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# Editorial

## Hard times: Progress narratives, historical contingency and the fate of global constitutionalism

JEFFREY L. DUNOFF, ANTJE WIENER, MATTIAS KUMM,  
ANTHONY F. LANG JR. and JAMES TULLY

Editorials in academic journals can serve many functions, including as a snapshot of a discipline's preoccupations at a particular moment in time. As *Global Constitutionalism* enters its fourth year of publication, we begin with reflections on the current global political environment. If last year's editorial asked 'How large is the world of global constitutionalism?' – and earlier editorials elaborated on the rationale for a new journal on Global Constitutionalism<sup>1</sup> and addressed the interdisciplinary challenges arising from the journal's novel remit<sup>2</sup> – this year the mood is decidedly different. Indeed, in light of developments over the past year, it is appropriate to consider whether, as a political matter, at least certain elements of global constitutionalism have provisionally peaked or even entered a period of decline – and if so, how scholars interested in global constitutional processes should respond.

### I.

The year 2014 has been marked by rising concerns over an upward spike in the frequency and intensity of politically-motivated violence, which have triggered anxieties about the stability and efficacy of the larger international legal order. Many view these developments as posing substantial threats to what last year's editorial characterized as 'the trinitarian mantra of the constitutionalist faith', namely human rights,

<sup>1</sup> A Wiener, AF Lang Jr., J Tully, M P Maduro and M Kumm (2012) 1 *Global Constitutionalism* 1.

<sup>2</sup> A F Lang, M Kumm, A Wiener, J Tully and MP Maduro (2013) 2 *Global Constitutionalism* 1.

democracy and the rule of law.<sup>3</sup> This journal's readers undoubtedly will be familiar with geopolitical developments over the past twelve months. Nevertheless, a brief *tour d'horizon* is useful to understand the disquiet that arises out of the current state of international affairs.

As this editorial is being written, in autumn 2014, the eyes of the world are once again focused on the Middle East. In recent months, the entity formerly known as the Islamic State in Iraq and the Levant (ISIL) has evolved from a dangerous but little-known terrorist organization into a *de facto* government with control of at least one-third of the land mass of both Iraq and Syria. The group – which now calls itself ‘the Islamic State’ – burst into global consciousness with the seizure of Mosul, Iraq’s second largest city, in June, after moving into Iraq from their base in Syria. Since that time, it has captured more territory; embarked on violent campaigns against those it considers apostates, including Shiites and Yazidis; and released videotapes of the grotesque beheadings of journalists and aid workers from the UK and US. Through seizures of oilfields and banks, kidnappings, and ‘tax’ collections in territories it controls, ISIL has amassed substantial economic resources; it also possesses sophisticated weapons looted from areas it controls.

ISIL’s siege of tens of thousands of Yazidis on Mount Sinjar in northern Iraq in August prompted fears of a potential genocide, and led to a rhetorical mobilization within the UN system and the launch of dozens of air strikes by the United States against ISIL positions in northern Iraq. In response to grisly videotapes of the beheading of three Westerners, the United States provided weapons to the Kurdish peshmerga and began to organize a broad-based international coalition with the objective to ‘degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy’.<sup>4</sup> By late September, a coalition led by the United States, and including Saudi Arabia, Jordan, the United Arab Emirates, Qatar and Bahrain had launched a series of air strikes on ISIL targets inside Syria. These actions, in turn, have prompted ongoing debates over the international legality, military efficacy and humanitarian implications of military interventions.

Regrettably, the political violence perpetuated by, and in response to, ISIL was far from the only example of political violence in this region. During July and August, 2014, Israel and the Palestinians engaged in yet another round of armed conflict. The proximate cause of these hostilities

<sup>3</sup> M Kumm, AF Lang Jr., J Tully and A Wiener, ‘How Large is the World of Global Constitutionalism?’ (2014) 3 *Global Constitutionalism* 1.

<sup>4</sup> B Obama, ‘Statement by the President on ISIL’ (10 September 2014) <<http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>> accessed 23 September 2014.

was the kidnapping and murder of three Israeli youths, and the presumably retaliatory murder of a Palestinian teenager; deeper causes include the collapse of US-sponsored peace talks which led many in the region to despair of peace. During this conflict, Israeli jets dropped thousands of bombs on Gaza and Hamas launched hundreds of rockets into Israel. Only after the deaths of more than 2,000 Palestinians, most of them civilians, and 70 Israelis, was an Egyptian proposal for a ‘ceasefire . . . unlimited in time’ accepted by both sides. It remains to be seen whether the ceasefire will prove durable.

While the rise of ISIL and the fighting between Israel and Hamas pushed other Middle East conflicts off the front pages, the tragedies and deprivations associated with these conflicts continued unabated. The ongoing hostilities in Syria have caused an estimated 200,000 deaths, and resulted in over 4.25 million internally displaced persons and 2.8 million refugees in neighbouring countries. A June 2014 UN report found that ‘the main cause of civilian casualties, mass displacement and destruction is the deliberate targeting of civilians, indiscriminate attacks, attacks on civilian and protected objects, and the punitive imposition of sieges and blockades’.<sup>5</sup> Developments in neighbouring states were likewise distressing. Political violence, and repression, intensified in Egypt. Nearly three years after a revolution that toppled former leader Moammar Gadhafi, Libya has experienced a collapse of governance and bloody infighting among factional militias. These and related developments in the region have quashed hopes for democratic and constitutional change raised by the so-called Arab Spring. While the dizzying pace of change has certainly mobilized political process and brought contention to the fore in states that were formerly dictatorships in the WANA (Western Asia and Northern Africa) region, the widespread optimism for more democratic governments has gradually been replaced with fears of dictatorships and caliphates. The relation of this rather daunting change of affairs with Western politics and perceptions of global constitutionalism remain to be explored in detail with reference to emerging forms of unbound constitutionalization.

Certain African states faced equally daunting challenges. In Nigeria and Somalia, in particular, deadly terrorist groups seek to destabilize and overthrow existing governments. In Nigeria, Boko Haram launched many attacks against government and civilian facilities. Educational institutions are a particular target, as they are seen as vehicles for advancing ‘Western values’, such as gender equality. For example, in February, Boko Haram slaughtered 50 teenage boys – some burned alive – at a college in

<sup>5</sup> UNCHR, Office of the High Commissioner for Human Rights, ‘Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (16 June 2014) UN Doc A/HRC/26/CRP.2.

north-eastern Nigeria. In April, Boko Haram attracted international attention when it kidnapped over 250 schoolgirls and threatened to ‘sell them in the market’. By summer 2014, Boko Haram had expanded its operations into neighbouring Cameroon, Chad and Niger. In Somalia, the Shabab continue to engage in paramilitary operations, including two attacks on the Presidential compound and one on the Parliament building. Elsewhere on the continent – including in Mali, Côte d’Ivoire and Zimbabwe – democratic consolidation is under threat.

Meanwhile, several states in West Africa struggled to contain an outbreak of the Ebola virus that quickly overwhelmed under-resourced national health systems. The epidemic began in rural Guinea in March and, within days, spread to neighbouring Liberia. By May, the disease had crossed into Sierra Leone, and by June was present in large urban centres such as Monrovia, Liberia’s capital. In July, it spread to Nigeria – Africa’s most populous nation. The WHO’s director general has called the Ebola outbreak ‘unquestionably the most severe acute public health emergency in modern times’,<sup>6</sup> and public health experts have warned that unless stringent new measures are urgently applied, the spread of the virus could kill hundreds of thousands of people within the next few months.

To be sure, the challenges associated with a regional pandemic are quite different from those posed by terrorist groups. Nevertheless, the spread of Ebola raises numerous questions relevant to readers of this journal. For example, how do constitutional norms and processes influence a government’s efforts to navigate between the sometimes conflicting demands of public health and individual liberties? In light of Liberia’s efforts to quarantine parts of Monrovia, Sierra Leone’s three-day nationwide lockdown, and the closure of certain international borders, what are the scope and limits of police powers states can exercise in the face of fast-spreading epidemics? Under what circumstances should untested but potentially life-saving therapies be used on vulnerable human populations? What principles determine who should receive treatment when the quantity of medicines is limited and thousands are infected? Is there a normative justification for the discrepancy between the high levels of treatment that infected Americans and Europeans receive, and the substandard health facilities used by thousands of Africans?

The epidemic is, of course, a tragedy for those individuals and families directly affected. Apart from the terrible toll in human lives and suffering, the spread of Ebola has already had, and will continue to have, a significant economic impact, including ‘foregone output; higher fiscal deficits; rising

<sup>6</sup> N Cumming-Bruce, ‘W.H.O. Chief Calls Ebola Outbreak a “Crisis for International Peace”’ *New York Times* (13 October 2014).

prices; lower real household incomes and greater poverty'.<sup>7</sup> Strikingly, the direct and indirect impacts of sickness and mortality are dwarfed by 'the behavioral effects resulting from peoples' fear of contagion', which in turn leads to a fear of interactions with others and disrupts normal economic activity.<sup>8</sup> One fear we have is that the human costs of the epidemic and resulting economic dislocation can lead to tears in the social fabric and political instability, eventually threatening to produce the sort of political vacuum that groups like Boko Haram and ISIL have tried to fill in other parts of the globe.

It was also a difficult year in Europe and Eurasia. In February, Ukrainian citizens mobilized to oppose a corrupt and authoritarian government. These protests induced then-President Yanukovich to leave office. The weeks that followed saw the repeated invocation of various constitutional processes – including a vote by Ukraine's parliament to formally remove Yanukovich from office, a vote by Crimea's parliament to join the Russian federation, a vote by Russia's parliament to authorize military operations in Ukraine, and a referendum by the Crimean people. While some of these processes surely contained large elements of political theatre, they nevertheless serve to underscore political leaders' efforts to cloak their actions with the legitimacy conferred by compliance with constitutional processes. In any event, while these processes were unfolding, armed Russian soldiers entered the Crimean Peninsula and, by early March, Russia had seized and annexed Crimea, triggering what many called the greatest political crisis in Europe since World War II. Tensions escalated after a missile brought down a Malaysian Airlines flight and killed all 298 people on board and, despite a shaky ceasefire, show no signs of abating. Indeed, even with a ceasefire in place, Moscow allegedly continues to supply arms, money and intelligence to pro-Russian militants who are fighting the Kiev government for control of territories in eastern Ukraine.

Authoritarianism was on the rise elsewhere in Europe as well. In Hungary, the ruling Fidesz Party, which has rewritten the Constitution and come to dominate all branches of government, was re-elected and the Jobbik – a party known for its paramilitary arm and openly anti-Semitic and anti-Roma views – gained strength in parliamentary elections. The government has packed the courts and other nominally independent

<sup>7</sup> The World Bank, 'The Economic Impact of the 2014 Ebola Epidemic: Short and Medium Term Estimates for Guinea, Liberia, and Sierra Leone' (2014) Working Paper No 90748. <<http://documents.worldbank.org/curated/en/2014/09/20214465/economic-impact-2014-ebola-epidemic-short-medium-term-estimates-guinea-liberia-sierra-leone>> accessed 23 September 2014.

<sup>8</sup> Ibid.

institutions, politicized the central bank, and barred the media from delivering ‘unbalanced news coverage’. In Turkey, the government has been embroiled in a corruption scandal, harshly cracked down on anti-government protests, and severely constrained free speech and the press, even banning Twitter and YouTube. In response, thousands took to the streets to protest government corruption and Internet restrictions.

Developments in other parts of the globe are hardly more encouraging. In Asia, the news was dominated by China’s territorial disputes with several of its neighbours, including Japan, Vietnam and the Philippines. Concerns have also been raised about the deteriorating human rights situation in China and China’s efforts to commandeer the nominating process for Hong Kong’s next chief executive. In Thailand, after six months of protests that divided the nation along regional and class lines, the Supreme Court forced a Prime Minister out of office and the Army staged a coup. Thereafter, military rulers ordered foreign networks, like CNN and the BBC, off the air, largely silenced the country’s lively news media and banned gatherings of five or more people. And Burma’s halting journey towards democratic reform seems to have reversed, as the ruling generals have overseen attacks on the Rohingya, an ethnic minority in western Burma, rolled back press freedoms and pushed laws that seek to build a ‘national identity on the basis of nationalism and Buddhist chauvinism, rather than multicultural democracy’.<sup>9</sup>

In the Western hemisphere, Mexico, Colombia and other Latin American states face escalating political violence, but lack institutions or social mechanisms that can productively channel dissent and facilitate political compromise. These conditions, in part, fuelled a vast surge in the movement of young Central American immigrants to the United States. This influx overwhelmed US border officials, and prompted controversial policies of expedited deportation without access to immigration courts. The intertwined law and politics of these cross-border migrations, along with regional rules on the flow of capital, labour and goods, have yet to be adequately analysed within a global constitutionalist framework.

As if these sobering developments were insufficient, the past year also witnessed the continued emergence of another set of concerns, namely the increasing threat to civil liberties and human rights posed by information technologies. The Internet and other information technologies enrich the daily lives of millions of individuals. Yet the rapid spread of these very technologies also enhances the ability of governments, private firms and individuals to undertake surveillance, interception and data collection,

<sup>9</sup> T Fuller, ‘In Myanmar, the Euphoria of Reform Loses Its Glow’ *New York Times* (4 July 2014).

which may infringe human rights. Ongoing revelations of NSA spying illustrate that the declining cost of technology and data storage have eroded financial and practical disincentives to conducting surveillance. These revelations also confirm that states and other actors have a greater capacity to undertake simultaneous, invasive, targeted and broad-scale surveillance than ever before. In response, a number of international bodies, NGOs and academics have begun to address the status of human rights in the information age.<sup>10</sup>

To be sure, from a constitutional perspective, the news was not uniformly grim. A spirited electoral campaign surrounding a referendum addressing whether Scotland would remain part of the United Kingdom produced record numbers of voters and a sustained, focused and widespread public debate over the most basic of constitutional issues. Even a disappointed leader of the pro-independence movement hailed the electoral process as ‘a triumph for the democratic process and for [public] participation in politics’,<sup>11</sup> and it is likely that the election will result in significant constitutional change in the UK.<sup>12</sup> The 2014 EU elections witnessed dramatically lower turnout than Scotland’s, and produced far more ambiguous results, including gains for right-wing populist parties that share a common antipathy towards the EU. Nevertheless, as European integration scholars have noted, recent developments pose ‘an integration paradox. While the basic constitutional features of the European Union have remained stable, EU activity has expanded to an unprecedented degree.’<sup>13</sup> Whether contestation regarding parliamentary elections and their input on the placement of so-called Spitzenkandidaten does anything to enhance European unity in light of the rising challenges beyond the Western world remains to be seen, even though it arguably introduces a level of democratic legitimacy that EU governance has historically lacked in comparison with nation-state democracy.

Moreover, regional and constitutional courts substantially contributed to debates over cyber-privacy, religious freedoms and other issues with constitutional dimensions. To mention just a few significant decisions: in

<sup>10</sup> See, e.g., UNGA, ‘The Right to Privacy in the Digital Age’ (21 January 2014) UN Doc A/Res/68/167; UNCHR, Office of the High Commissioner for Human Rights, ‘The Right to Privacy in the Digital Age’ (30 June 2104) UN Doc A/HRC/27/37.

<sup>11</sup> R Cohen, ‘We the People of Scotland’ *New York Times* (19 September 2014) (quoting Alex Salmond, First Minister of Scotland and leader of the Scottish National Party).

<sup>12</sup> For one analysis of the constitutional implications of the referendum vote in Scotland, see the lecture by Sir David Edward, former justice of the European Court of Justice, available at <<http://www.st-andrews.ac.uk/intrel/cgc/>>.

<sup>13</sup> C Bickerton, D Hudson and U Puetter, ‘New Intergovernmentalism: European Integration in the Post-Maastricht Era’ (2014) 1 *Journal of Common Market Studies* 1.



May, the Grand Chamber of the Court of Justice of the European Union ruled that, under certain conditions, individuals can request that certain personal information be removed from Internet search engine results.<sup>14</sup> In July, the European Court of Human Rights found that a French law prohibiting the wearing of clothing that covers one's face – such as a burqa – did not violate the European Convention on Human Rights. Interestingly, the Court did not uphold the law on the grounds of gender equity or human dignity, but on the grounds of public safety and 'respect for the minimum requirements of life in society' and 'living together'.<sup>15</sup> And courts around the globe continued to address the rights of gay, lesbian and transgender individuals.<sup>16</sup>

Despite these important developments in constitutional norms and processes, however, a widespread sense of unease suggests that these are grim times for those interested in global constitutionalism, and committed to democracy, human rights and the rule of law.

## II.

The instances of political breakdown and violence surveyed above are all deeply rooted in and shaped by local conditions. Nevertheless, many sense that these geographically dispersed events are somehow related to one another. What larger trends or causes lie behind the apparent increase in global disorder? Why is the international community unable – or unwilling – to mount effective responses? And what implications do these developments hold for global constitutionalism?

Some observers suggest that the apparent inability to meaningfully address the increased disorder associated with recent global events reflects a *lack of global leadership*. The claim takes several forms, but usually emphasizes that the United States lacks the resources or will to continue as the primary provider of global public goods, Europe continues to be preoccupied with the Eurozone crisis and stagnant economies, Japan is fully occupied with internal political and economic problems, and emerging powers are too focused on domestic growth to assume leadership positions.<sup>17</sup> In this

<sup>14</sup> *Google Spain v AEPD and Mario Costeja Gonzalez* [2014] C-131/12.

<sup>15</sup> *S.A.S. v France* [2014] ECHR 695.

<sup>16</sup> See, e.g., *National Legal Services Authority v Union of India* [2014] Supreme Court of India (drawing on international legal instruments and a wide array of foreign case law in support of finding that transgender individuals constitute a third gender); *Bostic v Schaefer*, 760 F.3d 352 [2014] US 4th Cir. (striking state ban on same-sex marriage as unconstitutional); *Bishop v Smith*, 760 F.3d 1070 [2014] US 10th Cir. (same).

<sup>17</sup> I Bremmer, *Every Nation for Itself: Winners and Losers in a G-Zero World* (Penguin, New York, 2012).

‘G-zero’ world, no state or group of states is willing to step forward to address global issues or to create or maintain the public good of an institutionalized international order.

A more subtle version of this claim emphasizes the *growing multipolarity of international relations*. This approach foregrounds an international landscape in which power is diffusing and politics diversifying.<sup>18</sup> The trade regime provides a representative example: at its inception, the GATT consisted of 23 members, mostly Western; today’s WTO consists of 160 members representing a wide variety of economic and political systems. Indeed, today’s WTO includes at least four distinct groups of states: the old OECD states; a group of powerful ‘emerging economies’ that aggressively pursue their interests at the WTO, such as China, India, Brazil, Korea, Mexico, Argentina and a handful of others; the other developing states, and the least developed states. Each of the four groups has its own trade interests and agenda. The wide diversity of interests renders reaching any agreement – let alone one that substantially advances global interests – increasingly difficult.

Similar patterns of multipolarity characterize other policy domains. During the Cold War, the US and the USSR dominated the security realm. Today, an increasingly broad range of states and non-state actors (including terrorists, pirates, cyber hackers and others) are key players on security issues, giving rise to multiple veto points and rendering pursuit of uniform global policies increasingly infeasible. Similarly, the areas of environment and investment are marked by sharp and persistent North–South conflict, where no particular actor or region is able to impose its will. In short international legal and political processes are increasingly embedded in a world marked by numerous power centres and without a political centre of gravity.

Still others interpret recent events as evidence of an emerging contest between authoritarian and democratic models. For example, Michael Ignatieff argues that, since 1989, capitalism has been ‘politically promiscuous’, willing to pair up with either democratic or authoritarian polities.<sup>19</sup> According to Ignatieff, from ‘the Polish border to the Pacific, from the Arctic Circle to the Afghan border, a new political competitor to liberal democracy [has begun] to take shape: authoritarian in political form, capitalist in economics, and nationalist in ideology’.<sup>20</sup> Ignatieff notes

<sup>18</sup> CA Kupchan, *No One’s World: The West, the Rising Rest, and the Coming Global Turn* (Oxford University Press, New York, 2012).

<sup>19</sup> M Ignatieff, ‘The New World Disorder’ (2014) LXI *New York Review of Books* 30 (25 September).

<sup>20</sup> *Ibid.*

that, for those who thought that globalization would lead to political convergence, it is a cruel irony that it is precisely the rising standards of living associated with access to open and free global markets that enable authoritarian states to maintain repressive political systems at home.<sup>21</sup>

While these competing conceptualizations attempt to provide a theoretical account of current international affairs, they do not fully capture the sense of alarm that many feel over recent developments. For this, it may be necessary to look for a different type of explanation.

In *The Whig Interpretation of History*, the English historian Herbert Butterfield criticized the tendency of some scholars ‘to emphasize certain principles of progress in the past and to produce a story which is the ratification if not the glorification of the present’.<sup>22</sup> Whiggish tendencies are frequently found in writings on the international legal order.<sup>23</sup> Thus scholars in this area consistently engage in ‘an elaborate disciplinary practice retelling international law’s progressive development, which serves as a common intellectual background for professionals in the field’.<sup>24</sup> In this practice, international law is conceptualized as both sign and instrument of progress; the historical narrative takes the form of a ‘from .... to’ story. International law’s progress narrative can be summarized as ‘the slow and steady progress of law against power, reason against ideology, international against national, order against chaos in international affairs’.<sup>25</sup>

Notably, this general trajectory of the discipline’s progress narrative is repeated in the history of specific subfields or doctrines. Consider, for example, the conventional account of the genesis of human rights law. In this narrative, in the aftermath of World War II the revelation of German wartime atrocities prompted the international community to undertake a fundamental reassessment of traditional doctrines regarding the status of individuals under international law. To ensure that the wartime horrors

<sup>21</sup> M Ignatieff, ‘Are the Authoritarians Winning?’ (2014) LXI *New York Review of Books* 53 (10 July).

<sup>22</sup> H Butterfield, *The Whig Interpretation of History* (G Bell, London, 1931). Within the discipline of history, Butterfield’s thesis has been both influential and heavily criticized. See, e.g., A Patterson, *Nobody’s Perfect: A New Whig Interpretation of History* (Yale University Press, New Haven, CT, 2002).

<sup>23</sup> Indeed, some go so far as to claim that ‘[b]elief in international law as a normative ideal to be progressively realized in the conduct of foreign relations is virtually a necessary condition of international law scholarship’. PW Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, Chicago, IL, 1999) 109.

<sup>24</sup> D Kennedy, ‘The Disciplines of International Law and Policy’ (1999) 12 *Leiden Journal of International Law* 9, 90. For thoughtful discussions of international law’s progress narratives, see T Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press, The Hague, 2010); R Miller and R Bratspies (eds), *Progress in International Law* (Martinus Nijhoff, Leiden, 2008).

<sup>25</sup> Kennedy (n 24) 90.

would ‘never again’ occur, the international community pursued a dual-track strategy. On the one hand, the Allies pursued prosecutions against individuals responsible for the commission of atrocities.<sup>26</sup> On the other hand, the community of nations, along with numerous civic and religious groups, began to create human rights law. In the years that followed, these actors developed a sprawling body of law and an elaborate institutional machinery to promote and protect an ever-expanding catalogue of human rights. Accounts of these developments typically note the ‘immense progress’ made, while acknowledging that much more remains to be done.<sup>27</sup>

A similar narrative arc shapes conventional accounts of international trade law. The standard version of this story starts with the disastrous trade policies of the 1920s and 1930s, when many states pursued mercantilist policies in efforts to boost exports and limit imports. As a result, the volume of international trade plummeted; between 1929 and 1934, world trade declined by roughly 66 per cent. This spectacular contraction of international commerce, in turn, contributed to the strength and length of the Great Depression.<sup>28</sup>

The post-war trading order was consciously designed to avoid a repeat of this experience. The core policy assumption underlying the GATT was that liberalized trade permits states to exploit comparative advantage, which in turn spurs economic growth, productivity gains and job creation. The GATT/WTO system has succeeded admirably in its pursuit of these goals. Through negotiations, global tariffs and other impediments to trade have been substantially reduced. In turn, levels of international trade have skyrocketed, growing much more quickly than the expansion of world output. Thus, the trade narrative views the international trade regime as helping the global community successfully avoid the economically and politically destructive experiences of the 1930s and 1940s, and facilitating economic development.

The reference above to Whig history is neither accidental nor ornamental. Whig history is not simply a progress narrative. More specifically, it is a history of the triumph of *constitutionalism*, *rights* and the *rule of law* over

<sup>26</sup> These trials, of course, mark the start of what we now know as international criminal law – a specialty that is itself marked by progress narratives. For an overview and critique, see D Koller, ‘... and New York and The Hague and Tokyo and Geneva and Nuremberg and ... : The Geographies of International Law’ (2012) 23 *European Journal of International Law* 97.

<sup>27</sup> For one account, see P Alston, ‘The UN’s Human Rights Record: From San Francisco to Vienna and Beyond’ (1994) 16 *Human Rights Quarterly* 375, 378. For an overview of critiques of this progress narrative, see G Frankenberg, ‘Human Rights and the Belief in a Just World’ (2014) 12 *International Journal of Constitutional Law* 35.

<sup>28</sup> In the 1940s and 1950s, many advanced the additional claim that the turn to protectionism also produced distrust among nations, helping to pave the way for World War II.

a series of foes, including monarchy, despotism, corruption, ignorance and religious dogma. Whig narratives place constitutional developments at the centre of the progress narrative. These accounts are centrally concerned with the triumph of freedom over oppression and injustice, and the emergence of modern forms of constitutional governance, resulting in greater rights, equality and political justice.

Thus it should not surprise that Whiggish tendencies and progress narratives are particularly pronounced in the literature on global constitutionalism. Writings on global constitutionalism often invoke ‘progress tropes’<sup>29</sup> such as the increasing value-orientation of international law (i.e., the expansion of rights, or the shift away from a state-centric international legal order to a constitutionalized order)<sup>30</sup> or the gradual replacement of power politics with rule-of-law approaches.<sup>31</sup> One prominent commentator summarizes ‘the meaning of global constitutionalism’ in language that foregrounds these tendencies: ‘[g]lobal constitutionalization refers to the continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalist elements in the international legal order . . . bolstered by academic discourse in which these elements are identified and further developed’.<sup>32</sup>

But events over the past year remind us that history is not over, and that political trajectories stubbornly refuse to march in only one direction. Constitutionalism, human rights, rule of law, and democracy are features of political orders that can exist along continuums. More importantly, their strength and salience will ebb and flow over time. The heightened violence that defines the moment suggests that the long arc of history need not inevitably bend towards justice. Whether it does so or not in any particular region, or globally, depends on an incalculably large number of military, political, economic and social contingencies that cannot be predicted. As the French poet René Char noted, ‘[n]otre héritage n’est précédé d’aucun testament’.<sup>33</sup>

<sup>29</sup> T Altwicker and O Diggelmann, ‘How is Progress Constructed in International Legal Scholarship?’ (2014) 25 *European Journal of International Law* 425.

<sup>30</sup> For a discussion, see GW Brown, ‘The Constitutionalization of What?’ (2012) 1 *Global Constitutionalism* 201.

<sup>31</sup> See, e.g., J Habermas, *Between Naturalism and Religion* (Polity Press, Cambridge, 2008) 316 (noting that the expanding body of international law resembles a form of global constitutionalism and that these processes can create ‘a rule of law that can normatively shape existing power relations . . . and direct the exercise of political power into legal channels’).

<sup>32</sup> A Peters, ‘The Merits of Global Constitutionalism’ (2009) 16 *Indiana Journal of Global Legal Studies* 397.

<sup>33</sup> R Char, *Feuillets d’Hypnos* (Gallimard, Paris, 1946). Hannah Arendt translated this phrase as ‘our inheritance was left to us by no testament’. H Arendt, *Between Past and Future* (The Viking Press, New York, 1961) 3.

Thus, Whiggish progress narratives exhaust neither our constitutional imagination nor our experiences. These experiences support narratives of decline, restoration or redemption.

To note that the phenomena embedded in this journal's title are contingent, and that they appear to be in (a temporary) retreat, is decidedly *not* to suggest that scholarly analysis of these topics is unimportant. To the contrary; their waxing and waning serves to underscore why we should study and analyse these topics. Just as we should not be surprised if they are in temporary eclipse, we should expect more favourable circumstances at some point in the future. At those times, the existence of a robust and informed scholarly literature exploring their contours, their possibilities and limits, can be of immense intellectual and practical utility. This literature can provide a comprehensive body of theory and evidence that can inform contemporaneous issues of law and policy. These writings can help inform our understanding of the world, and shape our views of how and why aspects of political life should be valued and continued (or not). In short, they can not only shape our understanding of contemporaneous events but offer normative direction to our endeavours.

Just as importantly, the current hard times serve to remind us why *Global Constitutionalism's* scholarly mission is decidedly *pluralist*. Notably, *Global Constitutionalism* does not limit itself to papers that explore human rights, democracy and the rule of law from the perspective of a progressive meta-narrative; while we publish such pieces, we also welcome papers that are written from different and competing theoretical orientations. This openness reflects our concern, outlined above, that as a descriptive matter Whiggish approaches are often partial and misleading. It also reflects our suspicion that at least some perspectives that adopt a progressive meta-narrative may, perhaps unwittingly, serve to legitimate aspects of international law as an imperial project.<sup>34</sup> Thus, *Global Constitutionalism* welcomes submissions that not only critique the Whiggish meta-narrative, but also the imperial project itself, in both its colonial and post-colonial forms.

Thus, this journal's pluralism refers to a plurality of ways that human rights, democracy and the rule of law can be studied from outside a Whiggish, progressive framework. One way of doing so is by suggesting, as we do above, that human rights, democracy and rule of law are

<sup>34</sup> For seminal treatments of these themes, see M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, Cambridge, 2004); A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2004).

historically *contingent* phenomena. Alternatively, we might say that human rights, democracy and rule of law are deeply *contextual*. That is, we urge scholars to study human rights, democracy and the rule of law in the context of the events we have outlined above, their rival implications, and the competing histories of these events.

### III.

To note that it was a grim year for global constitutionalism, human rights, democracy and the rule of law is not to say it was a grim year for *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*. To the contrary, the journal continued to publish provocative and cutting-edge scholarship.

A number of papers published in the past year addressed foundational constitutional concepts. For example, several papers published in the past year address different forms of constitutional pluralism. Martin Loughlin published a trenchant critique of pluralist thinking, arguing that constitutional pluralism cannot offer a coherent reconfiguration of the nature of contemporary political authority.<sup>35</sup> From a rather different perspective Jonathan W Kuyper argued in favour of systemic pluralism as a mechanism to enhance democratic contestation and deliberation on the international plane.<sup>36</sup> And Klaus Dieter Wolf's article on *lex sportiva* explores whether transnational private regulatory regimes take on constitutional functions, and thus produce a form of constitutional pluralism.<sup>37</sup>

The normative desirability and political feasibility of constitutional pluralism was also at the centre of a lively exchange between William Scheuerman and Jean Cohen sparked by Scheuerman's review of Cohen's volume *Globalization and Sovereignty: Rethinking Legality and Legitimacy and Constitutionalism*. In his review, Scheuerman carefully details Cohen's embrace of constitutional pluralism, and argues that Cohen gives insufficient weight to cosmopolitan efforts to construct a transformational global agenda in light of concerns over unacceptably high levels of global poverty and injustice.<sup>38</sup> In her reply, Cohen sets out a spirited defence of

<sup>35</sup> M Loughlin, 'Constitutional Pluralism: An Oxymoron?' (2014) 3 *Global Constitutionalism* 9.

<sup>36</sup> JW Kuyper, 'The Democratic Potential of Systemic Pluralism' (2014) 3 *Global Constitutionalism* 170.

<sup>37</sup> KD Wolf, 'The Non-Existence of Private Self-Regulation in the Transnational Sphere and its Implications for the Responsibility to Procure Legitimacy: The Case of the *Lex Sportiva*' (2014) 3 *Global Constitutionalism* 275.

<sup>38</sup> WE Scheuerman, 'Globalization, Constitutionalism, and Sovereignty' (2014) 3 *Global Constitutionalism* 102.

her conception of the dualist nature of the contemporary international system, and advocates for a federal union of states that is not itself a state.<sup>39</sup>

Other foundational concepts that received attention included ‘constituent power’, ‘republicanism’, and ‘accountability’. In his contribution, Zoran Oklopcic urges us to distinguish between the use and meaning of constituent power in the context of democratic, social and national arenas of political struggle.<sup>40</sup> Using Sieyès’s *What is the Third Estate?* as his point of departure, Oklopcic’s analysis provides a set of analytic categories that will enable us to more precisely identify those risks and ideational trade-offs that accompany use of the phrase ‘constituent power’ in different contexts. Steven Slaughter’s article explores how transnational activism and democratization interfaces with existing forms of global and national governance. Developing a concept he calls ‘critical republicanism’, he argues that transnational activism opens up possibilities for more democratic forms of public consideration and contestation at both the international and domestic levels.<sup>41</sup> In her contribution, Danielle Hanna Rached examines the differing meaning of ‘accountability’ within and beyond the state.<sup>42</sup> In particular, she carefully details how global administrative law writings disaggregate several features of accountability and seeks to embed these components into transnational institutions, before analysing the relationship between global constitutionalism and global administrative law.

Other contributions focused on specific elements of legal systems. For example, Theresa Reinold and Michael Zürn offered an account of the dynamics endogenous to legal systems, specifically the drive towards consistency and coherence that permit the extension of legal norms, even in the face of adverse political conditions.<sup>43</sup> They point to these dynamics to help explain the continued strengthening of the rule of law and human rights, even in a context where the United States has turned increasingly unilateralist, Europe faces a backlash against international organizations and rising powers like China and India assert traditional sovereign

<sup>39</sup> JL Cohen, ‘Reply to Scheuerman’s Review of *Globalization and Sovereignty*’ (2014) 3 *Global Constitutionalism* 119.

<sup>40</sup> Z Oklopcic, ‘Three Arenas of Struggle: A Contextual Approach to the Constituent Power of “the People”’ (2014) 3 *Global Constitutionalism* 200.

<sup>41</sup> S Slaughter, ‘Transnational Democratization and Republican Citizenship: Towards Critical Republicanism’ (2014) 3 *Global Constitutionalism* 310.

<sup>42</sup> DH Rached, ‘Doomed Aspiration of Pure Instrumentality: Global Administrative Law and Accountability’ (2014) 3 *Global Constitutionalism* 338.

<sup>43</sup> T Reinold and M Zürn, ‘“Rules About Rules” and the Endogenous Dynamics of International Law: Dissonance Reduction as a Mechanism of Secondary Rule-Making’ (2014) 3 *Global Constitutionalism* 236.



prerogatives. The developments addressed in Part I of this editorial can be considered a test case for Reinold and Zürn's thesis. Joel I Colón-Ríos's article critiques conventional approaches to judicial review found in the comparative constitutional law scholarship. Drawing on a wide array of comparative constitutional practices, he offers a new typology that includes additional models of judicial review.<sup>44</sup> And Kai Möller's paper set out a theory on international human rights that draws on recent philosophical writings on national constitutional rights.<sup>45</sup> Breaking from much of the literature, Möller argues that international human rights are not more minimalist than national constitutional rights, and that the moral structures of both bodies of rights are identical.

Thomas Müller's contribution focused on the historiography of constitutionalism. His paper provides a conceptual framework for bridging different historical accounts of how constitutional structures developed in international affairs and proposes several analytical tools for a more nuanced and empirically sensitive constitutional history of interpolity relations.<sup>46</sup> And Ge Chen's paper described how China's censorship laws have come under increasing scrutiny in various institutions within a fragmented international legal order, and theorized that the global legal order might undermine the Chinese system of censorship.<sup>47</sup>

Both individually and in the aggregate, these papers evidence the journal's commitment to interdisciplinary scholarship and openness to a broad range of theoretical perspectives, methodological commitments and subject matters. More importantly, they advanced scholarly understanding of various dimensions of global constitutionalism.

The journal also experienced a change to its editors. Miguel Maduro accepted a ministerial position in the government of Portugal. As a result of his new responsibilities, it became necessary for him to step down from his position as editor. We are very grateful to Miguel for his extremely valuable contribution as co-editor in the journal's foundational period, sharing energies, ideas and above all valuable time with the editorial team over the past three years.

<sup>44</sup> J I Colón-Ríos, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143.

<sup>45</sup> K Möller, 'From Constitutional to Human Rights: On the Moral Structure of International Human Rights' (2014) 3 *Global Constitutionalism* 373.

<sup>46</sup> T Müller, 'Global Constitutionalism in Historical Perspective: Towards Refined Tools for International Constitutional Histories' (2014) 3 *Global Constitutionalism* 71.

<sup>47</sup> Ge Chen, 'Piercing the Veil of State Sovereignty: How China's Censorship Regime into Fragmented International Law Can Lead to a Butterfly Effect' (2014) 3 *Global Constitutionalism* 31.

We are extremely pleased to welcome Professor Jeffrey Dunoff to our editorial team. Dunoff, who teaches at Temple University Beasley School of Law in Philadelphia, Pennsylvania, USA, is a public international lawyer who writes broadly across a number of fields, including international constitutionalism, international regulatory regimes, international organizations and international courts. He co-edited the volume *Ruling the World? Constitutionalism, International Law and Global Governance*, which has quickly become required reading for students of global constitutionalization around the world.

Finally, we wish to extend sincere thanks to three groups of individuals. First, we are indebted to those who contributed their outstanding research and scholarship to the journal. We are proud to publish these contributions, and regret that we receive many more meritorious submissions than we are able to publish. Second, we are grateful to our external reviewers. Reading and evaluating manuscripts is a time-consuming task that brings neither remuneration nor glory. It would not be possible to maintain stringent quality control without a cadre of first-rate scholars willing to review potential articles. Last, but not least, we thank our readers, without whom there would be no reason to publish. Given the combined efforts and commitment of these three groups, *Global Constitutionalism* has enjoyed great success during its first three years and we look forward to a bright future.