judged sufficient to navigate these concerns.⁸⁹ Underlying this renewal, then, was an implicit sense of the mission and future of the project of international

⁸¹ Dann and Al-Ali (n 2) 462; Turner and Houghton (n 2) 123.

⁸² Turner and Houghton (n 2) 130. See also Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 *American Journal of International Law* 580 (on the relationship of the *jus in bello* to the question of transformation).

⁸³ Although the drawing of disciplinary boundaries is here an exercise fraught with difficulty, I am omitting public law-oriented literature also framed through this language in favour of a focus on the international legal literature, for reasons discussed in part IIA.

⁸⁴ David Kennedy, ‘When Renewal Repeats: Thinking Against the Box’ (2000) 32 *New York University Journal of International Law & Politics* 335, 337.

⁸⁵ Bhuta (n 80); Dann and Al-Ali (n 2).

⁸⁶ Dann and Al-Ali (n 2).

⁸⁷ Turner and Houghton (n 2).

⁸⁸ Armin von Bogdandy et al, ‘State-Building, Nation-Building and Constitutional Politics in Post-Conflict Situations’ (2005) 9 *Max Planck Year Book of United Nations Law* 579, 588.

⁸⁹ Turner and Houghton (n 2) 135, 140; Hay (n 2) 153; Zaid Al-Ali, ‘Constitutional Drafting and External Influence’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 77, 91; Dann and Al-Ali (n 2) 459–60 (though see the note at n 100).

constitution-making (as conducted by international institutions) as opposed to other forms of action.

In order to fortify the account that I outlined above of what that constitution-making is, as well as where we should look for its history, and how we should understand its future, scholars drew on the history of postwar constitution-making projects in Germany and Japan. Historical ideas about postwar constitution-making in Germany and Japan took on an especially central role in how some scholars presented their ideas about the teleology of that constitution-making.⁹⁰ This emerged most strongly in response to critiques of constitutionalism as a project of international law, where the centring of particular accounts of how to realise democratic ordering was perceived as in tension with the claim of that law to be drawn from the practice of all states. The international lawyer and global constitutionalist scholar Matthias Kumm, for example, explicitly sought, in response, to offer an ‘affirmative genealogy’ of constitutionalist thought and practice.⁹¹ He did so by positioning the changes wrought by the Allies in the political and legal structures of Germany and Japan, together with the rise of the United Nations, as part of building a world after empire.⁹² In this context, the US was a ‘revolutionary agent’ ‘seeking to shape a new world order’ in taking a role in ‘establishing new constitutions’ under military occupation for the two powers.⁹³ Kumm narrated these practices of constitution-making as an aspect of the struggle against fascism, both within ‘the most aggressive imperial powers of their time’, and as part of the movement toward establishing self-determination as a general principle and the representation of formerly colonised peoples through the United Nations.⁹⁴ Understood in this way, the postwar moment (and the practices associated with it) could be properly seen as ‘a high point of anti-imperialism’ rather than a form of imposition.⁹⁵

The history of directing these practices toward fascist and imperialist states has been held out by scholars within the field as evidence not of a perfect analogy with the constitution-making projects of the post-Cold War period, but of their suitability for adoption and defense as an institutional project. This history showed, according to some scholars, that processes led by or involving external actors could deliver a greater degree of democracy in the longer-term, and therefore could not be ruled out as a matter of principle, even if they had been poorly implemented in practice.⁹⁶ Underpinning this return to the postwar history of international constitution-making was a sense that postwar projects by Allied states in both nations had

⁹⁰ On history as teleology, see Orford, *Politics of History* (n 13) 245ff.

⁹¹ Matthias Kumm, ‘On the History and Theory of Global Constitutionalism’ in Takao Suami et al (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, 2018) 168.

⁹² Ibid; see also (more ambivalently) Matthias Kumm et al, ‘The End of “the West” and the Future of Global Constitutionalism’ (2017) 6 *Global Constitutionalism* 1, 9.

⁹³ 184

⁹⁴ Kumm (n 91) 187. See also Thomas M Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46, 54–5.

⁹⁵ Kumm 187

⁹⁶ See, eg, Hay (n 2) 154–5; Kumm (n 91) 189; Saunders (n 7) 79, citing Chaihark Hahm and Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge University Press, 2015). On the question of implementation see Tom Ginsburg, Zachary Elkins and James Melton, ‘Baghdad, Tokyo, Kabul ... : Constitution Making in Occupied States’ (2007) 49 *William and Mary Law Review* 1139, 1142; von Bogdandy et al (n 88) 584; Ghai and Galli (n 74) 15.

resulted in the apparent longevity and stability of the constitutional orders in Germany and Japan, and the participation of those states as liberal and prosperous members of the international community.⁹⁷ By centring fascist forms of empire and the need for their transformation, however, this historiography directed attention away from the question of how the relations of domination inherent in empire were remade for the postwar world, and what constitutionalism might, if anything, have to do with that remaking.⁹⁸

Returning to the history of the postwar projects of constitution-making by Allied occupiers in Germany and Japan was also significant for scholars creating or sustaining an account of what constitution-making *was*, of which practices it consisted, and how to judge and evaluate the level of ‘imposition’ involved. This was especially important for scholarship that sought to analyse the relative ‘success’ of postwar constitution-making projects through an empirical or social-scientific lens, scholarship on which international institutions have drawn.⁹⁹ The classic article by Ginsburg, Elkins and Melton on constitution-making in occupied states is an early example of empirical work in this field. That article expressed itself as being ‘motivate[d]’ by the parallels that the authors perceived, as well as those that the occupiers had explicitly drawn, between the then-ongoing Coalition occupation of Iraq, and the Allied occupation of postwar Japan.¹⁰⁰ In recounting this history, the authors focused on the practices of drafting a written document that was labelled a constitution by the military occupation, emphasising, *inter alia*, the inclusion of the ‘peace clause’ found in Article 9 and the abolition of the aristocracy.¹⁰¹ Also significant were the public-facing aspects of that process: the secrecy surrounding the occupiers’ drafting, the process of translation by members of the Japanese prewar government, and the means through which the product of the written constitution was presented to the people and adopted by the legislature.¹⁰² Finally, through a focus on written constitutional provisions, the authors defined the metric of constitutional

⁹⁷ I am grateful to Elizabeth Hicks for discussions on this point. See also Kumm (n 91) 190. These arguments echoed older scholarship, much of it released during or immediately after the occupation of Iraq, in which legal scholars presented the postwar histories as analogue or precedent for transformative changes wrought by occupying authorities in the constitutional systems of the states they occupied: Kristen Boon, ‘Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers’ (2005) 50 *McGill Law Journal* 285, 297; Roberts (n 82) 601–3; Ruti Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Journal* 69, 72–4. See also the famous quote from George W Bush prior to the invasion of Iraq referring to the postwar occupations and stating that ‘after defeating enemies, we did not leave behind occupying armies; we left constitutions and parliaments. We established an atmosphere of safety, in which responsible, reform-minded local leaders could build lasting institutions of freedom. In societies that once bred fascism and militarism, liberty found a permanent home’: ‘President Discusses the Future of Iraq’ (Speech delivered in Washington DC, 26 February 2003).

⁹⁸ On this remaking as a critical question for international lawyers see Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003) 40–81.

⁹⁹ Ginsburg, Elkins and Melton (n 96); Charlotte Fiedler, ‘Why Writing a New Constitution after Conflict can Contribute to Peace’ (Briefing Paper no 11/2019, Deutsches Institut für Entwicklungspolitik); Jennifer Widner, ‘Constitution Writing and Conflict Resolution’ (2005) 94 *Commonwealth Journal of International Affairs* 381; Leigh Payne et al, ‘Conflict Prevention and Guarantees of Non-Recurrence’ (United Nations–World Bank Background Paper, 2017).

¹⁰⁰ Ginsburg, Elkins and Melton (n 96) 1158.

¹⁰¹ *Ibid* 1160, 1164.

¹⁰² *Ibid* 1161–2.

imposition as the similarity between the occupation constitution and the occupier's own, rather than a thick analysis of the types of structural relation that it brought into being.¹⁰³

This focus on formal written constitutions and their presentation to and reception by a domestic public has informed the framing of subsequent empirical work. Much of that work went on to treat questions of constitution-making as primarily questions of design and of participation.¹⁰⁴ As Ginsburg and Dixon have observed, this focus on written documents termed constitutions has also commonly been adopted in the framing of qualitative work.¹⁰⁵ That focus was critical to studies suggesting that new constitutions assisted in the reduction of recurrent violence, studies that were invoked by the World Bank and United Nations in concluding that 'the process of writing a constitution and the existing postconflict political, security, economic or other conditions that enable this process are important for sustaining peace'.¹⁰⁶ Finally, this focus on formal constitutions may have intersected with at least some teleological accounts above, in the sense that it is not *any* account of constitutionalism that is considered to be possessed of a teleology but a *dominant* or broadly shared account of the practices and principles of which it consisted. As noted above, however, the question of what is 'constitutional' and where to find it has long been contested by scholars, some of whom have pointed to the outward-facing dimensions of constitutionalism as well as its material (as opposed to formal) elements.¹⁰⁷ These accounts of the teleology of constitution-making and of which practices it consisted were therefore, in part, the product of scholarly intervention and debate.

More radical accounts written during this time presented international constitution-making not as an enclosed field of professional practice but as part of a broader relationship of structural exploitation. Although many of these accounts focused on the relatively exceptional case of the occupation and constitutional transformation of Iraq, I am interested in the ongoing lessons to be derived for the field from the method that they adopted for doing so. Unlike the work conducted with a reformist sensibility that I explored above, these accounts positioned the question of constitutional imposition (and of international law's possible complicity with such imposition) as a more fundamental challenge to existing institutions, doctrines and practices. Part of their basis for doing so was that they took a wider view of the practices that could be said to be associated with 'constitution-making'. These scholars brought into view the routinisation and depoliticisation of practices relating to development, finance, property, or investment that had accompanied projects of administration and constitution-making. They argued that these practices were unresponsive to social demands on the part of local actors,¹⁰⁸

¹⁰³ Ibid 1154–7.

¹⁰⁴ Tom Ginsburg, Zachary Elkins and Justin Blount, 'Does the Process of Constitution-Making Matter' (2009) 5 *Annual Review of Law and Social Science* 201; Bell and Zulueta Fulscher (n 33).

¹⁰⁵ Tom Ginsburg and Rosalind Dixon, 'Introduction' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 4. As alternatives to this, the authors mention 'functional' theories of the constitution that ask which documents play a role in restraining and constituting authority, and 'sociological' theories that ask which documents are perceived as constitutional by local actors: at 4–5.

¹⁰⁶ *Pathways for Peace* (n 4) 145, citing 'Characteristics of National Constitutions, Version 2.0'

¹⁰⁷ See sources cited above at n 26.

¹⁰⁸ Outi Korhonen, 'The "State-Building" Enterprise: Legal Doctrine, Progress Narratives and Managerial Governance' in Brett Bowden, Hilary Charlesworth and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies After Conflict: Great Expectations* (Cambridge University Press, 2009) 15, 16, 19, 36–7;

or served to justify the transformation of political structures under conditions of military occupation.¹⁰⁹ They critiqued the forms of knowledge about constitution-making that had accompanied these transformations, which they saw as facilitating economic exploitation,¹¹⁰ or as the product of specific ‘situated interests’.¹¹¹ Some argued that the combination of international constitution-making under military occupation with marketisation and the facilitation of foreign investment created new relationships of dependency between powerful states and those peoples for whom a constitution was being made.¹¹² They positioned contemporary projects of international administration and constitution-making in Iraq and the expansive powers granted to occupiers to interpret the scope of their authority as continuous with the partial and unequal sovereignty afforded to peoples under relations of mandatory governance.¹¹³

This literature offers significant reason to be skeptical about claims that constitution-making, as currently understood, can or should be a central technique for processes of legal and social transformation. Although not all of these scholars took on the framing and language of constitution-making, each of their work brought constitutionalist thought into relation with the forms of global economic ordering that it helped to facilitate and deepen, or against which it offered little purchase. In this sense, they might be understood as having engaged in the move that scholars of constitutionalism have more recently renewed calls for: to widen our view beyond the ‘formal’ constitution to include the material forces that influence its change and development and that cause it to come into crisis.¹¹⁴ Repeated references in the literature on international constitution-making to questions of imposition and the reproduction of colonial forms of relation can be read as responses to these critiques, as well as symptomatic of the broader anxieties provoked by the now long-standing call to reassess and critically reimagine the doctrines, sources, histories, politics and practices of international law as it relates to the disciplining of the decolonised world.¹¹⁵ These anxieties might be taken as evidence that the question of domination is a shared concern, and that the critical point of divergence between the two accounts of constitution-making presented here — of renewed commitment or of structural critique — is how to understand and interpret its relationship to economic ordering.

Yet it was not clear from the work of scholars writing in the field that, beyond a generalised concern with domination, these structural critiques were received *as* critiques with

Anne Orford, ‘International Territorial Administration and the Management of Decolonization’ (2010) 59 *International and Comparative Law Quarterly* 227.

¹⁰⁹ Rittich (n 13) 497–8.

¹¹⁰ Rittich (n 13) 508

¹¹¹ Kendall (n 19) 106.

¹¹² James Thuo Gathii, ‘Foreign and Other Economic Rights upon Conquest and Under Occupation: Iraq in Comparative and Historical Context’ (2004) 25 *University of Pennsylvania Journal of International Economic Law* 491, 525ff.

¹¹³ Usha Natarajan, ‘Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty’ (2011) 24 *Leiden Journal of International Law* 799, 812, 820–1. See also Vijayashri Sripati, ‘The United Nation’s Role in Post-Conflict Constitution-Making Processes: TWAIL Insights’ (2008) 10 *International Community Law Review* 411; Sripati, *UN Auspices* (n 2).

¹¹⁴ Goldoni and Wilkinson (n 26).

¹¹⁵ See Karin Mickelson, ‘Taking Stock of TWAIL Histories’ (2008) 10 *International Community Law Review* 355; James Thuo Gathii, ‘The Promise of International Law: A Third World View’ (2021) 36 *American University International Law Review* 377.

which the field should be concerned. Scholars concerned to defend constitutionalist approaches from critique and to point out the shortcomings of ‘critical postcolonial sensibilities’ focused largely on critiques that centred the question of ‘civilisational or cultural difference’.¹¹⁶ As I have highlighted, however, much of this work was not concerned with ‘civilisational or cultural difference’ but with economic structures, material interests, and new relations of dependency. One function of narrating the teleology and defining the practices of the field in the ways that I have described can therefore be understood as insulating the field from the more radical implications of bringing constitution-making and these more structural questions into conversation. In other words, it can be understood as a manifestation of a kind of ‘disciplinary sensibility’.¹¹⁷ David Kennedy has argued that these kinds of sensibilities can be unpacked through observing the ‘blind spots, strategies of evasion, elision or forgetfulness’ of a particular field or professional or intellectual discipline, and that this sensibility is ‘as much about desire, construction, and work as it is about error or ignorance’.¹¹⁸ In the context of international human rights practice, Susan Marks has described a similar kind of active reluctance to consider whether economic structures have exacerbated forms of violence and deprivation as related to a disciplinary tendency to render problems technical, rather than obviously political, and amenable to professionalised solutions offered by international actors.¹¹⁹ In relation to international constitution-making, a field which has sought to actively facilitate some forms of local contestation, pluralism, and redistribution while largely avoiding the deeply political questions of legal structures governing the distribution of wealth and the creation of private right, this might better be described as a selective technicity: the embrace of politics in some quarters but not others.¹²⁰

In what follows, I argue that at least part of that technicity can be understood as related not only to the choices that scholars were overtly making in the present but to the epistemic boundaries and blind spots of the law that they have inherited. In other words, I am interested in exploring the relationship of history to the disciplinary sensibility of this particular field. Articulations of the teleological orientation of a field and descriptions of the practices that it takes as the basis of its analysis can be understood not only as offering a project but as setting out and reproducing the boundaries of that project. These boundaries — how the field is oriented, which practices it is interested in examining or confronting, and who it is in conversation with — are the product of choices made by scholars in the present. But those choices are made easier (although not inevitable) by the theories, taxonomies, and ways of organising the discipline that are the product of choices made in the past. This dual quality of scholarly reproduction within the discipline of international law reflects the nature of that law, which Anne Orford has described as a ‘virtual object’ that is ‘neither fully factual nor fully fictional’.¹²¹ Instead, international legal scholars work with actually-existing materials, and the

¹¹⁶ Kumm (n 91) 198.

¹¹⁷ Kennedy, *Disciplines of International Law and Policy* (n 25) 11.

¹¹⁸ *Ibid* 12-13.

¹¹⁹ Susan Marks, ‘Human Rights and Root Causes’ (2011) 74 *Modern Law Review* 57.

¹²⁰ Cf Kendall (n 19).

¹²¹ Anne Orford, ‘Food Security, Free Trade and the Battle for the State’ (2015) 11 *Journal of International Law and International Relations* 1, 20.

politics, concepts and orientations transmitted through those materials,¹²² while also patterning them anew. The particular shape that this reproduction takes at any given point in time is not only a question of choice but of reception: while scholars selectively draw in new materials and use them to create new syntheses, only some of these syntheses may be understood by scholarly venues as acceptable, or received by the audience within the field as authoritative. This is particularly true of fields that are adjacent to practice, that understand themselves as responding to a ‘demand for usefulness’ from practitioners and activists operating within an already-drawn field, and that may prioritise those demands over the scholarly imperatives of critical inquiry.¹²³ Inquiring into the epistemic boundaries of the field seemed therefore essential in order to reckon with the questions of force, imposition, imperialism, and domination that continue to trouble the field as a whole.

In the case of international constitution-making, I have shown how scholars make the field through drawing on historical narrative. As I will argue below, however, the background assumptions that enable that narrative to be put together and to *make sense* for its audience are also the product of disciplinary orientations and vocabularies that have been inherited from the past. The close relationship between the academy and practice that I have described above may help to orient scholarship toward that ‘demand for usefulness’ that helps to reproduce international constitution-making as a distinct field of practice and condition what we see as relevant for that practice.¹²⁴ Yet paradoxically, that close relationship also means that past scholarship and disciplinary taxonomies can be understood as doing significant conceptual work in organising, orienting and sustaining the field. For this reason, an intervention that draws on history and theory to understand that orientation can also help to re-organise that field for the future. In what follows, I turn to the histories and theories of international constitution-making in the postwar period in order to illustrate the particular tradition of constitutionalism that they represent and on which international lawyers and institutions continue to draw in the present. In doing so, I show that the questions at stake in the formation of that tradition included the understanding of constitutionalism as a formal set of practices rather than a material process, its self-containment as a field of social-scientific study, and its relative separation from projects of global economic ordering. I then show how this recovery can assist us in retheorising the terms on which the international constitution-making project is conducted, and to move toward reshaping that project for the present.

III. HISTORIES PRESENT: POSTWAR ORDER AND THE BOUNDARIES OF CONSTITUTIONALISM

This inquiry into the tradition of postwar constitutionalism begins with the history of empire. The rapid expansion of European colonial rule and domination during the nineteenth century saw immense violence in the colonised world as well as the ordering of the global

¹²² Ibid 24.

¹²³ Kennedy, *When Renewal Repeats* (n 84) 461.

¹²⁴ Ibid.

economy through a system of laws and imperial preferences facilitating the transfer of wealth to the metropolises. It was within this system of imperial competition, combined with rapid economic transformation after its forcible ‘opening up’ to trade with the United States in the 19th century, that the Japanese state came to hold mandates in the Pacific as well as being a colonial power in Asia itself.¹²⁵ Japanese officials and scholars supporting a policy of expansion sought to justify this authority initially in civilisational terms and then subsequently by reference to ideas of a greater Asia organised around racial hierarchy and Japanese rule.¹²⁶ For the fascist officials of the German Reich, which had been stripped of its legal authority over colonised peoples in the Versailles settlement, territorial expansion, racialised violence within Germany, and the conquest of peoples living to the east also became central to the reclamation of a German empire. Following the extensive bombing and defeat of Germany and Japan, the Allied states (themselves imperial powers) formulated plans for a period of occupation of the former enemy states and the transformation of their legal and social orders.¹²⁷

Treating former imperial powers as societies to be remade through law — as less than sovereign — required a reformulation of theories about international law and its relation to the legal instrument of the constitution, as well as engagement with broader debates about questions of law and aggression that were central to both the resolution of imperial rivalries and the process of decolonisation. In the years leading up to and following the Second World War, states and international lawyers turned to constitutional thought in order to answer the question of how law should respond to war and aggression, and to facilitate change in the political institutions of a territory after war. Significant aspects of that reformulation, which I argue are critical to understanding the shape of the contemporary field of international constitution-making, took place within the United States and were the product of conversations between German emigré scholars and members of the US legal and scholarly academy. As others have argued, the experiences, vocabularies and sensibilities formed during and in relation to the postwar occupations were also central to the forms of internationalism that animated the work of the US postwar generation of international lawyers.¹²⁸ My intention in tracing this reformulation is not to take a position in the significant historical and historiographical debates about whether and to what extent constitutions were pivotal in the postwar transformations of these states, but rather to ask what the legacies of that disciplinary conversation have been for our theories of international constitution-making projects. While

¹²⁵ R P Anand, ‘Family of Civilized States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation (2003) 5 *Journal of the History of International Law* 1.

¹²⁶ Urs Matthias Zachmann, ‘Race and International Law in Japan’s New Order in East Asia, 1938–1945’ in Rotem Kowner and Walter Demel (eds), *Race and Racism in Modern East Asia: Western and Eastern Constructions* (Brill, 2013)

¹²⁷ *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers* (5 June 1945) TIAS No 1520; 60 Stat 1649; *Instrument of Surrender* (2 September 1945) Executive Agreement Series No 493; 59 Stat 1733. For recent English-language treatments of Allied planning and occupation among a very large literature, see Dayna Barnes, *Architects of Occupation: American Experts and Planning for Postwar Japan* (Cornell Press, 2017); Edmund Spevack, *Allied Control and German Freedom: American Political and Ideological Influences on the Framing of the West German Basic Law (Grundgesetz)* (Lit Verlag, 2001); R W Kostal, *Laying Down the Law: The American Legal Revolutions in Occupied Germany and Japan* (Harvard University Press, 2019). For an account of the August Revolution theory that followed the end of formal Allied occupation of Japan, see Hahm and Kim (n 96) ch 3.

¹²⁸ Kennedy, *Disciplines of International Law and Policy* (n 25) 23.

Japanese scholars were relatively underrepresented in that conversation, I have sought to emphasise where possible how the place of Japan, as well as of other non-European societies, was significant for this body of thought.

I begin this part by exploring the debate between two German and Jewish lawyers and legal theorists that emigrated to the United States in the 1930s and who were, in different ways, in conversation with their US contemporaries: Franz Neumann and Ernst Fraenkel. I argue that this debate shows the particularity and limitations of a way of thinking about constitution-making that focused on institutions and formal rights, and how an approach that sought to relate those constitutional questions to a thicker understanding of social power was available. I then revisit the work of US-based scholars Quincy Wright and Carl Friedrich, who I argue each contributed to the building of constitutionalism as a vocabulary for the international legal management of Germany and Japan, a vocabulary on which, as I have shown, lawyers continue to draw. In refuting older assumptions, theories and forms of international legalism, they pointed to new ways in which these practices could be conceived of and justified: as a means of transforming prerogative rule, of preventing international aggression, and as a form of democratic transformation rather than authoritarian dictatorship. Reading their work, I suggest, offers a window into the broader disciplinary transformation provoked by the encounter between Allied, German, and Japanese empires and occurring in the wake of immense violence. I show also that this tradition of constitutionalist thought can be viewed as deeply imbricated with political ideas about the economic and constitutional organisation of a purportedly post-imperial world, and that it came at the cost of different ways of understanding the possibility of political change and social revolution after fascist and colonial rule.

A. Against the Economic Constitution: Juridical Modernism and the Solidification of the State

During the years of and following the Second World War, lawyers sought to understand how the state had been enrolled in a process of fascist expansion and to develop theories of the relationship of law to a peaceful future. One such radical or revolutionary imagining of the work that law might do after war can be found in the work of the German and Jewish lawyer Franz Neumann, a member of the *Institut für Sozialforschung*.¹²⁹ In contrast to the focus on formalist modes of written constitution-making and public reception that I explored above, Neumann offered a window onto a larger vision of the role that law might perform after conflict: one of social ownership, rather than guided transition. In this section, I describe aspects of Neumann's methodological approach that permitted this vision. I then read that method and vision against the competing approach in the work of Ernst Fraenkel, who, like

¹²⁹ Institute for Social Research, also known as the Frankfurt School. Some members of that School, including Otto Kirchheimer, Franz Neumann and Herbert Marcuse, after emigrating to the United States from Germany, had worked in the Research and Analysis Branch of the State Department advising on how to deal with the German question after the prosecution of the war. Rather than a straightforward harnessing of academic inquiry by the state, however, the marriage of the theoretical and political commitments of the members of the School with intensely practical questions 'resulted in their work at times assuming even more critical contours': Raffaele Laudani, 'Introduction' in *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort* (Raffaele Laudani ed, Princeton University Press, 2013) 7–8.

Neumann, had emigrated to the US and was in conversation with the major scholars of his time. I do so in order to offer an account of the theoretical questions at stake in the postwar moment and to explore one instance of how those questions came to be answered.

In his work *Behemoth*, Neumann had inquired into the nature and political constitution of the Nazi ‘state’ and the twin projects of colonisation in the East and mass persecution and slaughter within the German territory.¹³⁰ At the time, some theorists had argued that the political and economic system of Germany was a variety of state capitalism, in which the existence of private property had been all but erased, and in which the state had achieved the ‘primacy of politics’ over formalised practices of governing and economic exchange.¹³¹ Against this, Neumann had argued that Germany was best understood as a new kind of legal entity composed of the four ‘ruling groups’ — German industry, the party, bureaucracy, and the military. Each of these groups, on Neumann’s account, was possessed of legislative, administrative and judicial power: there was no centralised authority that dictated the direction of politics, but only the product of the agreements and compromises between them.¹³² The existence of governing power across these social groupings, he argued, showed that the German ‘state’ was no Hobbesian leviathan, but a Behemoth: able to ‘control the rest of the population directly without the mediation of that rational though coercive apparatus hitherto known as the state’.¹³³ For Neumann, the defining characteristic of the German legal order was not the subjugation of private industry to the commands of the party, but the forming of new legal relationships and networks of collaboration between them.¹³⁴

Neumann’s theory of the political and legal organisation of Germany flowed from his attention to material and social structures and their interrelationship with formal sources of law. Rather than German expansionism being solely guided by the executive and realised through central directives, Neumann argued that ‘the aggressive, imperialist, expansionist spirit of German big business unhampered by considerations for small competitors, for the middle classes, free from control by the banks, delivered from the pressure of trade unions’ was ‘the

¹³⁰ Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (Frank Cass, 1967, first published 1942) 169. A former legal advisor to the *Sozialdemokratische Partei Deutschlands* (or SPD), Neumann fled Germany in 1933 and subsequently studied for a doctorate with Harold Laski at the London School of Economics: Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research, 1923–1950* (University of California Press, 1966) 144–5. See also Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt and Franz Neumann* (Oxford University Press, 2003) 260. I have greatly benefited from reading Doreen Lustig’s work on the relevance of Neumann and Fraenkel’s thought to postwar international criminal law: ‘The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann’s Concept of Behemoth at the Industrialist Trials’ (2011) 43 *New York Journal of International Law and Politics* 965.

¹³¹ Jay (n 130) 152–156.

¹³² Neumann (n 130) 468–70, 361.

¹³³ Ibid 470. To do so, Neumann undertook to analyse the material and social structure of the German economy, rejecting theory that rested solely on ‘legal or administrative forms’: at 224–7. For a criticism of Neumann’s argument that the collapse of the state was an inevitable rather than historically conditioned consequence of certain forms of capitalist accumulation, see Claus Offe, ‘The Problem of Social Power in Franz L Neumann’s Thought’ (2003) 10 *Constellations* 211, 222.

¹³⁴ See the editorial in the *Deutsche Volkswirt* addressing the foundation of the Continental Oil Corporation: *Behemoth* (n 130) 356.

motivating force of the economic system'.¹³⁵ This analysis owed a debt to Bolshevik theorists of imperialism, but was also shared to some degree by both liberal thinkers and Allied officials, with early agreements regarding the German occupation reflecting this condemnation of the large industrial firms that had been so implicated in the impetus to war.¹³⁶ It was the difficulties in satisfying business under social democracy, Neumann argued, that had necessitated new forms of state command of the economy, aggressive territorial expansion, and the corralling of economic activity into the network of industrial combines.¹³⁷ Neumann's diagnosis of the German condition, and of the causes of militarism and aggression, led him to prescribe a particular set of responses. In order to return to conditions of legality, it was not sufficient that the party and senior bureaucracy be removed from power, or that German armaments be destroyed: 'the power of the monopolistic economy must be definitely broken and the economic structure of Germany must be profoundly changed'.¹³⁸ Resolution of the German question, in other words, would require a reckoning with the material as well as legal legacies of fascist expansionism.

This vision of the concrete situation necessary for the peace can be understood through Neumann's writing on the relationship between constitutional order and social and economic life. In his 1931 essay 'On the Preconditions and Legal Concept of an Economic Constitution', Neumann had argued that the limited freedoms that capitalism offered to its labouring subjects – freedom of choice and the negotiation of contractual conditions – could not exist in the context of a monopolised economy. Instead, the significant social and political power exercised by monopolies, both over workers but also, through trade associations, in relation to the functioning of the state itself, required a means of addressing the 'contradiction ... between the norms of constitutional law and the concrete contemporary situation of the constitution'.¹³⁹ Legal analysis of this 'concrete contemporary situation', for Neumann, required attending not only to formal constitutional ordering but to its *relationship* with structures of private law – property, the company, and finance – and the consequences of the social order they engendered for the very possibility of public law, understood as a relationship between free subjects. This was what he termed the 'economic constitution', as distinct from the formal or state constitution.

¹³⁵ Ibid 354, 361.

¹³⁶ See Robert Knox and Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of Imperialism and International Law' in Kathryn Greenman et al, *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press, 2021) 27; Amanda Alexander, 'Lenin at Nuremberg: Anti-Imperialism and the Juridification of Crimes against Humanity' in Kathryn Greenman et al (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press, 2021). The 'Protocol of the Proceedings of the Berlin Conference' (1 August 1945) in Foreign Relations of the United States, The Conference of Berlin (The Potsdam Conference), 1945, vol II, 1477 ('Potsdam Agreement') referred to the 'present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts, and other monopolistic arrangements'. Forms of industrial restitution (including the removal of industrial equipment) were strongly favoured by the Soviets — and carried out in both Germany and Soviet-occupied Manchuria after the war — given the German occupation had ransacked Soviet property, they said, 'almost to the last nail and thread': Herbert Feis, *Between War and Peace: The Potsdam Conference* (Princeton University Press, 1960) 257.

¹³⁷ *Behemoth* (n 130) 34, 157, 261.

¹³⁸ Ibid 476.

¹³⁹ Franz Neumann, 'On the Preconditions and Legal Concept of an Economic Constitution' [1931] in Otto Kirchheimer and Franz Neumann, *Social Democracy and the Rule of Law* (Leena Tanner and Keith Tribe trans and Keith Tribe ed) 48–9.

This analysis was potentially transformative of the way that lawyers conceptualised the state, its obligations and relations to its subjects. For example, in arguing that particular forms of state action were not precluded by the provisions of the Weimar constitution regarding freedom of contract and property, Neumann theorised that the failure of the state to intervene in situations of a ‘change in the legal substratum’ was not best conceptualised as non-intervention. Rather, this apparent neutrality could be seen as an active process of facilitation of exploitation and capital accumulation by industrial concerns, with which the state had actively cooperated. Seen in this light, the provisions of the constitution providing for socialisation and worker representation could give rise to a countervailing duty to prevent that accumulation.¹⁴⁰ This argument had implications not only for the landscape of possible constitutional interpretations but also, critically, for the forms of knowledge that one needed in order to be a good constitutionalist. For Neumann, it was not possible to have an appreciation of the constitutional situation without a thick understanding of social and economic power and its implications for political subjectivity.

Following the fall of the Nazi state and in relation to the period of occupation, Neumann again drew on these ideas. He argued for a social-democratic agenda of redistribution, both domestically and internationally: the seizure of corporate property on a massive scale, land reform and the sequestration of ‘large estates’, and the restitution of looted property.¹⁴¹ Although he opposed extreme plans to deindustrialise Germany and create an agrarian society, Neumann argued nonetheless for the comprehensive conduct of reparations through taxation of the wealthy and of corporate interests, though urging that ‘care should be taken to avoid curtailment of vital social services’.¹⁴² In the circumstances of a society restructured in this way, it was possible for a ‘fairly stable and fully acceptable government’ naturally and democratically to arise to take the place of the occupying powers.¹⁴³ In order for a constituent assembly that could set the pattern for a future Germany to be democratically elected, it would also be necessary to offer clarity to the German people on ‘whether, to what extent, and what kind of international supervision is to be maintained over Germany after the cessation of [military government], how long it is to last, and under what conditions it is to be changed or abrogated’.¹⁴⁴ That constituent assembly had also to be ‘free to enact expropriation and socialization measures and to provide for far reaching legislative acts intended to eliminate aggressive elements from German society’.¹⁴⁵ In other words, he argued that the horizon for international intervention should be social ownership and the elimination of the influence of war industrialism, coupled with formalist constraints on the manner and scope in which that authority was exercised.

¹⁴⁰ Ibid 49, 57; Offe (n 133) 217.

¹⁴¹ Franz Neumann, ‘The Treatment of Germany’ (11 October 1944) in *Secret Reports* (n 129) 439.

¹⁴² Franz Neumann, ‘The Revival of German Political and Constitutional Life under Military Government’ in *Secret Reports* (n 129) 431.

¹⁴³ ‘Treatment of Germany’, in *Secret Reports* (n 129) 445. See also Anne Orford, ‘Hammarskjöld, Economic Thinking and the United Nations’ in Carsten Stahn and Henning Melber (eds), *Peace Diplomacy, Global Justice and International Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammarskjöld* (Cambridge University Press, 2014) 156, 167; *Behemoth* (n 130) 476.

¹⁴⁴ ‘Revival’, in *Secret Reports* (n 129) 435.

¹⁴⁵ Ibid 435.

Neumann's exposition of the types of theorising that were needed for a democratic order in the aftermath of conflict can be contrasted with the competing analysis found in the work of Ernst Fraenkel.¹⁴⁶ A German and Jewish emigré who had worked as a defence lawyer during the Reich, Fraenkel's experience as having been subject to both legal and seemingly extra-legal forms of persecution had led him to theorise the Reich as an *Urdoppelstaat*, or 'Dual State'.¹⁴⁷ He wrote that 'Nazi Germany, far from being the unitary state that the Hitler regime proclaimed it had established, consisted of two *parallel* and *contending* halves'.¹⁴⁸ In the prerogative state, a creature of 'unlimited arbitrariness and violence unchecked by any legal guarantees', officials exercised discretion according to political aims and in the circumstances of the individual case.¹⁴⁹ The normative state, a technical legal apparatus characterised by predictability, certainty, and the rule according to law that German capital demanded, subsisted under Nazi rule, in which it functioned 'as the legal frame-work for private property, market activities of the individual business units, all other kinds of contractual relations, and for the regulations of the control relations between government and business'.¹⁵⁰ It did so, however, only to the extent that it was not consumed by the prerogative state.¹⁵¹ Since the two were halves of an 'interdependent whole', the normative state could not be compared to the state of law obtaining under the Weimar Republic, but rather, Fraenkel argued, should be considered a beast peculiar to the period of National Socialism.¹⁵²

Although it has been described as a sociological or ethnographic undertaking, Fraenkel's thesis was organised along primarily juridical lines. He took as his central problematic the expansion of prerogative jurisdiction — with which he had had to contend as a lawyer under the Reich — at the expense of Neumann's focus on the shifting relations between particular social groups, including his analysis of cartels as an aspect of the state.¹⁵³ His initial diagnosis of Germany's ills relied heavily on formal legal materials and in particular an indictment of the German courts. Fraenkel claimed that 'possessing no guiding traditions in questions of constitutional law, [these courts] never succeeded in establishing a claim to jurisdiction' after the Weimar Republic declared a state of siege in 1933, thus easing the way for National Socialism.¹⁵⁴ Instead, a series of judicial decisions had led to a position where administrative decrees, exercises of discretion, and finally the political precepts of the party prevailed over the Weimar Constitution.¹⁵⁵ Critically, in his account, the political authorities had the ability to decide on the limits of their own jurisdiction, and in so doing, to 'draw[] the

¹⁴⁶ See also Lustig (n 130).

¹⁴⁷ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press, 2017, first published 1941).

¹⁴⁸ Jens Meierhenrich, 'An Ethnography of Nazi Law: The Intellectual Foundations of Ernst Fraenkel's Theory of Dictatorship', in *Dual State* (n 147) xli. See further Jens Meierhenrich, *The Remnants of the Reich: An Ethnography of Nazi Law* (Oxford University Press, 2018).

¹⁴⁹ Meierhenrich (n 148) lxii, quoting Fraenkel.

¹⁵⁰ Fraenkel, *Dual State* (n 147) 185.

¹⁵¹ *Ibid* 61.

¹⁵² *Ibid* 71.

¹⁵³ See also Meierhenrich (n 148) liii, noting the 'diminished evidence' of materialist analysis in the English-language version.

¹⁵⁴ Fraenkel, *Dual State* (n 147) 6.

¹⁵⁵ *Ibid* 14–16.

line' between the normative and prerogative halves of the state.¹⁵⁶ In this sense, Fraenkel argued, there was no clear separation of functions or any area entirely free from the exercise of arbitrary power: rather, under the prerogative state, 'politics is that which political authorities choose to define as political'.¹⁵⁷

What accounted for the continued existence of the normative state, under which 'the legal foundations of the capitalistic economic order ha[d] been maintained' by the German courts?¹⁵⁸ Fraenkel's initial thinking on this had been influenced by Marxist and socialist legal thought, as well as by the work of his former colleague Neumann, with whom he had set up a law practice in the late 1920s.¹⁵⁹ But the original German work refuted what he saw as some of their excessive conclusions:

We are far away from claiming that big agriculture and heavy industry raised the Hitler movement as their vassal, so to speak. The course of world history cannot be explained in such simple terms, nor can the materialist conception of history be applied in such a crude fashion.¹⁶⁰

After consulting with scholars on publishing for a US audience (including Carl Friedrich, who provided comments on the manuscript) Fraenkel further distanced himself from theories of the Nazi state that emphasised the constitutive role of capital in German expansionism and aggression.¹⁶¹ He characterised the cartels, who had sought to free themselves from political interference, as merely 'organs' of the normative state: it was the courts and the National Socialist party that were its primary guardians.¹⁶² Fraenkel accepted that, in general, the work of arming Germany and of expansionist war had served to enhance the safety of income from private property.¹⁶³ On his account, however, and remembering the 'necessity for decentralization of certain [economic] functions in any large-scale society with advanced technology', it was not industry that fuelled the prerogative state, but ultimately the prerogative state that needed private enterprise, and allowed for the normative state that sustained it.¹⁶⁴ In this sense, we can understand Fraenkel as concerned to develop a vocabulary that, unlike Neumann, eschewed any direct legal or constitutional relationship to social planning. This account led him to the conclusion that the true enemy was not the expansionist tendencies of capitalist relations but the prerogative state that had nurtured and corrupted them, and from which they could be redeemed.¹⁶⁵

¹⁵⁶ Ibid 30, 38.

¹⁵⁷ Ibid 42, and 68–9. To this extent, Fraenkel agreed with Schmitt's assessment that '[t]he sovereign is he who has the legal power to command in an emergency' and to determine the limits of that emergency: at 57, quoting Schmitt's *Politische Theologie*.

¹⁵⁸ Ibid 72. See further at 76–8 (on ongoing protections for contract, property and the predictability necessary for tax assessments); 173 (on modifications to specific private property rights). With the exception of German Jews, who were subjected to the prerogative rather than the normative state: at 89.

¹⁵⁹ Kelly (n 130) 260.

¹⁶⁰ Meierhenrich (n 148) liii (German parentheticals omitted).

¹⁶¹ Ibid liii, lviii–lx.

¹⁶² Fraenkel, *Dual State* (n 147) 71–97.

¹⁶³ Ibid 173.

¹⁶⁴ Ibid 185, 206–8.

¹⁶⁵ Ibid 183, quoting Schumpeter's assertion that '[n]ationalism and militarism are not created by capitalism. They become, however, capitalized and, finally they take their best strength out of capitalism'. See also Meierhenrich (n 148) liv.

The distinctions between Neumann's account and Fraenkel's provide an heuristic for understanding the implications of the shifting trajectory of US practice. During the war, German-speaking lawyers in the US, influenced by Neumann's theories, had been influential in shaping responses to cartelisation.¹⁶⁶ In response to the dangers of fascist internationalism, early proposals from within the US called for radical German deindustrialisation and agrarianisation.¹⁶⁷ Some US lawyers and administrators initially took a similar view of Japan, where since the 1920s large *zaibatsu* or company combines had steadily increased their connections to and influence over the government of Japan.¹⁶⁸ During the war, permissive legislation had enhanced the 'dominant economic position' of these companies within Japan, and 'hybrid agencies' with state capital and a measure of state control were created for international ventures, such as 'Manchuria Colonization' and 'Imperial Mining Development'.¹⁶⁹ US military administrators such as General Douglas MacArthur in turn attributed significant responsibility for the conflict to the *zaibatsu*, stating that '[i]t is these very persons...who, working in closest affiliation with the military, geared the country with both the tools and the will to wage aggressive war'.¹⁷⁰

Later in the occupations, however, administrators during the Japanese occupation would echo Fraenkel's views, reluctant to extend early measures for the purge of 'active

¹⁶⁶ Heinrich Kronstein, 'The Dynamics of German Cartels and Patents II' (1942) 10 *University of Chicago Law Review* 49. Kronstein was an advisor to the Antitrust Division of the US Department of Justice and this article was the basis of testimony given to the Congressional Committee on Patents in 1942, headed by Senator Bone.

¹⁶⁷ The Morgenthau Plan, proposing German agrarianisation, was an extreme postwar proposal that drew on this understanding of aggression. On thinking about German and Italian fascism and Japanese imperialism as forms of spatial ordering, see A Dirk Moses, 'Empire, Colony, Genocide: Keywords and the Philosophy of History' in A Dirk Moses (ed), *Empire, Colony, Genocide* (Berghahn, 2008) 3, 36; Adam Tooze, *The Wages of Destruction: The Making and Breaking of the Nazi Economy* (Allen Lane, 2006) 9–10; Davide Rodogno, *Fascism's European Empire: Italian Occupation during the Second World War* (Cambridge University Press, 2006); Jeremy A Yellen, *The Greater East Asia Co-Prosperity Sphere: When Total Empire Met Total War* (Cornell University Press, 2019). In Japan, this also had a complicated relationship to the political legacy of calls by Japanese intellectuals for forms of pan-Asian solidarity dating back to the late nineteenth century: Marc Andre Matten, *Imagining a Postnational World: Hegemony and Space in Modern China* (Brill, 2016) ch V, 'Fighting the White Peril'. Though Japanese forms of spatial and racial ordering were justified by reference to US hegemonic interventions in Latin America, this charge was strenuously refuted by US commentators who stressed that the Monroe Doctrine was 'as officially defined, solely a policy of self-defense': George H Blakeslee, 'The Japanese Monroe Doctrine' (1933) 11 *Foreign Affairs* 671, 676. On the continuities between the Monroe doctrine and contemporary forms of spatial and legal ordering, see Anne Orford, 'NATO, Regionalism, and the Responsibility to Protect' in Ian Shapiro and Adam Tooze (eds), *Charter of the North Atlantic Treaty Organisation together with Scholarly Commentaries and Essential Historical Documents* (Yale University Press, 2018).

¹⁶⁸ The *zaibatsu* were corporate conglomerates or combines, often said to be largely controlled by a single family. Bisson estimates that by 1945 the number of employees of the Mitsubishi combine alone numbered some 2.8 million: T A Bisson, *Zaibatsu Dissolution in Japan* (University of California Press) 11.

¹⁶⁹ Ibid 13–14. Bisson suggested that the urgent promotion of the *zaibatsu* form, as a way of doing commerce, had itself been a response to the need for Japan to present itself as a fully industrialised and civilised nation able to participate in international relations on an equal footing: the 'price paid by Japan to catch up with the Western world': ibid 34. See further R P Anand, *Studies in International Law and History: An Asian Perspective* (Martinus Nijhoff, 2004) 24–102; Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill, 2019) 208.

¹⁷⁰ Montgomery, *Forced to be Free: The Artificial Revolution in Germany and Japan* (University of Chicago Press, 1957) 99. See also Theodore Cohen, *Remaking Japan: The American Occupation as New Deal* (Free Press, 1987) 157–8. On MacArthur as the 'last of the great colonial overlords' see Takemae Eiji, *Inside GHQ: The Allied Occupation of Japan and its Legacy* (Continuum, 2002) 5.

exponents of militant nationalism and aggression' to figures that many politicians and business leaders perceived to be merely ordinary commercial actors, critical to the revival of the postwar world.¹⁷¹ In some German industries, such as coal and steel, extensive deconcentration proved difficult due to perceptions of business needs for technological integration and security of supply.¹⁷² A focus on deconcentration also proved politically contentious within the US given domestic struggles over the scale of its own oligopolies during this period.¹⁷³ Commentators in the subsequent decade would also observe that the importance of private property became more significant for the occupiers of the western zones over the course of their occupation.¹⁷⁴ Over the course of both the German and Japanese occupations, the focus of Allied administrators shifted toward decartelisation and antitrust, which US occupiers viewed as compatible with concepts of the free market and healthy competition, and the internationalisation of an 'open door' economy.¹⁷⁵ This philosophy was also reflected in planning for postwar forms of regional organisation that might ensure a secure, economically integrated Asia.¹⁷⁶ Regulation, rather than transformation, became the Allied answer to the question of private industry and its relationship to problems of international aggression. With the eventual shift from a strategy of military pacification to one of reindustrialising new strategic allies, and of feeding occupied populations, economic revitalisation in both Germany and Japan would eventually become the 'prime objective' of the occupying forces.¹⁷⁷ The re-instantiation of constitutional protections, including for property rights, would to a large extent prevail over proposals for the socialisation or redistribution of private power.¹⁷⁸

¹⁷¹ Cohen (n 170) 155–6; 166, quoting Navy Secretary Forrestal, *The Forrestal Diaries* (Walter Millis ed, Viking Press, 1951) 248. See also George Blakeslee, *The Far Eastern Commission: A Study in International Cooperation, 1945–52* (Department of State, 1953) 199–200, on the dismayed reaction within the US to the release of a policy paper entitled 'Excessive Concentrations of Economic Power in Japan'. In Japan, the influence of business was not only rhetorical: two seats of the five-person Holding Company Liquidation Commission were allocated to businessmen, who along with the appointed chairman (a man of business himself) vetoed many of the deconcentration measures: Cohen (n 170) 372–3. On the business response regarding Germany, see the *Economist* article of 8 September 1945 cited in Volker R Berghahn, *The Americanisation of West German Industry 1945–1973* (Berg, 1986) 89.

¹⁷² H K Bock and H Korsch, 'Germany: Allied Decartelisation and Deconcentration Laws' in W Friedmann (ed), *Antitrust Laws: A Comparative Symposium* (Stevens & Sons, 1956) 1326, 157–8.

¹⁷³ Berghahn (n 171) 89.

¹⁷⁴ W Friedmann (ed), *Antitrust Laws: A Comparative Symposium* (Stevens & Sons, 1956) 173–4.

¹⁷⁵ Berghahn (n 171) 101, and see generally 84ff on the role of the Freiburg School; Bisson (n 168) 187–90. See also Eleanor M Hadley, *Antitrust in Japan* (Princeton University Press, 1970). Directives to occupation officials fleshing out the way in which the Japanese economy would be reshaped for participation in global trade included the abrogation of 'all legislative or administrative measures which limit free entry of firms into industries ... where the purpose or effect of such measures is to foster and strengthen private monopoly' and the elimination of 'private international cartels or other restrictive private international contracts or arrangements': SWNCC 150/4; 'Basic Directive for Post-Surrender Military Government in Japan Proper', JCS 1380/15, reproduced in *Political Reorientation of Japan: September 1945 to September 1948: Report of Government Section* (US Government Printing Office, 1949) vol II, 428.

¹⁷⁶ See Barnes (n 127) 74.

¹⁷⁷ Tetsuya Kataoka, *The Price of a Constitution: The Origins of Japan's Postwar Politics* (C Russak, 1991) 47; Berghahn (n 171) 88. See the famous speech of September 1946 by US Secretary of State James F Byrnes reproduced in Armin Grunbacher, *The Making of German Democracy: West Germany during the Adenauer Era, 1945–65* (Manchester University Press, 2010).

¹⁷⁸ Although the UK had announced the nationalisation of German coal and steel companies in August of 1946, they gave up these plans due to US influence over the Bizone: Berghahn (n 171) 96, 106. See also the reported UK proposals in the Far Eastern Commission regarding the nationalisation of coal, iron and steel: Bisson (n 168) 4. On internal US discussions, see Cohen (n 170) 355; on rejection, see Bisson (n 168) 47ff. In Japan,

In this endeavour, Fraenkel's vocabulary of prerogative rule lent itself to a focus on legal institutions as constituting the 'state' and, correspondingly, a solidification of formal legal analysis over sociological readings of private power. That solidification, offering as it did an alternative to Neumann's economic constitutionalism, can be understood as significant for the US scholars with whom he was in conversation.¹⁷⁹ For Fraenkel, the task of military government within the conditions of a formerly fascist state was to ensure the restoration of the rule of law, rather than the narrower confines of military necessity.¹⁸⁰ Like Neumann, he believed that the political realities of foreign interference under the conditions of occupation were unavoidable.¹⁸¹ But the role that Fraenkel proposed for the occupier was not to support the social-democratic vision put forward by Neumann and the remaking of private right and social power that it required. Instead, Fraenkel's was a more technocratic focus on institutions and formal rights: the elimination of the 'prerogative state' and of 'German institutions that are contrary to the idea of the Rechtsstaat', along with the granting of 'civil liberties' and protection from arbitrary interference.¹⁸² As I have shown above, this same question of whether scholarship should attend to formal written constitutions or also encompass a thicker analysis of structural relations has been at stake in contemporary scholarly debates.¹⁸³ Retrieving the Neumann-Fraenkel argument shows that this can be understood not only as a question of scholarship *about* international constitution-making versus scholarship *about* structural exploitation or new forms of dependency, but also as a question of the boundaries of and methods adopted by the constitutionalist vocabulary.

B. *Law after Empire? From Civilisation to Constitutionalism*

Debates about desirable theories of constitutionalism in the wake of imperial expansion were staged not only among lawyers and theorists from the defeated states, but also among US international lawyers and theorists of international organisation. Of these, the work of Quincy Wright is instructive for illustrating one influential account of the relationship between constitutions and the postwar international legal order.¹⁸⁴ In this part, I argue that Wright's interest in constitutional forms of organisation as a technique for organising the postwar

opposition to measures of deconcentration within the US occupation was also aided by the recently introduced constitution, since the head of Section considered that domestic legislation to enforce the policy was very likely to fall foul of its provisions: Cohen (n 170) 364, referring to the views of Courtney Whitney. See also the view of the Deconcentration Review Board, cited in Nisuke Andō, *Surrender, Occupation and Private Property in International Law: An Evaluation of US Practice in Japan* (Oxford University Press, 1991) 26.

¹⁷⁹ On the communications between Fraenkel and Friedrich see Meierhenrich (n 148) liii.

¹⁸⁰ Was it right to say, in other words, that "the sacred right of revolution" [is] suspended indefinitely by invasion?: Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupation Government in the Rhineland* (Oxford University Press, 1944).

¹⁸¹ The task of the occupier was rather to 'decide what part he will take in the internal struggle for power': *ibid* 32. Fraenkel singled out with approval the work of Carl Friedrich on the necessity for military government of making choices about law: at 229.

¹⁸² *Ibid* 230–1. On Fraenkel's subsequent role in the Korean War, see Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton University Press, 2014) 89ff.

¹⁸³ See Part IIB.

¹⁸⁴ On the general influence of Quincy Wright on the disciplines of international law and international relations as they took shape within the US, see the memorials in (1972) 66 *American Journal of International Law* 560 and (1970) 14 *Journal of Conflict Resolution* 443. See also 'A Select Bibliography of the Writings of Quincy Wright' in Lepawsky, Buehrig and Lasswell (eds), *The Search for World Order: Studies by Students and Colleagues of Quincy Wright* (Appleton-Century-Crofts, 1971) 441, and the sources cited at below n 210.

transition drew on frameworks of mandatory governance and the standard of civilisation that had been significant in mediating legal relations between the European and non-European worlds. His contribution, along with other shifts in thought and scholarship during this time assisted in transforming these frameworks into a social-scientific vocabulary for the postwar world. At the same time, recovering his work on this question shows that the vocabulary of civilisation on which it drew was connected to a set of ideas about international commerce and economic ordering: a connection which was unremarkable for Wright's contemporaries but which has come to seem marginal as a result of present taxonomies and ways of organising the field.

Wright's vision of the postwar transformation, and the new forms of thinking required to achieve it, is perhaps most clear in his 1942 paper entitled 'Political Conditions of the Period of Transition', published in a collection of papers by the Commission to Study the Organisation of Peace.¹⁸⁵ This was part of a wider project to set out new frameworks of international ordering in the aftermath of the failure of the League, and of colonial organisation and domination of territory, to prevent the outbreak of war.¹⁸⁶ Members of the Commission, including Wright, dedicated themselves to planning for a new mode of international organisation in which states would renounce force except in self-defense, commit to collective security maintained through regional and international policing, and maintain a global economy with free access to resources and goods.¹⁸⁷ Central to that project was the conceptualisation of and planning for the 'transitional period' following the conclusion of the war, which needed to take place before this organisation of international society could be realised.¹⁸⁸ In his paper, Wright argued that the present situation demanded a departure from the conventions of international law regarding war's resolution. What Wright described as ordinary practices — a brief transitional period following the resolution of war through treaty-making, premised on a swift return to the state of international relations that existed prior to the war — did not, he argued, accord with present needs, in which the community of nations was faced with a 'revolutionary outbreak' against established laws, including the outlawry of aggressive war or the non-recognition of its gains in the Paris Pact and the Stimson Doctrine.¹⁸⁹ The present conflict, widely regarded as exacerbated by the terms of the Versailles settlement, had also revealed the peace treaty to be

¹⁸⁵ See the collection of papers presented to the Commission to Study the Organization of Peace: (1942) 21 *International Conciliation* 264. The Commission, which Wright had helped to set up in 1939, was largely composed of American international relations scholars, international lawyers, historians and peace activists: Robert P Hillmann, 'Quincy Wright and the Commission to Study the Organization of Peace' (1998) 4 *Global Governance* 485.

¹⁸⁶ Commission to Study the Organization of Peace, *Building Peace: Reports of the Commission to Study the Organization of Peace* (Scarecrow Press, 1973) 'Preliminary Report' 3. Although this did not mean abandoning colonialism altogether, but only limiting it to 'backward areas ... suitable for that purpose without injury to the native inhabitants': at 8.

¹⁸⁷ Ibid 7. As P E Corbett had elsewhere observed, leaving the colonies under European supervision was 'hardly adapted to the recognition of universal interest in the commerce and in the progress of the colonial territories': P E Corbett, *Post-War Worlds* (Institute of Pacific Relations, 1942) 182. The Institute's work itself was funded by philanthropic businessmen, as well as Carnegie and the Rockefeller Foundation: Tomoko Akami, *Internationalizing the Pacific: The United States, Japan and the Institute of Pacific Relations* (Routledge, 2003) 48–50.

¹⁸⁸ *Building Peace* (n 186) 12–15. See also Hillman (n 185) 491.

¹⁸⁹ Quincy Wright, 'Political Conditions of the Period of Transition' (1942) 21 *International Conciliation* 264–5.

a 'static instrument ill-adapted to cope with changing conditions'.¹⁹⁰ In its place, Wright proposed that 'the transitional period from violent to peaceful change be given a more definite recognition' through the active suppression of aggression and a 'period of reconstruction' by international occupiers.¹⁹¹ In other words, Wright felt that that process of governing should now be performed by international, rather than domestic, political actors.

In Wright's view, the horizon for that process of international governing should be the eventual acceptance by the local population of the new forms of order that it installed, rather than an account of how that order could be liberated from private interests. The function of this period of transition would be first and foremost to enable the discrediting of aggression as a means of conducting politics, by means of both the complete defeat of aggressor governments and the sustained occupation of their populations.¹⁹² However, the actions of the occupying states needed to avoid the characterisation of 'Anglo-American aggression' — instead presenting themselves as performing the functions of a 'police power acting in behalf of the world community'.¹⁹³ Hence, the governments responsible for the defeat of the aggressors should first perform 'emergency tasks' of administration stemming from the needs of the occupied populations, including 'the suppression of violence and lawlessness, the demobilization of armies ... the setting of people to work ... and the re-education of peoples in the values of civilization'.¹⁹⁴ Following these emergency tasks, the most important aspect of the transition would, Wright said, be the establishment of political institutions based on consent of the governed. This was to be conducted 'in accordance with the 'Anglo-Saxon tradition of gradual development' developed through imperial and colonial forms of administration which preferred 'tried practices to logical theories'.¹⁹⁵ However '[c]are must be taken not to restore and recognize national governments prematurely', in order to avoid 'concepts of national sovereignty' that would prove problematic to these new forms of international organisation.¹⁹⁶ In the meantime, the occupiers should focus on obtaining the consent of the occupied populace to 'democratic institutions'.

One means of doing so was through constitutional forms of organisation, which both worked to establish such institutions and provided a treatment for aggressive tendencies. In a technical sense, the transformation of 'civilised' states under conditions of occupation was not evidently straightforwardly permitted by formal international conventions, a problem that vexed international lawyers and that fuelled critiques from the Japanese government.¹⁹⁷ Elsewhere, Wright had argued that constitutionalism of the United-States type 'facilitate[d] a

¹⁹⁰ Quincy Wright, 'Peace Problems of Today and Yesterday' (1944) 38 *American Political Science Review* 512.

¹⁹¹ Wright, 'Transition' (n 189) 265–6.

¹⁹² *Ibid* 267.

¹⁹³ *Ibid* 268.

¹⁹⁴ *Ibid* 268–9.

¹⁹⁵ *Ibid* 269. See also Quincy Wright, 'The Government of Iraq' (1926) 20 *American Political Science Review* 743, 743.

¹⁹⁶ Wright, 'Transition' (n 189) 273. This position would be formalised to some degree in the enemy states clauses of the United Nations Charter.

¹⁹⁷ See Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press, 2nd edn, 2012) 163, quoting the correspondence between Max Huber and US Secretary of State Byrnes; 'The Swiss Chargé (Grässli) to the Secretary of State' (16 August 1945), in *Foreign Relations of the United States, 1945–1955*, 1945 vol VI, The British Commonwealth, The Far East, 668–670, enclosing correspondence from the Japanese government.

harmonizing of international law and municipal law through application of the former in national courts', and thus reduced conflicts between legal sovereigns.¹⁹⁸ A separation of powers meant that the ability of the executive to wage war was restrained by legislative bodies, such as Congress, while a functional centralisation facilitated war.¹⁹⁹ Third, the geographical federalism of a government, such as the division of powers between state and national governments in the United States, also lent itself to peace, insofar as it reduced the intrusion of the government into private rights.²⁰⁰ In summary, Wright considered that

absolutistic states with geographically and functionally centralized governments under autocratic leadership are likely to be most belligerent, while constitutional states with geographically and functionally federalized governments under democratic leadership are likely to be most peaceful.²⁰¹

Wright's interest in these techniques was part of a then-emergent vocabulary of constitutionalist thought emerging out of colonial and mandatory rule. During the preceding century, international lawyers deployed what they termed the 'standard of civilisation' as a means of differentiating the legal status of European, Christian states and the rights, capacities and immunities accorded to the political communities they encountered through trade and military conquest. This formulation, born of the colonial encounter, was central both to European expansion and to the constitution of the modern discipline of international law and the concomitant shift to a largely, though not exclusively, positivistic and fact-oriented jurisprudence.²⁰² It allowed for the mediation of unequal relations with non-European polities and the rationalisation of their exclusion (with limited exceptions) from full membership of international society. Civilisation existed not only as a binary question of inclusion but as a set of capacities based on gradation within a hierarchy, at the apex of which was the European state.²⁰³ Both this question of factual classification and the question of legal consequences attaching to such classification were a matter of contest: for example, the occupation of lands inhabited by peoples considered not to be possessed of recognisable legal institutions of their own could lead to territorial acquisition either through conquest or through the legally distinct though no less violent doctrine of *territorium nullius*.²⁰⁴ This explicit use of civilisational language, though still common, was by Wright's time in decline, while resistance and movements for self-determination in the colonies were ascendant.²⁰⁵

¹⁹⁸ Quincy Wright, *A Study of War* (University of Chicago Press, 1942) vol II, 836.

¹⁹⁹ *Ibid* 838–9.

²⁰⁰ *Ibid* 837–8. See also Friedrich Hayek, 'The Economic Conditions of Interstate Federalism' [first published 1939] reprinted in *Individualism and the Economic Order* (University of Chicago Press, 1948).

²⁰¹ Wright, *Study* (n 198) 847–8.

²⁰² Anghie (n 13) 55. More recently, Tzouvala, *Capitalism as Civilisation* (n 98) has argued that the animating logics of the standard of civilisation continue to be a key axis along which the argumentative practices of international law oscillate in their application to non-Western polities, even if no longer exclusively described in such terms.

²⁰³ Anghie (n 13) 77–8.

²⁰⁴ Quincy Wright, *Mandates under the League of Nations* (University of Chicago Press, 1930) 7, and see sources cited at n 10 (Oppenheim, Westlake, Lindley). This can be contrasted with the legal duties attaching to the occupation of European states.

²⁰⁵ Anghie (n 13) 138–9; Tzouvala, *Capitalism as Civilisation* (n 98) 46. Although the language of civilisation and of barbarism is occasionally used today by some contemporary scholars of constitutionalism: see Ulrich Preuss, 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External

But if by 1930 Wright had recorded that ‘international law [was] no longer limited by geographical position or type of civilization’ in form, nonetheless as a practical matter international law’s subjects were not yet equal.²⁰⁶ Instead, Wright saw a world of ‘entities displaying a tropical luxuriance of political and legal organization, competence and status’.²⁰⁷ The new institutions and techniques of mandatory government created under the League of Nations had at least nominally been directed at the amelioration of that status, with the promise of statehood conditioned on the imparting of specific forms of rule, and the opening of territories to trade on equal terms as between the mandatory power and other states.²⁰⁸ Although few formal international legal protections applied to the inhabitants of the mandates, Wright implied that the mandatory powers were nonetheless moderately suited to such a task since:

‘[a]ll civilized states have incorporated into their constitutions ... certain limitations upon political and administrative tyranny or caprice in the interests of the inhabitants of their territories ... [and] have become so imbedded in the system of law, in the practice of the administration, in the traditions of the legislature and other political bodies, and in the mores of the people that departure from them is unlikely’.²⁰⁹

In other words, Wright endorsed the idea that the mandatory powers were possessed of superior constitutional orders not only in a formal sense, but also through their inculcation into the social norms and political attitudes of the power’s own population.

Wright’s focus on constitutional structure and mores illustrates a moment of transition toward the embedding of civilisational language in the more scientific vocabulary of constitutionalism. As scholars have shown, Wright’s work was heavily influenced by social science methodology in general and Chicagoan pragmatism in particular.²¹⁰ This transition had begun to occur through the League institution of the mandate.²¹¹ In respect of the Syrian mandate, for example, the French government had refused to accept several articles of the constitution promulgated in 1928. Though this refusal was influenced by domestic conservative anxieties over the end of empire, the French couched it in legal terms, claiming that refusal was required by the conflict of those articles with the general duties of mandatory powers to

Constitutionalization’ (2006) 51 *New York Law School Law Review* 467, 494; Kumm (n 91) describing Germany and Japan as ‘highly civilised barbarians’.

²⁰⁶ Wright, *Mandates* (n 204) 16.

²⁰⁷ *Ibid* 276.

²⁰⁸ *Ibid* 22–3. See generally Anghie (n 13) ch 3; Tzouvala, *Capitalism as Civilisation* (n 98) ch 3. On the distinct position of the ‘C’ class mandates see Cait Storr, ‘“Imperium in Imperio”: Sub-Imperialism and the Formation of Australia as a Subject of International Law’ (2018) 19 *Melbourne Journal of International Law* 335.

²⁰⁹ Wright, *Mandates* (n 204) 401. The specific question Wright was discussing was whether the mandates system would recognise the extension of constitutional protection to the inhabitants of the mandates through territorial annexation, or support international protection and administration: 404.

²¹⁰ Emily Hill Griggs, ‘A Realist Before “Realism”’: Quincy Wright and the Study of International Politics between Two World Wars’ (2001) 24 *Journal of Strategic Studies* 71. Wright’s A Study of War project was the work of several scholars hosted at the University of Chicago for more than a decade. See Waqar H Zaidi, ‘Stages of War, Stages of Man: Quincy Wright and the Liberal Internationalist Study of War’ (2018) 40 *International History Review* 417.

²¹¹ Tzouvala, *Capitalism as Civilisation* (n 98) 89. Tzouvala also notes the extent to which the particular mechanisms of transformation and formal independence embraced by the mandatory powers were those that allowed imperial forms of economic exploitation to continue unchecked: *ibid* 98, 124. Sripathi has argued that constitutional mechanisms were instrumental in providing continued trade and mineral rights for great powers during this period: *UN Auspices* (n 2) 144.

supervise and circumscribe the transition to self-government.²¹² As this claim was a matter of interpretation it required that the idea of proper constitutional self-government be given some meaning: an enterprise that was being undertaken before the war in US practice and schools of government and with which US international lawyers were becoming familiar.²¹³ Carl Friedrich, whose thought is explored further below, had been one of the leading figures in promoting a version of this vocabulary within the United States.²¹⁴ Wright himself had been significant in the building of this social-scientific enterprise through describing and evaluating the extent to which, in Iraq, the promulgation of national constitutions had been able to solve ‘the international problem of backward areas’.²¹⁵ This shift from mandatory governance to scholarly evaluation shows that civilisational thought lived on through an embrace of constitutional techniques of governance.

Wright’s views on the Manchurian incident indicate his shift toward the view that legal responses to Japan’s actions needed to consider the constitutional dimensions of imperialism. Dating from the forcible ‘opening up’ of Japan to forms of unequal commercial and diplomatic relations in the nineteenth century, the Japanese government had pursued legal recognition of civilised status through a set of private law codification reforms and a constitution modelled on the German state.²¹⁶ From the early twentieth century, this had extended to a policy of imperial expansion into Manchuria, first through the management and exploitation of treaty-based concessions, and then subsequently to demands from Japanese companies for colonial control of areas of the mainland.²¹⁷ In 1931, conflict between Japanese imperialists and Chinese nationalists came to a head through an explosion engineered by Japanese army officers, which served as a pretext for invasion and colonisation.²¹⁸ In response, Secretary of State Henry L Stimson announced that the United States would refuse to recognise ‘any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of

²¹² Wright, *Mandates* (n 204) 429; Philip Khoury, *Syria and the French Mandate* (IB Tauris, 1987) 340–2. The articles in question proclaimed Syria’s indivisibility as a territory that included Lebanon, Transjordan, and Palestine; empowered the government to raise an army; and granted the head of state capacity to enter into diplomatic and legal relations and declare a state of emergency.

²¹³ On practices, see, eg, Woodrow Wilson’s views regarding the Philippines in ‘The Place of the United States in Constitutional Development’ cited in Bâli and Rana (n 13); and Elihu Root’s view that the US should educate the colonial territory of ‘Porto Rico’ (as it was then called) in ‘respect for the principles of constitutional government’: Report of the Secretary of War’ in *Annual Reports of the War Department for the Fiscal Year ended June 30, 1899* (Government Printing Office, 1899) 26. On schools of government, see the work of Carl Friedrich discussed below. This might be understood as one precursor to the postwar ‘rise’ of US comparative constitutional law that Fontana has described: David Fontana, ‘The Rise and Fall of Comparative Constitutional Law in the Postwar Era’ (2011) 36 *Yale Journal of International Law* 1.

²¹⁴ Paul Sigmund, ‘Carl Friedrich’s Contribution to the Theory of Constitutionalism-Comparative Government’ (1979) 20 *Nomos* 32, 36.

²¹⁵ Wright, ‘Iraq’ (n 195) 757ff, 767. The article itself is instructive as a moment of coexistence between explicitly biological racism and more scientific discipline: see, eg, Wright’s statement lamenting that ‘the Arab mind seems not to take kindly to orderly judicial procedure’ (at 763).

²¹⁶ Anand, ‘Family of Civilised States’ (n 125).

²¹⁷ See Y Tak Matsutaka, *The Making of Japanese Manchuria, 1904–1932* (Harvard Asia Center, 2001); Louise Young, *Japan’s Total Empire: Manchuria and the Culture of Wartime Imperialism* (University of California Press, 1998) 197–9.

²¹⁸ Louise Young, ‘When Fascism Met Empire in Japanese-Occupied Manchuria’ (2017) 12 *Journal of Global History* 274, 284–5.

the Pact of Paris'.²¹⁹ While Wright's writings on the subject considered Stimson's doctrine to be a development of the general principles of international law,²²⁰ he was also interested in more durable solutions that would reach within the structure of the state as a matter of law, not merely as a matter of consequence. He framed the question as one of Japanese legal organisation, and specifically 'the division of authority in the Japanese constitution by which the military arm is imperfectly controlled by the civil government responsible for the conduct of the foreign relations of Japan'.²²¹ Japan's 'constitutional institutions', he had written, tended to 'act as a spur' to 'war-like activities'.²²² It was therefore 'difficult to avoid the conviction ... that a development of the position of parliament and cabinet in Japan beyond the possibility of constitutional challenge by the military would be in the interest of peace'.²²³ In other words, the answer might be to turn to the legal and particularly constitutional structures that for the mandates had been so regarded as a civilising force: not in respect of 'backward areas' but, now, as a generalised technique for ensuring peace. Similar views came to be reflected in internal memoranda produced by the UK and US, which viewed the former Meiji constitution as 'defective' because it allowed Japanese aggression to 'flourish', while avoiding the question of the co-existence of the constitutional arrangements of European states not only with centuries of colonial rule but with the re-invasion of former colonial territories following the fascist defeat.²²⁴

At the same time as promoting a focus on formal institutions of government, civilisational thought was the medium through which Wright contested the idea that post-capitalist forms of social ordering were needed in the wake of fascist aggression. Within Europe, what international lawyers perceived as distinguishing the war from other conflicts was not only the scale of the violence but the many acts of 'economic spoliation' by Axis powers: the stripping from the land and its inhabitants of food, raw materials, and even slave

²¹⁹ 'The Secretary of State to the Ambassador in Japan (Forbes)' (7 January 1932) in *Foreign Relations of the United States, Japan, 1931–1941*, vol I, 76. This came to be known as the Stimson Doctrine. See also the note from the Council of the League of Nations to the Japanese Government, cited in Kisaburo Yokota, 'The Recent Development of the Stimson Doctrine' (1935) 8 *Pacific Affairs* 133. The members of the League of Nations, after a lengthy examination by the Lytton Commission, eventually followed suit: Quincy Wright, 'The Concept of Aggression in International Law' (1935) 29 *American Journal of International Law* 373, 378. Responses from Japanese international lawyers varied, from the assertion of the Japanese right to self-defence within a regional sphere of interest to acceptance of the principle of non-recognition, if only as a provisional measure pending a 'final peaceful solution of the dispute'. See Inazo Nitobe, 'Japan and the Peace Pact' (Report of Radio Broadcast, 20 August 1932) cited in Quincy Wright, 'The Meaning of the Pact of Paris' (1933) 27 *American Journal of International Law* 39; Yokota, 'The Recent Development of the Stimson Doctrine' (n 219). See also Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge University Press, 2012) ch 4.

²²⁰ Quincy Wright, 'The Legal Foundation of the Stimson Doctrine' (1935) 8 *Pacific Affairs* 439, 443.

²²¹ Quincy Wright, 'The Manchurian Crisis' (1932) 26 *American Political Science Review* 45, 47.

²²² Quincy Wright, 'Introduction' in Tatsuji Takeuchi, *War and Diplomacy in the Japanese Empire* (Doubleday, Doran and Co, 1935) xix. Tatsuji Takeuchi was a Professor of International Relations at Kwansai Gakuin University who had visited with Wright in Chicago.

²²³ *Ibid* xix.

²²⁴ The National Archives (UK), DO 35/2026, WR 335/21, p. 36, Far Eastern (Ministerial) Committee, 'Future Constitutional Machinery for Japan' (13 October 1945) Appendix; 'Politico-Military Problems in the Far East: Reform of the Japanese Governmental System' (PR-32), Records of the State–War–Navy Coordinating Committee (October 8, 1945).

labour.²²⁵ By the interwar period, the idea that imperialism was an economic as well as a political phenomenon had gained currency among Western authors, as well as Soviet and anti-colonial thinkers.²²⁶ Wright, however, was among those scholars of economics, political science and law that contested the idea that aggression could be understood as the product of capitalist structures. Although during the nineteenth century, war had perhaps rightly been understood as an economic institution, wrote Wright, the conditions of modern capitalism and trade on liberal terms ‘made it no longer such’. While the German war rhetoric linked the war to ‘demands for *Lebensraum*, colonies and conquest’, Wright ascribed these demands not to expansionary tendencies of capital but to misguided ‘[m]otives of escape from domestic depression, coupled with dubious theories concerning the economic value of protectionism and of the political control of markets and sources of raw materials’.²²⁷ Such theories, geared as they were toward the acquisition and withholding of military power from potential enemies, were ultimately political in nature, rather than lending themselves to materialist explanations.²²⁸ Here, he relied on a new wave of British and American scholarship by economists such as Lionel Robbins and Eugene Staley, suggesting that ‘[i]nvestors have more frequently been the unwilling instruments of a politically motivated imperialism than the concealed drivers of diplomatic or military expansionism’.²²⁹ Although these attempts at economic self-sufficiency contained ‘the seeds of war’ because states raising barriers to trade were ‘certain to injure others thereby deprived of markets’, the solution that Wright proposed was not the reduction of the power of capital through forms of state control or nationalisation.²³⁰ Rather, the economic elements of the solution were greater industrialisation and international trade on liberal terms.²³¹

Wright, along with other Allied international lawyers, positioned fascist expansionism as part of a wider landscape of challenges to liberal economic order in the interwar period that included socialist planning and nationalisation, as well as liberal protectionism and barriers to trade.²³² Addressing the American Society of International Law in 1941, Wright described this as a process by which the

[g]eneral equality of the opportunity to trade and moderate freedom of trade have given way to discrimination and totalitarian control of economy. As this process has developed, economic

²²⁵ Alexander (n 136). See, eg, L H Woolsey, ‘Post-War Development of International Courts’ (1943) 37 *American Journal of International Law* 276, 283, 286. Some even viewed this as partly attributable to the existing law of occupation, which as it was then structured was ‘more likely to be adopted by rich and conservative states than by radical powers badly in need of the additional wealth of occupied areas’: Ernst H Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, 1942) [108].

²²⁶ Alexander (n 136).

²²⁷ Wright, *Study* (n 198) vol I, 284. See also Quincy Wright, ‘International Law and Commercial Relations’ (1941) 35 *American Society of International Law Proceedings* 30, 30–1.

²²⁸ Wright, *Study* (n 198) vol I, 282.

²²⁹ *Ibid* vol I, 284–5, citing Eugene Staley, *War and the Private Investor* (Doubleday, Doran & Co, 1935), and Lionel Robbins, *The Economic Causes of War* (Cape, 1939).

²³⁰ *Ibid* vol II, 851.

²³¹ *Ibid* vol II, 1143, 1189–92.

²³² Feilchenfeld (n 225) [68]; Wright, *Commercial Relations* (n 227) 30. On the broader international legal response to these revolutions see Kathryn Greenman et al (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press, 2021).

crises and wars have become worse, until the structure of not only business and government, but of civilization itself, has been gravely shaken.²³³

Liberal forms of international economic organisation, Wright believed, were another aspect of the ‘concepts of civilization’ long expounded by international law, which, by ‘separating commerce from government and insisting on some respect for the individual, had an influence in moderating the practices of war’.²³⁴ The experience of the nineteenth century showed that constitutions had also acted to embed these concepts through protections for freedom of contract and carrying on a business. The flaw in such forms of organisation up until this point, for Wright, was not their contribution to expansionism, but their failure to sufficiently integrate a focus on institutions of rule. Accordingly, he proposed a program for an international economic multilateralism concerned with fair dealing in international commerce, the investigation and conciliation of controversies, and the adjudication of international responsibility for injuries to an underlying customary right to trade.²³⁵ Although drawing more explicitly from international legal traditions than from Austrian economics, Wright thus shared the diagnosis of the mid-century’s ills with the ordoliberal thinkers that were influential in reshaping the state for a smoothly functioning economic order following the end of formal colonialism.²³⁶

Wright’s scholarship on the constitutional aspects of this question offers a window onto one moment in the social-scientific professionalisation of the vocabulary of constitutional governance. Above, I have shown that contemporary empirical or social-scientific scholarship addressing the question of international constitution-making has facilitated a focus on the formal written constitution at the expense of alternative theories and methods. I have also argued that isolating and addressing of the ‘constitutional’ question in this way has allowed it to be framed as a legal question that is distinct from questions of economic ordering. Recovering Wright’s thought shows, however, that ideas about both economic and constitutional ordering for the postwar world can be understood as two halves of a wider vocabulary of civilisation. Rethinking their relative separation, and asking how we might reinterpret constitutional vocabularies in response, therefore offers one means of crafting a new field for the present.

C. Framing the External: The Constitutional Dictator

I have argued above that Wright’s engagement with the question of constitutional governance can be understood as part of an emerging social-scientific vocabulary of

²³³ Wright, ‘International Law and Commercial Relations’ (n 227) 31.

²³⁴ Quincy Wright, ‘International Affairs: International Law and the Totalitarian States’ (1941) 35 *American Political Science Review* 738, 739; Wright, *Study* (n 198) vol I, 284–5.

²³⁵ Wright, ‘International Law and Commercial Relations’ (n 227) 37–8.

²³⁶ See Anne Orford, ‘Theorising Free Trade’ in Anne Orford and Florian Hoffman (eds), with Martin Clark (asst ed), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016); Ntina Tzouvala, ‘The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale’ [2020] *European Yearbook of International Economic Law* 37.

constitutionalism as a form of international rule. One of the most prominent authors of that vocabulary was the constitutional law scholar and advisor to the US military government in Germany Carl Friedrich.²³⁷ For Friedrich, as for Wright, constitutional change under occupation represented the best possible method of achieving peace.²³⁸ But the relative formalisation of this method required grappling with a number of legal and political questions: under what circumstances was it lawful or excusable to impose constitutional democracy through force?²³⁹ And how was it possible to preserve a degree of the wartime commitment to popular self-determination or to defend against accusations of authoritarianism? For Friedrich, the answer revolved centrally around the political system of the occupying state and the objects of the postwar transformation. Part of his work had sought to work with the international legal categories of the *occupatio pacifica* to adjust what was possible within existing vocabularies.²⁴⁰ But a far greater part of his work sought to offer, through the use of constitutionalist thought and practice, a new way of conceiving of the international. As I will show, his work also explicitly opposed attempts by other authors to connect the use of constitutional techniques to broader questions of international order and forms of domination. Returning to Friedrich's theories therefore illustrates the significance as well as the limitations of this form of constitutionalist thought and its relationship to the building of a postwar vocabulary.

Friedrich's writings during and after the war were aimed at producing a political theory of the transformation of foreign territory under military occupation. The question that this theory sought to answer was how a vision of democratisation of the defeated enemy states by the occupation governments (and specifically, in his account, by the government of the United States) could be justified, employing as it did the authoritarian technique of political change through military government.²⁴¹ Friedrich aimed to theorise this 'new' postwar type of military occupation, a 'politico-military phenomenon whose boundaries, as a science or a profession,

²³⁷ German-born, and with a doctorate in sociology from Heidelberg, Friedrich had emigrated to the United States in 1926, in his mid-20s, and was later appointed professor of government at Harvard University. See Carl Friedrich, 'Military Government and Dictatorship', in Commander Sydney Connor and Carl J Friedrich (eds), *Military Government* (American Academy of Political and Social Science, 1950) 1, 7. On Friedrich's significance for the discipline within the United States, see Sigmund (n 214); Greenberg, *Weimar Century* (n 182) ch 1. Friedrich's work is included in canonical reprintings of literature in the field of constitution-making, such as Sujit Choudry and Tom Ginsburg (eds), *Constitution Making* (Edward Elgar, 2016). After his work in Germany, he went on to advise on a number of constitutional forms of organisation, including the constitutions of Puerto Rico and the European Constituent Assembly.

²³⁸ Carl Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Little, Brown and Co, 1941) (first published in 1937 as *Constitutional Government and Politics*) 81–2.

²³⁹ In Japan, too, the US occupiers presented the postwar occupation, committed both to retaining the Japanese government and to reforming the Japanese political system, as a 'new problem in international law': *Political Reorientation of Japan* (n 175) vol I, 88.

²⁴⁰ Friedrich had suggested an adjusted taxonomy of the categories of occupation: dividing pacific occupation (*occupatio pacifica*) into a preliminary and a final stage (*occupatio pacifica preliminaris* and *pacifica finalis* or *permanens*): Carl J Friedrich, 'Rebuilding the German Constitution, I' (1949) 43 *American Political Science Review* 461, 474. For this unwieldy distinction he was roundly mocked: Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press, 1957) 285.

²⁴¹ See Carl J Friedrich, 'Military Government and Democratization: A Central Issue of American Foreign Policy' in Carl J Friedrich (ed), *American Experiences in Military Government* (Rinehart & Company, 1948) 3, 3–4.

have not yet been defined'.²⁴² His answer, which he termed 'constitutional dictatorship', can be read as both an answer to the question of under what conditions an internationalised transformation could be conducted, as well as a description of a process that Friedrich had been intimately involved with. In 1942, believing that a responsible bureaucracy was central to new forms of administrative government, Friedrich had helped to found the new Harvard School of Overseas Administration, providing training for a new class of postwar international bureaucrats to be deployed to locations including Italy, Germany and Japan.²⁴³ Due to his expertise in constitutional law and theory, and familiarity with the institutions and debates of the Weimar period, he was later appointed governmental affairs adviser to both Military Governor of Germany Lucius Clay and the Control Council in 1948, and was 'in constant touch' with the German Parliamentary Council, the body that would later draft the German Basic Law.²⁴⁴

Unlike many international lawyers, who had also argued for temporary but expansive ideas of the occupiers' authority, Friedrich emphasised that a theory of what was taking place needed to allay the concerns of an Anglo-American public that this kind of military government was an undemocratic and coercive form of rule 'more nearly akin to dictatorship than to democracy'.²⁴⁵ The language of constitutionalism offered a means of allaying these concerns, as well as of responding to German claims that the authoritarianism of military government, and the forms of violence that it enabled, was uncomfortably close to experiences of Nazi rule.²⁴⁶ While acknowledging arguments that 'a certain amount' of what he understood to be authoritarian measures, including forced labour and capital punishment, had occurred under Allied rule, Friedrich argued that the innate tendency of 'the military government of constitutional democracies' was to 'continually relax[] these controls as it moves toward the establishment of a constitutional system'.²⁴⁷ It was this form of military government that he labelled 'constitutional dictatorship'.²⁴⁸

²⁴² Sydney Connor and Carl J Friedrich, 'Foreword' in Sydney Connor and Carl J Friedrich (eds), *Military Government* (American Academy of Political and Social Science, 1950) vii.

²⁴³ Greenberg, *Weimar Century* (n 182), 54–5.

²⁴⁴ See Spevack (n 127) 189. See also Edward N Peterson, *The American Occupation of Germany—Retreat to Victory* (1977). He was also previously special governmental advisor to Civil Affairs Division in the War Department, the Office of Military Government of the US, and Lucius Clay in his capacity as Deputy Military Governor from 1946–1947.

²⁴⁵ Friedrich, 'Military Government and Dictatorship' (n 237) 1. See also Carl J Friedrich, 'Military Government as a Step toward Self-Rule' (1943) 7 *Public Opinion Quarterly* 527, 531.

²⁴⁶ See Friedrich, 'Military Government and Dictatorship' (n 237) 1. Some German international lawyers called for the Allied intervention to be conducted within specific limits: namely, the avoidance of a situation of 'permanent dependency or control', and the creation of a political entity that was 'endowed with the democratic right of self-determination also against the intervening powers': Wilhelm Grewe, *Ein Besatzungstatut für Deutschland* (1948) 135–6, as summarised in Kurt von Laun, 'Legal Status of Germany' (1951) 45 *American Journal of International Law* 267, 281. See also the resolution in the German *Jahrbuch* of a meeting of German international law teachers proclaiming '[t]he inalienable right of self-determination of the German people': Resolutions, *Jahrbuch für Internationales und Ausländisches Öffentliches Recht*, vol I, 1948, 7.

²⁴⁷ Friedrich, 'Military Government and Dictatorship' (n 237) 1.

²⁴⁸ As distinct from 'totalitarian dictatorship'. See also Clinton L Rossiter, *Constitutional Dictatorship* (Princeton University Press, 1948); Frederick M Watkins, 'The Problem of Constitutional Dictatorship' (1940) 1 *Public Policy* 324 (though neither Watkins nor Rossiter's theories were so expressly directed to constitutional dictatorship as a form of military rule by one state over another).

Friedrich described ‘constitutional dictatorship’ as drawn from an institution that emerged in the Roman empire ‘for the explicit purpose of protecting the constitution against exceptional dangers’.²⁴⁹ In his major work on constitutional government he had described the tendency of ‘[e]very modern constitution’ to ‘provide for a temporary concentration of powers to be used in overcoming such emergencies’.²⁵⁰ Constitutional dictatorship was his term encompassing ‘all such methods’ of emergency rule, including the civil law ‘state of siege’, as well as ‘martial law’, ‘emergency power’, and what Nazi jurist Carl Schmitt had in the interwar period described as the ‘commissarial dictatorship’ of earlier times.²⁵¹ Far from being a constitutional deviation, the provision for such emergency was, according to Friedrich, ‘the final test’ of an effective constitutionalism, since ‘a government which cannot meet emergencies is bound to fall sooner or later’.²⁵² Unlike Schmitt, however, Friedrich sought to establish a concept of constitutional dictatorship in which Schmitt’s ‘exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation’ took place across national borders and under a temporary situation of occupation, rather than territorial acquisition.²⁵³ In this sense, what Friedrich was proposing was a new form of international rule.

Before the interwar period, international lawyers framed questions of occupation through the ‘elaboration of basic theories on the status of occupations’ rather than a more direct interrogation of their political ends.²⁵⁴ As we have seen, however, international legal scholarship on constitutional government during the interwar and postwar period had begun to shift in focus, from theories of international legal authority based on status to ones that grappled explicitly with the politics of the postwar transition. A growing number of international lawyers and administrators sought to accommodate that shift through practical readjustment of international legal rules, replacing a concern with the coincidence of *imperium* and *dominium* with one focused on functional questions of the capacity to rule and the product of that rule.²⁵⁵ Like other international lawyers of his time, Friedrich’s inclination was to bypass questions of the precise source of title, and the corresponding status of the governed, in order to concentrate on the ‘unprecedented task’ of ‘building a constitutional government’.²⁵⁶ On his account, constitutional dictatorship, as a juridical form of international rule, was properly understood not as unbounded, but as tightly confined by ‘constitutional provisions’.²⁵⁷ These provisions, the origins of which Friedrich located in the Roman tradition, ‘determine ... who decides when the state of emergency exists ... who is to appoint the dictator, ... for how long a period such

²⁴⁹ Friedrich, ‘Military Government and Dictatorship’ (n 237) 3.

²⁵⁰ Friedrich, *Constitutional Government and Democracy* (n 238) 236.

²⁵¹ Ibid 236. See also Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (Michael Hoelzl and Graham Ward trans, Polity, first published 1921, 2014 ed). On Friedrich’s correspondence with Schmitt, see Udi Greenberg, ‘The Limits of Dictatorship and the Origins of Democracy: The Political Theory of Carl J Friedrich from Weimar to the Cold War’ in Leonard Kaplan and Rudy Koshar (eds), *The Weimar Moment: Liberalism, Political Theology, and Law* (Lexington Books, 2012) 443.

²⁵² Friedrich, *Constitutional Government and Democracy* (n 238) 250.

²⁵³ Schmitt, *Dictatorship* (n 251) citing Carl Schmitt, *Diktatur*, in *Staatslexikon im Auftrage der Görregesellschaft* (Herder, 1926) vol I, 1448.

²⁵⁴ Feilchenfeld (n 225) [61].

²⁵⁵ Orford, *International Authority* (n 63) ch V. See, eg, F A Mann, ‘The Present Legal Status of Germany’ (1947) 1 *International Law Quarterly* 314, 329.

²⁵⁶ Friedrich, ‘Rebuilding I’ (n 240) 461.

²⁵⁷ Friedrich, ‘Military Government and Dictatorship’ (n 237) 3.

powers are to be exercised, and ... for what purposes it may be employed'.²⁵⁸ In other words, the conditions of restraint were not to be found in international legal instruments, such as the treaties governing the laws of war, or principles derived therefrom contained in military manuals. Instead, they were located in the authority given to the dictator and the limits placed on it by the domestic structures and democratic publics within the state granted that authority — in this case, the Allied states.

As articulated by Friedrich, the legality of modern constitutional dictatorship turned on its very impermanence, as well as two specific conditions that would ensure that impermanence. The first condition was that a constitutional dictatorship should be 'established by a constitutional government' such as the United States.²⁵⁹ This turn to his adopted homeland as a guarantor of international liberalism, for Friedrich, reflected a faith in the ethic of constitutionalism, understood as a faith in elite reason combined with some form of public scrutiny. His pre-war writings had argued that what was required in order to create a new and foundational law for a political community was not some revolutionary or radically democratic mobilisation of the people, understood as a totality. Instead of popular sovereignty — 'a confused expression at best' — his constitutional theory urged a focus on the narrower category of the 'constitutional group' that in fact exercises the 'revolutionary, residuary, constituent power of establishing a new constitution'.²⁶⁰ This was the ultimate insurance for the 'procedural devices' of appointment, delegation and temporal limits that attached to the use of emergency power.²⁶¹ When it came time to operationalise this theory in the international sphere, and in the context of the failure of German elites to safeguard Weimar republicanism, Friedrich turned to the traditions of American constitutionalism and to the US electorate as a source of restraint and responsibility. 'Full, and at times sharp, even unjust, criticism', he wrote, 'by the representative bodies and by the public both in Britain and in the United States has tended to ensure the employment of these dictatorial powers for constitutional purposes'.²⁶²

The second condition was that constitutional dictatorship be instituted 'for the express purpose of re-establishing constitutional government' in the occupied territory.²⁶³ The military government of the Western Allies, which according to Friedrich, conformed — unlike that of the Soviet zone — to those conditions, 'far from being a totalitarian dictatorship, [was] instituted precisely for the purpose of preventing its recurrence'.²⁶⁴ This reflected a view that constitutionalisation of the polity itself was the only justifiable goal. Friedrich saw the US model of constitutionalism as an answer to the excesses of fascist imperialism, realised through governmental power. Like Wright, he believed that a federal constitutionalism, such as that of the United States, could 'provide for a greater diffusion of this power both by making it work slowly, and in separate localities', while at the same time avoiding the 'absolute prohibitions'

²⁵⁸ Ibid 3.

²⁵⁹ Ibid 3.

²⁶⁰ Friedrich, *Constitutional Government and Democracy* (n 238) 16.

²⁶¹ Ibid 251.

²⁶² Friedrich, 'Military Government and Dictatorship' (n 237) 7.

²⁶³ Ibid 4. See also Friedrich, *Constitutional Government and Democracy* (n 238) 238.

²⁶⁴ Friedrich, 'Military Government and Dictatorship' (n 237) 3.

that were apt to lead to violent revolution.²⁶⁵ Seen properly, the military force of the Allies had been directed ‘not toward imposing democracy, but toward imposing restraints upon those elements of the population who would sabotage efforts of the constitutionalists and who would seek to undermine and eventually destroy constitutional democracy’.²⁶⁶ Understood as confined within these conditions, constitutional dictatorship was a form of liberation rather than an unacceptable imposition.²⁶⁷

Although constitutional dictatorship was most immediately a means of developing new legal and political institutions for domestic rule in Germany and Japan, Friedrich conceived of it as part of a larger international and post-imperial project. The setting for such a project was the period of rapid and profound upheaval for international relations in which he lived.²⁶⁸ Friedrich’s most immediate postwar concern was the widespread appeal of socialist politics, the implementation of which, he argued, would inevitably provoke fascist reaction.²⁶⁹ Entrenching forms of constitutional democracy around the world, while instrumentally accepting a degree of economic welfarism in order to gain popular support, was therefore essential to securing a peaceful international order.²⁷⁰ Friedrich defined his theory of constitutionalism in opposition to the critiques of both the British political theorist Harold Laski, and Polish Marxist theorist and revolutionary Rosa Luxemburg, who had each asserted the linkages between constitutionalism, on the one hand, and projects of European enrichment, on the other. For Laski, constitutionalism could be understood as an historically specific aspect of the liberal experiment that had transformed European society and government since the seventeenth century. The project of creating a global market in which men with property could thrive required, he argued, a corresponding theory of political authority in which state interference was limited ‘to the narrowest area compatible with public order’.²⁷¹ Understood historically, then, constitutionalism was bound up with capitalism: ‘with its substitution of rule for discretion, of civil liberty for monarchical caprice, [it] is the answer of the business men to the failure of national economy to serve his needs’.²⁷² For Luxemburg, imperialism, and the military violence that accompanied it, was a result of the ongoing European search for new markets, raw materials, and labour. Though this search, and the political transformations that it wrought, was often justified in the name of liberal progress, she argued that such ideals could not be taken as a horizon for political organising: they ought instead be understood as ‘little more than a vehicle for the economic process’.²⁷³ French colonialism and liberal governmental reform in Algeria, conducted in the name of ‘instituting orderly and civilised conditions’, was in her account self-confessedly directed toward ‘the establishment of private property among

²⁶⁵ Friedrich, *Constitutional Government and Democracy* (n 238) 151; and later, *Trends of Federalism in Theory and Practice* (Pall Mall, 1968).

²⁶⁶ Friedrich, ‘Military Government and Dictatorship’ (n 237) 6–7.

²⁶⁷ *Ibid* 7.

²⁶⁸ Friedrich, ‘Military Government and Democratization’ (n 241) 6.

²⁶⁹ *Ibid* 19–20.

²⁷⁰ ‘Any insistence that the economic problems of reconstruction be handled by free enterprise will put American into a reactionary camp which is occupied mostly by men who have little use for democracy’: *ibid* 21.

²⁷¹ Harold J Laski, *The Rise of European Liberalism* (Allen & Unwin, first published 1936, 1958 ed) 17.

²⁷² *Ibid* 63. On history, materialism and method, see at 17.

²⁷³ Rosa Luxemburg, *The Accumulation of Capital* (Agnes Schwarzhild trans, Verso, first published 1913, 2003 ed) 433. See also Robert Knox, *A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law* (PhD Thesis, London School of Economics, 2014) 160–1.

the Arabs' and the forcible enabling of a capitalist economy.²⁷⁴ Seen in this light, liberal constitutionalism, and its encouragement among so-called uncivilised peoples, was inextricable from its connection to the 'continuous and progressive disintegration of non-capitalist organisations [that] makes accumulation of capital possible'.²⁷⁵

Friedrich rejected such attempts to locate the philosophy of constitutionalism as an historically contingent and specific accompaniment to colonial rule or commercial relations.²⁷⁶ For him, the obligation to foster constitutional democracy was rooted in a firm belief in the universality of the principles and practices of constitutionalism. Yet an examination of Allied constitution-making practices in the occupations of Germany and Japan shows their entanglement with specific forms of international economic ordering. US planners presented new forms of internationalism as organised around the logics of free trade rather than of territorial expansion and colonial rule.²⁷⁷ Proposals for rebuilding occupied economies, such as that of Japan, rested on the US argument that certain 'forms of economic activity, organization and leadership' would be 'likely to strengthen the peaceful disposition of the Japanese people, and to make it difficult to command or direct economic activity in support of military ends', promoting liberalisation and a degree of redistribution while rejecting stronger forms of social ownership.²⁷⁸ For Allied occupiers in Germany, along with practices of decartelisation, this general favouring of decentralisation and federalism became a key means of articulating the relationship between law and the problem of expansion. This was reflected in the relatively rapid turning over of responsibility to German *Länder* in the US zone of occupation, with constitutions at the *Land* level adopted by representative bodies in order to represent the will of the German people.²⁷⁹ Scholars have argued that this nominal commitment to self-determination was accompanied by strategic interventions in order to 'elicit necessary changes' to the *Länder* constitutions, while avoiding the appearance of imposition.²⁸⁰ US opposition to the nationalisation of large-scale industries in Hesse and Bremen and a Bremen law implementing workers councils for all large businesses reflected the US position that 'no serious step will be taken to limit private capitalism' within Germany, despite the significant popularity of socialist-oriented proposals at the time.²⁸¹

²⁷⁴ Luxemburg (n 273) 359–60.

²⁷⁵ Ibid 397.

²⁷⁶ See *Constitutional Government and Democracy* (n 238) 6–7.

²⁷⁷ Barnes (n 127) 25.

²⁷⁸ See SWNCC 150/4 (n 175) on trade unions and 'economic democratization'. On land reform, see further Andō (n 178) and the rejection of UK nationalisation proposals discussed at n 178.

²⁷⁹ Spevack (n 127) 91–2.

²⁸⁰ The US policy, formulated by Clay, Friedrich and Parkman, was that 'objections should be made in the spirit of great caution and self-restraint' and attempts made 'to elicit necessary changes...and not to impose them': Spevack (n 127) 95–6.

²⁸¹ Ibid 86–8, and n 133. See also Spevack's discussion of interventions in the Bavarian and Württemberg-Baden constitutions: at 86, and n 124. And see Friedrich, 'Military Government and Democratization' (n 241) on German support in the British and US zones for the absence of constitutional restraints on dealing with private enterprise: at 9. The Soviets, during the occupation, also sought to offer different visions of constitutionalism, opposing the imposition of a federal structure, proposing that the eventual drafting be left to a convention of 'democratic parties, free trade unions, and other anti-Nazi organizations and representatives of the *Länder*': John Ford Golay, *The Founding of the Federal Republic of Germany* (University of Chicago Press, 1958) 5. This belied the extent to which Soviet administrators made strategic interventions either within the German administrations that they had swiftly set up after the beginning of the occupation, or to settle disputes

Though these practices of transformative military government had their parallels with American forms of imperialist war and colonial rule, in particular in the Philippines, Friedrich sought to distance his proposals from the ‘implied superiority of the conqueror’ that had there accompanied ‘a greater moral concern ... with the assumed welfare of the occupied people’.²⁸² Such openly racial ideas had no place in a post-fascist world and the new, post-imperial constitutionalism that he hoped would characterise it. Rather than representing a sharp break with ideas of civilisational hierarchy, however, the language of universalism permitted Friedrich to integrate aspects of civilisational thinking within a more social-scientific framework. Like Wright, rather than focusing on cultural or economic difference, Friedrich sought to locate Germany, as well as Japan, at different stages within a hierarchy of constitutional development.²⁸³ Friedrich’s American education and engagement with the US constitutional system had shaped his views on what he termed the ‘less advanced stage of constitutional and democratic development in Europe’.²⁸⁴ Since American military government also tended to be conducted ‘according to law’, at least as far as the ‘less advanced’ European situation required, the suspension of legal norms normally associated with military government was less problematic than it first appeared.²⁸⁵ In the German context, Friedrich considered that administration could be relied on to lead to a revival of the ‘German democratic tradition’ that had existed before the fascist period.²⁸⁶ In a memorandum to Clay, Friedrich proposed that, although where possible decisions should be left to German representatives, ‘[t]he basic pattern of a permanent German government is fixed by Allied policy declarations to be a decentralized and constitutionalized democratic Republic’.²⁸⁷ At the London conference discussing the future form of the West German constitution, the US and UK would agree that ‘only the most general restrictions required by the present and long-term security interests’ of the Allies should be placed on the drafting of the West German constitution, which they interpreted to mean a government capable of raising revenue, but with effective guarantees against centralisation of power in the executive, and protection of civil rights and freedoms, including the right to property.²⁸⁸

between local and central administrators, as well as the ultimately repressive policies that prevailed in the East: see Norman M Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945–1949* (Belknap Press, 1995) 44–7.

²⁸² Friedrich, ‘Military Government and Dictatorship’ (n 237) 3.

²⁸³ On civilisational ways of thinking about the former Axis states, see Ricarda Torriani, ‘Des Bédouins particulièrement intelligents? La pensée coloniale et les occupations française et britannique de l’Allemagne (1945–1949)’ (2006) 17 *Histoire & Société* 56.

²⁸⁴ Friedrich, ‘Self-Rule’ (n 245), 538.

²⁸⁵ *Ibid* 538.

²⁸⁶ Carl J Friedrich, ‘Rebuilding the German Constitution, II’ (1949) 43 *American Political Science Review* 704, 705.

²⁸⁷ Spevack (n 127) 212, reproducing Friedrich’s essay ‘Permanent Governmental Organization and Constitution’.

²⁸⁸ Golay (n 281) 8–10. In contrast, the powers reserved to the central government under the 1946 Soviet draft were broader than under the Weimar Constitution, and included industry, agriculture, economic planning, and education: Wolfgang Gaston Friedmann, *The Allied Military Government of Germany* (Stevens, 1947) 77–9. French proposals, unsuccessful at London, had been for a weak central government, combined with stronger forms of occupation and control of the coal and steel industry: Spevack (n 127) 116. The London agreements formed the basis for the Frankfurt Documents, handed over to the minister-presidents of the western Länder in July of 1948. Toward the end of constitutional negotiations the SPD also managed to achieve a degree of governmental centralisation that had not been envisaged in the London agreements: at 233.

Outside Europe, however, Japan and its territories, ‘many of which have never been subject to the rule of law or anything like it’, presented ‘distinct problems’ for military government.²⁸⁹ Friedrich, and his colleagues at the School for Overseas Administration, suggested that what was called ‘law’ in Japan was better regarded as ‘personal loyalty to leaders and obedience to official whims ... a sort of advance notice of official intentions that are subject to change as a result of official caprice’.²⁹⁰ Not only did they regard these laws as insufficiently constant and certain to meet the very definition of law, they argued that in many cases they ‘serve only as ornaments to impress the Occident or to placate local pressure groups; they are neither enforced nor honored’.²⁹¹ What they termed the ‘backward’ Japanese form of government — and regarded as a ‘government by men’ rather than law — did not so much require a departure from the laws of war as simply fail to ‘fit the pattern’ on which the laws of war were premised.²⁹² Because of the failure of the Meiji constitution to properly take root, if genuine constitutionalism was to be achieved, it would need to come as a ‘revolutionary creation’ from outside.²⁹³ This view took little account of the political debates within Japan and the constitutional proposals put forward by Japanese lawyers, intellectuals, and political parties, which ranged from the retention of the existing imperial structure of authority to proposals for a Japanese republic, with more socialist iterations including provisions for the nationalisation of industry and an extensive regime of formal rights modelled after Soviet constitutionalism.²⁹⁴ Instead, paralleling the language used to justify the mandates under the League, these authors argued that for any new constitutionalism to survive the ‘strain of the modern world’, what would be needed was a ‘framework of international agreement and cooperation’ to oversee its emergence.²⁹⁵

Friedrich’s case was that the conduct of such a task by military government might be not only excusable but necessary. As he wrote,

what is liberation, in the democratic and constitutional tradition, but the effort to help people achieve constitutional freedom by combating and defeating those who would deny this freedom to them? To do this by the temporary and strictly defined use of military force is the essence of constitutional dictatorship. *Consules videant ne respublica detrimentum capiat* [Let the consuls see to it that the State suffer no harm].²⁹⁶

This statement illustrates not only the building of a vocabulary of constitutionalism as international rule, but also the relative marginalisation of questions of force and imposition in

²⁸⁹ Friedrich, ‘Self-Rule’ (n 245) 532.

²⁹⁰ C J Friedrich and D G Haring, ‘Military Government for Japan’ in *Japan’s Prospect* (Harvard University Press, 1946) 411.

²⁹¹ *Ibid* 411.

²⁹² *Ibid* 412.

²⁹³ Frederick Watkins, ‘Prospects of Constitutional Democracy’ in *Japan’s Prospect* (Harvard University Press, 1946) 37. On the prominent and racialised US belief that aggression was ‘in the blood’ of the Japanese people, see Barnes (n 127) 18.

²⁹⁴ Koseki Shōichi, *The Birth of Japan’s Postwar Constitution* (Ray A Moore ed and trans, Westview Press, 1997) 19–42.

²⁹⁵ Watkins (n 293) 326, 329.

²⁹⁶ Friedrich, ‘Military Government and Dictatorship’ (n 237) 7 (author’s trans). See also the description in Kataoka (n 177) 24: ‘[t]here was no freedom from occupation because occupation was, ipso facto, freedom and liberation’.

favour of a focus on teleology and technique. In refuting the idea that constitutional techniques could be understood as a historically specific set of practices accompanying European enrichment, and in tying the politics of those techniques to the imperatives of transforming the fascist states, I have sought to highlight in Friedrich's work the beginnings of the kind of universalist vocabulary on which scholars continue to draw. In reading Friedrich's scholarship alongside Wright's, I have illustrated the different ways that legal scholars during this period drew on civilisational thought in order to locate states within a hierarchy of constitutional development. Finally, I have sought to show that Friedrich's account of constitutionalism was one in which the process was driven by domestic elites as well as by specific states within international society with trusted traditions of constitutional government. In the following section, I will draw on the thought that I have sketched here in order to propose an alternative account of constitutionalist thinking and its relationship to the international.

IV. 'LOCAL OWNERSHIP' AND THE DEMANDS OF CONSTITUTIONALISM

In the previous part, we saw how international lawyers and legal theorists formulated a vocabulary of constitutionalism as a way of framing and articulating the work of law in a postwar world. Tracing the development of this vocabulary allows us to appreciate that the boundaries of the discipline of international law and the taxonomies of its various fields are not fixed. Instead, they represent the instantiation of particular projects around which theory, policy and doctrine can be oriented and assembled. As I have argued, the solidification of this constitutionalist vocabulary as a way of articulating the work that law might do after war has entailed a focus on legal institutions, text and process, to the exclusion of the material conditions on which those institutions would rest and that text go to work. In this part, I explore how that vocabulary might be reimagined for the coming decades and what this reimagination might entail, focusing on the question of local ownership and drawing on the relationship of the international constitution-making project to the questions of land and of patents. I then argue, drawing on recent scholarship from both constitutional theorists and international lawyers, that this can be understood as one instance of a broader possible transformation in constitutionalist thought and practice. I suggest that constitutionalist thought and practice for the world in which we live should not only resist the separation between the juridical and the material, but also widen its view beyond the domestic to the laws governing the global economy, in a way which is capable of registering the structural concerns that I outlined above.

As I foreshadowed above, one of the critical ways that constitution-making policy documents and literature has understood the boundaries and purpose of international action is through the principle of local ownership. One dimension of this principle, which I explored above, is its relationship to questions of international authority. But a further and perhaps equally significant way that local ownership is understood is not as a condition or limit on international action but as a catalyst for local transformation. International institutions have stressed that the constitution-making process should be seen as a 'transformational exercise' for local populations, and that it enables a 'healthy debate on the nature of the state and state

power'.²⁹⁷ It offers a promise that through political debate, disagreement, and struggle, people will come to identify with the product of the constitutional process, overcoming old divisions in the process.²⁹⁸ As described by a paper published by one prominent non-governmental organisation:²⁹⁹

The hope is that the conflict, rather than being “resolved”, will at least be prevented and “transformed” into less violent forms, and that in the future new opportunities to transcend conflict and ensure sustainable peace might be created and cultivated.

Participation, debate and identification, in other words, is seen as a further and more dynamic measure by which ‘local ownership’ is judged and by which the ‘multiple layers of exclusion’ within conflict-affected societies may be overcome.³⁰⁰ Scholars have argued that the measure that is determinative of the politics of internationalised constitution-making, and should be taken as a lens through which to view international involvement, was ‘whether those subjected to the order generally embrace its basic principles over time ... engage with it, participate within it and ... modify aspects of it’.³⁰¹ The purpose of local ownership is sometimes understood as being not to deliver perfect inclusion but to ‘provide a reasonable basis on which constitutional practice can evolve over time’.³⁰² Local ownership is thus understood as demanded not only by international actors, as a condition of involvement, but also as a condition of the future functioning and evolution of constitutional order.

The focus on local ownership as a project of political transformation sits uneasily with another aspect of that concept expressed in the institutional literature: the idea that all peoples within a state are entitled to some share in the wealth of the territory over which it governs. Imagining the object of local ownership as processual inclusion and political transformation has, to this extent, been unsettled by this distributive turn. International institutions have for this reason noted that exclusion from democratic processes has ‘multiple layers’ which are political, but also social and economic in nature.³⁰³ Yet the loose internationalist consensus described in part II around concrete techniques of constitution-making — that domestic constitutions might facilitate peace by delivering forms of redistribution through federalism, along with solidifying the domestic adjudication of property and contract as a basis for economic development — is premised on the idea that local ownership is primarily a question of political representation in the constitution, and identification with the product of that process. There is a gap, in other words, between the distributive concerns that have appeared in the literature that I described in part II, and an examination of whether the practices promoted in that literature facilitate future social (as opposed to political) transformation. In addition, there

²⁹⁷ *Guidance Note* (n 6).

²⁹⁸ See, eg, Bogdandy et al (n 88), citing Habermas’ concept of ‘constitutional patriotism’: ‘the constitution itself can become the focal object of collective loyalties ... so that other, traditional elements of identity become largely irrelevant’: 597.

²⁹⁹ Cats-Baril (n 73) 15 (citations omitted).

³⁰⁰ *Guidance Note* (n 6).

³⁰¹ Kumm (n 91).

³⁰² Saunders (n 7) 82.

³⁰³ *Guidance Note* (n 6).

is little reflection on the extent to which that transformation might be precluded by international, rather than local, actors and structures.

The question of land offers one site for considering the limits of current concepts of local ownership, and for reconsidering what a different concept might demand. In critiquing the conditions produced by international constitution-making projects, scholars and governmental figures have pointed to the ways that protections for property have prevented the creation of a more just social order through perpetuating the hierarchy and dispossession enacted through colonisation. Early instances of international constitution-making in Namibia and South Africa, which each codified those protections, drew heavily on rights frameworks.³⁰⁴ At the close of the Cold War and with the decline of the political possibilities of non-alignment, rights came to represent a more neutral form of internationalism on which constitutionalist scholars could draw.³⁰⁵ These rights frameworks brought together civil freedoms and freedom from forced labour, racial discrimination and apartheid, with guarantees of the legal protection of property and, in the case of Namibia, an embrace of foreign investment.³⁰⁶ In the ensuing decades, however, writers have pointed to the inclusion of property clauses as effectively impeding redistribution, formalising the constitutional dispossession of those peoples already once dispossessed of their land through colonisation.³⁰⁷ Some scholars have argued that the tendency in South Africa to idealise the post-apartheid constitutional settlement has impeded scholarly critique of the implications of the property clauses for broader questions of justice.³⁰⁸ This suggests that despite widespread concern over the distribution of land in the post-apartheid settlement, forms of international consensus over formal rights provisions came at the expense of a thicker understanding of ‘ownership’ of the constitutional settlement. Such an understanding might be concerned with whether that settlement offers the conditions for — or at the very least, does not concretely impede — land justice and the creation of conditions for communal life. In other words, the ‘economic context’ to which constitution-making projects and practitioners are encouraged to attend might be not only a prompt for choosing differently from among the menu of constitutional design options but also for exposing how some such

³⁰⁴ For accounts of these processes, see Jill Cottrell, ‘The Constitution of Namibia: An Overview’ (1991) 35 *Journal of African Law* 56; Christina Murray, ‘A Constitutional Beginning: Making South Africa’s Final Constitution’ (2001) 23 *University of Arkansas at Little Rock Law Review* 809.

³⁰⁵ See the recounting in Marinus Wiechers, ‘Namibia’s Long Walk to Freedom: The Role of Constitution-Making in the Creation of an Independent Namibia’ in Laurel Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010, USIP) 81, 87–8. See also Thomas M Franck and Arun K Thiruvengadam, ‘International Law and Constitution-Making’ (2003) 2 *Chinese Journal of International Law* 467, 507–9. For an early critique of that narrative see Upendra Baxi, ‘Constitutionalism as a Site of State Formative Practices’ (2000) 21 *Cardozo Law Review* 1183.

³⁰⁶ See *Constitution of the Republic of Namibia* (1990) arts 9, 10 16, 17, 21, 23 and 99; *Constitution of the Republic of South Africa* (1996) ss 9, 13, 16, 17, 19, 23 and 25. The South African constitution is also famous for including extensive social rights, such as to housing, health care, food, water and social security, and education: ss 26, 27, 29.

³⁰⁷ ‘Today [the Damara-speaking people] have no right to ask for compensation or claim their ancestral land rights because property rights were made part of the human rights chapter which cannot be amended ... If I had the opportunity to change anything in the Constitution I would change that’: ‘Pendukeni Iivula-Ithana, Founding Perspective’ in *The Constitution in the 21st Century: Perspectives on the Context and Future of Namibia’s Supreme Law* (Namibia Institute for Democracy and Institute for Public Policy, 2011).

³⁰⁸ Tshepo Madlingozi ‘Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution’ (2017) 28 *Stellenbosch Law Review* 123, 128–30, 141–2.

options have been linked to the continuation of forms of dispossession and violence that these processes seek to prevent.³⁰⁹

Patent rights offer a further site for considering the limits of contemporary concepts of local ownership, as well as for tracing their intersection with international economic order. In the occupation of Iraq, scholars have shown that the introduction of patent laws formed a key part of the transformation conducted by the Coalition Provisional Authority.³¹⁰ These patent reforms were explained by the then-Deputy Secretary of the US Department of Commerce as concerned ‘[t]o address deficiencies in Iraq’s protection of intellectual property rights and to align Iraqi law with current internationally-recognized standards of protection’.³¹¹ Coalition Provisional Authority Order 81 clarified that patents could be granted to legal persons or corporations as well as natural persons, suspended the bar on patenting ‘[m]edical and pharmaceutical formulations’, and introduced extensive provisions for plant patenting.³¹² The law also introduced a narrower basis for the use by the Iraqi state of ‘flexibilities’, or compulsory licensing, than that available under the TRIPS agreement, restricted to where that use was ‘a necessity for national defense or emergency or for noncommercial public good’ or where patent rights were deemed to be noncompetitive.³¹³ In the circumstances of the occupation, UN officials justified general measures for economic liberalisation on the basis of their alignment with UNSC Resolution 1483, which requested the UN Special Representative and the Authority to promote ‘economic reconstruction and the conditions for sustainable development’.³¹⁴ The introduction of patent reforms and the preparation for Iraq’s accession to the WTO, however, required the removal of constitutional provisions preventing the taking out and enforcement of patents over biological resources.³¹⁵ Tzouvala and Gathii have shown that the introduction of these patenting reforms not only accompanied but directly facilitated the concentration and corporatisation of land ownership and food production, with major implications for power relations between social groups.³¹⁶

By the time many of the policy documents that currently set out the framework for international constitution-making were drafted, that particular moment of liberal internationalism and its welding to militarised forms of intervention in Iraq had ended. Yet protections for patents have remained a feature of some constitution-making projects conducted outside conditions of occupation since that time. The post-Arab Spring reforms in both Egypt

³⁰⁹ See *Guidance Note* (n 6).

³¹⁰ Maj Grasten and Ntina Tzouvala, ‘The Political Economy of International Transitional Administration: Regulating Food and Farming in Kosovo and Iraq’ (2018) 24 *Contemporary Politics* 588, 599.

³¹¹ Theodore W Kassinger and Dylan J Williams, ‘Commercial Law Reform Issues in the Reconstruction of Iraq’ (2004) 33 *Georgia Journal of International and Comparative Law* 217. For the views of two US legal advisors to the occupation see generally Ashley S Deeks and Matthew D Burton, ‘Iraq’s Constitution: A Drafting History’ (2007) 40 *Cornell International Law Journal* 1.

³¹² Coalition Provision Authority Order 81 ss 3, 4, 6, 51–79.

³¹³ Order 81 s 17(A), (C). Section 17(A) appears to transform the cases where reasonable prior negotiation requirements could be waived into generalised conditions: see TRIPS art 31(b).

³¹⁴ See UN Doc S/2003/715 [83]–[94] for a description of economic reconstruction and the role of the international financial institutions.

³¹⁵ Grasten and Tzouvala (n 310) 599.

³¹⁶ Ntina Tzouvala, ‘Food for the Global Market: The Neoliberal Reconstruction of Agriculture in Occupied Iraq (2003–2004) and the Role of International Law’ (2017) 17 *Global Jurist* 1, 10–11; Gathii, ‘Iraq in Comparative and Historical Context’ (n 112) 538–42.

and Tunisia, for example, both introduced explicit protections for patents within the constitution.³¹⁷ In the Tunisian reforms, as Alicia Pastor y Camarasa has shown, external actors including the UNDP, the Venice Commission, German NGOs and wealthy state and regional actors were extensively involved, particularly between the years 2011–2014.³¹⁸ Commentary published by the World Intellectual Property Organization apparently embraced the inclusion of these patent protections, describing them as ‘part of a general trend towards the “constitutionalization” of IP protection within a human rights framework’.³¹⁹ At the same time, that commentary has sought to present intellectual property clauses and frameworks as sufficiently capacious to ‘take[] into account the level of development of each country and ... [to be] supportive of their respective public policy’ objectives, and to position the main challenges as challenges of implementation.³²⁰ In other words, institutional actors involved in projects of constitution-making have either maintained that these clauses are not *per se* inconsistent with local ownership and local priorities, or have not interpreted their role as being to oppose them.

Scholarship on international intellectual property has drawn attention to significant issues with any attempt to position patent rights as consistent with principles of local ownership. The first is the impact of the administration of patent rights on governmental priorities and the delivery of social services. As scholars have noted, the implementation of TRIPS and WTO obligations in and of themselves has been a major burden on the ‘scarce administrative resources’ possessed by states in the Global South.³²¹ The second is that these constitutional provisions help lock states into structural forms of economic relation that deliver benefits to wealthy states in the global North and that have been criticised as offering relatively little to those peoples on whose behalf the constitution is understood to govern. Some scholars have argued that TRIPS was an effort to remake the laws of the global South in order to deliver ‘the benefits of ownership on a global scale’ for intellectual property rights-holders located largely in the global North.³²² They have further argued that the use of market power by powerful states to ensure accession to these agreements restricts the ability of states and peoples ‘to choose the development model, and in particular the legal and administrative system, that

³¹⁷ Ahmed Abdel-Latif, ‘Egypt and Tunisia’s New Constitutions Recognize the Importance of the Knowledge Economy and Intellectual Property Rights’ (14 March 2014) on *World Bank Blogs* <<https://blogs.worldbank.org/arabvoices/egypt-and-tunisias-new-constitutions-recognize-importance-knowledge-economy>>. See art 69 (Egypt); art 41 (Tunisia).

³¹⁸ Pastor y Camara (n 21). See generally UNDP, *The Constitution of Tunisia* (2020).

³¹⁹ Abdel-Latif, ‘Egypt and Tunisia Underscore the Importance of IP’ (n 76).

³²⁰ *Ibid.*

³²¹ Chantal Thomas, ‘Transfer of Technology in the Contemporary International Order’ (1999) 22 *Fordham International Law Journal* 2096, 2102.

³²² Ruth Okediji, ‘The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System’ (2003) 7 *Singapore Journal of International and Comparative Law* 315, 336. Anne Orford has recently argued that the TRIPS agreement was a *quid pro quo* for lowering tariff barriers to markets in the global North, a bargain on which the United States has reneged in blocking the appointments to the WTO Appellate Body and from which states should now withdraw: Anne Orford, ‘Why It’s Time to Terminate the TRIPS Agreement (Lecture delivered at the Australian National University, 30 June 2022). Michael Waibel and William Alford have noted the shift from technology transfer as a central plank of development in the 1970s and 80s to the ‘competition law approach’ that prevails in TRIPS, noting that ‘comprehensive multilateral legal rules on technology transfer remain[] a distant prospect’: ‘Technology Transfer’ in *Max Planck Encyclopedia of Public International Law* (June 2014) [59].

they believe best suits their interests’: to realise the promise of self-determination.³²³ These arguments have been borne out by recent work by advocates showing that low- and middle-income countries pay vastly more in royalties than they receive, and that the scale of these payments is growing at an alarming rate.³²⁴ Addressing the implications of contemporary legal and economic structures, especially international intellectual property, in the context of the COVID-19 pandemic, Special Rapporteur Tendayi Achiume has stated that:

the burdens of the pandemic have been borne disproportionately by certain States, peoples and territories most harmed by colonialism and racism, while the mechanisms for reducing these burdens are controlled almost entirely by States, peoples and territories which were the beneficiaries of colonialism.³²⁵

The land and patent questions show how particular projects of constitution-making have facilitated the continuation of colonial dispossession or the incorporation of societies into particular forms of global economic relation. Yet unlike the questions of representation and political inclusion, core policy documents of international institutions have not explicitly addressed these proprietary forms of exclusion as a question of local ownership. Instead, these documents, and much of the literature in the field, are premised on the idea that social exclusions and inequalities are produced by domestic struggles rather than *international* forms of legal ordering. International institutions have presented constitutional reform as part of a raft of solutions to war and conflict that also includes mechanisms for the development and judicial enforcement of those rights and the attraction of investment and private finance.³²⁶ This vision of the political economy frames social and political inequality and domination as a local question. For many of the scholarly writings canvassed in Part II, the enterprise of constitution-making could be examined separately from the continuation of patterns of international trade, development finance and legal protections for foreign investment that were developed in the second half of the 20th century.³²⁷ The extent to which these relations, and their intersection with aspects of constitutions, might foreclose the choice of political and legal system, the collective ownership of social resources, or the postcolonial repossession of ways of living in community has not been foregrounded by institutional actors as a problem *for* constitutionalism. Institutional articulations of constitution-making processes remain premised on ideas of political inclusion as enabling ‘competition over resources and power [to] give[] way to the development of a shared vision of the state’,³²⁸ as well as by the background

³²³ Anne Orford, ‘Globalization and the Right to Development’ in Philip Alston (ed), *Peoples’ Rights* (Collected Courses of the Academy of European Law, 2001) 127, 170.

³²⁴ South Centre, ‘Direct Monetary Costs of Intellectual Property for Developing Countries: A Changing Balance for TRIPS?’ (2 March 2022) 6–7: ‘low- and middle-income countries paid 77 billion USD in royalties for the use of IP, and received 13 billion USD ... [s]ince the signature of the TRIPS Agreement in 1994 ... the amount of IP-related transfers increased from 50 billion to 449 billion in 2020’.

³²⁵ Tendayi Achiume, ‘Open Letter from the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance to the World Trade Organization’s Twelfth Ministerial Conference’ (13 June 2022) <<https://www.ohchr.org/sites/default/files/2022-06/2022-06-13-WTO-Open-Letter.pdf>>.

³²⁶ *Pathways for Peace* (n 4) 166, 288.

³²⁷ With the exception of Kumm, who describes the GATT, WTO, World Bank and IMF as ‘an infrastructure for administratively managing certain aspects of the global commons with a focus on the global economy’: (n 91) 180.

³²⁸ *Primer* (n 7).

assumptions about the wisdom of accepted formulas of economic development through investment and marketisation that I explored above. This ongoing separation can be understood as facilitated by the theoretical focus on juridical institutions over material inclusion, and the empirical focus on constitutional text over structural relation, both of which I have argued are a major legacy of the postwar debates.

In the context of the rapidly unfolding crises of global inequality, climate emergency, and the new extractivisms of the green transition, addressing the limitations of this vocabulary and the circumscription of the constitutionalist ideal has become an urgent task: one not limited to the ‘post-conflict’ contexts explored above, but raised by scholars as a general question for the discipline. Within Europe, constitutional scholars have criticised the failure of constitutional thinking to grapple with the limits of current forms of European political and legal ordering, and their interrelationship with both material and political crises.³²⁹ Latin American scholars have argued that provisions ‘excluding certain economic policies and choices from public deliberation’ should be understood as a form of authoritarian constitutionalism.³³⁰ In settler colonies such as the United States and Australia, scholars have sought to question the legal identification of strong forms of judicial independence and human rights ideals as progressive horizons, to the detriment of socially transformative forms of politics.³³¹ In place of the familiar vocabularies of judicial institutions and rights, scholars have sought to broaden out the question of what exactly is ‘constitutional’ in nature to include an analysis of class relations and social movements as well as institutions, and a recognition that political settlements are premised on inherently unequal and therefore unstable relations of production and forms of land ownership.³³² In other words, they have returned to the issues that also fuelled debates taking place during the interwar period, in the leadup to fascist forms of rule and in the wake of the dismantling of German and Japanese empire. In doing so, they have joined a longer tradition of scholarship and resistance from and in solidarity with the decolonised world that has sought to make constitutional order responsive to the projects, vocabularies, and aspirations of social demands.³³³

As some of these scholars have shown, this call to broaden out constitutional thinking at the domestic level can be productively placed in conversation with scholarship on international economic ordering.³³⁴ Such scholarship has turned away from the question of how this law might facilitate the fulfilment of basic needs, or order economic relations in accordance with rational principles, to a more foundational inquiry of how such law affects the public

³²⁹ Goldoni and Wilkinson (n 26) 568.

³³⁰ Helena Alviar García, ‘Neoliberalism as a Form of Authoritarian Constitutionalism’ in Helena Alviar García and Günter Frankenberg (eds), *Authoritarian Constitutionalism* (Edward Elgar, 2019) 37, 41.

³³¹ Niko Bowie, ‘The Contemporary Debate over Supreme Court Reform: Origins and Perspectives’ (Testimony to the Presidential Commission on the Supreme Court of the United States, 30 June 2021); Dylan Lino, ‘Are Human Rights Enough (in Australia)?’ (2019) 41 *Sydney Law Review* 281.

³³² Goldoni and Wilkinson (n 26) 582–3.

³³³ See, eg, Baxi (n 305); Issa Shivji, *Where is Uhuru? Reflections on the Struggle for Democracy in Africa* (Fahamu Books, 2009) ch 5, ‘Three Generations of Constitutions and Constitution-Making in Africa’, as well as writing within the Critical Legal Studies movement engaging with these questions, including by Karl Klare and Duncan Kennedy.

³³⁴ See Alviar García (n 330), examining the interaction of domestic constitutions with the protection of foreign investment.

‘capacity to participate in political decisions about the material limits to the logic and goals of the market’.³³⁵ This inquiry can be understood as part of a now extensive body of work investigating core aspects of international economic law and its relationship to social freedom. Scholars have argued that the operationalisation of free trade, now at the core of contemporary international regimes governing the flow of goods and services across borders, should be understood as part of an intellectual tradition that seeks to eliminate forms of planning through which the state might act as a shield against the social impacts of the market.³³⁶ They have also argued that the commitments of the law on investment protection and its judicialisation after the mid-twentieth century should be seen as a response to, among other things, what some economists, businessmen and powerful states viewed as unacceptable forms of collectivism and developmentalism within the decolonising world, and as animated by a mistrust of democratic politics.³³⁷ Other scholars have argued that regimes for the international protection and enforcement of intellectual property rights should be understood as the structural elevation of private sector interests over rights of public access and social benefits of technology,³³⁸ and that the constitutive instruments of the international financial institutions mean they are not politically representative of the peoples of African states.³³⁹ In the wake of the apparent backlash to forms of internationalised decision-making, Anne Orford has described the imperative to reorient international legal scholarship and practice toward the social as an imperative of representation: how would it be possible to craft an international law that is capable of responding to democratic politics?³⁴⁰

Taking such scholarship seriously means reconsidering the reliance by international constitution-making projects on embedded orders of investment and patent protection and trade liberalisation and background claims that by facilitating economic development they support the stability of political compacts. It challenges scholars and practitioners to rethink forms of international constitution-making and their connection to the highly legalised forms of relation that now underpin the global economy. The idea that international practices and forms of economic ordering have acted to insulate decisions about the operation of markets and the role of the state from national control leads to the conclusion that the redivision of power among peoples within a state and institutional forms of decentralisation, federalism or consociation may, in and of themselves, be insufficient to deliver on the promise of local ownership. Instead,

³³⁵ Anne Orford, *International Law and the Social Question* (Asser Press, 2020) 3.

³³⁶ Orford, ‘Food Security’ (n 121) 56–61.

³³⁷ See Ntina Tzouvala, ‘The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale’ [2020] *European Yearbook of International Economic Law* 37; Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment against Revolution* (Cambridge University Press, 2021).

³³⁸ Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2009).

³³⁹ ‘African Sovereign Debt Justice Network’s Statement on the Occasion of the 2022 Spring Meetings of the IMF and the World Bank: Fundamental Reforms of the International Financial and Debt Architecture are Crucial to Addressing Africa’s Sovereign Debt Crisis’ (18 April 2022) <<https://www.afronomicslaw.org/category/african-sovereign-debt-justice-network-afsdjn/african-sovereign-debt-justice-networks>>.

³⁴⁰ Orford, *Social Question* (n 335). On engaging with the ‘social’ as a concept, see also Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850–2000’ in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 19; Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2001) ch 4.

this scholarship invites scholars to look beyond redistribution and to reconsider the separation of the constitutional question from other kinds of questions about ownership and the organisation of power: questions of the domestic legal forms of property and contract, the privileging of the corporation and deprivileging of other forms of social collectives, and forms of international property protection, trade liberalisation, and debt structuring. In terms of the procedures that are enacted and the groups that are included in internationally-advised processes of constitutional drafting, this might require a reframing of inclusion not in terms of equality of representation or durability of solutions but in terms of historical dispossession or exploitation, as well as a greater focus on the ways that private law structures preclude social ownership or political choice.

This inquiry entails a departure from the pragmatic mode in which post-war constitution-making has been conducted over the last decades toward one that both acknowledges the discipline's past collaboration with forms of dispossession and exploitation, and that actively reconsiders its future boundaries. However, it is not a sharp break from what many writing about constitution-making perceive to be the discipline's commitments. Instead, it takes seriously the question of democratic inclusion and of local ownership by suggesting that current scholarly discourses, policy documents, and practices of constitution-making offer only a limited and partial view of that inclusion and of that ownership. In many ways, this inquiry is only an extension of the already existing sensibility found in constitution-making policy that the question of what constitutionalism *is* and what it might require is not fixed, but politically and socially contingent: that '[i]t is not possible ... to divide issues into those that are categorically constitutional and those that are not'.³⁴¹ It also takes up the call from scholars contending that the project to transform international law for a decolonised world must be framed not only through questions of inclusion and exclusion but also through the transformation of the very order into which inclusion is promised.³⁴² This would depart from earlier iterations of a more 'global' constitutionalism, framed around procedural mechanisms that sought to formalise interaction between, and the enabling or constraining of, existing institutions and projects of international law and their relationship to domestic order.³⁴³ Instead, this would be a thicker conception of constitutionalism that eschews an emphasis on stability and order in favour of social transformation.

Finally, it is worth recalling here the vastly unequal nature of our profession, and the argument that the reproduction of disciplinary sensibilities and exclusions may be 'as much about desire' as about anything else.³⁴⁴ This indicates that moving toward this conception will require not only a degree of reflexivity from legal scholars from powerful states but also our active collaboration in the transformation of our discipline. Writing on the relationship of

³⁴¹ *Primer* (n 7).

³⁴² Gathii, 'Promise of International Law' (n 115) 409–10.

³⁴³ See, eg, Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2012) 3.

³⁴⁴ See above part IIB.

international law to democracy, Hilary Charlesworth observed in 2015 that the term ‘postconflict society’:³⁴⁵

suggests a neat transition from a State of conflict to peace; it also implies that these are discrete and separate types of societies. ... Post-conflict societies carry the sense of being unruly, teetering on the edge of chaos; of a tentative redemption by the international community; and they are measured in contrast to the mature, secure, democracies of the West. In this sense, the term “post-conflict” obscures the identity of the actors involved and represents them either as the nurturers – the agents of change – or the nurtured. These categories shroud the way that the democracy-builders can be complicit in the dysfunctions that make “building democracy” necessary.

In this article I have argued that the problems of ‘postconflict societies’, seen in the context of being part of a global network of relations of production that shape the lives of those who live in them, ought not to be seen as hermetically distinct from the societies which have played a role in structuring those relations.³⁴⁶ Instead, scholars of international constitution-making, especially those writing from and situated in universities in the global North, might also consider on whose behalf, and to whose benefit, laws and treaties are made and economies ordered in this way. Rethinking the vocabularies and practices of constitutionalism along these lines is one method of asking what forms of legal ordering and of political organisation might return to the peoples of the decolonised world the ability to make political decisions about forms of production, distribution of wealth, and relations with the natural world. In short, by unsettling the relationship of constitutionalist ideals to contemporary forms of economic ordering, the theoretical challenge that I presented in this part offers a new kind of invitation to ‘broaden the constitutional imagination’.³⁴⁷

V. CONCLUSION

Constitution-making has over the last three decades taken shape as a formalised practice, articulated by a set of international actors and institutions and supported by the orientation of disciplinary sensibilities. The creation of this technique as a means of securing peace and protecting against perceived risks of conflict for societies in the decolonised world has become an internationally-supported endeavour, emphasising common processes and philosophies, a set of minimum norms, and the facilitation of specific forms of economic development. In inquiring into the politics, legality, and effects of this technique, practitioners and scholars have turned to the postwar inheritance and the histories of constitution-making in Germany and Japan. I have argued that through doing so, they assisted in reproducing an account of constitution-making as practice that was narrowly defined, and an account of constitution-making as teleology that acted to insulate the project from critiques regarding its relationship to material interests and structural exploitation. In reproducing this selective

³⁴⁵ Hilary Charlesworth, ‘Democracy and International Law’ (2015) 371 *Recueil des cours* 53, 137.

³⁴⁶ See also Rittich (n 13) 482.

³⁴⁷ United Nations, *UN Constitutional*, Issue 1 (2013/2014) 3 (Nicholas Heysom).

technicity, the problems of constitutional intervention have come to be portrayed as problems of political and situational sensitivity, or technical knowledge. They are viewed as problems of implementation, rather than problems of orientation; problems of practice, rather than problems of theory.

Returning to the postwar history and the questions at stake during that moment for the field assists in retrieving these questions of theory. It shows that the vocabularies that these actors formed, and that have helped to constitute the epistemic boundaries of the field, were themselves selected from the multiple and unstable meanings of constitutionalism and what it might mean for a world seeking to emerge from imperial and colonial rule. In large part, the specific tradition of constitutionalism around which fields of professional practice, institutional knowledge and forms of law have coalesced remains allied with liberal forms of economic development and of property. In the context of the present crises, however, these same forms are the subject of broad scrutiny, critique, and social resistance. If constitutionalism is the method by which law can be placed in service of social demands, then revisiting this tradition allows lawyers, diplomats and the movements with which they work to consider which legal institutions — beyond those that have widely been understood as belonging to a ‘public’ law — can be understood as aspects of political settlements, open to reinterpretation and renovation. By placing scholarship and policy literature in conversation with international legal thought and constitutional theory that have, in different ways, refused the separation of the constitutional and the material questions, I hope to provoke a broader reconsideration of the postwar inheritance and the ways that it has continued to animate a particular understanding of the relationship of law to social life. This reconsideration offers international lawyers and constitutional theorists some ways to rethink what constitutionalism has meant and might yet mean in the coming decades, and where it might be found and practiced.